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—Terms: **Fidelity National Information Solutions** ([Edit Search](#))
*2004 U.S. Dist. LEXIS 6687, **

FIDELITY NATIONAL INFORMATION SOLUTIONS, INC., MARKET INTELLIGENCE, INC., and PENNSYLVANIA BANKERS ASSOCIATION, Plaintiffs, v. GEORGE D. SINCLAIR, et al., Defendants.

CIVIL ACTION NO. 02-6928

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2004 U.S. Dist. LEXIS 6687

March 31, 2004, Decided

PRIOR HISTORY: [Fid. Nat'l Info. Solutions, Inc. v. Sinclair, 2003 U.S. Dist. LEXIS 369 \(E.D. Pa., Jan. 8, 2003\)](#)

DISPOSITION: Defendants' motion for judgment on pleadings granted in part and denied in part. Plaintiffs' motion for summary judgment granted in part and denied in part.

COUNSEL: [*1] For **FIDELITY NATIONAL INFORMATION SOLUTIONS, INC., MARKET INTELLIGENCE, INC., Plaintiffs:** ALAN S. KAPLINSKY, BALLARD SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA. DAMIAN L. DINICOLA, BALLARD SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA. RAYMOND A. QUAGLIA, BALLARD SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA.

For CONSUMER BANKERS ASSOCIATION, AMERICAN BANKERS ASSOCIATION, PENNSYLVANIA BANKERS ASSOCIATION, Plaintiffs: DAMIAN L. DINICOLA, BALLARD SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA. RAYMOND A. QUAGLIA, BALLARD SPAHR ANDREWS & INGERSOLL LLP, PHILADELPHIA, PA.

For GEORGE D. SINCLAIR, WILLIAM P. WENTZ, JR., ROBERT E. FISHER, RAYMOND BOOK, ROBERT F. MCCRAE, KENNETH RAPP, DANIEL M. TAYLOR, JR., IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE PENNSYLVANIA STATE BOARD OF CERTIFIED REAL ESTATE APPRAISERS, Defendants: JOHN O.J. SHELLENBERGER, OFFICE OF THE ATTORNEY GENERAL, PHILADELPHIA, PA.

JUDGES: RONALD L. BUCKWALTER, S.J.

OPINIONBY: RONALD L. BUCKWALTER

OPINION: MEMORANDUM

BUCKWALTER, S.J.

Presently before this Court are Defendants' Motion for Judgment on the Pleadings (Docket No. 11&13), Plaintiffs' response thereto contained in Plaintiffs' Motion for Summary[*2] Judgment (Docket No. 16), Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment (Docket No. 19), and Plaintiffs' Reply Brief in Further Support of their Motion for Summary Judgment (Docket No. 20). For the foregoing reasons, Defendants' Motion for Judgment on the Pleadings is GRANTED in part and DENIED in part. Also Plaintiffs' Motion for Summary Judgment is GRANTED in part and DENIED in part.

I. BACKGROUND

In response to the savings and loan crisis of the 1980s, Congress passed the [Financial Institutions Reform, Recovery, and Enforcement Act of 1989 \("FIRREA"\)](#). This Act put in place protections to shore up the financial integrity of federally insured financial institutions. In evaluating savings and loan crisis, Congress determined that "faulty and fraudulent" appraisals of real estate collateral undermined the financial integrity of the various lending institutions. H. Rep. No. 101-54(I), at 311 (1989), reprinted in 1989 U.S.C.C.A.N. 86. These inflated appraisals led to savings and loan failures when the properties' values could not cover the loans after default. To solve this problem, Congress put several safeguards in place. Under FIRREA, [*3] appraisals conducted in connection with any federally related transaction must be written and performed by "individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision." [12 U.S.C. § 3331](#). To this end, Congress authorized the states to establish state certification and licensing agencies to provide uniform standards for appraisers utilizing certain minimum criteria issued by the Appraiser Qualification Board of the Appraisal Foundation ("AQB").

Pennsylvania licenses real estate appraisers through the Pennsylvania Real Estate Appraisers Certification Act ("REACA"), [63 P.S. §§ 457.1 et. seq.](#) (particularly [§ 457.3](#)). REACA established the Board of Certified Real Estate Appraisers ("the Board") to oversee the certification of appraisers and the regulation of the appraisal process. Originally under REACA, there were two classes of certified appraisers, both of which were required to meet the certification requirements of FIRREA. REACA permitted licensed real estate brokers to perform real estate appraisals, but only for non-federal related transactions under FIRREA. In 1996, Pennsylvania amended REACA[*4] to remove the performance of appraisals from the description of the powers of a real estate broker. n1 [63 P.S. § 455.201](#). This amendment also required all appraisals on Pennsylvania real estate to be performed by persons certified under one of the three classes. n2 Therefore real estate brokers, who were not grandfathered by the 1996 amendment, are not permitted to perform any real estate appraisals without meeting the full certification requirements applicable to all persons seeking to become state certified appraisers.

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n1 The amendment did "grandfather" real estate brokers who held a broker license at the time of the amendment and who filed an application for certification. These brokers were not authorized, however, to perform real estate appraisals for federally related transactions under FIRREA.

n2 There are three classes of appraisers under the Pennsylvania statute:(1) Residential, which shall consist of those persons applying for and granted certification relating solely to the appraisal of residential real property as required pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Public Law 101-73, 103 Stat. 183).

(2) General, which shall consist of those persons applying for and granted certification relating to the appraisal of both residential and nonresidential real property without limitation as required pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Public Law 101-73, 103 Stat. 183).

(3) Broker/appraiser, which shall consist of those persons who, on the effective date of this act, are licensed real estate brokers under the act of February 19, 1980 (P.L. 15, No. 9), known as the [Real Estate Licensing and Registration Act](#), and who, within two years of the effective date of this act, make application to the board and are granted without examination a broker/appraiser certificate. A holder of a broker/appraiser certificate shall only be permitted to perform those real property appraisals that were permitted to be performed by a licensed real estate broker under the Real Estate Licensing and Registration Act as of the effective date of this act. A holder of a broker/appraiser certificate is not authorized to perform real estate appraisals pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[63 P.S. § 457.6](#)

----- End Footnotes-----[*5]

The Plaintiffs, **Fidelity National Information Solutions, Inc.** ("FNIS"), and Market Intelligence, Inc. (FNIS's subsidiary), provide data, technology solutions and information products and services to lenders and real estate professionals throughout the United States. Using databases, computer programs and market analyses prepared by real estate professionals, FNIS and Market Intelligence produce various real estate valuation products. There is a broad continuum of products offered by FNIS and Market Intelligence, to include traditional appraisals, "desktop property value estimates and reports combined with property inspections and market analyses to lower-cost, fully automated evaluations (so-called "automated valuation models" or "AVMs")." (Pl. Mot. for Summ. J. at 2). All of FNIS's operations are located outside the Commonwealth of Pennsylvania. The Pennsylvania Bankers Association, the American Bankers Association, and the Consumer Bankers Association (collectively referred to as "the Banker Associations") are various organizations that utilize the real estate valuation products offered by FNIS and Market Intelligence, Inc..

The Board of Certified Real Estate Appraisers and its[*6] individual members are the Defendants in this case. In September 1999, the Board wrote CTMI a letter inquiring into their appraisal practices and advising the firm that some of the forms then used by CTMI required opinions that constituted appraisals under REACA. When asked, in a November 1999 letter by CTMI, to clarify whether AVMs, computer generated estimates drawn from comparable sales and tax assessor records, were illegal under REACA, the Board declined to respond.

In September 2001, Mr. Earl Hertzog, n3 a licensed real estate broker, completed a market analysis on a property in Bethlehem, Pennsylvania for Chicago Title Market Intelligence ("CTMI") Market Intelligence's corporate predecessor. (Def. App. II. Ex. A). In June 2002, Mr. Peter Kovach, a prosecuting attorney for the Commonwealth of Pennsylvania Department of State, filed an order for Mr. Hertzog to show cause before the Board of Certified Real Estate Appraisers ("the Board"). (Def. App. II.). The order alleged that Mr. Hertzog was not state certified to perform real estate appraisals, and that the market analysis he performed in September 2001 constituted an appraisal. Mr. Hertzog faced a \$ 1000 civil penalty, if[*7] the allegations proved true. (Def. App. II). During this time, CTMI/FNIS also received a cease and desist order from the Commonwealth's prosecuting attorney that threatened the firms with aiding and abetting the unlicensed practice of appraisals within Pennsylvania if they did not comply with the order. (Pl. Second Am. Compl. Ex. G)

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n3 Mr. Hertzog was not grandfathered under REACA, and thus does not hold a state certification to perform real estate appraisals.

