

Statement for the Record
The United States House of Representatives
Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Hearing - Occupational Licensing: Regulation and Competition
September 12, 2017

The undersigned associations of state licensing boards and the organizations representing those licensed professionals serving on these boards have a direct interest in the issues being considered by this Committee. Our shared mission is to work together with state governments to ensure the quality, safety, and integrity of the knowledge-based professions by promoting high standards for licensure and practice, and to effectuate the state's primary goal of protecting public health, safety, and welfare. The public is best served when state regulatory boards, duly constituted under state law, are free to make decisions on issues of public health, safety, and welfare, decisions which involve a balancing of multiple values—including the effect on the economic health of the marketplace—without heightened subjugation to federal antitrust law and other federal mandates which would force states to create additional levels of bureaucracy and oversight.

To that end, our organizations collectively voice concern that the injection of federal procedural mandates into areas of traditional state law and regulations will limit the ability of state and local officials from taking good faith actions which are reasonably believed to be in the best interests of the welfare of its citizens, thereby further eroding the constitutional balance of state and federal powers. We urge the Committee to contemplate the unique role of state licensing bodies in the system of state government and their mandate to protect the consuming public from harm. We respectfully suggest that regulation of certain licensed professional services requires deference to the preferences of the state regarding the structure, composition, and powers provided to their duly appointed boards and acknowledge that in performing its duties, a state regulatory body exercises judgment that focuses on many factors, including competition.

The Role of Licensing Boards in a Free Market

Professional licensure exists within a system of federalism in which, under the Tenth Amendment, the federal government displays respect for the sovereign decisions made by the states to oversee professionals providing services within their boundaries. State licensing boards limit the ability of unqualified professionals from entering the market and restrict or remove professionals

when they do not adhere to the professional standards set by the state or they endanger members of the consuming public. Through promulgation and enforcement of standards of practice, state licensing boards ensure that the skilled professional is acting for the benefit of the consumer, and not at the expense of the consumer.

It is important to underscore the great, pro-competitive strides that states and state licensing boards have made in recent years to facilitate and encourage licensed professionals to engage in the delivery of regulated services in a variety of U.S. jurisdictions. These strides have been in the form of interstate compacts, mutual recognition agreements, increased reciprocity, and, in some instances, the mobility model of no notice and no fee when practicing in a jurisdiction that is substantially equivalent to the individual licensee's state of licensure. In addition, many learned professions have developed and vigorously implemented their professions' model practice acts, thereby aligning and conforming state law in an attempt to streamline licensing and increase consistency, all while ensuring public protection. These efforts have been coupled with efforts to reduce licensing burdens for veterans and their spouses. Procompetitive steps being taken by states and their licensing boards, especially when they help to reduce barriers to crossing state lines, have been and should continue to be an area where there is cooperation between federal competition enforcers and state licensing regulators.

State licensing boards also serve an important role in the function of a free market by creating trust between the public consumer of a service and the professional that provides it within a state's borders. Although boards vary in structure and form, the legislatively mandated purview of any state licensing board is to determine whether other societal values, such as reduction of physical harm or avoidance of deception, outweigh the benefits of unrestricted competition. In comments at the July 2017 FTC Economic Liberty Taskforce Roundtable, Acting Chairman Maureen Ohlhausen recognized that licensing serves important consumer protection functions, especially in situations where consumers may be vulnerable because they lack sufficient information to evaluate the quality of service providers.

The broad generalizations relied upon by critics of state licensing boards assume that consumers can unilaterally discern the qualifications necessary to provide a service, and characterize the role of licensing boards as superfluous in a modern marketplace. However, it is difficult for a consumer to properly value a market good that is based upon the provision of advanced knowledge. Knowledge-based market goods lack the purely transparent character that allows a consumer to discern the quality of the goods much in the same way they would discern the quality of basic retail

goods such as food or clothing. This understanding is implicit in the decision of a state to license a profession and should be reflected in federal competition preferences.

The uncertainty and risk created by unclear antitrust standards and federal legislation creating additional levels of state bureaucracy limit the ability of state licensing boards to act expediently and with certainty, thereby weakening public protection. State licensing boards understand the concerns about professional licensure and will continue to work proactively with interested parties at the state and federal level to find solutions that meet the needs of the modern market, but also protect the public health, safety, and welfare.

