REGULATION RUN AMOK OR CONSUMER PROTECTION: WHAT DOES THE FTC REALLY WANT?
AN UPDATE ON REGULATORY OVERSIGHT ACCORDING TO THE FTC

Administrative Law Section
Alabama State Bar
2016 Annual Meeting

June 24, 2016
IN THE BEGINNING, THERE WERE DENTISTS . . .

- And the law gave immunity and protection . . .

- Then they screwed it up.
A BRIEF OVERVIEW OF THE NORTH CAROLINA DENTAL BOARD VS. FTC OPINION:

HISTORY

- NCDB is composed of: 6 licensed dentists, 1 dental hygienist, and 1 consumer member.

- Board members are elected by their peers.

- Board is state agency per North Carolina law.

- Board may enjoin the unauthorized practice of dentistry.

- Although the NC Dental Practice Act defines dentistry to include “removing stains, accretions or deposits from the human tooth,” it does not specifically say “whitening” teeth is the practice of dentistry.
As teeth whitening grows in popularity, non-dentists, many operating in shopping mall kiosks, offer teeth whitening at lower prices than what dentists were charging.

Dentists complained to the board not about risks to PATIENTS’ HEALTH that might occur from having teeth whitening performed by non-dentists, but about the MONEY they are losing since their prices are being undercut by the non-dentists.

Unfortunately, the board chose to “go forth and do battle” against the non-dentist teeth whiteners – and put it in writing.

Without a rule or regulation, without injunctive relief or a declaratory judgment, in 2006, the board sent out at least 47 “cease and desist” letters to non-dentist teeth whiteners for engaging in the unlicensed practice of dentistry.

In 2010, the FTC filed an administrative complaint charging the board with violating the FTC Act and the Sherman Act.

The board moved to dismiss based on “state action immunity.”
After a hearing, the ALJ ruled that the board’s actions unreasonably restrained trade.

The FTC sustained the ALJ’s ruling.

In 2013, the Fourth Circuit denied the board’s petition for review.

And in 2015, the U.S. Supreme Court granted certiorari and affirmed the Fourth Circuit, giving us the vexing opinion in . . .

The NC Dental Board relied on “state action” immunity based on *Parker v. Brown*, 317 U.S. 341 (1943), or *Parker* immunity.

In *Parker*, the Supreme Court interpreted antitrust laws to confer immunity on state anticompetitive conduct when the states were acting in their sovereign capacity.

However, when a state agency is controlled by active market participants, the agency is protected by parker immunity only when the alleged restraint of trade is “clearly articulated and affirmatively expressed as state policy” and is “actively supervised by the State.” *Midcal*, 445 U.S. 94, 100 (1988).

In the NC Dental Board case, the Court assumed that clear articulation existed, and focused on active supervision by the state. (135 S.Ct. at 1110).
WHAT IS “ACTIVE SUPERVISION?”

- The $64,000 question.

- In *NC Dental Board*, the Court stated that it wanted “political accountability” for the state anticompetitive action or rule (135 S.Ct. at 1111),

- that it required “more than a mere façade of state involvement (135 S.Ct. at 1111), and

- that it need not entail “micromanagement” or day to day involvement in the agency’s operations. (135 S.Ct. at 1116).

- But active supervision must provide “realistic assurance” that the board’s anti-competitive conduct promotes state policy rather than merely the board’s individual interests. (135 S.Ct. at 1116.)
The supervisor must **review the substance** of the board’s anti-competitive decision, not merely the procedures that were followed in order to make the decision.

The supervisor must have the **power to veto or modify** the decision to ensure that it accords with state policy.

“**Mere potential**” for state supervision is not enough. (135 S.Ct. at 1116.)

And the rest is up to us . . .
WHAT DOES THE FTC WANT?

- They want to rein in state action immunity.
  Really.
  They said so.
YOU DON’T BELIEVE ME?

The FTC's Plan

The FTC State Action Task Force convened in July 2001 to address the agenda of the new Chairman, Tim Muris. His agenda included reining in antitrust exemptions and immunities.

The State Action Task Force issued a report in Sept. 2003 that recommended to the commission:

- Reaffirm a clear articulation standard tailored to its original purposes and goals
- Clarify and strengthen the standards for active supervision
- Clarify and rationalize the criteria for identifying the quasi-governmental entities that should be subject to active supervision.

Reflections, p. 8.
“At the time of the 2003 report, the Commission began looking for appropriate cases in which to pursue a more limited interpretation of the state action doctrine.”

- So. Carolina State Board of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006). Board required patients to be seen by dentist in order to be seen by hygienist.

This “campaign,” as Commissioner Ohlhausen calls it, brought us to N. C. Dental Board.
QUESTIONS

- What does “controlled” mean in the context of state agencies “controlled by active market participants?”

- What constitutes active state supervision?

- What conduct by a state agency requires supervision?
First, “if a board is not engaging in conduct that is a violation of the antitrust laws, it need not even address the issue of active supervision.”

“[Active market participants] could comprise less than a majority of the board – or perhaps abstain from matters in which they have a financial interest.”

“[T]here are many options for actively supervising the actions of [the] board.”

- Ultimate regulatory decisions made by legislative committees, umbrella state agencies such as rules review commissions, or other disinterested state officials
- Indemnify individual board members in the event antitrust damages are imposed

*Reflections*, p. 15
COMPETITION CONSIDERATIONS DURING THE DECISION-MAKING PROCESS

- Consider whether any particular licensure regulations are likely to have a significant and adverse effect on competition;

- Consider whether the particular restrictions are targeted to address actual risks of harm to consumers;

- Consider whether the restrictions are narrowly tailored to minimize any burden on competition, or whether less restrictive alternatives may be available.

Since then...


- Aug. 2015: Oklahoma Attorney General Pruitt issues letter to regulatory boards that arguably muddies the water.

- Sept. 2015: National Association of State Boards of Accountancy issues letter to Governor Fallin outlining requirements of active state supervision and questioning the efficacy of EO 2015-33.
Sept. 2015: **California Attorney General Harris** issues advisory opinion addressing what constitutes state supervision and what can be done to guard against antitrust liability for board members.

- The CA AG recommended increasing public membership on licensing boards without radical changes to board composition.

- The CA AG offered these ideas for providing state oversight:
  - Superagency (stand alone office or a committee within a larger agency)
  - Modify powers of the boards themselves to be advisory only
FINALLY ...

What we had all been waiting for appeared --
Oct. 2015: FTC issues “Guidance on Active Supervision of State Regulatory Boards Controlled by Active Market Participants.”

Active market participants

- A board member is an active market participant if they are licensed by the board or provide any service that is subject to the regulatory authority of the board.

- If the board member is in the profession or sub-specialty that is regulated by the board, they are an active market participant.

- Even if the board member does not participate in the activity that is alleged to be a restraint of trade, he is still an active market participant because he is licensed by, and his business is regulated by, the board.
- A board member is still an active market participant even if they temporarily suspend their participation in the occupation in order to serve on the board.

- Method of selection does not determine whether a board member is an active market participant.

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Controlling Number of Actual Decisionmakers
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- Active market participants need not be a majority: “A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (e.g., through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.”

- Whether the alleged restraint has been imposed by a “controlling number of decisionmakers” who are active market participants is a question of fact, to be determined on a case-by-case basis. The FTC will consider:
  - the number of board members who are/are not active market participants and the rules governing the board’s authority, and
  - whether the active market participant board members have veto power over board decisions.
The level of participation, engagement, and authority of the consumer members on the board, and whether it differs from active market participant board members.

Whether the active market participant board members have exercised, controlled, or usurped the decisionmaking power of the board.

What constitutes active supervision?

FTC principles:

- To determine whether the details of the regulatory scheme “have been established as a product of deliberate state intervention” and not simply by agreement among the board members.
- States must accept political responsibility for anticompetitive conduct they permit and control. *N.C. Dental* at 1111; *Ticor*, 504 U.S. at 636.
- Constant requirements of active supervision set forth by the Court in *N.C. Dental Board* apply.
- Active supervision must occur prior to implementation of the alleged anticompetitive restraint.
- The FTC will evaluate each case in light of its own facts, and will apply these principles reasonably and flexibly.
The following factors determine whether the active state supervision prong of the state action defense is satisfied:

- The state supervisor has obtained all necessary information, has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies, and reviewed documentary evidence.

- The state supervisor has evaluated the substantive merits of the recommended action (not simply the procedures followed), and assessed whether the recommended action comports with state law.

- The state supervisor has issued a written decision approving, modifying, or disapproving the recommended action, including an explanation of the reasons and rationale for the decision.
  - The written decision is evidence that the supervisor has performed a meaningful review of the merits of the action.
  - The written decision is also a means by which the State accepts political accountability for the restraint being authorized.
March 2016: **Massachusetts Governor Baker issues Executive Order 567**, devolving additional supervisory duties onto existing offices of the director of professional licensure and the commission of public health.

May 2016: **FTC issues comments on Alabama House Bill 241/Senate Bill 243**.

- The bill was unnecessary because the antitrust laws already permit collaborations and mergers.
- The bill’s attempt to confer antitrust immunity is unnecessary for collaborations and mergers that would benefit citizens.

May 2016: **Federation of Associations of Regulatory Boards (FARB)** publishes Model for Identifying and Addressing Antitrust Issues.

- Engage legal counsel
- Subject decision to rulemaking process
- Seek a declaratory judgment
- Propose statutory changes
“When the proverbial fox is put in charge of the henhouse, board members’ financial incentives may lead the board to make regulatory choices that favor incumbents at the expense of competition and the public.” Prepared Statement of the Federal Trade Commission on Competition and the Potential Costs and Benefits of Professional Licensure Before the Committee on Small Business, United States House of Representatives, Washington, D.C, July 16, 2014.

Maureen K. Ohlhausen, FTC Commissioner, advocates a principle called “regulatory humility,” which is recognizing the inherent limits of regulation and acting in accordance with those limits: “Yet, despite the lip service paid, regulators still too often instinctually react to apparent problems by proposing top-down solutions. This is the opposite of regulatory humility. And to be more effective regulators, we must suppress it.” Regulatory Humility in Practice: Remarks by FTC Commissioner Maureen K. Ohlhausen, American Enterprise Institute, April 1, 2015.
NORTH CAROLINA
DENTAL CASE DECISION
IMPLICATIONS FOR
STATE BOARDS OF ACCOUNTANCY

November 23, 2015

NASBA
NATIONAL ASSOCIATION OF STATE BOARDS OF ACCOUNTANCY
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The U.S. Supreme Court’s Decision in  
*North Carolina State Board of Dental Examiners v. Federal Trade Commission*  
and Implications for State Boards of Accountancy

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Executive Summary

For more than 70 years, state boards of accountancy have been presumed to be immune from federal antitrust laws. This was true as long as their otherwise anticompetitive actions were clearly authorized by state statutes. However, the Supreme Court’s 2015 holding in *N.C. State Board of Dental Examiners v. Federal Trade Commission* (“NC Dental Board”) now requires that licensee-controlled state boards also be “actively supervised” by a neutral state entity in order to enjoy immunity from federal antitrust law.

The Supreme Court’s decision has left state regulators with questions concerning the extent of the decision’s application to boards of accountancy. 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 boards of accountancy, along with the potential for court review of enforcement actions, would be sufficient supervision to ensure antitrust immunity.

As a result, some states’ executive branches and legislatures are reacting to the *NC Dental Board* decision with an abundance of caution, proposing bills and enacting executive orders to create new supervision mechanisms. Further reactions, including changes to board composition and internal board enforcement and rulemaking procedures, might be proposed in the coming months. It is imperative that states and state boards not permit knee-jerk reactions and, instead, undertake a risk-management evaluation of their internal processes and procedures in light of the increased scrutiny and uncertainty.

Questions on state board antitrust exposure can be addressed by applying useful interpretive guidance drawn from several sources. This includes existing court precedent, the text of the Federal Trade Commission (“FTC”) Order against the North Carolina State Board of Dental Examiners (“Dental Board”), FTC staff guidance released in October 2015, and decisions in a number of pending and future court cases on the subject. By drawing on these sources, this paper concludes that state boards of accountancy are already largely functioning in compliance with antitrust law requirements. Thus, while the Supreme Court’s decision has given rise to some interpretive questions regarding the active supervision requirement, it does not appear that dramatic changes to accountancy boards’ functioning or relevant state laws will be necessary.

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1 This document has been prepared by NASBA in conjunction with Allen, Pinnix & Nichols, P.A., NASBA’s outside Legal Counsel, for the exclusive use of NASBA’s members, the state boards of accountancy. The areas of law addressed herein are rapidly changing and also affected by state laws. As such, state boards and others should rely upon their own legal counsel’s interpretations of the legal issues discussed herein. The opinions and statements contained in this document are not necessarily those of NASBA or any state board.

Overview

The following provides an overview of the procompetitive aspects of accountancy regulation, the history of state licensing board immunity, the effects of the Supreme Court’s decision in *NC Dental Board*, and implications for state boards of accountancy going forward. This paper is intended to be an evergreen document that may be updated as future litigation and state and federal guidance provide greater clarity on this topic.

State Regulation of CPAs Is Uniquely Procompetitive

Procompetitive benefits and efficiencies are key factors when undertaking an antitrust analysis and could weigh heavily in favor of state boards when evaluating the antitrust implications of actions that might otherwise be considered anticompetitive. The 55 state boards of accountancy around the nation have worked diligently with the National Association of State Boards of Accountancy (“NASBA”) to reduce barriers to trade in accountancy services. Beginning in 1997, the state boards, NASBA, and the American Institute of Certified Public Accountants (“AICPA”) embarked upon a national legislative effort to remove impediments to interstate practice, ease restrictions on firm ownership, lift anticompetitive limits on fee arrangements, and permit the use of trade names. Concurrently, NASBA and the AICPA developed and promoted these changes through the Uniform Accountancy Act (“UAA”), an evergreen model law developed to provide a comprehensive, uniform approach to regulation of the accounting profession. As stated in the “Introductory Comments” to the UAA 7th Edition: “these changes achieve the goals of enhancing public protection, facilitating consumer choice, and supporting the efficient operation of the capital markets.” In the past two decades, these procompetitive changes have been adopted in almost all U.S. jurisdictions and serve as a model for states and professional licensing generally for so long as boards operate within their statutory authorization.