----- End Footnotes-----

On July 17, 2003, after the filing of this action, the Board approved and recorded a Consent Agreement between Mr. Hertzog and the Commonwealth of Pennsylvania that required Mr. Hertzog to pay a \$ 750 civil penalty, and required him to cease and desist:from the practice of real estate appraisal in the Commonwealth of Pennsylvania as the term 'appraisal' is interpreted by the Bureau [of Professional and Occupational Affairs], subject to any contrary interpretation or other limitations resulting from the adjudication or settlement of the matter[*8] captioned Fidelity Nat'l Information Solutions, Inc. v. Sinclair, Civil Action No. 02-6928, pending in the United States District Court for the Eastern District of Pennsylvania.(Def. App. II Ex. A.).

Throughout the time period from September 1999 to the present, FNIS and Market Intelligence maintained their position that valuations, other than written appraisals produced by certified appraisers, are permitted for all non-federally related transactions under FIRREA. (Pl. Second Am. Compl. Ex. C (Chicago Title's November 22, 1999 letter to the Board), Ex. F (Market Intelligence's August 29, 2001 letter to the Board); Ex. H (FNIS's July 23, 2002 letter to Mr. Kovach)).

II. STANDARD OF REVIEW

Under [Fed. R. Civ. P. 12\(c\)](#), in order to succeed on a motion for Judgment on the Pleadings, the movant must clearly establish "that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." [Corestates Bank, N.A. v. Huls American, Inc., 176 F.3d 187, 193 \(3d Cir. 1999\)](#). The Court treats a Motion on the Pleadings using the same standards as a Motion to Dismiss under [Rule 12\(b\)\(6\) \[*9\]](#). Therefore, all allegations must be accepted as true, all reasonable factual inferences drawn in favor of the plaintiff. [Unger v. National Residents Matching Program, 928 F.2d 1392, 1394-95 \(3d Cir. 1991\)](#). The Court may grant Defendant's Motion only if no relief could be granted under any set of facts that could be proved. Id.

A motion for summary judgment will be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." [Fed. R. Civ. P. 56\(c\)](#). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." [Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 \(1986\)](#). Since a grant of summary judgment will deny a party its chance in court, all inferences must be drawn in the light most favorable to the party opposing the motion. [U.S. v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176 \(1962\)](#).

The ultimate question in determining whether a motion for summary judgment should be[*10] granted is "whether reasonable minds may differ as to the verdict." [Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 129 \(3d Cir. 1998\)](#). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." [Anderson, 477 U.S. at 248](#).

III. DISCUSSION

A. Claim ripeness and justiciability

1. FNIS & Market Intelligence

a. The Younger Abstention

The Defendants do not challenge the ripeness or justiciability of Plaintiffs FNIS and Market Intelligence's claim, except to argue that the Court should abstain from intervening under the doctrine of [Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 \(1971\)](#). In that case, the Supreme Court declined to enjoin the state prosecution of a man for criminal syndicalism n4 under California state law, holding that federal courts should not enjoin a pending criminal prosecution. [Younger v. Harris, 401 U.S. 37, 51, 27 L. Ed. 2d 669, 91 S. Ct. 746 \(1971\)](#). Plaintiffs argue and this Court agrees that [Younger](#) does not apply in the present case. In this case, unlike in [Younger](#), the state agreed[*11] to settle the underlying state administrative action and abide by to this findings of this federal Court. n5 In this unusual circumstance, the Court is not in danger of usurping the State's administrative and judicial process, because the state itself has passed adjudication of the essential elements to the federal court. The Defendants argue that in their role as the adjudicating board in this case, they did not accede to the jurisdiction of the federal courts. This Court disagrees. Mr. Peter Kovach, the state's prosecutor, who fully represents the Commonwealth's interest in this matter willingly entered into the consent decree. Moreover, the Defendant Board members approved the settlement. The Defendants argue that their acceptance of the settlement does not abdicate their rights to challenge this Court's jurisdiction under [Younger](#), because they are bound to "accept settlements made by the parties before it when they appear reasonable." (Def. Resp. at 5). However, the Defendants could have rejected the settlement as an unreasonable abdication of state jurisdiction over the matter. They did not. Therefore, for the reasons discussed above, the Court believes [Younger](#) is inapplicable. [*12]

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n4 Criminal syndicalism is defined as "any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage

or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change." [Younger v. Harris, 401 U.S. 37, 40, 27 L. Ed. 2d 669, 91 S. Ct. 746 \(1971\)](#)

n5 See part I for the actual quoted text from the Consent Decree.

----- End Footnotes-----

2. The Banker Associations

a. Justiciability of Claims

The Defendants next challenge the ability of the Banker Associations to participate in this action because "a plaintiff must be suffering, or in imminent danger of suffering, an actual injury caused by the defendants' alleged conduct." (Def. Resp. at 5 (citing [Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 102-04, 140 L. Ed. 2d 210, 118 S. Ct. 1003 \(1998\)](#)). The Defendants[*13] argue that REACA does not cause any direct or indirect injury to the Plaintiff Banker Associations, because the harm claimed by the Plaintiffs (higher appraisal costs and delays in processing appraisals) are not caused by REACA itself, but rather by the independent actions of state certified appraisers. Indirect injury caused by an agency's enforcement of a statutory provision, however, has been recognized as sufficient to meet the harm requirement of justiciability. [Bennett v. Spear, 520 U.S. 154, 170-71, 137 L. Ed. 2d 281, 117 S. Ct. 1154 \(1997\)](#) (holding that an agency's Advisory Opinion caused traceable injury to the Plaintiffs that could be adequately redressed by setting aside the opinion). The Declaration of Mr. Ray Ferrarin, Executive Vice President of Valuation Services of FNIS, alleges that costs for appraisals performed by certified or licensed appraisers are on average higher than those performed by unlicensed or certified individuals. (Decl. of Mr. Ray Ferrarin PP 7, 12, 24). Although the Defendants are correct in asserting that these costs are set independently by the various certified appraisers, the Plaintiffs' allegations of harm, when taken in the light most favorable[*14] to the non-moving party (the Plaintiffs in this case), establishes that REACA may cause some indirect harm to the Banker Associations' constituents. Therefore this Court finds that the Plaintiff Banker Associations alleged sufficient harm resulting from the enforcement of Pennsylvania's REACA to have standing in the present case.

b. Ripeness of Claims

As a general rule, courts should abstain from ruling on claims that are not yet ripe for adjudication. [Abbott Laboratories v. Gardner, 387 U.S. 136, 148, 18 L. Ed. 2d 681, 87 S. Ct. 1507 \(1967\)](#). The purpose of this policy is to keep the courts from overruling legislation before it has concretely affected parties before the court. Id. Defendants allege that the Banker Associations' claims are not ripe for adjudication because there are still "open interpretive questions" to be determined. (Def. Resp. at 8). These questions include, whether REACA's definition of appraisal covers evaluations by regular salaried bank employees as well as what kinds of activities fall within the definition of appraisal under REACA. The Court agrees that these are open interpretive questions, and should be left to the Board to determine before[*15] challenged through the judicial process. However, these are not the issues at the crux of this matter. This case provides several ripe issues for determination. First and foremost, although the Board has not defined the width and breadth of what constitutes "appraisal activities," in a September 30th, 1999 letter, then Board Chairman David J. King wrote for the Board that "if a value estimate is made for property in Pennsylvania, it must be made by a Pennsylvania State certified appraiser. If Chicago Title [Market Intelligence's predecessor] is using this information to reach a specific or range of value conclusion for property in Pennsylvania, you are in violation of our Act and Regulations." (Second Am. Compl. Ex. B). This is a specific pronouncement made by the Chairman of the Defendant Board on behalf of the Board. Although the Defendants argue that this letter was not binding, this Court finds that it was an unequivocal policy statement meant to change the Plaintiffs' conduct and put the Plaintiffs as a whole on notice that the Board viewed automated valuation models ("AVMs") as violating REACA. Furthermore, the action brought against Mr. Hertzog confirms that the Commonwealth[*16] of