North Carolina Dental and Its Results

For more than 70 years, state licensing boards were presumed to be immune from federal antitrust laws as long as their actions were clearly authorized by state statutes. However, the Supreme Court's 2015 holding in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* now requires that state licensing boards comprised of a controlling number of active market participants also be "actively supervised" by a neutral state entity in order to enjoy state action immunity from federal antitrust law. The decision in *North Carolina Dental* fails to recognize the capacity (and in many cases, an ethical duty under state law) of an individual, often appointed by a governor or approved by the state legislature, to put self-interest aside and act in the public interest during his or her service on a state board.

The Supreme Court's decision also left open questions concerning the extent of the decision's application to the various situations where a professional licensing board could act in a manner that impacts the market. For example, the Court did not detail how many licensee board members would constitute a controlling interest on the board or whether their particular area of practice would be a factor, leading to speculation as to whether traditional state oversight of licensing boards, along with the potential for court review of enforcement actions, would be sufficient supervision to ensure antitrust immunity.

In October 2015, the FTC released staff guidance that addressed the lingering questions left by *North Carolina Dental*. The guidance does implicitly recognize that states will not cede the expertise and contributions of active market participants. However, the guidance urges states to create another level of review which, in practice, will delay decisions and jeopardize expedient actions made to protect the public. In a rehashing of the Court's four constants of a context-dependent review, the supervisor must take a fresh look at the decision and issue a written

explanation as to why he or she agrees with the board's determination. The guidance also states that the participation of disinterested state actors, such as staff of the attorney general, should not be considered state supervision. Moreover, neither does a decision reached in compliance with the administrative procedures act and other state transparency laws. One way to make the market more efficient, no matter if the goal is time, money, or any other value, is not to add another layer of bureaucratic review.

Despite the FTC's assertion to the contrary, federal policy makers should acknowledge that state regulatory boards and their members are subject to procedures that ensure that any action is undertaken in a manner that reflects state policy, rather than implementing private preferences of market participants. There are checks and balances inherent in the state political process that federal policy should acknowledge and respect. Active supervision starts at the appointment process, as a governor is responsible for appointing members capable of acting in a manner that ensures decisions of the regulatory board reflect state policy, rather than simply the private preferences of market participants. Additionally, all rules that a regulatory board wishes to promulgate must go through a notice-and-comment process under state administrative procedure acts, subjecting board actions to public scrutiny and review. On top of the various forms of political oversight and public accountability set forth above, many state regulatory boards are already subject to periodic, comprehensive review by the legislature. These reviews, so-called "sunset reviews," identify the mission, goals, and objectives of the state board and analyze the extent to which they have been achieved. All of these options are less burdensome on the regulatory process than the creation of a new oversight body that would operate to overturn decisions made transparently by politically accountable actors.

What constitutes active supervision is far from clear, particularly where state statutes grant boards substantial authority and independence in carrying out their duties. Thus, over the last two years, the actions of boards and their members and employees have been placed under a cloud of uncertainty, including the prospect of antitrust treble damages as they attempt to carry out their duties under their existing governance structures. Just as importantly, this threat of treble damage liability has led several states to adopt regulatory or legislative changes to board governance mechanisms without assurance that antitrust courts *might* find, over the course of years of litigation, that these changes meet the active supervision requirement. Nonetheless, absent clarity on this issue, states have incurred costs to defend against these claims in court.

To date, at least twenty-seven antitrust cases have been filed against state licensing boards in the wake of the Supreme Court's 2015 decision. The majority of those have been dismissed on Eleventh Amendment and sovereign immunity grounds, or have been found to be insufficient grounds to uphold a claim under federal antitrust law, as the action challenged related to issues of individual discipline. Indeed, ministerial acts and licensee discipline actions present very low antitrust risk and do not necessarily require active supervision scrutiny, a fact that was acknowledged by the majority in the *North Carolina Dental* decision and the FTC guidance on active supervision.

More troubling, however, is the potential use of antitrust litigation to compel a state licensing board to rescind its disciplinary inquiries against a licensee. Sadly, this is less fantasy and more reality. In June 2017, the Kansas Board of Healing Arts received a strongly worded letter from an attorney representing the subject of a disciplinary inquiry. In this letter, the attorney demanded that the board "cease and desist" its investigation of his client, lest it be subject to the filing of a federal antitrust lawsuit. This threat was punctuated by the statement that the plaintiff would seek personal damages from board members. Clearly, threats of litigation to avoid discipline were never intended to be the aim of federal antitrust laws, nor did subsequent guidance envision the use of threats of litigation as a shield from discipline, but such threats are the result of the *North Carolina Dental* decision that weakens the state regulatory systems and may allow bad actors to continue to provide services in the marketplace.