As a result of these efforts, the regulation of accountancy among the states is uniquely efficient and procompetitive. For example, under the UAA, as implemented by state laws:

- CPAs only need to be licensed in the state of their principal place of business. UAA §§ 3(p), 23.
- CPAs can practice in another jurisdiction without notice or fee. UAA § 23.
- CPAs are subject to substantially equivalent licensing requirements. UAA § 6(c)(2).
- Only titles that have the capacity or tendency to deceive are prohibited. UAA §§ 2, 14(c)-(h).
- Holders of substantially equivalent foreign credentials are allowed to provide certain services in the states. UAA § 14(j).
- Nonlicensees are allowed to render many accounting services to the public. UAA § 14(a).
The Supreme Court first established its state action antitrust immunity doctrine in 1943 in *Parker v. Brown*. At issue in *Parker* was the legality of a California state program, implemented pursuant to state law, to monitor the sale of, and set prices for, raisin production. This case interpreted decades-old federal antitrust law, concluding that Congress had not used its Commerce Clause power to preempt state restraints on competition. Thus, the Court concluded that federal antitrust law “makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.” In the decades that followed *Parker*, courts determined that the “state” included at least the state legislature and the state supreme court and, as such, these bodies were entitled to automatic immunity. Presumably, as the third branch of state government, governors could have been deemed automatically immune from federal antitrust law under *Parker* as well. However, few court decisions considered the question of how *Parker* might apply to state agencies or private parties implementing state law.

In 1980, the Supreme Court elaborated on the state action doctrine in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, in order to limit abuse of the antitrust law exception by private parties. *Midcal* established two requirements for private parties seeking to invoke state action immunity—clear articulation and active state supervision. Then, in 1985, the Supreme Court held in *Town of Hallie v. City of Eau Claire* that municipalities (themselves sub-state entities) need only demonstrate clear articulation and not active supervision because “[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement.”

In recent decades, other federal court cases have dealt with the application of *Parker* with regard to state agencies, including licensing boards. The focus of these cases was generally the clear articulation prong and whether the state agencies had acted pursuant to their statutory authorization, or in the case of a state bar, pursuant to the mandate imposed on them by the state supreme court. Courts, including the Supreme Court, tended to conclude that state agencies were not required to show active supervision in order to enjoy immunity, so long as they acted pursuant to state law.

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3 317 U.S. 341 (1943).
4 Id. at 351.
7 In *Hallie*, the Supreme Court opined in a footnote that “[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.” Id. at 46 n.10.
In *NC Dental Board*, the clear articulation prong was assumed by the Supreme Court to be met and not at issue. However, it is important to understand how State Boards can and must meet this standard. Under the clear articulation standard, a proposed board action should be supported by a state statute authorizing the proposed action. As the Supreme Court recently stated: “to pass the clear articulation test, a state legislature need not expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects.”\(^8\) Instead, the displacement of competition should be “the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.”\(^9\)

**What Did the Supreme Court Hold?**

In *NC Dental Board*, the Supreme Court held that state agencies controlled by active market participants in the industry they regulate must demonstrate both clear articulation and active state supervision in order to invoke state action immunity. The Supreme Court affirmed the U.S. Court of Appeals for the Fourth Circuit, which denied the Dental Board’s petition for review of the FTC’s Order. The *NC Dental Board* case stemmed from the Dental Board’s practice of sending cease and desist letters to unlicensed teeth whitening service providers and warning letters to property management companies. Some of these letters ordered the recipients to cease and desist from the unauthorized practice of dentistry. While the Dental Board has statutory authority to sue individuals for unauthorized practice in court or to refer matters to other officials for criminal prosecution, it does not have express statutory authority to send cease and desist letters or orders. The letters had the effect of limiting the provision of teeth whitening services within North Carolina. In 2008, the FTC opened an investigation and subsequently brought an administrative complaint against the Dental Board in 2010.

Ultimately, the FTC determined that the Dental Board must demonstrate active supervision because the board was controlled by market participants and such supervision was lacking with regards to the issuance of the cease and desist letters. On the merits (beyond state action immunity), the FTC found that the

\(^8\) *FTC v. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1011 (2013) (internal citations and quotations omitted). In *Phoebe* (a quintessential clear articulation case), the Court was faced with the issue of “whether a Georgia law that creates special-purpose public entities called hospital authorities and gives those entities general corporate powers, including the power to acquire hospitals, clearly articulates and affirmatively expresses a state policy to permit acquisitions that substantially lessen competition.” *Id.* at 1007. The Court held that “[b]ecause Georgia’s grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively, . . . the clear-articulation test is not satisfied and state-action immunity does not apply.” *Id.* In contrast, state accountancy acts contain extensive mandates for state boards to act anticompetitively but the boards must ensure their conduct is pursuant to and within such mandates.

\(^9\) *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. at 1112.
Dental Board had restrained trade in violation of the federal antitrust laws. The FTC ordered the Board to not send cease and desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It is important to note that the issue of public protection and evidence of harm was not before the Supreme Court although the Dental Board had introduced evidence before the FTC of individuals being physically harmed by unlicensed teeth whitening service providers.

**FTC Releases Its Staff Guidance**

In October 2015, the FTC’s Bureau of Competition released its “FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants.”¹⁰ This document sets forth FTC staff’s views on the active supervision requirement as it applies to state regulatory boards in the wake of the NC Dental Board case. Significantly, the Staff Guidance is not binding on the FTC, and FTC staff has reserved the right to modify, rescind, or revoke the guidance.

The Staff Guidance sets out to respond to two questions: “First, when does a state regulatory board require active supervision in order to invoke the state action defense? Second, what factors are relevant to determining whether the active supervision requirement is satisfied?”¹¹ Before explaining the answers to those two questions, the guidance sets forth some important caveats for state legislators to consider: Federal antitrust law does not require that a state legislature provide for active supervision of any state regulatory board.¹² Moreover, “[t]his document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.”¹³ These caveats acknowledge the fact that it is a state’s prerogative as to whether or not to shield its regulatory boards from antitrust oversight and that there is no one-size-fits-all approach when it comes to state action immunity and any potential antitrust liability.

Beyond state action immunity, the Staff Guidance addresses some general points regarding board actions and the applicability of antitrust law:

1. Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.

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¹¹ Id. at 2.

¹² Id.

¹³ Id. at 3.
2. The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability.

... 

3. In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the “sham exception.”

The Staff Guidance continues by addressing two of the key issues that remain unresolved by the Supreme Court and will continue to be at issue in the lower courts. First, it sets forth who will be considered an active market participant: “[a] member of a state regulatory board will be considered to be an active market participant if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.” This broad view appears to encompass retiree or inactive licensee board members, board members who practice exclusively in a different specialty than one at issue before the board, and board members whose work is limited to academia.

Second, the Staff Guidance leaves open the question of what constitutes a controlling number of licensee board members: “[w]hether a particular restraint has been imposed by a ‘controlling number of decisionmakers [who] are active market participants’ is a fact-bound inquiry that must be made on a case-by-case basis.” That said, FTC staff does provide the following factors that will be considered in such an analysis:

The structure of the regulatory board (including the number of board members who are active market participants) and the rules governing the exercise of the board’s authority.

Whether the board members who are active market participants have veto power over the board’s regulatory decisions.

The level of participation, engagement, and authority of the non-market participant members in the business of the board — generally and with regard to the particular restraint at issue.

Whether the participation, engagement, and authority of the non-market participant board members in the business of the board differs from that of board members who are active market participants — generally and with regard to the particular restraint at issue.

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14 Id. at 6.
15 Id. at 7.
16 Id. at 8.
Whether the active market participants have in fact exercised, controlled, or usurped the decisionmaking power of the board.¹⁷

The Staff Guidance provides some insights as to what constitutes active supervision and what factors are relevant to determining whether the active supervision requirement has been satisfied. These insights will not be repeated in detail here, but, in essence, they make clear that the FTC staff is looking for the active supervisor to review the substance of a proposed board action prior to the implementation of such action. Moreover, the reviewer should gather all necessary information to make an informed decision as to whether to approve, modify, or veto the proposed action. Then, the reviewer should issue a written decision as to the outcome of the review in order to demonstrate the meaningful review that occurred and to serve an evidentiary function. Finally, the Staff Guidance sets forth examples of what does and does not constitute active supervision in the rulemaking and disciplinary setting.

The information contained in the Staff Guidance is one important source that state boards and state legislators should consider when evaluating potential responses to the NC Dental Board case. While the guidance raises further questions, it does give readers some of the parameters that FTC staff will employ when evaluating the potentially anticompetitive conduct of state boards. Additionally, missing details will likely be provided in the coming months and years by pending and future court cases challenging licensing board immunity.

**What Is Active State Supervision?**

Active supervision requires “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”¹⁸ The Supreme Court further elaborated on the active supervision requirement in *NC Dental Board*:

*Midcal’s* supervision rule “stems from the recognition that ‘[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.’” . . . Concern about the private incentives of active market participants animates *Midcal’s* supervision mandate, which demands “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”¹⁹

In order to effectuate the active supervision requirement, the Supreme Court has declined to offer a bright-line test or checklist. Instead, each case will be

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¹⁷ *Id.*


¹⁹ 135 S. Ct. at 1112 (internal citations omitted).
evaluated on the conduct at issue and the measures taken to ensure independent state oversight. Nonetheless, the Court did offer guidance on the role of the state supervisor:

[T]he supervisor must review the substance of the anticompetitive decision; . . . the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; . . . and the “mere potential for state supervision is not an adequate substitute for a decision by the State.”

This guidance may be put into practice in a variety of state-created structures and entities. As states continue to respond to *NC Dental Board*, each state will have to review its own entities and procedures to determine the best course of action for its agencies. This review will require a balancing of regulatory efficiency and public protection with the need for antitrust supervision and the risks that flow from potential liability.

Some models for supervision 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 charged with rules review oversight. Whether or not a state’s rules review mechanism is sufficient 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.

With regard to state board actions outside of rulemaking, including enforcement activities, there are many potential responses that states can consider. The first and most likely response may be to make no changes beyond ensuring that state boards operate within and pursuant to their statutory mandates for all actions. Doing so will generally limit the antitrust risks for state boards and allow states to continue their public protection mission in the most regulatorily efficient manner, without the additional layers of bureaucracy.

In several states, active supervision review entities have been proposed, with the anticipated role of vetting potentially anticompetitive decisions by state boards. These entities range from designated parties within the Attorney General’s office to stand-alone agencies or similar entities empowered to approve, modify, or veto proposed board actions. There are many questions as to the extent of the role these review entities will play in overseeing board activities, whether they will be funded by licensees or general funds, whether their decisions will be subject to time limits, and whether there will be avenues for appeal. It is also important to note that the

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20 135 S. Ct. at 1107 (internal citation omitted).
FTC has emphasized that any such independent review agency must review the substance of the proposed board action and not merely serve as a rubber stamp.\(^{21}\)

A minority of state boards operate under umbrella agencies that oversee and in some instances carry out much of the work of state boards. So long as the umbrella agency has the authority to review and either modify or veto a proposed board action, such a structure is not likely to require further active supervision changes.

Another potential response could be the dilution of the membership of market participants on state boards to the point where licensees make up less than a controlling interest. This response would lessen the role of licensees and increase the role of public members on state boards so that board actions may not require active state supervision in the first place. However, such changes pose practical and regulatory concerns. Significant questions will arise for states considering this option because, according to the *NC Dental Board* dissent, “it is not clear what sorts of changes are needed to satisfy the test that the Court now adopts.”\(^{22}\) Indeed, without further court guidance, it is unclear who may be considered an “active market participant” and what is a “controlling interest.” The FTC has weighed in with its Staff Guidance, adopting a broad stroke for both concepts.

FTC staff states that an individual “will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.”\(^{23}\) Furthermore, the inquiry as to whether a board is “controlled” by active market participants “is a fact-bound inquiry that must be made on a case-by-case basis.”\(^{24}\) The FTC Staff Guidance sets forth the following factors that it will consider in the inquiry regarding the existence of a controlling interest: “The structure of the regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board’s authority. Whether the board members who are active market participants have veto power over the board’s regulatory decisions.”\(^{25}\) Thus, any licensee of a

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\(^{21}\) Per the examples found on page 13 of the FTC’s Staff Guidance, the following scenarios do not constitute active supervision:
- An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency.
- The independent state agency perfunctorily approves the recommendations of the regulatory board. . . .
- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board.

\(^{22}\) 135 S. Ct. at 1123 (Alito, J., dissenting).
\(^{23}\) FTC Staff Guidance at 7.
\(^{24}\) *Id.* at 8.
\(^{25}\) *Id.*
state board may be considered an active market participant, and the controlling interest analysis does not necessarily turn on majority licensee status alone.

In addition to the open structural questions regarding board composition, states considering the dilution of licensee board members could also jeopardize the technical expertise and cost-saving benefits that flow from staffing boards of accountancy with licensees. Large and small boards rely on their members’ experience, and often highly specific and advanced knowledge, to handle enforcement matters, standards adoption and interpretation, and evaluation of harm or potential harm to the public.

Undoubtedly, there are other possible responses beyond those referenced above. Any potential response must be evaluated in light of the FTC’s and the Supreme Court’s focus on certain board activities requiring supervision—not all activities undertaken by state boards. As a practical matter, any response should also be subject to an evaluation of costs and benefits to boards’ public protection missions.

What Activities Should Be Subject to Active State Supervision?

Not all state board activities require active supervision because most board activities are not the focus of antitrust enforcement and potential liability. As the FTC stated in its brief before the Supreme Court: “[e]ven where the prerequisites for an exemption are absent, finding lack of state action immunity does not prove the violation.” Further, “the great majority of practices found non-immune are undoubtedly not antitrust violations to begin with.” As a result, the focus of active supervision has been on state board actions where immunity would actually be of legal significance. This includes potentially unauthorized actions that seek to restrain competition by excluding unlicensed competitors who engage in activities that may or may not be prohibited by a particular practice act.

Thus, active state supervision is generally not needed for routine operations, such as most licensure decisions, license renewals, and most licensee discipline. Rather, supervision should focus on state board conduct that could be deemed an unreasonable restraint on trade under federal antitrust laws. This conclusion is supported by the Supreme Court’s decision, which laid out the scope of the Court’s antitrust concerns:

Active supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather, the question is whether the State’s review mechanisms provide realistic assurance that a nonsovereign actor’s anticompetitive conduct

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27 Id. (internal citation omitted).
promotes state policy, rather than merely the party’s individual interests.\textsuperscript{28}

As previously noted, the FTC’s Order details the actions that the Dental Board may and may not take pursuant to federal antitrust law. The FTC’s Order allows the Dental Board to continue to legally engage in conduct that is within its statutory prerogative. For example, under the terms of the FTC’s Order, the Dental Board may continue to take the following actions without any new supervision requirement:

(i) investigate a Non-Dentist Provider for suspected violations of the Dental Practice Act;
(ii) file, or cause to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act ....; or
(iii) pursue any administrative remedies against a Dentist pursuant to and in accordance with the North Carolina Annotated Code....\textsuperscript{29}

Consistent with (ii) above, the initiation of a lawsuit generally will not require active supervision as it would not constitute an antitrust violation in the first place. This position is consistent with the FTC Staff Guidance which states that “the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the ‘sham exception.’”\textsuperscript{30}

Under the FTC’s Order, the Dental Board is also generally permitted to continue communicating with third parties regarding the content of its authorizing statute and the limits that the Dental Practice Act places on unauthorized practice, without active state supervision. The Dental Board may also continue with licensee enforcement, unchanged, pursuant to state law. The practical effect of the Order is thus limited to addressing actions taken against unlicensed teeth whitening service providers without statutory authorization.