Pennsylvania intended to enforce REACA against those who supplied information to produce AVMs. Finally, the June 17, 2002 cease and desist letter from Mr. Kovach, the Commonwealth's prosecuting attorney, indicates the Commonwealth's intent to pursue AVM producers for aiding and abetting in the unlicensed practice of real estate appraising in the Commonwealth of Pennsylvania. (Letter to CTMI, Second Am. Compl. Ex. G). From as early as 1999, when responding to the Commonwealth's efforts to advise Plaintiffs that they were in violation of REACA, Plaintiffs have asserted that federal banking law, specifically FIRREA, preempts the state regulation of appraisals. All this puts squarely before this Court the question of whether and to what extent federal banking law preempts REACA. This is a question not open to interpretation by the Board, and which is at the very heart of this controversy. Even if the Board interprets AVMs as being outside the definition of an appraisal under REACA, the valuation completed by Mr. Hertzog is fully within the definition of an appraisal contained in [63 P.S. § 457.2](#), specifically "[a] written analysis, opinion or conclusion relating to the nature, quality, [*17] value or utility of specified interests in, or aspects of, identified real property, for or in expectation of compensation." n6 For these reasons, the Court finds that this matter is sufficiently ripe for adjudication.

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n6 Mr. Hertzog completed a CTMI market analysis form that expressed his subjective opinions in a number of areas including the nature and quality of the neighborhood, how the subject property compared to other properties sold in the area, and what price the property might sell for given various market conditions. For this service, Mr. Hertzog received \$ 48 from CT MI.

----- End Footnotes -----

B. Preemption

1. Preemption Generally

The [Supremacy Clause of the United States Constitution](#) states that the laws of the United States "shall be the supreme law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding ." [U.S. Const. art VI, cl. 2](#). This means that "any state law that conflicts with Federal law is 'without effect.'" [Cipollone v. Liggett Group, Inc., 505 U.S. 504, 526, 120 L. Ed. 2d 407, 112 S. Ct. 2608 \(1992\)](#) [*18] (internal citations omitted). In addition, Federal regulations preempt state law with the same force and effect as the Federal statutes under which they are promulgated. [Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 \(1982\)](#).

There are three types of preemption recognized within the courts: express, field and conflict preemption. Express preemption occurs when there is clear statutory directive displacing state law on a particular subject matter. [Morales v. Trans World Airlines, Inc., 504 U.S. 374, 119 L. Ed. 2d 157, 112 S. Ct. 2031 \(1992\)](#). Field preemption arises when federal law "so thoroughly occupies a legislative field as to make reasonable the inference the Congress left no room for the States to supplement it," [Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 \(1992\)](#). Conflict preemption occurs "when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress.'" [United States v. Locke, 529 U.S. 89, 109, 146 L. Ed. 2d 69, 120 S. Ct. 1135 \(2000\)](#) [*19] (quoting [California v. ARC America Corp., 490 U.S. 93, 100-101, 104 L. Ed. 2d 86, 109 S. Ct. 1661\(1989\)](#)).

In this case, FIRREA does not expressly preempt state law, nor does it completely occupy the real estate appraisal field. Instead, FIRREA creates a regulatory framework that recognizes the states' role in licensing and certifying real estate appraisers. n7 Professional licensing has long been recognized as part of the states' police power. [Bhan v. NME Hospitals, Inc., 669 F. Supp. 998, 1003 \(E.D. Cal. 1987\)](#) (licensing of medical professionals recognized as a valid exercise of state's police power); [Doran v. Imeson Aviation, Inc., 419 F. Supp. 586, 588 \(D. Wyo. 1976\)](#) (statute making it illegal to act as a real estate broker without a license was a

valid exercise of state's police power); [Stahl v. Teaneck, 162 F. Supp. 661, 667 \(D. N.J. 1958\)](#) (regulation of businesses, including licensing of real estate brokers, is part of state's police power); [In re Harris, 85 B.R. 858, 863 \(Bankr. D. Colo. 1988\)](#) (disciplinary action involving a debtor's real estate license was within the scope of the state's police power). Because[*20] FIRREA neither expressly preempts Pennsylvania's REACA statute, nor does it completely occupy the same field, the only type of preemption possible in this case is conflict preemption.

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n7 See, [12 U.S.C. § 3332](#) (charging the Appraisal Subcommittee with monitoring the requirements established by the States for certifying and licensing appraisers); [12 U.S.C. § 3338](#) (requiring the states who establish appraiser certification and licensing agencies to keep rosters of all certified and licensed individuals).

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When determining whether a state statute is preempted by federal law, the courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 \(1996\)](#) (quoting [Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 \(1947\)](#)). This creates[*21] a strong presumption against preempting state laws regulating areas historically within the state's police power that the Plaintiffs must overcome in order to make their case and win summary judgment.

Finally, where Congress has specifically not acted, the states may legislate. [U.S. Const. Amend. X](#); [Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. 335 U.S. 525, 536, 93 L. Ed. 212, 69 S. Ct. 251 \(1949\)](#) ("States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."); See also, [State v. Whitaker, 45 S.E.2d 860, 228 N.C. 352 \(N.C. 1947\)](#) ("The 'police power' of a state arises out of reservation of powers to individual states contained in the [\[Tenth\] amendment](#)"). The Court must also consider that in areas where the states have traditionally occupied the field of regulation, such as professional licensing, the Supreme Court has articulated a strong "presumption against the pre-emption of state police power regulations to support a narrow interpretation[*22] of such an express command" [Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 \(1996\)](#).

2. Conflict Preemption and REACA

As stated above, in conflict preemption, those parts of a state statute that conflict or obstruct the objective of federal law are preempted. To this end, Plaintiffs argue that REACA and FIRREA conflict because FIRREA regulates all real estate transactions, both federally related and non-federally related.

a. Non-Federally Related Transactions

Plaintiffs argue that insofar as it purports to apply to valuations performed for in non-federally related transactions, REACA's appraiser certification requirement is preempted by federal law. To bolster this argument, Plaintiffs advance two separate lines of reasoning. First, Plaintiffs argue that Title XI of FIRREA applies to all real estate-related financial transactions by virtue of the express language of its purpose and therefore any attempt by REACA to regulate in this area would impermissibly conflict with FIRREA's purpose. The language to which Plaintiffs refer states that the purpose of FIRREA is:to provide that Federal financial and public policy interests[*23] in real estate related transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision.[12 U.S.C. § 3331](#).

Plaintiffs seize upon the absence of the word "Federal" directly before the phrase "real estate related transactions" to support their contention that FIRREA was intended to govern all real estate transactions and not just those that involve federal institutions. The Plaintiffs further argue that because there is no requirement with FIRREA that certified real estate appraisers be used for non-federally related real estate transactions, this indicates an express intent in FIRREA that such transactions are exempt from the certified appraiser requirement. (Pl. Mot. for Summ. J. at 25). This reading of the statute's purpose does not take into account the historical basis of the law and the plain reading of the statutory language. See H.Rep. No. 101-54(I) pp. 291, 292, 302-07 (1989), reprinted[*24] at 1989 U.S.C.C.A.N. 86 ("The primary purposes of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 are to provide affordable housing mortgage finance and housing opportunities for low- and moderate-income individuals through enhanced management of federal housing credit programs and resources. . . and, enhance the regulatory enforcement powers of the depository institution regulatory agencies to protect against fraud, waste and insider abuse.") (emphasis added); S. Rep. 101-19, pp. 35-36 (1989) reprinted at 1989 U.S.C.C.A.N. 86 ("Many loans and other transactions entered into by federally insured financial institutions are collateralized by real estate. While repayment ability forms the primary determinant of creditworthiness, the value of collateral and reasonable ratio of loan to collateral value provide important protections against loss. Thus, the quality of real estate appraisals can significantly affect the soundness of insured institutions and, ultimately, the Federal deposit insurance system."). The plain language of the statute n8 and the legislative history point to a singular purpose for FIRREA, which is not to regulate the entire real[*25] estate appraisal process, but instead to protect federal financial institutions from the dangers associated with fraudulent or poorly executed appraisals. *Id.* Given this focus, it is unreasonable to read FIRREA as making any indication, express or otherwise, that the statute was intended to control real estate transactions beyond those involving federal financial institutions.