States will continue to incur costs to defend against antitrust claims for the foreseeable future. Subjecting individual decisions regarding issuance or denial of a license, or standard disciplinary decisions to a bureaucratic review process has created an unnecessary hurdle that represents a waste of government resources for marginal, if any, market improvement. The requirement that such actions be reviewed unduly burdens the regulatory board and other components of state government, not to mention compromises public safety during the interim period before the board's action becomes final.

Restoring Board Immunity (RBI) Act

Some state models for active supervision and the review of occupational licensing boards already exist or are being developed. With regard to rulemaking, the rules of many state boards are already subject to review by an executive or legislative branch commission or agency charged with rules review oversight. Whether or not a state's rules review mechanism is sufficient to meet the requirements for active supervision will likely depend upon whether there is a substantive review of the promulgating entity's statutory authority to propose such a rule and whether the disinterested

reviewer has the power to modify or veto the proposed rule. Despite variations within these models of supervision, it is right and proper for states to continue to perfect their own regulatory structures in a manner that is free from federal interference and in a manner that accounts for a broader range of local considerations, rather than merely the value of competition, when matters of the public welfare of its citizens are at issue.

We recognize that the recently-introduced Restoring Board Immunity Act (RBI Act) aims to achieve both deregulation and active supervision goals. The RBI Act appears to use the *North Carolina Dental* decision as an opportunity to mandate state deregulation efforts under the guise of antitrust compliance. In doing so, the RBI Act would have states establish an Office of Supervision of Occupational Boards to oversee the activities undertaken by licensing boards. Of additional concern, the RBI Act specifically sets out federal mandates for the staff structure of a state agency, directing the state on the minimum number of attorneys that must staff the agency and further restricting the state from using its own employees as the state sees fit. Creating more state bureaucracy, processes, and red tape is not the answer.

Moreover, the active supervision that is required under the RBI Act goes far beyond the supervision parameters set by the Supreme Court in *North Carolina Dental* and in the decades of jurisprudence since the first decision establishing the active state supervision standard was issued by the Supreme Court in 1980. The RBI Act proposes an active supervision regime that implicitly targets state legislative mandates, not actions undertaken by state boards. It requires the newly-developed bureaucratic office to determine whether a state licensing board has utilized the “least restrictive means” to regulate within a particular profession or occupation. However, under the powers vested in it through the Tenth Amendment, it is the prerogative of a state legislature to determine what means it wants to employ to regulate a given profession or occupation. The legislature has already defined the least restrictive means for most of its learned professions—a state licensure regime. Thereafter, the legislature has set forth the requirements for licensure, typically addressing areas such as examination, education, and experience. If deregulating certain occupations is the aim, the RBI Act is not the most effective way to address such aim.

The practical application of such systems is not without its limitations. The institution of such reforms does not guarantee that the regulatory process will improve, but it will guarantee a less efficient process. An unforeseen consequence of creating a new agency tasked with reviewing a regulatory board’s actions through an antitrust lens is that the potential for regulatory capture has not been ameliorated, but shifted to another entity within government. The decisions of the

reviewing entity are not subject to the same transparency demanded of state regulatory boards during the rulemaking process. The decision to veto or modify a board's decision is not subject to the same scrutiny as the process which created the rule under review. By forcing states to bend to federal preferences, federal law would attempt to prevent regulatory capture but, quite possibly, would ultimately encourage it by shifting unlimited veto powers to another state agency.

Of note, in this past legislative session, several states have considered state legislation that mirrors much of the language contained in the RBI Act. The rationale for these proposals included the establishment of statewide policy for the regulation of professions and occupations specifying criteria for government regulation with the objective of increasing opportunities, promotion of competition, encouragement of innovation, protecting consumers, and compliance with applicable federal antitrust laws. These state legislative proposals would have established a process for the active supervision of state regulatory boards, including the establishment of a bureaucratic oversight body responsible for the active supervision of regulatory boards and which is to review all state licensure on a hierarchy similar to that proposed in the RBI Act.