It appears that the Supreme Court and the FTC are focusing their attention on a pattern of unilateral board actions to restrain competition without oversight from an independent state body. The FTC is not concerned with Dental Board enforcement actions against a single competitor.\textsuperscript{31} This focus is supported by the premise that federal antitrust laws are directed at injuries to competition, not injuries to individual competitors or potential competitors. Indeed, the FTC Staff

\textsuperscript{28} 135 S. Ct. at 1116 (emphasis added) (internal quotes omitted).
\textsuperscript{29} Final Order at 4, \textit{In re N.C. Bd. of Dental Examiners}, Docket No. 9343 (F.T.C. Dec. 7, 2011).
\textsuperscript{30} FTC Staff Guidance at 6.
\textsuperscript{31} “[T]he Board had decided teeth whitening constitutes ‘the practice of dentistry’ and sought to prohibit those who competed against dentists from participating in the teeth whitening market. . . . [T]here is no evidence here of any decision by the State to initiate or concur with the Board’s actions against the nondentists.” 135 S. Ct. at 1116.
Guidance notes “that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition.”\textsuperscript{32} It goes on to state, however, that “[a] pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.”\textsuperscript{33}

This distinction was recently illustrated in the U.S. District Court for the Eastern District of Virginia case of Petri v. Virginia Board of Medicine.\textsuperscript{34} Petri, a chiropractor licensee of the Medical Board, was disciplined by the board and, in response, she sued the board alleging an antitrust violation. The court rejected Petri’s claim not on state action immunity grounds but under a full antitrust analysis of whether her situation was the type of claim that is meant to be addressed by antitrust law. Petri argued that her “individual injury constitutes harm to the overall competition.”\textsuperscript{35} The court held that:

\begin{quote}
[T]he law is clear that “the elimination of a single competitor, standing alone, does not prove the anticompetitive effect necessary to establish antitrust injury.” . . . Petri has shown no evidence that pricing in the market was altered or that other chiropractors failed to join, or left, the market as a result of the Board’s actions. Without such a showing, Plaintiff has failed to show the necessary anticompetitive effects of a Sherman Act violation.\textsuperscript{36}
\end{quote}

Therefore, from the FTC’s Order, the Supreme Court’s decision, and the developing body of federal antitrust law on this subject, it is likely that the active supervision requirement need not extend broadly to issues such as initial licensure, examination, peer review, continuing education, renewals, or most licensee discipline. Instead, it appears that the Supreme Court’s intent is to ensure that enforcement actions against unlicensed persons, taken without the clear authorization of state law, must occur under active supervision.

**Related Issues**

**Does a Board’s Member Selection Process Affect the Active Supervision Requirement?**

The Supreme Court did not view the Dental Board’s member selection process as an applicable factor in its analysis of whether active supervision applies. The FTC Staff Guidance expressly rejects selection method as a determining factor on the active market participant analysis (though it does not address selection

\textsuperscript{32} FTC Staff Guidance at 12.
\textsuperscript{33} Id.
\textsuperscript{35} Id. at *7.
\textsuperscript{36} Id. at *7-*8 (internal citations omitted).
method as a factor in whether active supervision should be or is present): “The
test of whether active supervision should be or is present): “The
method by which a person is selected to serve on a state regulatory board is not
determinative of whether that person is an active market participant in the
occupation that the board regulates.”37

However, it is conceivable that a board’s member selection process might be a
factor in determining the amount or degree of state supervision required in a
particular case. In the Dental Board’s case, dentist board members were elected by
North Carolina’s dentists.38 This practice is unusual among licensing boards, and is
not used by any U.S. boards of accountancy, which instead generally rely on
executive branch appointments. While the Court’s decision did not address the
Dental Board’s unusual selection practice, a concurring judge’s opinion in the
Fourth Circuit Court of Appeals’ decision highlighted the Dental Board’s selection
methods as a key factor in her conclusion that a violation of federal antitrust law
occurred.39

Do States Need to Indemnify?

Private antitrust lawsuits against state boards, their staffs, and their
members have proliferated in the months following the NC Dental Board decision.
Antitrust liability carries significant risks, including potential treble damages and
attorneys’ fees. The Supreme Court noted that “States may provide for the defense
and indemnification of agency members in the event of litigation.”40 The issue of
board member and board staff indemnification and defense is one that many states
will grapple with in this case’s wake. Many states already provide for board
member and board staff indemnification statutorily, and changes to these practices
will not be required unless states wish to expressly provide for the defense of these
individuals. Other states may wish to amend their statutes so that they provide for
the indemnification and defense of state board members and their staffs. Some
state boards may be permitted to, and may opt to, carry insurance that helps to
defend against and offset any potential antitrust liability.

37 FTC Staff Guidance at 7.
38 The Dental Board’s membership also includes a dental hygienist, who is elected by the state’s
dental hygienists, and a consumer member who is appointed by the governor.
39 “In this context, it is useful to state what our opinion does not hold. We do not hold that a state
agency must always satisfy the active supervision prong of the standard set forth in Midcal to qualify
for antitrust immunity under the state action doctrine. Nor do we hold that a state agency
comprised, in whole or in part, of members participating in the market regulated by that state
agency is a private actor subject to Midcal’s active supervision prong. Instead, our holding that the
Board is a private actor for purposes of the state action doctrine turns on the fact that the members
of the Board, who are market participants, are elected by other private participants in the market.”
N.C. State Bd. of Dental Examiners v. FTC, 717 F.3d 359, 376 (4th Cir. 2013) (Keenan, J.,
concurring).
40 135 S. Ct. at 1106.
Conclusion

In light of the outcome of the *NC Dental Board* case, there are a number of considerations for states and their boards of accountancy. The current lack of certainty regarding the effect of federal antitrust law and the potential threat of increased private litigation on this subject reveals the need for a cautious and measured approach.

Regardless of how state governments react to this case, boards of accountancy should ensure that enforcement actions against nonlicensees are taken with explicit, specific statutory support or clear court precedent. Similarly, rulemaking implicating unlicensed practice or rulemaking with the effect of increasing requirements imposed for licensure or renewal must be undertaken pursuant to clearly-articulated state law. Most boards of accountancy already operate in an environment and with procedures that do not give rise to significant antitrust exposure. Therefore, it is essential that state governments seeking to alter board of accountancy structures or practices understand the nuances of state action immunity, the Supreme Court’s holding, and the FTC’s intentions. Otherwise, a state may respond to the *NC Dental Board* case in a manner that unnecessarily hampers regulatory efficiency, increases costs, and threatens public protection.
EXECUTIVE ORDER NUMBER 7

June 23, 2015
Executive Orders

WHEREAS, in North Carolina State Board of Dental Examiners v. FTC, the United States Supreme Court held that state licensing boards do not enjoy automatic immunity from antitrust claims if a controlling number of the decision makers are "active market participants in the occupation the board regulates." In such circumstances, the regulators will only be immune from antitrust claims if the "challenged restraint" is clearly and affirmatively expressed as state policy and the board is actively supervised by the State;

WHEREAS, according to the United States Supreme Court, active state supervision requires substantive review of the purported anti-competitive action, veto and modification power over a board or commission decision, and more than mere potential supervision;

WHEREAS, the "state supervision must be specific and bona fide[,]" or in other words, state rubber-stamping of a regulatory board's actions is inadequate to trigger state action immunity;

WHEREAS, in order to comply with the mandate of the United States Supreme Court's decision, there is a need for the State of Alabama to put into place active state supervision of boards and commissions' rule-making and certain licensing actions to ensure that the rulemaking or board actions do not result in anti-competitive conduct without a significant and corresponding state interest; and

WHEREAS, no state legislation is currently in place that provides a mechanism for the required active state supervision.

NOW, THEREFORE, based upon these considerations, and for other good and valid reasons related thereto, I, Robert Bentley, Governor of the State of Alabama, by virtue of the authority vested in me by the Constitution and laws of the State of Alabama, do hereby establish a voluntary program for those Alabama boards and commissions controlled by active market participants to comply with existing law requiring active state supervision as a condition of state action immunity.

BE IT ORDERED, that there is established the Alabama Office for Regulatory Oversight of Boards and Commissions (the Office), and the Office shall be headed by a Secretary appointed by the Governor as an employee in the Office of Governor and assigned to the State Personnel Department, which shall provide administrative support, serve as the fiscal agent, and develop policies and procedures for charging fees and expenses of the Office to Participating Entities (as such term is defined below).

BE IT FURTHER ORDERED, that, for those state entities that regulate a business or a profession and that voluntarily submit to the authority of the Secretary (Participating Entities), the Secretary shall review actions and/or rules submitted by Participating Entities (the Submitted Actions) to ensure the Submitted Actions are based upon clear state policy and shall be authorized to veto or modify the Submitted Actions as the Secretary deems necessary.
BE IT FURTHER ORDERED, that the Secretary shall develop and adopt procedures for reviewing Submitted Actions by Participating Entities and shall require each of the Participating Entities to agree to the adopted procedures as a condition to participating in the program.

BE IT FURTHER ORDERED, that the Secretary shall be an unclassified employee and subject to termination or removal only for the reasons set forth in Section 36-11-1, Code of Alabama (1975).

BE IT FURTHER ORDERED, that this Executive Order shall become effective immediately upon its execution and shall remain in effect until amended or modified by the Governor or legislative act.

DONE AND ORDERED this 23rd day of June, 2015.

Robert Bentley
Governor

Attested

John Merrill
Secretary of State

Provided by the Office of the Governor of Alabama | governor.alabama.gov
The Federation of Associations of Regulatory Boards Publishes Model for Identifying and Addressing Antitrust Issues

Northbrook, IL - The Federation of Associations of Regulatory Boards (FARB) is pleased to announce the development of the FARB Model for Identifying and Addressing Antitrust Issues. The Model provides a reasoned and balanced approach to regulation in response to the 2015 Supreme Court of the United States ruling in North Carolina State Board of Dental Examiners v. FTC. Legislative and legal responses exceeding those necessary to adequately address the issues have emerged, ignoring the foundation of the established administrative regulatory system. Examples of legislative responses range from the formation of oversight commissions to altering the board membership. The composition of state boards has become the focus of criticism, rather than the underlying nature of the contemplated board action.

Supreme Court Ruling
The Supreme Court ruling has prompted varied legal and political reactions including challenges to the basic need for an administrative regulatory system; suggested additional bureaucratic layers of government decision makers; and modifications to the composition of the regulatory boards. The judicial decision characterized a state regulatory board as "non-sovereign" for purposes of applying the immunity principles under the state action doctrine. This state action doctrine is a common law defense and provides antitrust immunity to state actors. Based upon the involvement of licensees, referred to as "active market participants," the Supreme Court imposed the two part test generally reserved to private actors seeking immunity from antitrust liability. The two part test includes a clearly articulated state policy to displace competition and active supervision by the state. In spite of the checks and balances in place to curb self-serving interests and the existence and application of relevant ethics laws applicable to volunteer state board members, the Court found the need for satisfaction of the two prong test and focused on the state oversight requirement.

FARB offers the following Model as a method by which boards may address the concerns in the opinion, balancing economic factors and the public protection needs met by an effective and efficient state based licensure system.

About FARB
FARB is a not for profit, 501(c)(3) organization incorporated in 1974 to promote public protection and provide a forum for information exchange for associations of regulatory boards and their stakeholders with interests in professional regulation. The mission of FARB is to advance excellence in regulation of the professions in the interest of public protection. FARB looks forward to continued dialogue with relevant stakeholders on important topics related to effective and efficient regulation of the professions.

###
FARB Model for Identifying and Addressing Antitrust Issues

**STEP ONE: Engage legal counsel**
It is strongly recommended that state licensing boards engage and regularly involve legal counsel. Attendance and participation by counsel at all board meetings provides ongoing opportunities for counsel to identify, research, and advise on important legal consequences to decisions. It is here where counsel can proactively identify board actions and relevant antitrust issues.

**STEP TWO: Determine the scope of the proposed action**
In conjunction with legal counsel, assess whether the proposed board action implicates antitrust laws. Decisions to grant or deny an individual applicant a license or pursue administrative prosecution of a licensee generally do not constitute anti-competitive behavior. Adoption of policy positions that may affect virtually all practitioners or preclude others from entering the market are the types of board actions which should not take place without prior assessment of compliance with antitrust laws.

**STEP THREE: Choose the appropriate course of action**
If a decision has potential antitrust implications and the issue is not addressed by current statute or rules, state licensing boards can seek the necessary oversight to satisfy the second prong of the immunity test. Such oversight can be addressed in one or more of the following options.

- **OPTION ONE: Rulemaking**
  Subject the licensing board determination to the rulemaking process, which involves notice, an opportunity for comment(s), and hearings. In many jurisdictions, legislative and/or executive approval is required before new rules are effectuated. Rulemaking involves oversight from multiple perspectives.

- **OPTION TWO: Declaratory judgement**
  Seek a declaratory ruling from a court regarding the encompassing position of the licensing board. The board will be required to substantiate its position to justify the entry of a court order. If successful, the judicial order would provide oversight and justification for the proposed action.

- **OPTION THREE: Statutory changes**
  Provide data to the legislature to stimulate statutory changes to address the encompassing issue(s). To the extent the practice act is in need of change, the board would clearly be acting under oversight of the legislative branch.

These options, individually and/or collectively, will involve time, costs, and effort, and may contain some uncertainty. However, such checks and balances provide state oversight while maintaining the expertise on the boards to promote effective and efficient public protection legislation.
FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*

I. Introduction

States craft regulatory policy through a variety of actors, including state legislatures, courts, agencies, and regulatory boards. While most regulatory actions taken by state actors will not implicate antitrust concerns, some will. Notably, states have created a large number of regulatory boards with the authority to determine who may engage in an occupation (e.g., by issuing or withholding a license), and also to set the rules and regulations governing that occupation. Licensing, once limited to a few learned professions such as doctors and lawyers, is now required for over 800 occupations including (in some states) locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers.¹

In general, a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated. However, across the United States, “licensing boards are largely dominated by active members of their respective industries . . .”² That is, doctors commonly regulate doctors, beekeepers commonly regulate beekeepers, and tour guides commonly regulate tour guides.