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n8 The language of the statute is unambiguous in stating that the concern of the drafters was to protect "Federal financial and public policy interests" by requiring appraisals in "connection with federally related transactions . . ." [12 U.S.C. 3331](#). It would be unreasonable to interpret this provision to mean that Congress wished to protect federal financial and public policy interests by specifically exempting non-federally related transactions from any certified or licensed appraisal requirement.

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The second line of reasoning the Plaintiffs propound is that there are certain transactions, which involve a[*26] federal financial institution, but are exempted from FIRREA's state certified appraiser requirement and are by definition "non-federally related transactions." These transactions are nonetheless regulated by the federal financial institution regulatory agencies and therefore, according to the Plaintiffs, demonstrate that FIRREA's reach goes beyond federally related transactions and encompasses non-federally related transactions as well. This argument, however, is contrary to the express intent of Congress. As explained above, Congress drafted the appraisal section of FIRREA with the express intent of protecting federal financial institutions from fraud or incompetence on the part of appraisers.

When dealing with issues of statutory interpretation, the Court must follow the Supreme Court's framework developed in [Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.](#), 467 U.S. 837, 842-43, 81 L. Ed. 2d 694 (1984). The Court in [Chevron](#) set out a two part test to determine whether courts should defer to agency interpretations of federal law. First, when reviewing an agency's interpretation of a statute it administers, the court should determine whether Congress[*27] has "directly spoken to the precise question at issue." *Id.* If Congressional intent is clear, then both the court and the agency must follow that unambiguously expressed intent. *Id.* On the other hand, if Congress has not directly spoken on the issue, or if the statutory language is ambiguous, then the court must defer to the administering agency's interpretation, so long as that interpretation "is based on a permissible construction of the statute." *Id.*

As explained below, the Court is confident both from the express language of FIRREA and from subsequent Congressional amendments, that FIRREA extends only to federally related transactions and any agency regulations that address non-federally related real estate transactions exceed that agency's statutory grant of authority.

Shortly after Congress passed FIRREA, the various federal financial institution regulatory agencies began creating a regulatory framework to implement FIRREA. From the start the agencies determined that there were certain transactions involving federal financial institutions that did not require an appraisal by a certified or licensed appraiser. At that time (prior to 1993) there was no provision within[*28] FIRREA specifically allowing the agencies to exempt certain transactions from the certified or licensed appraiser requirement. In a 1991 Notice of Proposed Rulemaking, the Office of Thrift Supervision ("OTS") explained that FIRREA's definition of a "federally related transaction" provided a basis in law for the De Minimis exemption put in force by the various federal financial institution regulatory agencies at the time. [56 Fed. Reg. 67,548 \(Dec. 31, 1991\)](#) (codified at [12 C.F.R. pt. 564](#)). The OTS explained in its Notice that the various federal financial institution regulatory agencies had the power to set De Minimis levels under which appraisals were not required because the definition of "federally related transaction" encompassed both a transaction involving a federal financial institution and one that required the "services of an appraiser." Id. (citing [12 U.S.C. § 3350\(4\)](#)). Thus, OTS argued:had Congress wanted every transaction to have an appraisal no matter what the size or circumstances of the transaction, there would have been no reason to include the clause "requires the services of an appraiser" as one of the elements of the[*29] definition of "federally related transaction." To give effect to the clause "requires the services of an appraiser," agencies must necessarily have the discretion to determine that not all transactions require such services and therefore do not fall within the definition of "federally related transaction."[56 Fed. Reg. 67,548](#) (codified at [12 C.F.R. pt. 564](#)).

In 1992, Congress stepped in and amended FIRREA's real estate appraisal section as part of the [Housing and Community Development Act of 1992](#). See Pub. L. No. 102-550, § 954 (codified as amended [12 U.S.C. § 3341](#)). That amendment to FIRREA empowered federal financial institution regulatory agencies to "establish a threshold level at or below which a certified or licensed appraiser is not required to perform appraisals in connection with federally related transactions[.]" [12 U.S.C. § 3341\(b\)](#) (emphasis added). Thus, Congress expressly clarified that the federal financial institution regulatory agencies should be allowed to set a de minimis level under which the regulatory agencies may waive the certified or licensed appraiser requirement, but most [*30] importantly, that such transactions were nonetheless, federally related.

Congress was well aware that previously the federal financial institution regulatory agencies derived their authority to set de minimis threshold levels and exempt certain other transactions from FIRREA's certified appraiser requirement by interpreting FIRREA's definition of "federally related transaction" to provide the authority for the agencies to designate certain transactions (such as those below the threshold amount) as non-federally related by virtue of the regulatory agencies' determination that such transactions did not require the services of an appraiser. With this knowledge, Congress amended the statute to allow the federal financial institution regulatory agencies to set thresholds below which a "certified or licensed appraiser is not required to perform appraisals in connection with federally related transactions. . . ." [12 U.S.C. § 3341\(b\)](#)(emphasis added). Therefore, insofar as it relates to transactions exempted from FIRREA's certified or licensed appraiser requirement by [section 3341\(b\), REACA](#) is preempted, because those transactions are still within FIRREA's scope. [*31] More importantly, however, Congress overrode the regulatory agencies' previous interpretation of FIRREA-that transactions below a certain amount that did not require an appraisal were non-federally related and instead specified that such transactions were still federally related, but simply did not require an appraisal by a certified or licensed appraiser.

In response to the amendment of [section 3341](#), the federal financial institutions jointly promulgated a new Final Rule. In the preamble, the regulatory agencies stated:In their appraisal regulations, the agencies identify categories of real estate-related financial transactions that do not require the services of an appraiser in order to protect federal financial and public policy interests or to satisfy principles of safe and sound banking. These real

estate-related financial transactions are not federally related transactions under the statutory and regulatory definitions. Accordingly, they are subject to neither Title XI of FIRREA nor those provisions of the agencies' regulations governing appraisals. [59 Fed. Reg. 29,482](#) (emphasis added).

This language harkens back to the reasoning used to justify[*32] threshold and other exemptions before Congress passed the amendments to [section 3341](#), but it also expressly acknowledges what the Court finds in this case, that non-federally related transactions are not subject to FIRREA nor are they subject to regulation by the federal financial institution regulatory agencies.

Although this Court does not challenge the regulatory agencies' ability to define which transactions require the "services of an appraiser," and thereby exempt certain transactions from FIRREA, there are problems with its current implementation. In the background section of the Final Rule on Real Estate Appraisals, [59 Fed. Reg. 29482](#) (June 4, 1994) (codified at [12 C.F.R. pt. 34 \(OCC\)](#); [12 C.F.R. pt. 225 \(Fed.\)](#); [12 C.F.R. pt. 323 \(FDIC\)](#); [12 C.F.R. pt. 545, 563, 564 \(OTS\)](#)), the regulatory agencies state that under the definition of "federally related transaction" they may identify categories of real estate transactions that do not require the services of an appraiser and such transactions are "subject to neither Title XI of FIRREA nor those provisions of the agencies' regulations governing appraisals." [59 Fed. Reg. 29482 \(June 4, 1994\)](#). This means, [*33] however, that once those classes of transactions are established as "non-federally related," the regulatory agencies do not have the authority to require evaluations n9 for those transactions, nor can they later require non-federally related transactions performed by certain troubled institutions to comply with FIRREA's certified or licensed appraiser provision when there are safety and soundness concerns. n10 Once a class of transactions is exempted, "they are subject to neither Title XI of FIRREA nor those provisions of the agencies' regulations governing appraisals." [59 Fed. Reg. 29,482](#). The regulatory agencies may bring a class of real estate transactions back under its control, subject to proper rulemaking, by declaring it requires "the services of an appraiser" and is therefore a "federally related transaction." [12 U.S.C. § 3350\(4\)](#). Only then, however, do the federal financial regulatory agencies have statutory authority under FIRREA to require appraisals performed by certified or licensed appraisers in connection with troubled institutions or to address other safety and soundness concerns. [12 U.S.C. § 3341\(b\)](#).