Beyond issues of practicality, of concern were the issues of additional costs that would be imposed upon states. Fiscal analysis of the costs of legislation proposed in 2017 for the creation of agencies similar to that which has been proposed in the RBI Act are significant.

- Maryland -- HB 1471
 - Fiscal Year 2018: \$1,100,000
- Nebraska -- LB299
 - Fiscal Year 2017-18: \$642,000
 - Fiscal Year 2018-2019: \$1,207,400
- Virginia -- HB1566
 - Fiscal Year 2018: \$1,240,362
- West Virginia -- HB2984
 - Fiscal Year 2017-18: \$855,000

None of these bills have been enacted. If state legislators believed that the creation of a new oversight board to review occupational licensure on a continuum of restraint was a cost-effective, efficient, and practical approach to occupational licensure and antitrust immunity, surely this legislation would have been more successful at the state level.

The lack of passage of these proposals by state legislatures begs the question of whether the federal legislature should use the antitrust laws to supplant the choices of a state on how it spends its money and how it structures its governmental functions. Additionally, this Committee should question whether it is appropriate for federal policy to offer states immunity by way of an unfunded mandate that requires creation of a new state agency and additional layers of red tape and bureaucracy.

A Better Way Forward

In the wake of *North Carolina Dental*, there is an opportunity for federal legislation to help states navigate the Supreme Court's decision without creating an immunity that is neither practical, productive, nor consistent with universal application of competition law across all sectors of the economy. Alternative legislation should seek a balanced approach that protects the public against potential antitrust violations without disrupting the good faith functioning of state government or threatening public treasuries with significant damage awards.

A substitute approach for consideration by this Committee would not create immunity, but rather shield state professional and occupational licensing boards and their staff members from damage awards by removing treble damages from the available remedies for actions brought against state regulatory boards. Elimination of monetary damages for antitrust violations by state regulatory boards found guilty under the federal antitrust laws would leave intact the injunctive relief to remedy potentially anticompetitive acts of a state regulatory board. Limiting the available remedy to only injunctive relief (including attorneys' fees) will ensure that antitrust laws are not used to bring frivolous claims against state regulatory boards for the purpose of monetary gain. It would also address the type of threats made against board members as illustrated in the Kansas example and deter the filing of meritless antitrust lawsuits in disciplinary matters.

Additionally, it better aligns with the rationale of subjecting regulatory boards to active supervision, serving as a check against regulatory activity that conflicts with competition goals. By retaining state board liability under federal antitrust laws, and retaining both public and private enforcement, free and open market competition will be preserved. But at the same time, the unique role of state licensing boards governing the learned professions is acknowledged and state government retains the unfettered authority to structure and supervise their regulatory boards in a manner of their choosing.

Moreover, the removal of treble damages ensures that state boards will continue to be populated and staffed by well-meaning and civic-minded professionals. For regulatory functions of the state to work for the public's welfare, officials who are required to exercise their discretion in the public interest must receive assurance that their exercise of official authority will not subject them to joint and several antitrust treble damages. Potential antitrust liability has already caused some to reconsider service. In 2016, the chair of the Florida Board of Accountancy wrote Governor Rick Scott and expressed concern that his reappointment to the board, absent the state's ability to indemnify his actions while on the board, would expose him to personal antitrust liability. In some states, board members are barred by constitutional provisions from indemnification and in other states risk managers have refused to extend the coverage of insurance. Removal of treble damages in federal law addresses these issues while respecting the sovereignty of state regulatory affairs.

Conclusion

We appreciate the House Judiciary Committee's attention to this issue, and respectfully urge the Committee to consider devising appropriate policies that balance underlying concerns of competition, efficiency, and innovation with the principles of federalism and the good public policy of state regulatory boards as the protector of the health and safety of the public. We would be pleased to meet with the Committee to discuss these issues further. Thank you.

Sincerely,

American Association of Veterinary State Boards (AAVSB)
American Physical Therapy Association (APTA)
American Psychological Association Practice Organization
American Society of Civil Engineers (ASCE)
American Society of Landscape Architects (ASLA)
Association of Social Work Boards (ASWB)
Association of State and Provincial Psychology Boards (ASPPB)
Council of Landscape Architectural Registration Boards (CLARB)
Federation of Associations of Regulatory Boards (FARB)
Federation of Podiatric Medical Boards (FPMB)
Federation of State Boards of Physical Therapy (FSBPT)
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