Earlier this year, the U.S. Supreme Court upheld the Federal Trade Commission’s determination that the North Carolina State Board of Dental Examiners (“NC Board”) violated the federal antitrust laws by preventing non-dentists from providing teeth whitening services in competition with the state’s licensed dentists. N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101 (2015). NC Board is a state agency established under North Carolina law and charged with administering and enforcing a licensing system for dentists. A majority of the members of this state agency are themselves practicing dentists, and thus they have a private incentive to limit

* This document sets out the views of the Staff of the Bureau of Competition. The Federal Trade Commission is not bound by this Staff guidance and reserves the right to rescind it at a later date. In addition, FTC Staff reserves the right to reconsider the views expressed herein, and to modify, rescind, or revoke this Staff guidance if such action would be in the public interest.

² Id. at 1095.
competition from non-dentist providers of teeth whitening services. NC Board argued that, because it is a state agency, it is exempt from liability under the federal antitrust laws. That is, the NC Board sought to invoke what is commonly referred to as the “state action exemption” or the “state action defense.” The Supreme Court rejected this contention and affirmed the FTC’s finding of antitrust liability.

In this decision, the Supreme Court clarified the applicability of the antitrust state action defense to state regulatory boards controlled by market participants:

“The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy Midcal’s [Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)] active supervision requirement in order to invoke state-action antitrust immunity.” N.C. Dental, 135 S. Ct. at 1114.

In the wake of this Supreme Court decision, state officials have requested advice from the Federal Trade Commission regarding antitrust compliance for state boards responsible for regulating occupations. This outline provides FTC Staff guidance on two questions. First, when does a state regulatory board require active supervision in order to invoke the state action defense? Second, what factors are relevant to determining whether the active supervision requirement is satisfied?

Our answers to these questions come with the following caveats.

➤ Vigorous competition among sellers in an open marketplace generally provides consumers with important benefits, including lower prices, higher quality services, greater access to services, and increased innovation. For this reason, a state legislature should empower a regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers. The Federal Trade Commission and its staff have frequently advocated that states avoid unneeded and burdensome regulation of service providers.3

➤ Federal antitrust law does not require that a state legislature provide for active supervision of any state regulatory board. A state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust

laws. If the state legislature determines that a regulatory board should be subject to antitrust oversight, then the state legislature need not provide for active supervision.

➢ Antitrust analysis – including the applicability of the state action defense – is fact-specific and context-dependent. The purpose of this document is to identify certain overarching legal principles governing when and how a state may provide active supervision for a regulatory board. We are not suggesting a mandatory or one-size-fits-all approach to active supervision. Instead, we urge each state regulatory board to consult with the Office of the Attorney General for its state for customized advice on how best to comply with the antitrust laws.

➢ This FTC Staff guidance addresses only the active supervision prong of the state action defense. In order successfully to invoke the state action defense, a state regulatory board controlled by market participants must also satisfy the clear articulation prong, as described briefly in Section II. below.

➢ This document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.
II. Overview of the Antitrust State Action Defense

“Federal antitrust law is a central safeguard for the Nation’s free market structures . . . . The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.” N.C. Dental, 135 S. Ct. at 1109.

Under principles of federalism, “the States possess a significant measure of sovereignty.” N.C. Dental, 135 S. Ct. at 1110 (quoting Community Communications Co. v. Boulder, 455 U.S. 40, 53 (1982)). In enacting the antitrust laws, Congress did not intend to prevent the States from limiting competition in order to promote other goals that are valued by their citizens. Thus, the Supreme Court has concluded that the federal antitrust laws do not reach anticompetitive conduct engaged in by a State that is acting in its sovereign capacity. Parker v. Brown, 317 U.S. 341, 351-52 (1943). For example, a state legislature may “impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives.” N.C. Dental, 135 S. Ct. at 1109.

Are the actions of a state regulatory board, like the actions of a state legislature, exempt from the application of the federal antitrust laws? In North Carolina State Board of Dental Examiners, the Supreme Court reaffirmed that a state regulatory board is not the sovereign. Accordingly, a state regulatory board is not necessarily exempt from federal antitrust liability.

More specifically, the Court determined that “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates” may invoke the state action defense only when two requirements are satisfied: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. N.C. Dental, 135 S. Ct. at 1114.

➢ The Supreme Court addressed the clear articulation requirement most recently in FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013). The clear articulation requirement is satisfied “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.” Id. at 1013.

➢ The State’s clear articulation of the intent to displace competition is not alone sufficient to trigger the state action exemption. The state legislature’s clearly-articulated delegation of authority to a state regulatory board to displace competition may be “defined at so high a level of generality as to leave open critical questions about how
and to what extent the market should be regulated.” There is then a danger that this
degradated discretion will be used by active market participants to pursue private
interests in restraining trade, in lieu of implementing the State’s policy goals. *N.C. Dental*, 135 S. Ct. at 1112.

- The active supervision requirement “seeks to avoid this harm by requiring the
State to review and approve interstitial policies made by the entity claiming [antitrust]
immunity.” *Id.*

Where the state action defense does not apply, the actions of a state regulatory board controlled by active market participants may be subject to antitrust scrutiny. Antitrust issues may arise where an unsupervised board takes actions that restrict market entry or restrain rivalry. The following are some scenarios that have raised antitrust concerns:

- A regulatory board controlled by dentists excludes non-dentists from competing with dentists in the provision of teeth whitening services. *Cf. N.C. Dental*, 135 S. Ct. 1101.

- A regulatory board controlled by accountants determines that only a small and fixed number of new licenses to practice the profession shall be issued by the state each year. *Cf. Hoover v. Ronwin*, 466 U.S. 558 (1984).

III. Scope of FTC Staff Guidance

A. This Staff guidance addresses the applicability of the state action defense under the federal antitrust laws. Concluding that the state action defense is inapplicable does not mean that the conduct of the regulatory board necessarily violates the federal antitrust laws. A regulatory board may assert defenses ordinarily available to an antitrust defendant.

1. Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.

Example 1: A regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without raising antitrust concerns. A regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. Cf. Cal. Dental Ass’n v. FTC, 526 U.S. 756 (1999).

Example 2: Suppose a market with several hundred licensed electricians. If a regulatory board suspends the license of one electrician for substandard work, such action likely does not unreasonably harm competition. Cf. Oksanen v. Page Mem’l Hosp., 945 F.2d 696 (4th Cir. 1991) (en banc).

2. The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344 n. 6 (1987).

Example 3: A state statute requires that an applicant for a chauffeur’s license submit to the regulatory board, among other things, a copy of the applicant’s diploma and a certified check for $500. An applicant fails to submit the required materials. If for this reason the regulatory board declines to issue a chauffeur’s license to the applicant, such action would not be considered an unreasonable restraint. In the circumstances described, the denial of a license is a ministerial or non-discretionary act of the regulatory board.

3. In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the “sham exception.” Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

Example 4: A state statute authorizes the state’s dental board to maintain an action in state court to enjoin an unlicensed person from practicing dentistry. The members of the dental board have a basis to believe that a particular individual is practicing dentistry but does not hold a valid license. If the dental board files a lawsuit against that individual, such action would not constitute a violation of the federal antitrust laws.
B. Below, FTC Staff describes when active supervision of a state regulatory board is required in order successfully to invoke the state action defense, and what factors are relevant to determining whether the active supervision requirement has been satisfied.

1. When is active state supervision of a state regulatory board required in order to invoke the state action defense?

**General Standard:** “[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*’s active supervision requirement in order to invoke state-action antitrust immunity.” *N.C. Dental*, 135 S. Ct. at 1114.

**Active Market Participants:** A member of a state regulatory board will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.

- If a board member participates in any professional or occupational sub-specialty that is regulated by the board, then that board member is an active market participant for purposes of evaluating the active supervision requirement.

- It is no defense to antitrust scrutiny, therefore, that the board members themselves are not directly or personally affected by the challenged restraint. For example, even if the members of the NC Dental Board were orthodontists who do not perform teeth whitening services (as a matter of law or fact or tradition), their control of the dental board would nevertheless trigger the requirement for active state supervision. This is because these orthodontists are licensed by, and their services regulated by, the NC Dental Board.

- A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant.

**Method of Selection:** The method by which a person is selected to serve on a state regulatory board is not determinative of whether that person is an active market participant in the occupation that the board regulates. For example, a licensed dentist is deemed to be an active market participant regardless of whether the dentist (i) is appointed to the state dental board by the governor or (ii) is elected to the state dental board by the state’s licensed dentists.
A Controlling Number, Not Necessarily a Majority, of Actual Decisionmakers:

- Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (e.g., through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.

- Whether a particular restraint has been imposed by a “controlling number of decisionmakers [who] are active market participants” is a fact-bound inquiry that must be made on a case-by-case basis. FTC Staff will evaluate a number of factors, including:
  - The structure of the regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board’s authority.
  - Whether the board members who are active market participants have veto power over the board’s regulatory decisions.

**Example 5:** The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of five board members. Thus, no regulation may become effective without the assent of at least one electrician member of the board. In this scenario, the active market participants effectively have veto power over the board’s regulatory authority. The active supervision requirement is therefore applicable.

  - The level of participation, engagement, and authority of the non-market participant members in the business of the board – generally and with regard to the particular restraint at issue.
  - Whether the participation, engagement, and authority of the non-market participant board members in the business of the board differs from that of board members who are active market participants – generally and with regard to the particular restraint at issue.
  - Whether the active market participants have in fact exercised, controlled, or usurped the decisionmaking power of the board.

**Example 6:** The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of a majority of board members. When voting on proposed regulations, the non-electrician members routinely defer to the preferences of the electrician members. Minutes of
board meetings show that the non-electrician members generally are not informed or knowledgeable concerning board business – and that they were not well informed concerning the particular restraint at issue. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

**Example 7:** The state board of electricians consists of four non-electrician members and three practicing electricians. Documents show that the electrician members frequently meet and discuss board business separately from the non-electrician members. On one such occasion, the electrician members arranged for the issuance by the board of written orders to six construction contractors, directing such individuals to cease and desist from providing certain services. The non-electrician members of the board were not aware of the issuance of these orders and did not approve the issuance of these orders. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

2. **What constitutes active supervision?**

FTC Staff will be guided by the following principles:

- “[T]he purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control” such that the details of the regulatory scheme “have been established as a product of deliberate state intervention” and not simply by agreement among the members of the state board. “Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy.” The State is not obliged to “[meet] some normative standard, such as efficiency, in its regulatory practices.” *Ticor*, 504 U.S. at 634-35. “The question is not how well state regulation works but whether the anticompetitive scheme is the State’s own.” *Id.* at 635.

- It is necessary “to ensure the States accept political accountability for anticompetitive conduct they permit and control.” *N.C. Dental*, 135 S. Ct. at 1111. *See also Ticor*, 504 U.S. at 636.

- “The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the ’mere potential for state supervision is not an adequate substitute for a decision by the State.’ Further, the state supervisor may not itself be an active market participant.” *N.C. Dental*, 135 S. Ct. at 1116–17 (citations omitted).
The active supervision must precede implementation of the allegedly anticompetitive restraint.

“[T]he inquiry regarding active supervision is flexible and context-dependent.” “[T]he adequacy of supervision . . . will depend on all the circumstances of a case.” N.C. Dental, 135 S. Ct. at 1116–17. Accordingly, FTC Staff will evaluate each case in light of its own facts, and will apply the applicable case law and the principles embodied in this guidance reasonably and flexibly.

3. What factors are relevant to determining whether the active supervision requirement has been satisfied?

FTC Staff will consider the presence or absence of the following factors in determining whether the active supervision prong of the state action defense is satisfied.

- The supervisor has obtained the information necessary for a proper evaluation of the action recommended by the regulatory board. As applicable, the supervisor has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies, and reviewed documentary evidence.
  - The information-gathering obligations of the supervisor depend in part upon the scope of inquiry previously conducted by the regulatory board. For example, if the regulatory board has conducted a suitable public hearing and collected the relevant information and data, then it may be unnecessary for the supervisor to repeat these tasks. Instead, the supervisor may utilize the materials assembled by the regulatory board.

- The supervisor has evaluated the substantive merits of the recommended action and assessed whether the recommended action comports with the standards established by the state legislature.

- The supervisor has issued a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision.
  - A written decision serves an evidentiary function, demonstrating that the supervisor has undertaken the required meaningful review of the merits of the state board’s action.
  - A written decision is also a means by which the State accepts political accountability for the restraint being authorized.
Scenario 1: Example of satisfactory active supervision of a state board regulation designating teeth whitening as a service that may be provided only by a licensed dentist, where state policy is to protect the health and welfare of citizens and to promote competition.

- The state legislature designated an executive agency to review regulations recommended by the state regulatory board. Recommended regulations become effective only following the approval of the agency.

- The agency provided notice of (i) the recommended regulation and (ii) an opportunity to be heard, to dentists, to non-dentist providers of teeth whitening, to the public (in a newspaper of general circulation in the affected areas), and to other interested and affected persons, including persons that have previously identified themselves to the agency as interested in, or affected by, dentist scope of practice issues.

- The agency took the steps necessary for a proper evaluation of the recommended regulation. The agency:
  - Obtained the recommendation of the state regulatory board and supporting materials, including the identity of any interested parties and the full evidentiary record compiled by the regulatory board.
  - Solicited and accepted written submissions from sources other than the regulatory board.
  - Obtained published studies addressing (i) the health and safety risks relating to teeth whitening and (ii) the training, skill, knowledge, and equipment reasonably required in order to safely and responsibly provide teeth whitening services (if not contained in submission from the regulatory board).
  - Obtained information concerning the historic and current cost, price, and availability of teeth whitening services from dentists and non-dentists (if not contained in submission from the regulatory board). Such information was verified (or audited) by the Agency as appropriate.
  - Held public hearing(s) that included testimony from interested persons (including dentists and non-dentists). The public hearing provided the agency with an opportunity (i) to hear from and to question providers, affected customers, and experts and (ii) to supplement the evidentiary record compiled by the state board. (As noted above, if the state regulatory board has previously conducted a suitable public hearing, then it may be unnecessary for the supervising agency to repeat this procedure.)

- The agency assessed all of the information to determine whether the recommended regulation comports with the State’s goal to protect the health and
welfare of citizens and to promote competition.

The agency issued a written decision accepting, rejecting, or modifying the scope of practice regulation recommended by the state regulatory board, and explaining the rationale for the agency’s action.

Scenario 2: Example of satisfactory active supervision of a state regulatory board administering a disciplinary process.

A common function of state regulatory boards is to administer a disciplinary process for members of a regulated occupation. For example, the state regulatory board may adjudicate whether a licensee has violated standards of ethics, competency, conduct, or performance established by the state legislature.

Suppose that, acting in its adjudicatory capacity, a regulatory board controlled by active market participants determines that a licensee has violated a lawful and valid standard of ethics, competency, conduct, or performance, and for this reason, the regulatory board proposes that the licensee’s license to practice in the state be revoked or suspended. In order to invoke the state action defense, the regulatory board would need to show both clear articulation and active supervision.