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n9 An evaluation is "a general estimate of the value of real estate and need not meet the detailed requirements of a Title XI appraisal." [12 C.F.R § 34.43\(b\)](#); [12 C.F.R § 225.63\(b\)](#); [12 C.F.R. § 323.3\(b\)](#); [12 C.F.R. § 564.3\(b\)](#).
[*34]

n10 This right is specifically reserved by the federal financial institution regulatory agencies at the present time as explained in their June 4, 1993 Notice of Proposed Rulemaking: The agencies are proposing to amend their regulations to clarify that each agency may require Title XI appraisals to address safety and soundness concerns. Under this provision, the agencies could require appraisals where real estate-related financial transactions present greater-than-normal risk to individual institutions. For example, an agency may require a problem institution or an institution in troubled condition to obtain appraisals for transactions below the proposed threshold level. [58 Fed. Reg. 31878, 31883 \(June 4, 1993\)](#).

----- End Footnotes -----

However prudent, there is no statutory authority express or implied, for the regulatory agencies to require regulated institutions to perform evaluations on non-federally related or even on most types of federally related transactions. [12 C.F.R § 34.43\(b\)](#); [12 C.F.R § 225.63\(b\)](#); [12 C.F.R. § 323.3\(b\)\[*35\]](#) ; [12 C.F.R. § 564.3\(b\)](#). Nor is there statutory authority for the agencies to parse out the non-federally related transactions of certain troubled institutions for more stringent treatment by requiring them to have certified appraisals. n11 As explained above, the federal financial institution regulatory agencies have no statutory authority over non-federally related transactions.

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n11 Although the court finds this to be imminently prudent, it simply is not permitted under FIRREA's statutory scheme, even as acknowledged by the agencies themselves.

----- End Footnotes-----

Congress likewise was very precise about the authority of the federal financial institution regulatory agencies with regard to federally related transactions in [section 3339 of FIRREA](#). That section requires the regulatory agencies to:prescribe appropriate standards for the performance of real estate appraisals in connection with federally related transactions under the jurisdiction of each such agency or instrumentality. These rules shall [*36] require, at a minimum-

- (1) that real estate appraisals be performed in accordance with generally accepted appraisal standards as evidenced by the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation; and
- (2) that such appraisals shall be written appraisals.[12 U.S.C. § 3339](#) (emphasis added).

Congress further defines a written appraisal as "a written statement used in connection with a federally related transaction that is independently and impartially prepared by a licensed or certified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by presentation and analysis of relevant market information." [12 U.S.C. 3350\(10\)](#) (emphasis added). This means the only area where evaluations may be performed on federally related transactions is where transactions fall below the threshold set by the regulatory agencies under [section 3341\(b\)](#), because the language of that section states that the regulatory agencies may set a threshold level "at or below which a certified or licensed appraiser is not required to perform appraisals[*37] in connection with federally related transactions." [12 U.S.C. § 3341\(b\)](#). [Section 3341\(b\)](#) can be reconciled with the other parts of FIRREA, particularly [sections 3350\(4\)\(B\) and 3339](#), only if there is a type of appraisal recognized by FIRREA that does not require a certified or licensed appraiser. Thus, the Plaintiffs' contention that any transaction not requiring the use of a state certified or licensed appraiser is a "non-federally related transaction" is incorrect, because the statute itself simply designates a subset of "federally related" transactions as not requiring state certified appraisers.

For all of these reasons, the Court does not believe that the intent of Congress in drafting FIRREA was to control non-federally related transactions, but instead such transactions were left to the states to regulate.

b. The De Minimis Exemption

As previously discussed, the central concern of FIRREA is that federal financial institutions be protected from inaccurate, overinflated appraisals. Under [section 3341\(b\) FIRREA](#) permits individual federal financial institution regulatory agencies to set their own minimum threshold, under which the lack of a certified[*38] appraiser's involvement in real estate transactions would not "represent a threat to the safety and soundness of financial institutions." [12 U.S.C. § 3341\(b\)](#). The various federal financial institutions as a group have set the threshold amount at which state certified appraisers are required at \$ 250,000 (this amount is the result of several increases over the past 15 years). [12 C.F.R. § 34.43\(a\)](#) (Office of the Comptroller of the Currency ("OCC")); [12 C.F.R. § 225.63\(a\)](#) (Federal Reserve System ("Fed"));[12 C.F.R. § 323.3\(a\)](#) (Federal Deposit Insurance Corporation ("FDIC")); [12 C.F.R. § 564.3\(a\)](#) (Office of Thrift Supervision ("OTS")). Thus for federally related transactions, federal law expressly waives the state certified appraiser requirement for transactions below \$ 250,000. Id. When Congress amended FIRREA to permit the threshold exemption, the agencies continued to hold that the previously set \$ 100,000 de minimis amount was the threshold below which transactions were considered non-federally related. This policy ignores the express intent of Congress as[*39] explained above. For this reason, the court finds that because Congress' express mandate overrode the regulatory agencies' previous interpretation on threshold levels, all transactions below \$ 250,000, which otherwise meet the

requirements of [section 3350\(4\)](#), are federally related. Therefore, FIRREA preempts REACA as it applies to all federally related transactions below \$ 250,000.

c. Other specifically exempted transactions

For all other exempted transactions, these transactions are non-federally related, and are thus outside the authority of the federal financial institution regulatory agencies. Therefore, for these transactions, REACA is not preempted.

3. The [Home Owner's Loan Act](#) and the [National Banking Act](#)

a. HOLA and NBA Preemption Generally

Plaintiffs next argue that REACA's certified appraiser requirement is explicitly preempted for Federal Savings Associations by an OTS regulation, implementing the Home Owner's Loan Act ("HOLA") that occupies the field of lending regulation. The OTS regulation states unequivocally that, "To enhance safety and soundness and to enable federal savings associations to conduct their operations in accordance with the best[*40] practices (by efficiently delivering low-cost credit to the public free from undue regulatory duplication and burden), OTS hereby occupies the entire field of lending regulation for federal savings associations." Plaintiffs claim this indicates that laws, such as REACA, that regulate real estate appraisals are preempted because part of "delivering low-cost credit to the public" would include providing low cost appraisals. Although, keeping costs low for the consumer is unquestionably part of the HOLA's (and its implementing regulations') purpose, this law was not targeted at preempting state laws regulating the real estate appraisal process.

To resolve this issue, the Court must look no further than the first line of the implementing regulation which states "OTS is authorized to promulgate regulations that preempt state laws affecting the operations of federal savings associations." [12 C.F.R. § 560.2\(a\)](#) (emphasis added). Plaintiffs do not claim in their pleadings or motion for summary judgment that the federal savings associations themselves perform, as part of their operations, real estate appraisals. Furthermore, although the results of REACA incidentally[*41] affect savings association operations, by requiring appraisers from whom the savings associations receive appraisals to be certified, it does not "regulate their credit activities." [12 C.F.R. § 564.2](#).

OTS provides a list of the types of areas in which state regulation is preempted by HOLA and its implementing regulations. In addition, OCC recently adopted regulations preempting state laws that "obstruct, impair, or condition a national bank's ability to fully exercise its powers to Federally authorized real estate lending powers" and adopted a list of preempted areas mirroring OTS's list. [12 C.F.R. § 34.4\(a\),\(b\)](#). Plaintiffs point to the areas of federal preemption mentioned in both the OTS and OCC regulations, specifically "licensing, registration; access to and use of credit reports; and processing, origination and servicing of mortgages." (Pl. Mot. for Summ. J. at 41). Although at first blush, the area dealing with licensing and registration might seem relevant, the actual regulation reads that state law is preempted in the area of "licensing, registration (except for service of process), filings and reports by creditors[,] "[*42] making it inapplicable in the present case. [12 C.F.R. § 34.4](#) (emphasis added). According to OTS interpretive letters, the type of state "licensing and registration" laws or regulations preempted by OTS regulations are business license requirements and other registration requirements imposed upon federal savings associations that wish to do business in the state. Opinion of Carolyn Buck, Chief Counsel, 1998 OTS LEXIS 6, 20-21 (1998) ("It is well established that state laws that purport to impose licensing or registration requirements, including the payment of a license or registration fee, on federal savings associations in order to conduct business in a state are preempted."); Opinion of Carolyn Buck, Chief Counsel, 1997 OTS LEXIS 7 (1997) ("It is well established that federal law and regulation preempt state laws or rules that purport to impose licensing requirements, including the payment of a license fee, on federal savings associations in order to conduct business in a state.").

The OCC and OTS regulations also preempt state laws regulating "processing, origination, servicing, sale or purchase of or investment or participation in, mortgages." [12 C.F.R. § 34.4\(10\)\[*43\]](#) ; [12 C.F.R. § 560.2\(b\)\(10\)](#).

Other courts have interpreted this language to preempt state laws directed at federal savings associations' mortgage lending operations. See [Haehl v. Wash. Mut. Bank, F.A., 277 F. Supp. 2d 933, 942 \(S.D. Ind. 2003\)](#) (holding that a state law allowing banks and savings associations to pass on to customers only bona fide reconveyance fees was preempted by [12 C.F.R. § 560.2\(b\)\(5\)](#) and [\(10\)](#)). Nothing in HOLA, NBA, or OTS/OCC regulations indicates that their preemption focus was on anything other than state laws specifically targeting federal savings association or national bank operations.

REACA does not specifically target the operations of national banks and federal savings associations. In fact, neither mortgages, loans, banks nor savings associations are even mentioned in REACA. At best, REACA's affect on national banks and savings associations is the same as a state requirement that persons doing home inspections be licensed. Neither law requires that every real estate transaction use the regulated service, n12 but if it is used, it must be done by a licensed person. For the foregoing reasons, [*44] the Court finds that neither HOLA nor NBA preempt Pennsylvania's real estate appraisal regulations.

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n12 REACA states simply that it is unlawful for any person to perform real estate appraisals on federally or non-federally related transactions without a license. [63 P.S. 457.3](#).

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b. Preemption by [Section 24 of the NBA](#)

Plaintiff's reliance on [Section 24 of the NBA](#) and [12 C.F.R. § 7.1004\(a\)](#) is also misplaced. This OCC regulation allows national banks to "use the services of, and compensate persons not employed by, the bank for originating loans." [12 C.F.R. § 7.1004\(a\)](#) (emphasis added). This section of the CFR is a codification of Comptroller of the Currency Interpretive Ruling 7.7380 (formerly [12 C.F.R. § 7.7380](#)). That ruling concerned whether banks may use non-public back offices to approve loans originated at bank branches, 1994 OCC QJ LEXIS 30, and defined loan origination and solicitation activities as: 1) solicitation[*45] of loan business, including by means of advertisements disclosing the nature and limitations of the [Loan Production office];

2) providing information as to loan rates and terms;

3) interviewing and counseling of applicants regarding loans (only), including the provision of disclosures required by regulations such as Regulation Z of the Federal Reserve Board;

4) aiding customers in the completion of loan applications.

Fed. Banking L. Rep. (CCH) P85, 1979 OCC Ltr. LEXIS 36 (OCC Ltr., 1979). Nothing within the above definition could be construed to apply to hiring a person to perform real estate appraisals in connection with mortgage services.

1. Barnett Bank does not apply

Plaintiffs next argue that the Supreme Court's holding in [Barnett Bank, N.A. v. Nelson, 517 U.S. 25, 134 L. Ed. 2d 237, 116 S. Ct. 1103 \(1996\)](#), controls in this case. In Barnett Bank, the Supreme Court held a federal law allowing national banks to sell insurance preempted a Florida state law that barred banks from engaging in insurance sales. [Barnett Bank, 517 U.S. at 37](#). Central to the Supreme Court's holding was the proposition that the states may not[*46] limit the powers granted to national banks. The Plaintiffs claim that even if a state law does not "flatly bar the exercise of a federal power" (Pl. Mot. for Summ. J. at 44), it may be preempted by federal law because according to the Supreme Court in Barnett Bank "Congress would not want the States to forbid, or to impair significantly, the exercise of a power Congress explicitly granted." [Barnett Bank, 517 U.S. at 33](#). Thus, Plaintiffs contend, Congress granted national banks the power to "make real estate loans and to use third parties as agents." (Pl. Mot. for Summ. J. at 45). The Court has already discussed why the agency power granted to national banks does not apply in this case. (See Part III(B)(3)(b)). Therefore the rest of this discussion will be limited to the national banks powers to make real estate loans and whether those powers are significantly

impaired.

As evidence of significant impairment of national banks' ability to make real estate loans, Plaintiffs provided a sworn declaration made by Ray Ferrarin, Executive Vice President of Valuation Services of **Fidelity National Information Solutions**, Inc. that states that certified appraisals take[*47] "5-10 business days or more" at a cost of \$ 325 for a full appraisal, \$ 210 for a drive-by appraisal. The Nonconforming valuations, done primarily using automated data not provided by board certified appraisers may be done in seconds, n13 and for these valuations FNIS charges between \$ 25 and \$ 100. n14 (Decl. of Ray Ferrarin PP 23, 24).

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n14 Mr. Ferrarin's declaration loses much of its credibility when it provides a cost comparison between Nonconforming Valuations and appraisals done in conformity with REACA. First, Mr. Ferrarin does not disclose the number of nonconforming valuations done of Pennsylvania real estate, but instead, provides a dollar figure of \$ 420,000. He then states that "the corresponding charge would have been approximately \$ 4,490,000 if half of these Nonconforming Valuations had been drive-by appraisals and half had been full appraisals, and the charge would have been approximately \$ 5,460,000 if all of these Nonconforming Valuations had been full appraisals." (Decl. of Ray Ferrarin P 25). Instead of using actual figures, Mr. Ferrarin clearly guesstimated, using the number assumptions most favorable to his case.

----- End Footnotes-----[*48]

[Barnett Bank](#) does not apply in the present case, for the simple reason that it, and the other cases cited by the Plaintiffs, all concern state laws that directly seek to regulate the operations of national banks and/or federal savings associations. The case at bar, features a law that does not target banking operations at all and, at best, only incidentally affects the business of national banks and federal savings associations.

Barnett Bank allows preemption in cases where there is significant impairment of a national banks' explicitly granted powers. [Barnett Bank](#), 517 U.S. at 33. However, again the cases cited to support this proposition in [Barnett Bank](#) concern laws that directly regulate banks--not industries or professionals that do business with a bank. For example, in [Anderson Nat. Bank v. Lueckett](#), 321 U.S. 233, 247-252, 88 L. Ed. 692, 64 S. Ct. 599 (1944), the court upheld a state statute regulating abandoned deposit accounts because it did not "unlawfully encroach on the rights and privileges of national banks." Id. In [McClellan v. Chipman](#), 164 U.S. 347, 358, 41 L. Ed. 461, 17 S. Ct. 85 (1896), also cited by Barnett Bank, the Supreme[*49] Court held as not preempted, a state statute forbidding certain real estate transfers by insolvent transferees, because it "would not 'destroy or hamper' national banks' functions." Id. In [National Bank v. Commonwealth](#), 76 U.S. 353, 19 L. Ed. 701 (1870), the Supreme Court held that state taxation of national bank shares, paid by the bank cashier, did not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government." These statutes sought to directly affect the banking operations, and are thus even closer to the types of laws that are preempted than is REACA in the present case.

In addition, Plaintiffs' contention that the delay and extra expense caused by requiring property valuations to be performed by a certified appraiser constitute a significant impairment of the mortgage lending process is unavailing. First and foremost, this argument fails because Congress itself recognized the value of such appraisals when it required them for federally related transactions under FIRREA. 12 U.S.C. § 3331. The main thrust of FIRREA is that the requirement that[*50] appraisals be done by state certified or licensed appraisers is necessary to protect "the safety and soundness of financial institutions." 12 U.S.C. § 3341(b). In those areas where the regulatory agencies did not require appraisals the issues considered were significantly different from those considered by state legislators in drafting REACA. n15 Although such requirements may slow the processing time of individual loans, it "does not prevent or significantly interfere with the national bank's exercise of its powers." [Barnett Bank](#), 517 U.S. at 33. Moreover, Plaintiffs failed to provide any evidence, other than mere speculation, that the increased cost would have or has had any impact whatsoever on national banks

and federal savings association's ability to make mortgage loans. Appraisal fees are typically borne by the consumer. (Decl. of Ray Ferrarin P 26). Also, such fees whether \$ 25 or \$ 325 are relatively insignificant when compared to either the average total amount of closing costs of \$ 4,659.34 n16 or the total price of the real estate. Furthermore, Plaintiffs have provided no evidence that requiring certified appraisers to perform all[*51] appraisals on non-federally related real estate transactions in Pennsylvania has or will have any negative effect on the mortgage loan market. Plaintiffs have not provided one example or instance of a consumer not taking a mortgage loan on real estate because the appraisal fee was \$ 325 versus \$ 25. The data collected by the regulatory agencies, during their rulemaking on this issue, speaks to a different issue entirely. There, the regulatory agencies consider countrywide whether a threshold level or other appraisal exemption will affect the health regulated financial institutions. Some of the issues cited by the boards, such as premiums paid by small town lending institutions to bring an appraiser to the area, simply do not apply, when a state requires every real estate appraisal to be performed by a certified appraiser. [59 Fed. Reg. 29482, 29485 \(June 7, 1994\)](#). Another concern expressed by the regulatory agencies is that there is an uneven playing field between regulated and non-regulated financial institutions. *Id.* REACA actually solves this problem by requiring all appraisals done, regardless of the type of transaction, to be completed by certified or licensed[*52] appraisers.