In this context, active supervision may be provided by the administrator who oversees the regulatory board (e.g., the secretary of health), the state attorney general, or another state official who is not an active market participant. The active supervision requirement of the state action defense will be satisfied if the supervisor: (i) reviews the evidentiary record created by the regulatory board; (ii) supplements this evidentiary record if and as appropriate; (iii) undertakes a de novo review of the substantive merits of the proposed disciplinary action, assessing whether the proposed disciplinary action comports with the policies and standards established by the state legislature; and (iv) issues a written decision that approves, modifies, or disapproves the disciplinary action proposed by the regulatory board.

Note that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.
The following do **not** constitute active supervision of a state regulatory board that is controlled by active market participants:

- The entity responsible for supervising the regulatory board is itself controlled by active market participants in the occupation that the board regulates. *See N.C. Dental*, 135 S. Ct. at 1113-14.


- A state official (*e.g.*, the secretary of health) serves ex officio as a member of the regulatory board with full voting rights. However, this state official is one of several members of the regulatory board and lacks the authority to disapprove anticompetitive acts that fail to accord with state policy.

- The state attorney general or another state official provides advice to the regulatory board on an ongoing basis.

- An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency. The independent state agency perfunctorily approves the recommendations of the regulatory board. *See Ticor*, 504 U.S. at 638.

- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board. *See Patrick*, 486 U.S. at 104-05.
PREPARED STATEMENT OF
THE FEDERAL TRADE COMMISSION

on

Competition and the Potential Costs and Benefits of Professional Licensure

Before The

COMMITTEE ON SMALL BUSINESS

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

JULY 16, 2014
I. Introduction

Chairman Graves, Ranking Member Velázquez, and Members of the Committee, thank you for the opportunity to appear before you today. I am Andrew Gavil, the Director of the Office of Policy Planning at the Federal Trade Commission (“FTC” or “Commission”), and I am pleased to join you to discuss competition perspectives on the licensing and regulation of occupations, trades, and professions. In my time here today I will describe the FTC’s approach to evaluating the potential competitive effects of such regulation and how we use a combination of advocacy and enforcement tools to promote competition among professionals.¹

The FTC and its staff recognize that occupational licensure can offer many important benefits. It can protect consumers from actual health and safety risks and support other valuable public policy goals. However, that does not mean that all licensure is warranted and, most importantly in our experience, it does not mean that the benefits of all of the specific restrictions imposed on occupations are sufficient to justify the harm they can do to competition and mobility in the workforce. We have seen many examples of licensure restrictions that likely impede competition and hamper entry into professional and services markets, yet offer few, if any, significant consumer benefits. In these situations, regulations may lead to higher prices, lower quality services and products, and less convenience for consumers. In the long term, they can cause lasting damage to competition and the competitive process by rendering markets less responsive to consumer demand and by dampening incentives for innovation in products, services, and business models.

¹ This written statement presents the views of the Federal Trade Commission. Oral testimony and responses to questions reflect my views and do not necessarily reflect the views of the Commission or any individual Commissioner.

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Occupational regulation can be especially problematic when regulatory authority is
delegated to a nominally “independent” board comprising members of the very occupation it
regulates. When the proverbial fox is put in charge of the henhouse, board members’ financial
incentives may lead the board to make regulatory choices that favor incumbents at the expense of
competition and the public. This conflict of interest may lead to the adoption and application of
licensure restrictions that discourage new entrants, deter potential competition from professionals
in related occupations, and suppress innovative forms of service delivery that could challenge the
status quo. Such entry and innovation can have substantial consumer benefits.

From a competition policy perspective, it is also helpful to appreciate that we view
anticompetitive occupational licensing in the broader context of industry regulation that, instead
of protecting consumers, can become protectionist of current industry incumbents. Our economy
is evolving rapidly, in part due to emerging technologies that facilitate new products, services,
businesses, and even business models. When these develop and challenge incumbents in heavily
regulated industries, it is not unusual to see regulatory responses, spurred on by those very
incumbents, which erect barriers to new business models and have the effect of slowing or
barring their development, even when consumer demand for new methods is pronounced.

The FTC and its staff address these concerns primarily in two ways. First, as part of the
FTC’s competition advocacy program, where appropriate and feasible, we respond to calls for
public comment and invitations from legislators and regulators to identify and analyze specific
licensure restrictions that may harm competition without offering significant consumer benefits.
In recent years, for example, we have focused on diverse issues including advertising
restrictions, automobile distribution, nursing scope of practice restrictions, accreditation
standards, taxicabs and related forms of passenger vehicle transportation, casket sales, and real
estate brokerage. Typically, we urge policy makers to integrate competition concerns into their decision-making process—specifically, that they consider whether: (1) any particular licensure regulations are likely to have a significant and adverse effect on competition; (2) the particular restrictions are targeted to address actual risks of harm to consumers; and (3) the restrictions are narrowly tailored to minimize any burden on competition, or whether less restrictive alternatives may be available.

When appropriate, we have also used our enforcement authority to challenge anticompetitive behavior by occupational regulators. The Commission has authorized civil challenges in several instances when faced with delegations of authority to regulatory boards comprising self-interested competitors, alleging that each board’s actions harmed competition and that “state action” was an insufficient defense to the conduct. As you know, one of these cases, North Carolina State Board of Dental Examiners, currently is pending on a writ of certiorari before the U.S. Supreme Court.

The Commission has not studied and has not taken a position on whether there is excessive licensing of occupations, trades, or professions as a general matter. As I have described, however, it has demonstrated a long-standing commitment to tracking and identifying regulatory restrictions that unduly restrict competition in specific trades, occupations and professions, and has taken enforcement action when appropriate to stop self-interested regulatory boards from abusing their authority to eliminate competition.

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2 The state action doctrine holds that certain sovereign acts of state governments are exempt from antitrust scrutiny. It also holds that certain private actors may be exempt from antitrust liability if they can demonstrate that their actions were taken pursuant to a clearly articulated decision by the state to displace free market competition in favor of regulation, and that their conduct is actively supervised by the state. Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, 445 U.S. 97, 105-06 (1980).

3 North Carolina State Bd. of Dental Examiners v. FTC, 717 F. 3d 359 (4th Cir. 2013).
This testimony will cover three main points.

- First, it provides a brief overview of the FTC’s interest and experience in competition issues related to occupational licensure and related restrictions;
- Second, it outlines general competition concerns in this area, touching on some of the issues raised in the Committee’s invitation to testify; and
- Third, it concludes by providing additional details on the FTC’s work relating to the potential competitive harm of excessive regulation of the professions and other service occupations, including FTC research, competition advocacy, and law enforcement.

II. Interest and Experience of the FTC

Competition is at the core of America’s economy, and vigorous competition among sellers in an open marketplace can provide consumers the benefits of lower prices, higher quality products and services, and greater innovation. In furtherance of that national policy, the FTC Act grants the Commission broad enforcement authority with regard to both competition and consumer protection matters in most sectors of the economy.4 In addition, Section 6 of the FTC Act provides, among other things, a general authority to investigate and report on market developments in the public interest, as well as authority to make recommendations based on those investigations.5 This distinct charge supports the agency’s research, education, and competition advocacy efforts.

To fulfill these statutory mandates, the Commission seeks to identify private, public, and quasi-public restrictions that may unreasonably impede competition. In the context of occupational licensure, the Commission and its staff have for over thirty years conducted various

4 The FTC’s authority reaches “[u]nfair methods of competition” and “unfair or deceptive acts or practices” that are “in or affecting commerce.” 15 U.S.C. § 45(a)(1) (2013). With some exceptions, the FTC’s authority ranges broadly over “commerce” without restriction to particular segments of the economy. Id. at § 45(a)(2).
economic and policy studies, as well as focused inquiries into regulations applying to particular professions such as nursing, eye doctors and vendors of optical goods, legal services, and the real estate brokerage industry. As mentioned above, the Commission has relied on both competition advocacy and enforcement tools in responding to potentially anticompetitive occupational regulations and conduct by occupational regulatory boards.

III. Competition Issues Raised by Licensure and Other Occupational Regulations

Licensure is a process that establishes the conditions for entry into an occupation. Licensing regulations typically specify entry conditions and define the various practices that constitute a licensed occupation. Unlicensed practice, or the provision of services outside one’s scope of practice, generally is prohibited by statute and may be subject to civil or criminal

11 This testimony focuses on competition issues for licensure, which is one particular form of occupational regulation. For a general discussion of less restrictive regulatory alternatives to licensure, such as certification, output monitoring, and registration, see COX & FOSTER, supra note 6, at 21-22, 43-51.
penalties. One study has found that approximately 29 percent of the U.S. workforce is required to obtain a license to work for pay.\textsuperscript{12}

For some occupations, the process of licensure—and particular licensure regulations—may be an appropriate policy response to identified consumer protection or safety concerns. Licensure can help to prevent consumer fraud and mitigate the effects of certain types of market failure, such as information asymmetries between professionals and consumers.\textsuperscript{13} Licensure regulations may serve an especially important function in health care, where consumers might face serious risks if they were treated by unqualified individuals, and patients might find it difficult (if not impossible) to adequately assess quality of care at the time of delivery.

We note, at the same time, that licensure inherently constrains competition, albeit to varying degrees.\textsuperscript{14} When a law or regulation establishes entry conditions for an occupation, only individuals who satisfy those conditions are legally authorized to provide the services associated with that occupation, which tends to reduce the number of market participants. This reduction in supply, and the resulting loss of competition, can lead to higher prices, reduced non-price competition on terms such as convenience or quality, or other distortions in services or labor markets.\textsuperscript{15} For example, one recent study suggests that licensing an occupation at the state level


\textsuperscript{13} For example, consumers may not have reliable access to, or sufficient ability to understand, relevant information relating to the quality of the services they are consuming or the risks they may face and conflicts of interest may arise when professionals serve as both diagnosticians and treatment providers. \textit{See, e.g.}, COX & FOSTER, \textit{supra} note 6, at 4-12.

\textsuperscript{14} George J. Stigler, \textit{The Theory of Economic Regulation}, 2 BELL J. ECON. & MGMT. SCI. 3, 13 (1971) (“The licensing of occupations is a possible use of the political process to improve the economic circumstances of a group. The license is an effective barrier to entry because occupational practice without the license is a criminal offense.”).

\textsuperscript{15} Regarding licensure generally, see Morris M. Kleiner, \textit{Occupational Licensing}, 14 J. ECON. PERSP. 189, 192 (2000) (“The most generally held view on the economics of occupational licensing is that it restricts the supply of labor to the occupation and thereby drives up the price of labor as well as of services rendered.”); \textit{see also} COX & FOSTER, \textit{supra} note 6, at 21-36.
is associated with a 17% increase in earnings by members of the occupation.\textsuperscript{16} In addition, although licensure may be designed to provide consumers with minimum quality assurances, licensure provisions do not always increase service quality.\textsuperscript{17} Licensure costs and burdens, such as training or education requirements, may also discourage innovation and entrepreneurship. In some cases, these regulatory barriers to entry may severely impede the flow of labor or services to where they are most in demand, potentially reducing consumer access to valued services.\textsuperscript{18}

The FTC and its staff have not closely studied whether, or to what extent, particular occupations should be subject to licensure as a form of regulation or whether the U.S. economy is characterized by excessive occupational licensing. Nor have we attempted to design regulatory institutions or tell various jurisdictions and licensing authorities how best to administer their licensing laws. Rather, we have recognized that specific licensure regulations can have good, bad, or mixed competitive effects, depending on the circumstances. Therefore, we typically focus on case-by-case competition analysis of particular restrictions in review of specific laws and regulations that may affect competition and urge legislators and regulators to do the same.

\textsuperscript{16} Morris M. Kleiner & Alan B. Krueger, \textit{Analyzing the Extent and Influence of Occupational Licensing on the Labor Market}, 31 J. LABOR ECON. S-173, S-191 (2013); \textit{see also} COX & FOSTER, \textit{supra} note 6, at 28-31 (reviewing studies of effects of licensing on the prices of dental, legal, and optometric services).

\textsuperscript{17} \textit{See, e.g.}, Morris M. Kleiner & Robert T. Kurdle, \textit{Does Regulation Affect Economic Outcomes: The Case of Dentistry}, 43 J. LAW & ECON. 547, 570 (2000) (“Overall, our results show that licensing does not improve dental health outcomes as measured by our sample of dental recruits. Moreover, treatment quality does not appear to improve significantly on the basis of the reduced cost of malpractice insurance or a lower complaint rate against dentists, where regulation is more stringent.”); \textit{see also} COX & FOSTER, \textit{supra} note 6, at 21-29.

\textsuperscript{18} For example, FTC staff comments on nursing regulations have focused on primary care provider shortages and the abilities of advanced practice nurses and others to meet the needs of underserved populations. \textit{See generally} POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES, \textit{supra} note 7, at 2, 20-26; \textit{see also} FTC Staff Comment Before the Louisiana House of Representatives on the Likely Competitive Impact of Louisiana House Bill 951 Concerning Advanced Practice Registered Nurses (April 2012), http://www.ftc.gov/os/2012/04/120425louisianastaffcomment.pdf (regarding a bill that would have removed certain supervision requirements for APRNs working in medically underserved areas or treating underserved populations); FTC Staff Letter to the Hon. Jeanne Kirkton, Missouri House of Representatives, Concerning Missouri House Bill 1399 and the Regulation of Certified Registered Nurse Anesthetists (March 2012), http://www.ftc.gov/os/2012/03/120327kirktonmissouriletter.pdf.
IV. Advocacy

A central goal of the FTC’s competition advocacy program is to encourage federal, state, and local policymakers, as well as private, self-regulatory authorities, to integrate competition concerns into their decision-making process. By doing so, we hope they can avoid standards likely to interfere unnecessarily with the proper functioning of a competitive marketplace.\textsuperscript{19}

Even well intentioned laws and regulations may impose undue burdens on competition, in ways that ultimately harm consumers. Moreover, public restraints on competition may sometimes prove particularly harmful and durable, but may not always be actionable under the federal antitrust laws. Competition advocacy – in the form of comments, testimony, workshops, reports, and amicus briefs – encourages federal and state policy makers to consider likely competitive effects of existing and proposed regulations, while also taking into account other important policy goals.

A. Framework for Analysis

To address these concerns while still preserving the potential benefits of occupational licensure, the Commission and its staff propose the following framework for evaluating licensing regulations:

- Are there significant and non-speculative consumer health and safety issues, or other legitimate public policy purposes, that warrant some form of licensure?

• Are any of the specific conditions or restrictions imposed as part of the licensure scheme likely to have a significant adverse effect on competition and consumers?