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n15 Congress' expressed purpose in drafting FIRREA's appraisal requirements was to protect the integrity and stability of federal financial institutions. 1989 U.S.C.C.A.N. 86. REACA's purpose is to protect the accuracy of appraisal results, the state business environment, the stability of the local real estate market and the integrity of the real estate appraisal process. (Def. Resp. at 41-42).

n16 Average taken from closing cost information gathered from 103 lenders and brokers from 10 states and based on the purchase of a \$ 125,000 home for the year 2001. This average amount does not include pre-paid items such as taxes, insurance, and prorated mortgage amount. Michael D. Larson, Closing costs compared, Bankrate.com, at <http://www.bankrate.com/brm/news/mtg/20010621b.asp>.

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For all these reasons, the court finds that the Plaintiffs have failed to make a showing that REACA significantly impairs the lending powers of national banks.

C. REACA does not violate the [Commerce Clause](#)[*53]

The Plaintiffs argue that REACA violates the [Commerce Clause](#) because it imposes excessive burdens on interstate commerce that outweigh its local benefits. The [Commerce Clause, U.S. Const. art. I, § 8, cl. 3](#), serves as the basis in law for Congress' power to regulate trade between the states. The Courts have long held that Congress may pass laws regulating interstate economic activity, and conversely, that states may not pass protectionist measures that have a discriminatory effect on out-of-state businesses. [West Lynn Creamery v. Healy, 512 U.S. 186, 193, 129 L. Ed. 2d 157, 114 S. Ct. 2205 \(1994\)](#) (quoting [New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-274, 100 L. Ed. 2d 302, 108 S. Ct. 1803 \(1988\)](#))("This 'negative' aspect of the [Commerce Clause](#) prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. . . . Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism").

1. REACA does not discriminate against interstate commerce[*54]

In the present case, Plaintiffs' argument fails primarily because REACA is not a measure designed to burden out-of-state competitors to promote in-state economic interests. REACA applies equally to all persons wishing to perform real estate appraisals, without regard to residency or citizenship. [63 P.S. § 457.3](#). Nor does it require

any additional burden for out-of-state entities seeking to obtain appraisals. *Id.* All appraisals done on Pennsylvania real estate must be done by a certified real estate appraiser. *Id.* In addition, the two factors cited as causing the unreasonable burden are that the fees charged by certified appraisers are more than those charged by people doing nonconforming valuations, and the time it takes for a certified appraiser to complete an appraisal is longer than it would take to generate a nonconforming valuation. Neither of these things are actually controlled by REACA. REACA simply requires that all appraisals of real property within the Commonwealth be done by persons who have met certification requirements.

A state law might also be struck down if it unreasonably burdened interstate commerce. However, the court must engage in a balancing test[*55] to determine whether the state's local interest outweighs the burden placed on interstate commerce. [Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 \(1970\)](#). The Supreme Court in *Pike* explained that "where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." [Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 \(1970\)](#) (citing [Huron Cement Co. v. Detroit, 362 U.S. 440, 443, 4 L. Ed. 2d 852, 80 S. Ct. 813 \(1960\)](#)). In the present case, REACA is non-discriminatory in application, so the Court's focus shifts to whether it places an excessive burden on interstate commerce when compared to the local benefits it provides. The Plaintiffs argue that this benefit analysis has already been done by the federal banking regulators and that the Court should adopt their conclusions on this matter. The Court, however, finds that the federal banking regulators made burden/benefit analyses that considered different factors [*56] than those relevant to the Commonwealth of Pennsylvania and its local communities. Where federal banking regulators considered the losses sustained by various federally insured and regulated financial institutions, [59 Fed. Reg. 29482, 29484 \(June 7, 1994\)](#) (codified at [12 C.F.R. § 34.43\(a\)](#); [12 C.F.R. § 225.63\(a\)](#); [12 C.F.R. § 323.3\(a\)](#); [12 C.F.R. § 564.3\(a\)](#)), the Commonwealth must consider "the accuracy of appraisal results, honesty in their production, protection of the State business environment, and protection of State real estate [values]." (Def. Resp. at 41-42). These are legitimate considerations that outweigh whatever slight burden may be imposed on interstate commerce by REACA's certified appraiser requirement.

2. REACA does not control out-of-state real estate transactions

Plaintiffs claim REACA attempts to control out-of-state real estate transactions by requiring the use of a certified real estate appraiser for all valuations of Pennsylvania real estate. For support of this proposition, Plaintiffs cite to [Healy v. The Beer Inst., 491 U.S. 324, 336-37, 105 L. Ed. 2d 275, 109 S. Ct. 2491 \(1989\)](#),[*57] as controlling in this case. Plaintiffs' reliance on *Healy*, is misguided at best. In that case, the Supreme Court struck down a state law that required out of state beer shippers to affirm that their prices were not higher than their prices in bordering states. *Id.* The Supreme Court held that such a law attempted to regulate the conduct of out-of-state parties in areas outside the legislating state. *Id.* In the present case, REACA requires that all real estate valuations conducted on Pennsylvania real estate be done by a state certified appraiser. The law does not attempt to influence how out-of-state parties act with regard to transactions in other states, which was the case in *Healy*. Instead REACA regulates parties actions solely with regard to appraisals of Pennsylvania property. The Commonwealth has the power to regulate with respect to real property within its borders. [Curry v. McCanless, 307 U.S. 357, 83 L. Ed. 1339, 59 S. Ct. 900 \(1939\)](#) (holding that the state where a tangible piece of property was located had the exclusive power to regulate and tax that property); [Pittsburgh v. N. & L. Realty Corp., 15 Pa. D. & C. 2d 391, 106 Pitts. Leg. J. 224](#) (holding that even where[*58] a real estate transaction took place outside Pennsylvania, because real property was located within the Commonwealth, the state was empowered to tax the transfer).

For these reasons, this Court does not find that REACA violates the [Commerce Clause](#).

D. REACA does not violate the [First Amendment](#)

The [First Amendment of the United States Constitution](#) states that "Congress shall make no law . . . abridging the freedom of speech" [U.S. Const. Amend. I](#). Plaintiff argues that the "communication of property

information from real estate professionals to FNIS, and of evaluations from FNIS to its clients" qualifies as protected speech under the [First Amendment](#). (Def. Mot. for Summ. J. at 55).

Speech does not lose its Constitutional protections simply because it has commercial value. [Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council](#), 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976). The Supreme Court explained in *Edenfield v. Fane* that: Commercial speech, however, is "linked inextricably" with the commercial arrangement that it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the[*59] expression itself. For this reason, laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive [First Amendment](#) scrutiny. [Edenfield v. Fane](#), 507 U.S. 761, 767, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993) (internal citations omitted).

REACA's self-evident purpose is to ensure appraisals conducted in the Commonwealth of Pennsylvania are conducted by qualified and well-trained persons, to avoid the problems of overinflated, erroneous or sometimes intentionally dishonest real estate appraisals. Ensuring the stability of the Commonwealth's real estate market, as well as the its financial institutions is a substantial state interest. In addition, the manner in which the Commonwealth seeks to regulate this speech, by establishing a licensing and certification process, is also reasonably tailored to fulfill its purpose. "The power of the State to license lawyers, psychiatrists, and public school teachers -- all of whom speak for a living -- is unquestioned." [Dun & Bradstreet v. Greenmoss Builders](#), 472 U.S. 749, 760, 86 L. Ed. 2d 593, 105 S. Ct. 2939 (1985).[*60] Likewise, licensing real estate appraisers is reasonable and unquestionably permissible under the [First Amendment](#). Plaintiffs have provided no other valid grounds upon which a [First Amendment](#) challenge to REACA might be sustained.