• If so, do the specific licensing conditions or restrictions adopted address the issues that gave rise to the decision to require licensure and protect against demonstrable harms or risks? For example, will they in fact reduce a risk of consumer harm from poor-quality services? Will the regulation yield other demonstrated or likely consumer benefits, such as reducing information or transaction costs for consumers?

• Are the regulations narrowly tailored to serve the state’s policy priorities such that they do not unduly restrict competition?  

When consumer benefits are slight or highly speculative, a licensure regime may not be desirable. Similarly, a specific regulation that imposes non-trivial impediments to competition may not be justified. Even when particular regulatory restrictions address well-founded consumer protection or other concerns, the inquiry should not end there. If the restrictions are also likely to harm competition, policy makers should consider whether the regulations could be more narrowly tailored to minimize the burden on competition while still achieving other goals.

B. Specific Advocacy Efforts

Since the late 1970s, the Commission and its staff have submitted hundreds of comments and amicus curiae briefs to state and self-regulatory entities on competition policy and antitrust law issues relating to such professionals as real estate brokers, electricians, etc.
accountants, lawyers, dentists and dental hygienists, nurses, eye doctors and opticians, and veterinarians. These advocacy efforts have focused on various restrictions on price competition, contracts or commercial practices, entry by competitors or potential competitors, and truthful and non-misleading advertising.

For example, a series of FTC staff competition advocacy comments have addressed various physician supervision requirements that some states impose on advanced practice


24 FTC Staff Comment to the Hon. Glen Repp Concerning Texas H.B. 252 to Establish a System to Voluntarily License Electricians and Electrical Contractors (1989),

25 FTC Staff Comment to the Honorable Jean Silver Concerning Washington Administrative Code 4-25-710 to Require Additional Academic Credits for Certified Public Accountants (CPAs) (1996),

26 FTC Staff Letter to the Supreme Court of Tennessee, Concerning Proposed Amendments to the Tennessee Rules of Professional Conduct Relating to Attorney Advertising (2013),

27 FTC Staff Letter to NC Representative Stephen LaRoque Concerning NC House Bill 698 and the Regulation of Dental Service Organizations and the Business Organization of Dental Practices (2012),

28 FTC Staff Comment Before the Maine Board of Dental Examiners Concerning Proposed Rules to Allow Independent Practice Dental Hygienists to Take X-Rays in Underserved Areas (2011),

29 See supra note 7 and accompanying text.

30 FTC Staff Comment Before the North Carolina State Board of Opticians Concerning Proposed Regulations for Optical Goods and Optical Goods Businesses (Jan. 2011),

31 FTC Staff Comment Before the Virginia Board of Veterinary Medicine Concerning Regulations to Remove Restrictions on Advertising and Non-Veterinarian Relationships (1996),
registered nurses (APRNs). FTC staff have not questioned state interests in establishing licensure requirements – including basic entry qualifications – for APRNs or other health professionals in the interest of patient safety. Rather, staff have questioned the competitive effects of additional restrictions on APRN licenses, such as mandatory supervision arrangements with particular physicians, which are sometimes cast as “collaborative practice agreement” requirements. Physician supervision requirements may raise competition concerns because they effectively give one group of health care professionals the ability to restrict access to the market by another, potentially competing group of health care professionals. Based on substantial evidence and experience, expert bodies have concluded that ARPNs are safe and effective as independent providers of many health care services within the scope of their training, licensure, certification, and current practice. Therefore, we have suggested that mandatory physician supervision may not be a justified form of occupational regulation.

In some situations, we engage in competition advocacy because we can find no plausible public benefit justifying licensure restrictions. For example, in 2011, the Commission filed an amicus brief in St. Joseph Abbey v. Castille, clarifying the meaning and intent of the

32 Many of the individual advocacy comments regarding nursing restrictions, along with the research and analyses underlying those comments, are described in detail in POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES, supra note 7. For a broader discussion of the advocacy program and competition perspectives on APRN, nurse anesthetist, and retail clinic regulations, see Daniel J. Gilman & Julie Fairman, Antitrust and the Future of Nursing: Federal Competition Policy and the Scope of Practice, 24 HEALTH MATRIX 143 (2014).

33 See, e.g., INST. OF MED., NAT’L ACAD. OF SCIENCES, THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH, 98-99 (2011); NAT’L GOVERNORS ASS’N, THE ROLE OF NURSE PRACTITIONERS IN MEETING INCREASING DEMAND FOR PRIMARY CARE, 7-8 (2012), http://www.nga.org/files/live/sites/NGA/files/pdf/1212NursePractitionersPaper.pdf (study funded by U.S. Dep’t Health & Human Servs., reviewing literature pertinent to NP safety and concluding “None of the studies in the NGA’s literature review raise concerns about the quality of care offered by NPs. Most studies showed that NP-provided care is comparable to physician-provided care on several process and outcome measures.”).  

Commission’s “Funeral Rule.” The plaintiffs, monks at St. Joseph Abbey who had built and sold simple wooden caskets consistent with their religious values, had challenged Louisiana statutes that required persons engaged solely in the manufacture and sale of caskets within the state to fulfill all licensing requirements applicable to funeral directors and establishments. Those requirements included, for example, a layout parlor for 30 people, a display room for six caskets, an arrangement room, the employment of a full-time, state-licensed funeral director, and, even though the Abbey did not handle or intend to handle human remains, installation of “embalming facilities for the sanitation, disinfection, and preparation of a human body.” The U.S. Court of Appeals for the Fifth Circuit found that “no rational relationship exists between public health and safety and restricting intrastate casket sales to funeral directors. Rather, this purported rationale for the challenged law elides the realities of Louisiana's regulation of caskets and burials.”

Private activities of accrediting organizations or trade associations also can influence licensing restrictions, either directly – as, for example, when state law requires a degree from an accredited school in order to obtain a license – or indirectly, when association activities establish a de facto standard of professional practice. A notable example is reflected in recent FTC staff comments to the American Dental Association’s Commission on Dental Accreditation (CODA), in which FTC staff suggested that CODA not take the unusual step of including supervision and scope of practice limitations in accreditation standards for new dental therapist education programs. Although the standard would not be binding on state legislatures, FTC staff were

36 St. Joseph Abbey, 712 F.3d at 226 (affirming the district court decision that the challenged regulations, and their enforcement by the state board, were unconstitutional).
concerned that it could effectively constrain the discretion of the states in defining scope of practice and supervisory requirements for dental therapists and impede the development of this emerging model for delivering dental health services.

As noted earlier, another area of concern relates to how heavily regulated industries respond to new and disruptive forms of competition. In some cases, regulators seek to adopt regulations that facilitate that competition, especially when it appears to respond to consumer demand and offer new or different services or products. In other instances, however, some regulators have responded by acting to protect those currently subject to regulation. This has been happening in the taxi and related transportation business, where innovative smartphone applications have provided consumers with new ways to arrange for transportation and, in some cases, enabled new sources of transportation services. Although some jurisdictions have responded by adapting, others have sought to either enforce existing regulations or adopt new ones that would impede the development of these new services without seemingly valid justifications. We have urged these jurisdictions to carefully consider the adverse consequences of limiting competition and question the basis for any restrictions advocated by incumbent industry participants.38

V. Enforcement

Although the FTC often relies on competition advocacy to discourage potentially anticompetitive occupational licensure laws and regulations, it has also relied upon its

enforcement authority to challenge anticompetitive conduct by independent regulatory boards that falls outside of the scope of protected “state action.” These enforcement actions have included challenges to agreements among competitors that restrained advertising and solicitation, price competition, and contract or commercial practices, as well as direct efforts to prohibit competition from new rivals, without any cognizable justification.

For example, in 2003, the Commission sued the South Carolina Board of Dentistry, charging that the Board had illegally restricted the ability of dental hygienists to provide basic preventive dental services in schools. In 2000, to address concerns that many schoolchildren, particularly those in low-income families, were not receiving any preventive dental care, the state legislature eliminated a statutory requirement that a dentist examine each child before a hygienist could perform preventive care in schools. In 2001, the FTC’s complaint charged, the Board re-imposed the dentist examination requirement. The complaint alleged that the Board's action unreasonably restrained competition in the provision of preventive dental care services, deprived thousands of economically disadvantaged schoolchildren of needed dental care, and

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39 The Supreme Court has very recently admonished that reliance on the state action doctrine is “disfavored.” FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003, 1010, 1016 (2013). As the Supreme Court has observed, “[t]he national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially . . . [private anticompetitive conduct].” Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, 445 U.S. 97, 106 (1980). As prerequisites to invocation of the state action doctrine, Midcal requires that the challenged private conduct be (1) undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation, and (2) actively supervised by the state. Id. at 105-06.

40 The Commission also has advocated against attempts to exempt certain licensed health care professions from antitrust scrutiny for the purpose of permitting blatantly anticompetitive conduct. See FTC Staff Comment Before the Connecticut General Assembly Labor and Employees Committee Regarding Connecticut House Bill 6431 Concerning Joint Negotiations by Competing Physicians in Cooperative Health Care Arrangements, 3 (2013), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-connecticut-general-assembly-labor-and-employees-committee-regarding-connecticut/130605conncoopcomment.pdf.

that its harmful effects on competition and consumers could not be justified. The Board ultimately entered into a consent agreement settling the charges.42

Similarly, in 2010, the Commission challenged the North Carolina Board of Dental Examiners for issuing a series of cease-and-desist letters that successfully expelled low-cost non-dentist providers of teeth-whitening services.43 The U.S. Court of Appeals for the Fourth Circuit agreed with the FTC that state agencies “‘in which a decisive coalition (usually a majority) is made up of participants in the regulated market,’ who are chosen by and accountable to their fellow market participants, are private actors and must meet both Midcal prongs [that is, clear articulation and active supervision].”44 The court further held that the Board had not been subject to the type of active supervision Midcal requires.45 Finally, the court affirmed the FTC's conclusion that the Board's behavior was likely to cause significant competitive harm, finding it “supported by substantial evidence.”46

Some of the Commission’s most important enforcement actions challenging restrictions on the dissemination of truthful advertising of professional services have been in the health care area.47 For example, some boards of optometry48 and dentistry49 have sought to suppress information that could be useful to consumers of their services. The FTC has also challenged

43 North Carolina State Bd. of Dental Examiners v. FTC, 717 F. 3d 359, 365 (4th Cir. 2013). As noted above, the case is before the U.S. Supreme Court.
44 Id. at 368. See also supra note 39.
45 Id. at 370.
46 Id. at 374.
47 For an example outside the health care area, see, e.g., Rhode Island Board of Accountancy, 107 F.T.C. 293 (1986) (consent order).
48 See, e.g., In the Matter of Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549 (1988).
advertising restraints imposed by private self-regulatory associations. In the seminal case of *American Medical Association* ("AMA"), the Commission found, among other things, that the AMA, through its ethical guidelines, had illegally suppressed virtually all forms of truthful, non-deceptive advertising and similar means of solicitation by doctors and health care delivery organizations. The Commission ordered the AMA to cease and desist from prohibiting such advertising. However, it allowed the AMA to continue its use of ethical guidelines to prevent false or deceptive advertisements or oppressive forms of solicitation.

VI. Conclusion

Occupational licensing can serve important goals and, when used appropriately, protect consumers from harm. But, as is illustrated by the Commission’s history of advocacy and enforcement, excessive occupational licensing can make consumers worse off, impeding competition without offering meaningful protection from legitimate health and safety risks. Even when some form of licensure is warranted, specific regulations can have significant adverse effects on competition and consumers. Such regulations should be analyzed for their impact on competition and, when they are likely to harm consumers, individually justified. States also should be cautious when delegating authority to enforce such regulations to self-interested boards of the very occupation to be regulated.

Thank you for the opportunity to share the Commission’s views and to discuss our efforts to promote competition and protect consumers.

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50 94 F.T.C. 701 (1979). The Commission’s decision was affirmed and modified by the U.S. Court of Appeals, 638 F.2d 443 (2d Cir. 1980), and affirmed in a 4-4 vote by the Supreme Court, 455 U.S. 676 (1982).
I, Mary Fallin, Governor of the State of Oklahoma, pursuant to the power and authority vested in me by Section 2 of Article VI of the Oklahoma Constitution, hereby order all state boards who have a majority of members who are participants of markets that are directly or indirectly controlled by the board, to immediately implement and adopt the following procedures.

**Attorney General Guidance**

Attorney General Scott Pruitt issued a letter to this office on July 6, 2015, recommending reform of certain current practices by Oklahoma licensing boards, in light of the recent opinion of the United States Supreme Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*. The Attorney General advised that any state board that has a majority of its members who are participants of markets that are directly or indirectly controlled by the board would be subject to possible suit for violations of antitrust law. The Attorney General opined that Oklahoma must implement procedures for those boards with a majority of such members that demonstrate active supervision by the State by a politically accountable state actor who has the power to review, veto and modify board decisions.

**Administrative Rules**

The Attorney General has reviewed the rulemaking powers of such boards and concluded that sufficient statutory safeguards are currently in place to prevent exposure to possible suit for violations of antitrust or other anti-competitive laws. The *Oklahoma Administrative Procedures Act* and *Executive Order 2013-34* clearly establish procedures that demonstrate active supervision by the Governor and Legislature who are compromised of politically accountable actors. Both the Governor and the Legislature have the power to review, veto and modify board administrative rules.

**Other Board Licensure or Prohibition Actions**

The Attorney General has concluded that licensure or prohibition actions (other than rulemaking) have insufficient procedures to demonstrate active supervision of boards with a majority of members who are participants of markets that are directly or indirectly controlled by
the board. The Attorney General recommended that a single state agency be clearly established as the politically accountable actor with the power to review, veto and modify board licensure or prohibition actions.

The agency best equipped to assume these duties is the Office of the Attorney General. It is the Office of the Attorney General that has the ultimate responsibility for review of violations of antitrust statutes. It is the Office of the Attorney General that is charged with the responsibility to enjoin and enforce the Oklahoma Antitrust Reform Act (79 O.S. §§ 201 et seq.) and the Oklahoma Consumer Protection Act (15 O.S. §§ 751 et seq.). The Office of the Attorney General is also the entity that provides legal advice to most boards and agencies. See 74 O.S. § 18c.

Therefore, I hereby order that all non-rulemaking actions proposed by any state board on which, a majority of its members are participants in the same market that the board regulates:

1. All proposed licensure or prohibition actions shall be submitted to the Office of the Attorney General for review and written analysis of possible violation of law;
2. Upon receipt of the written analysis provided by the Office of the Attorney General, the board shall defer to any recommended modification, including rescinding the proposed action; and
3. Failure to follow the written analysis provided by the Office of the Attorney General shall constitute misconduct and shall subject such board member(s) to removal for cause by the appointing authority.

This Executive Order shall be distributed to all members of the Governor’s Executive Cabinet and the chief executives of all state agencies, who shall cause the provisions of this Order to be implemented.

IN WITNESS WHEREOF, I have set my hand and caused the Great Seal of the State of Oklahoma to be affixed at Oklahoma City, Oklahoma, this 17th day of July, 2015.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA

MARY FALLIN

Executive Order 2015-33 Page 2 of 2
The Honorable Mary C. Fallin  
Office of Governor  
Oklahoma State Capitol  
2300 North Lincoln Boulevard, Room 212  
Oklahoma City, OK 73105  

Re: Executive Order 2015-33

Dear Governor Fallin:

Founded in 1908, the National Association of State Boards of Accountancy (NASBA) has served as an association dedicated to enhancing the effectiveness and advancing the common interests of the Boards of Accountancy in 55 U.S. states and territories. NASBA helps advance the public protection mandate of these member boards by, among other things, supporting their administration of the Uniform CPA Examination, submitting amicus briefs that reinforce their mission and values, and (along with the American Institute of Certified Public Accountants) developing and maintaining the Uniform Accountancy Act (“UAA”). To that end, the Oklahoma Board of Accountancy has asked us to provide an analysis and response to the recently issued Executive Order 2015-33 (“Executive Order”), which creates an independent state review process for board licensure and prohibition actions.

As one of the first states to respond to the U.S. Supreme Court’s decision in N.C. State Board of Dental Examiners v. Federal Trade Commission, Oklahoma will necessarily have to work through the ambiguities and hurdles this ruling raises as it perfects its regulatory oversight structure in response. From our vantage point, the goal is to establish the most efficient instrument for supervising potentially anticompetitive board actions in a manner that adheres to what the Supreme Court and the Federal Trade Commission (“FTC”) have prescribed. We believe that conforming to what the Supreme Court and the FTC have prescribed does not require the creation of a new, mandatory layer of bureaucratic oversight through which state boards must operate. Furthermore, this would be redundant and potentially competitive with a gubernatorial appointed, and statutory empowered, regulatory board. Moreover, the cost of this additional Attorney General oversight function could be unfairly passed on to the licensee. Instead, states must only provide a mechanism for actively supervising the actions of their licensing board agencies that could be deemed as anticompetitive under federal antitrust laws. It is our
belief that the Executive Order might be interpreted as creating broader oversight and red tape than is necessary or meaningful.

The FTC, as the lead federal enforcement agency in the area of state action immunity, is currently drafting guidance for state legislatures and state agencies regarding the exact sort of practices that it views as necessitating active state supervision. This guidance may also address suggested forms for that supervision to take. It may be helpful for states to delay adoption of supervision procedures and guidelines until further details are available from the FTC, or from a number of currently pending court cases concerning state action immunity. In the meantime, the following comments may assist the key parties in Oklahoma’s ongoing evaluation of the Supreme Court’s opinion.

I. Background: State Regulation of CPAs Is Uniquely Procompetitive

The Oklahoma Accountancy Board, along with the other 54 boards of accountancy, has worked with NASBA to reduce barriers to trade in accountancy services. Beginning in 1997, the accountancy boards, NASBA, and the American Institute of Certified Public Accountants (“AICPA”) embarked upon a national legislative effort to remove impediments to interstate practice, ease restrictions on firm ownership, lift anticompetitive limits on fee arrangements, and permit the use of trade names. As a result, NASBA and the AICPA developed and promoted these changes through the UAA. The UAA is an “evergreen” model licensing law developed to provide a comprehensive, uniform approach to regulation of the accounting profession. As stated in the “Introductory Comments” to the UAA 7th Edition: “These changes achieve the goals of enhancing public protection, facilitating consumer choice, and supporting the efficient operation of the capital markets.” In the past two decades, these procompetitive changes have been adopted in almost all U.S. jurisdictions. Oklahoma adopted key procompetitive provisions of the UAA several years ago.

II. The Independent State Review Process Need Only Apply to a Narrow Range of Actions

Under the terms of the FTC’s Order against the N.C. Dental Board and the Supreme Court’s decision upholding the FTC’s Order, states and their licensee-controlled state boards should concentrate their antitrust risk management efforts on specific actions. Their focus should be limited to certain board enforcement actions which are not taken pursuant to clearly-articulated state policy. Further, they should focus on board enforcement actions presenting a possible injury to competition, as opposed to just an injury to an individual competitor or potential competitor.

A. Federal Antitrust Law Applies to a Limited Range of Board Enforcement Activities

The Supreme Court’s opinion in N.C. State Board of Dental Examiners v. FTC laid out the scope of the Court’s antitrust concerns:

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1 Guidance from the FTC will need to be juxtaposed with the understanding that the FTC may be advocating for stricter regulation and oversight than the U.S. Supreme Court contemplated.
Active supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather, the question is whether the State’s review mechanisms provide realistic assurance that a non-sovereign actor’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.\(^2\)

In so holding, the Court gives insight into the type and extent of active state supervision that it envisions. Supervision is not needed for routine operations such as licensure decisions, license renewals, or licensee enforcement. Rather, supervision should focus on board conduct that could be deemed anticompetitive under federal antitrust laws.

The FTC’s Order lays out the actions that the N.C. Dental Board may and may not take. The FTC’s Order permits the N.C. Dental Board to engage in conduct that is clearly within its statutory prerogative and not the focus of federal antitrust scrutiny. For example, under the terms of the FTC’s Order, the N.C. Dental Board may continue to take a number of actions without oversight by the N.C. Attorney General (or another state entity), such as:

(i) investigating a Non-Dentist Provider for suspected violations of the Dental Practice Act;
(ii) filing, or causing to be filed, a court action against a Non-Dentist Provider for an alleged violation of the Dental Practice Act \(\ldots\); or
(iii) pursuing any administrative remedies against a Dentist pursuant to and in accordance with the North Carolina Annotated Code \(\ldots\).\(^3\)

Under the FTC’s Order, the N.C. Dental Board is also generally permitted to continue communicating with third parties regarding the content of its authorizing statute, and the limits that the Dental Practice Act places on unauthorized practice, without active state supervision. The N.C. Dental Board may also continue with licensee enforcement pursuant to state law.

Thus, pursuant to 59 Okla. Stat. § 15.27, Oklahoma Board of Accountancy Rule 10:15-37-8, Rule 10:15-37-9, and the above-described parameters, the Oklahoma Accountancy Board could continue to take the following actions without Office of the Attorney General oversight and in compliance with the terms set forth in the FTC’s Order:

(i) investigate an allegation against an individual who is not a holder of a certificate or license;
(ii) provide a non-licensee with a copy of the Oklahoma Accountancy Act along with a notification of an accusation against such individual;
(iii) file, or cause to be filed, a court action against a non-licensee for an alleged violation of the Accountancy Act; and

\(^2\) 135 S. Ct. 1101, 1116 (2015) (emphasis added) (internal quotes omitted).

\(^3\) Final Order, In re N.C. Bd. of Dental Examiners, Docket No. 9343, pg. 4 (Dec. 7, 2011).
(iv) take enforcement actions against licensees pursuant to the Oklahoma Accountancy Act.

The Board of Accountancy’s counsel, an Oklahoma Assistant Attorney General for many years, will continue to attend all board meetings and advise the board whenever it undertakes any of the aforementioned steps. The board’s counsel will also continue to advise the board whenever he or she believes that a proposed board action may be without the support of clearly-articulated state policy.

B. Federal Antitrust Law Targets General Harms to Competition, Not Harms to Individual Competitors

The Supreme Court and the FTC have set forth additional guidance regarding the scope of the application of federal antitrust law to professional licensing boards. Antitrust enforcement through the courts and by the FTC focuses on unauthorized practice enforcement against non-licensees (and rulemaking, which is not at issue here). In particular, when such enforcement against non-licensees does not include seeking injunctive relief from the judiciary or involve review or oversight by an independent state entity.\(^4\) In other words, the Supreme Court and the FTC are focusing their attention on unilateral board actions to restrain competition without oversight from an independent state body, not on board enforcement actions against a single competitor.

This is supported by the premise that federal antitrust laws are concerned with injuries to competition, not injuries to individual competitors or potential competitors. Thus, individual licensing decisions and actions should not be subject to attack under federal antitrust laws. This point was recently illustrated in the U.S. District Court for the Eastern District of Virginia case of Petri v. VA Board of Medicine.\(^5\) Petri, a chiropractor licensee of the Medical Board, was disciplined by the board and, in response, she sued the board alleging an antitrust violation. The court rejected Petri’s claim not on state action immunity grounds but under a full antitrust analysis of whether her situation was the type of claim that is meant to be addressed by antitrust law. Petri argued that her “individual injury constitutes harm to the overall competition.”\(^6\) The court held that:

[T]he law is clear that “the elimination of a single competitor, standing alone, does not prove the anticompetitive effect necessary to establish antitrust injury.” . . . Petri has shown no evidence that pricing in the market was altered or that other chiropractors failed to join, or left, the market as a result of the Board’s actions. Without such a showing, Plaintiff has failed to show the necessary anticompetitive effects of a Sherman Act violation.\(^7\)

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\(^4\) “[T]he Board had decided teeth whitening constitutes ‘the practice of dentistry’ and sought to prohibit those who competed against dentists from participating in the teeth whitening market . . . . [T]here is no evidence here of any decision by the State to initiate or concur with the Board’s actions against the nondentists.” 135 S. Ct. at 1116.


\(^6\) Id. at *7.

\(^7\) Id. at *7-*8 (internal citations omitted).
III. The Executive Order Contains Ambiguities That Leaves Some Issues Unresolved

As currently drafted, the Executive Order contains several points requiring further clarification. The procedures under which the Executive Order will be enacted should be clarified; similarly, the scope of the Executive Order and its practical effect require further review.

A. It Is Not Clear What Actions Should Be Submitted for Attorney General Review

In its current form, the Executive Order could create an oversight mechanism applying to a wider range of state agency actions than what was contemplated by the Supreme Court and the FTC. The Executive Order could provide greater clarity as to which board actions are to be submitted to the Attorney General. The Executive Order states that administrative rulemaking is not included in the scope of the Governor’s mandate. As far as enforcement actions, the Executive Order refers to “board licensure or prohibition actions” and, subsequently, to “all non-rulemaking actions.” However, as previously discussed under Section II, it appears that federal antitrust law only contemplates the need for active state supervision regarding board enforcement actions that may affect competition. Generally, this does not include investigation of and court actions against non-licensees, or any investigation of and enforcement against licensees. Nor should board licensure, renewal, continuing education, or peer review powers be affected by the Executive Order. Such clarification in the Executive Order will ensure that the Attorney General’s Office can conduct its review expediently, and board activities will proceed efficiently.

B. Regulatory Inefficiencies and Public Harm Could Result from the Executive Order

The Executive Order’s requirement that “all non-rulemaking actions,” including licensure and enforcement actions, be submitted to the Attorney General’s Office will require that the Attorney General’s Office expend time, expertise, and resources. It is one thing to have the Office review specific board enforcement actions against non-licensees for potential anticompetitive effects and to ensure that board actions are aligned with clearly-articulated state policy. It is another thing to have the Office serve as the conduit for all boards to submit their entire slate of proposed actions for review. This would likely overwhelm and consume the Attorney General’s Office to the point where the public would be harmed due to regulatory inaction. Indeed, regulatory inefficiencies could hamper a board’s ability to prevent unethical persons from obtaining licenses or to stop an individual from continuing to mislead or deceive the public.

Further, the Executive Order could clarify that the Attorney General’s Office will oversee a voluntary, rather than mandatory, review process, with boards responsible for determining which actions require supervision by the Attorney General’s Office. This is pursuant to the Supreme Court and FTC’s decisions on the subject, which do not require a mandatory state supervision process. A mandatory submission review process appears likely to exacerbate the concerns regarding regulatory inefficiency detailed above. If the Executive Order imposes a mandatory review process, it seems necessary that it also impose time limits on the review process to ensure that regulatory boards’ proposed actions are not unmanageably delayed.
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Lastly, the Executive Order does not contain an appeals process for boards to challenge decisions by the Attorney General’s Office. Boards may require a process to obtain review of decisions by the Attorney General’s Office to modify or veto a board’s actions when the submitted actions do, in fact, comport with clearly-articulated state policy.  

C. The Executive Order May Obscure the Purpose of Independent State Review  

Under the Executive Order, “all proposed licensure or prohibition actions shall be submitted to the Office of the Attorney General for review and written analysis of possible violation of law [emphasis added].” However, to best ensure compliance with federal antitrust law, the emphasis (and the review process) should focus on whether the proposed action and the resulting effect will conform to authorizing state statutes. The Attorney General’s Office should review the substance of each proposed action and ensure that it is an inherent, logical, or ordinary result of the authority vested in the board by the Legislature.  

D. The Deputy General Counsel’s Clarifying Memo Does Not Fully Address the Above-Listed Concerns  

On July 22, 2015, the Secretary of State’s Office forwarded an email from your Deputy General Counsel (“DGC”) to agency rules liaisons and other interested agency personnel. In that email, the DGC ostensibly provides clarification regarding the terms of the Executive Order. However, it is unclear whether this clarification has a practical legal effect limiting the Executive Order, as it is not contained within an Executive Order and thus appears subject to change by the Governor without notice. Further, the clarification does not address the concerns detailed above regarding the scope of the Executive Order and its implementation in practice.  

IV. Conclusion  

We believe the Executive Order’s intent appears to be aligned with the concerns of the Supreme Court and the FTC regarding the need to ensure active state supervision for potentially anticompetitive conduct by state regulatory boards. However, the Executive Order contains ambiguities that could insert confusion and inefficiency, thereby potentially impeding public protection. In addition, the Executive Order appears to impose some unnecessary restrictions that are not compelled by the Supreme Court’s decision, and such restrictions could further impair Oklahoma’s ability to protect the public.  

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8 The Supreme Court has provided guidance as to what clear articulation entails: “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.” N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. at 1112.
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In order for review by the Attorney General’s Office to have the intended effect of protecting board decisions from antitrust challenges, these ambiguities and potentially unnecessary restrictions should be evaluated and addressed via changes to the Executive Order. It may also be advisable to delay the implementation of the Executive Order until the FTC’s forthcoming guidance is issued. This will ensure that Oklahoma casts the most efficient net for protecting its state licensing boards, balancing the need for supervision with the role of boards in protecting the public.

At a time when the State of Oklahoma is adopting procedures to adhere to the Supreme Court decision, we are pleased to assist you and your staff in any manner that supports and advances the work of the Oklahoma State Board of Accountancy and the state of Oklahoma.