E. Counts Four and Five of Plaintiffs' Second Amended Complaint are Precluded by the [Eleventh Amendment](#)

In their motion for Judgment on the Pleadings, Defendants argue that Counts Four and Five of the Plaintiffs' Second Amended Complaint are precluded because the [Eleventh Amendment](#) does not allow parties to bring claims against state officials in federal court. The Plaintiffs conceded the issue. (Pl. Mot. for Summ. J. at 54 n28). Therefore Counts Four and Five of the Plaintiffs Second Amended Complaint are dismissed.

F. Plaintiffs' Civil Rights Claim

Count Eight of Plaintiffs' Second Amended Complaint is a claim under the Civil Rights Act, [42 U.S.C. § 1983](#). Neither the Plaintiffs nor Defendants addressed this claim in their Motions. As Defendants' motion was a motion for Judgment on the Pleadings, the Court finds that although not specifically mentioned, Defendants wish for judgment on this matter. Also, Plaintiffs' [*61] bear the burden in their motion for Summary Judgment, and failed to provide any argument or evidence to support this claim. For these reasons, the Court finds that there is no substantiated allegation of misconduct by the Defendants in this matter that would sustain this claim. Therefore, Count Eight of the Plaintiffs' Second Amended Complaint is dismissed.

IV. CONCLUSION

Accordingly, the Court DENIES Defendants' Motion for Judgment on the Pleadings on ripeness and lack of justiciability grounds, and GRANTS the Motion with respect to Count One of Plaintiffs' Second Amended Complaint in so far as it argues that FIRREA is exclusively directed toward regulation of federally related transactions, and non-federally related transactions fall outside FIRREA's scope are subject to regulation by the states. The federal financial regulatory agencies, pursuant to the Congressional authority granted under [12 U.S.C. § 3341\(b\)](#), have exempted federally related real estate transactions under \$ 250,000 from the state certified real estate appraiser requirement. Insofar as these federally related, but expressly exempt transactions are concerned, REACA is preempted[*62] by FIRREA. For all other transactions that are non-federally related either because they do not involve a federal financial institution regulatory agency or the Resolution Trust Corporation, or because they have been designated by the federal financial institution regulatory agencies as not requiring "the services of an appraiser" as set forth in [12 U.S.C. § 3350\(4\)](#), such non-federally related

transactions are outside the scope of FIRREA and are subject to state regulation. Defendants' Motion for Judgment on the Pleadings is GRANTED with respect to Counts Two and Three because neither Federal Reserve Act, [12 U.S.C. § 371\(a\)](#), the National Bank Act, [12 U.S.C. § 24\(Seventh\)](#) and [12 C.F.R. § 7.4001\(a\)](#), nor the federal Home Owner's Loan Act, [12 U.S.C. § 1464\(c\)](#) and [12 C.F.R. § 560](#) preclude the states from regulating appraisers or the appraisal process, these statutes and their implementing regulations preclude direct or significant interference with national banks and federal savings associations. Defendants' Motion for Judgment on the Pleadings is GRANTED with regard[*63] to Counts Four and Five because Plaintiffs conceded these by not briefing these issues in their response to Defendant's motion. Defendants' Motion for Judgment on the Pleadings is GRANTED as to Count Six, because as explained in detail above REACA does not burden or interfere with interstate commerce. Defendants' Motion for Judgment on the Pleadings is GRANTED as to Count Seven, because insofar as it regulates speech, REACA is a reasonable regulation of commercial speech permitted under the [First Amendment](#). Defendants' Motion for Judgment on the Pleadings is GRANTED as to County Eight as the Court finds there was no misconduct on the part of the Defendants that would sustain a claim under [section 1983](#) of the Civil Rights Act.

With respect to Plaintiffs' Motion for Summary Judgment, the Court DENIES Summary Judgment for the reasons stated above on Counts Two through Seven. Partial Summary Judgment is GRANTED on Count One in that FIRREA preempts REACA with regard to federally related transactions below the \$ 250,000 threshold set by federal financial institution regulatory agencies pursuant to the authority granted in [12 U.S.C. § 3341\(b\)](#). As stated above, for[*64] all other non-federally related transactions, including those exempted by the federal financial institution regulatory agencies, FIRREA does not extend to them, and state regulations, including REACA, apply.

An appropriate order follows.

ORDER

AND NOW, this 31st day of March, 2004, upon consideration of Defendant Members of the Pennsylvania State Board of Certified Real Estate Appraisers' Motion for Judgment on the Pleadings (Docket No. 11&13), Plaintiffs' **Fidelity National Information Solutions, Inc.**'s, Market Intelligence, Inc.'s, and the Pennsylvania Bankers Association's response thereto contained in Plaintiffs' Motion for Summary Judgment (Docket No. 16), Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment (Docket No. 19), and Plaintiffs' Reply Brief in Further Support of their Motion for Summary Judgment (Docket No.20), it is hereby ORDERED that Defendants' Motion is DENIED as to ripeness and lack of justiciability grounds, and GRANTED in part with respect to Count One of Plaintiffs' Second Amended Complaint in that non-federally related transactions fall outside FIRREA's scope and are subject to regulation by the states. [*65] Defendant's motion is DENIED in part as to federally related transactions. This includes those federally related transactions below \$ 250,000 that are exempted from the certified and licensed appraiser requirement by the federal financial institution's regulatory agencies, pursuant to the Congressional authority granted under [12 U.S.C. § 3341\(b\)](#). Insofar as these federally related, but expressly exempt transactions are concerned, REACA is preempted by FIRREA. For all other transactions that are non-federally related either because they do not involve a federal financial institution regulatory agency or the Resolution Trust Corporation, or because they have been designated by the federal financial institution regulatory agencies as not requiring "the services of an appraiser" as set forth in [12 U.S.C. § 3350\(4\)](#), such non-federally related transactions are outside the scope of FIRREA and are subject to state regulation. Defendants' Motion for Judgment on the Pleadings is GRANTED with respect to Counts Two and Three because neither Federal Reserve Act, [12 U.S.C. § 371\(a\)](#), the National Bank Act, [12 U.S.C. § 24\(Seventh\)](#) [*66] and [12 C.F.R. § 7.4001\(a\)](#), nor the federal Home Owner's Loan Act, [12 U.S.C. § 1464\(c\)](#) and [12 C.F.R. § 560](#) preclude the states from regulating appraisers or the appraisal process, these statutes and their implementing regulations preclude direct or significant interference with national banks and federal savings associations. Defendants' Motion for Judgment on the Pleadings is GRANTED with regard to Counts Four and Five, because Plaintiffs conceded these by not briefing these issues in their response to Defendant's motion. Defendants' Motion for Judgment on the Pleadings is GRANTED as to Count Six, because REACA does not burden or interfere with interstate commerce. Defendants' Motion for Judgment on the

Pleadings is GRANTED as to Count Seven, because insofar as it regulates speech, REACA is a reasonable regulation of commercial speech permitted under the [First Amendment](#). Defendants' Motion for Judgment on the Pleadings is GRANTED as to Count Eight as the Court finds there was no misconduct on the part of the Defendants that would sustain a claim under [section 1983](#) of the Civil Rights Act.

With respect[*67] to Plaintiffs' Motion for Summary Judgment, Summary Judgement is DENIED for the reasons stated above on Counts Two through Eight. Partial Summary Judgment is GRANTED in part on Count One in that FIRREA preempts REACA with regard to federally related transactions below the \$ 250,000 threshold set by federal financial institution regulatory agencies pursuant to the authority granted in [12 U.S.C. § 3341\(b\)](#). As stated above, for all other non-federally related transactions, including those exempted by the federal financial institution regulatory agencies, FIRREA does not extend to them, and state regulations, including REACA, apply. .

BY THE COURT:

RONALD L. BUCKWALTER, S.J.

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