Sincerely,

Ken L. Bishop  
President & CEO

c: Jay Engelbach, Chair, Oklahoma Board of Accountancy  
   Randall Ross, Executive Director
May 2, 2016

The Hon. Larry C. Stutts
Alabama State Senate
Alabama State House
11 South Union Street, Suite 735
Montgomery, Al 36130 – 4600

Dear Senator Stutts:

The Federal Trade Commission ("FTC") Office of Policy Planning, Bureau of Competition, and Bureau of Economics (collectively, the "staff") appreciate your request for comments on Alabama House Bill 241 / Senate Bill 243 (collectively, the "Bill").¹ The Bill would permit any public university that operates a school of medicine to form a new type of corporation in Alabama, to be known as an "authority," in collaboration "with all types of health care providers."² FTC staff submit this letter to address the Bill’s attempt to exempt authorities, their "collaborative activities," and their "university affiliates, as well as the public or private entities and individuals with which they collaborate" from the federal antitrust laws.³

If effective, the broad antitrust exemption the Bill purports to provide would immunize anticompetitive mergers, price fixing, boycotts, and a wide variety of other anticompetitive conduct that harms consumers. Many health care provider collaborations can be efficient and beneficial, and no antitrust exemption is needed to permit them from occurring. Indeed, the Bill appears to reflect mistaken beliefs about the antitrust laws and the benefits of competition among health care providers. If enacted, the exemption would not improve patient care, but would likely raise health care costs, and decrease access to care. As we discuss below,

- First, the antitrust laws permit health care collaborations that do not harm consumers. As the FTC and its staff have consistently explained, many competitor collaborations – including health care provider collaborations and mergers – can be efficient and procompetitive, and are therefore lawful.

- Second, because the antitrust laws already permit procompetitive health care collaborations, the Bill’s purported “immunization” provision would foster anticompetitive mergers, collective negotiations, and other conduct that would not pass muster under the antitrust laws. Hence, the antitrust immunity contemplated by the Bill would likely increase health care costs,
diminish incentives to improve quality, and decrease access to health care services for Alabama consumers.

I. Interest and Experience of the Federal Trade Commission

Congress has charged the Federal Trade Commission (“FTC” or “Commission”) with enforcing the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The FTC also enforces Section 7 of the Clayton Act, which prohibits transactions that may substantially lessen competition or tend to create a monopoly. Competition is at the core of America’s economy, and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, greater access to goods and services, and innovation. Pursuant to its statutory mandate, the FTC seeks to identify business practices and governmental laws and regulations that may impede competition without also providing countervailing benefits to consumers.

Because of the importance of health care competition to the economy and consumer welfare, anticompetitive conduct in health care markets has long been a key focus of FTC law enforcement, research, and advocacy. Of particular relevance, the Commission and its staff have long advocated against federal and state legislative proposals that seek to create antitrust exemptions for collective negotiations by health care providers because such exemptions are likely to harm consumers.

II. Alabama House Bill 241 / Senate Bill 243

The Bill “would authorize public universities operating schools of medicine to form a new type of public corporation to be called an authority.” The Bill would grant numerous corporate powers, in addition to those generally assigned under Alabama corporate law, to such authorities. These corporations and their affiliates might extend well beyond what are traditionally thought of as academic medical centers, both geographically and in terms of the services they provide. For example, such a corporation would have the power to acquire, construct, equip, and operate those health care facilities it considers necessary or desirable, to create, establish, acquire, operate, or support subsidiaries and affiliates, either for-profit or nonprofit, to assist an authority in fulfilling its purposes, and to participate as a shareholder in a corporation, as a joint venturer in a joint venture, as a general or limited partner in a general or limited partnership, as a member of a nonprofit corporation, or as a member of any other lawful form of business organization, that provides health care or engages in activities related thereto.

Once established, an authority could accept grants or gifts from any source, and “the state, any university, any governmental entity, and any public corporation [would be] authorized to give, transfer, convey, or sell to any authority . . . with or without
consideration: (1) Any of its health care facilities and other properties, real or personal, and any funds and assets, tangible or intangible, relative to the ownership or operation of any such health care facilities,” among other assets.17 In addition, the Bill would vest the power of eminent domain in authorities.18

There appears to be no requirement that all facilities owned or operated by authorities, their subsidiaries, or their affiliates participate directly in medical education, research, or training, or that all such facilities engage directly in the provision of health care to Alabama citizens. Under the terms of the Bill, even the determination of what counts as a “health care facility” would be left to the authority’s discretion.19

As noted above, the Bill purports to insulate these many and diverse entities, and their conduct, against the safeguards and consumer protections provided by the antitrust laws.20

III. The Bill Is Unnecessary Because the Antitrust Laws Already Permit Efficient Health Care Collaborations

The Bill appears to assume that antitrust laws prohibit efficient health care mergers, acquisitions, and collaborations to the detriment of health care and consumers in Alabama. That assumption is wrong.

Cooperation among competing health care providers, including academic medical centers, often can benefit competition and health care consumers. Many of the Bill’s stated goals—e.g., the promotion of public health and the potential contributions of academic medical centers to it21—are not objectionable and frequently result from robust provider competition. Consequently, seeking to immunize the Bill’s proposed corporate authorities, their affiliates, and their subsidiaries from any potential antitrust liability seems unnecessary, and as explained in Part IV below, also likely harmful.

The antitrust laws already recognize that competitor collaborations can be procompetitive. As the FTC and the U.S. Department of Justice (collectively, “the Antitrust Agencies”) have repeatedly explained,22 this position extends to collaborations among competing health care providers. For example, the Antitrust Agencies have stated that “[n]ew arrangements and variations on existing arrangements involving joint activity by health care providers continue to emerge to meet consumers’, purchasers’, and payors’ desire for more efficient delivery of high quality health care services.”23 More recently, FTC officials have emphasized that

[t]he FTC supports the key aims of health care reform, and . . . recognize[s] that collaborative and innovative arrangements among providers can reduce costs, improve quality, and benefit consumers. But these goals are best achieved when there is healthy competition in provider markets fostering the sort of dynamic, high-quality, and innovative health care that practitioners seek and patients deserve.24
Turning specifically to mergers, the Horizontal Merger Guidelines issued jointly by the Antitrust Agencies recognize that merger-generated efficiencies “may result in lower prices, improved quality, enhanced service, or new products.” Those efficiencies are routinely assessed in merger investigations as part of an evaluation of the potential anticompetitive harm stemming from a merger or acquisition. For those reasons, and because many mergers do not threaten competition, the Antitrust Agencies have challenged few of the thousands of health care provider mergers, joint ventures, and other types of collaborations that have occurred in recent years, and have “brought those challenges only after rigorous analysis of market conditions showed that the acquisition was likely to substantially lessen competition.” These outcomes confirm that the antitrust laws already consider likely benefits, as well as competitive harms, and therefore already accomplish many of the Bill’s objectives.

Moreover, the goals of antitrust law are consistent with the policy goals of fostering the coordination and integration of health care delivery via collaboration among health care providers through, for example, the formation of Accountable Care Organizations. Despite what some health care industry participants have claimed, the antitrust laws do not prohibit the kinds of collaboration necessary to achieve the health care reforms contemplated by the Affordable Care Act and other policy initiatives. Specifically, antitrust does not impede Alabama health care providers from forming procompetitive collaborative arrangements that are likely to reduce costs and benefit health care consumers through increased efficiency and improved coordination of care.

IV. The Purported Antitrust Exemption Poses a Substantial Risk of Consumer Harm

FTC staff understand that Alabama may take particular interest in fostering its academic medical centers. Still, because antitrust law already allows efficient collaborations among health care providers that benefit consumers, the Bill’s exemption provisions would encourage mergers and conduct that likely would not pass muster under the antitrust laws because they would tend to reduce competition, raise prices, diminish incentives to improve quality, and provide little or no benefits to consumers.

Even though an “authority” can only be established by a public university that operates a school of medicine, the Bill does not require that the authority be limited to that school of medicine, its academic medical center, or the university community. To the contrary, as noted above, the Bill expressly contemplates that authorities will “collaborate with all types of health care providers,” and that they may “create, establish, acquire, operate, or support subsidiaries and affiliates, either for-profit or nonprofit, to assist an authority in fulfilling its purposes.” In fact, the Bill contemplates that a university may incorporate more than one authority, even if it operates only one academic medical center. Hence, any competitive harm inflicted by such agreements might originate from the loss of competition between two or more other hospitals, or other health care providers, and the effects might originate or spread well beyond a teaching hospital and its surrounding community. Any effort to shield such harmful conduct from antitrust
enforcement—including attempts to confer state action immunity—is likely to harm Alabama’s health care consumers, including patients as well as both public and private third-party payors.

In its 2007 report, the congressionally established, bipartisan Antitrust Modernization Commission succinctly stated a widely recognized proposition: “[t]ypically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality and reduced innovation.”

Yet, in the face of this proposition, health care providers repeatedly have sought antitrust immunity for various forms of joint conduct, including agreements on the prices they will accept from payors, asserting that immunity for joint bargaining is necessary to “level the playing field” so that providers can create and exercise countervailing market power.

Here, at least with respect to antitrust treatment of health care providers, we disagree with the Bill’s assertion that “academic medical centers often are at a competitive disadvantage as a result of limitations on their ability to form networks and delivery systems and otherwise collaborate with other health care providers to form joint ventures or other entities with shared ownership.” No such competitive disadvantage is imposed by the federal antitrust laws. If the legislature finds that Alabama’s corporate law, or its university charters, unduly burden the state’s academic medical centers, we respectfully suggest that you seek more targeted, and less competitively harmful, ways to reform those provisions.

V. Antitrust Exemptions Deprive Consumers of the Substantial Benefits That Competition Provides in Health Care

The U.S. Supreme Court recently reiterated its long-standing position that, “given the antitrust laws’ values of free enterprise and economic competition, ‘state-action immunity is disfavored.’” As the Court recognized, this general principle applies with full force in the health care industry, where consumers benefit from vigorous competition, and where anticompetitive conduct can cause significant harm. As discussed above, antitrust law permits many forms of procompetitive collaborations among health care providers, and seeks only to protect health care consumers from anticompetitive forms of joint conduct that are likely to harm them. To confer antitrust immunity on provider collaborations, regardless of whether they are procompetitive or anticompetitive, thus would be overbroad and likely to harm consumers.

Empirical evidence on competition in health care markets generally has demonstrated that consumers benefit from lower prices when provider markets are more competitive. Retrospective studies of the effects of provider consolidation by FTC staff and independent scholars suggest that, “increases in hospital market concentration lead to
increases in the price of hospital care.” Moreover, additional empirical evidence suggests that, “[a]t least for some procedures, hospital concentration reduces quality.”

For example, recent research indicates that “health spending on the privately insured varies by more than a factor of three across the 306 hospital referral regions (HRRs) in the US.” For individual procedures, hospital prices can vary even more. The same study found that, “[h]ospitals’ negotiated transaction prices routinely vary by over a factor of eight or more across the nation and by a factor of three within HRRs.” Different factors may contribute to this variation but “hospital market structure stands out as one of the most important factors associated with higher prices, even after controlling for costs and clinical quality.”

Academic medical centers are no less responsive than other health care providers to changes in market structure and conditions, and therefore may respond to changes in market concentration in ways that harm consumers. For example, a retrospective study of a merger involving an academic medical center found that “four of the five commercial insurers experienced large and statistically significant price increases at the merged hospital.” Moreover, those insurers “were forced to raise their prices by at least 10 percentage points more at the merged hospital relative to other Chicago area hospitals.” Furthermore, the study found that the relative price increase could not be explained by changes in case mix, patients’ severity of illness, payer mix, or teaching intensity.

Empirical evidence also suggests that greater competition incentivizes providers to become more efficient and innovative. A recent study shows that hospitals faced with a more competitive environment have better management practices. In sum, ample evidence exists that competition can and does work in health care markets.

The FTC has engaged in significant enforcement efforts to prevent anticompetitive behavior in health care provider markets precisely because consumers benefit from competition and, conversely, are harmed by anticompetitive mergers and conduct.

VI. Conclusion

Competitor collaborations, mergers, and acquisitions can be procompetitive, benefitting patients and payors alike. Interest in such collaboration among health care providers is understandable and, indeed, important. As we have explained both in this comment and in numerous and detailed guidance documents, however, the antitrust laws already permit efficient, pro-consumer collaborations among competing health care providers, and already permit efficient and pro-consumer mergers. The Bill’s apparent attempt to confer antitrust immunity is therefore unnecessary for collaborations that would benefit Alabama’s citizens. If such immunity were conferred, it would prevent antitrust authorities from scrutinizing, moderating, or preventing anticompetitive mergers and conduct that would seriously harm Alabama consumers. In some cases, it also could encourage groups of private health care providers to engage in blatantly anticompetitive conduct.
We appreciate your consideration of these issues.

Respectfully submitted,

Marina Lao, Director
Office of Policy Planning

Ginger Jin, Director
Bureau of Economics

Deborah Feinstein, Director
Bureau of Competition


2 Alabama House Bill 241 / Senate Bill 243, proposed § 3(b)(2) (the companion bills will be cited hereinafter as Senate Bill 243).

3 Id.


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

7 See Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978) (The antitrust laws reflect “a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).


9 See, e.g., FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE (“DOJ”), IMPROVING HEALTH CARE:
A DOSE OF COMPETITION (2004), http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf [hereinafter FTC & DOJ, IMPROVING HEALTH CARE]. The report was based on, among other things, 27 days of formal hearings on competitive issues in health care, an FTC-sponsored workshop, independent research, and the Agencies’ enforcement experience.


12 Alabama Senate Bill 243, at Synopsis.

13 Id. § 9(a)(3).

14 Id. § 9(a)(8).

15 Id. § 9(a)(9) (emphasis added).

16 Id. § 9(a)(14).

17 Id. § 18(a).

18 Id. § 10.

19 Id. § 2(6) (“A determination by a board that an asset constitutes a health care facility shall be conclusive, absent manifest error.”).

20 Id. § 19(3) (“[T]he collaborative activities expressly authorized by this act, an authority and its university affiliates, as well as the public or private entities and individuals with which they collaborate, shall be immunized from liability under the federal and state antitrust laws.”).

21 Id. § 3(a)(1)–(3).


24 Edith Ramirez, Antitrust Enforcement in Health Care – Controlling Costs, Improving Quality, 371 NEW ENG. J. MED. 2245 (2014), http://www.nejm.org/doi/pdf/10.1056/NEJMp1408009. See also Deborah L. Feinstein, Dir., Bureau of Competition, Remarks at the Fifth National Accountable Care Organization Summit in Washington, DC: Antitrust Enforcement in Health Care: Proscription, not Prescription, 26 (June 19, 2014), https://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf (“We continue to hear claims that antitrust principles are at odds with the mandates of the Affordable Care Act. I believe these arguments misunderstand the focus and intent of federal antitrust enforcement. . . . In the final analysis, our actions make clear the important role of antitrust in health care policy. Ultimately, we believe that the imperatives of developing lower cost, higher quality health care can coexist with continued enforcement of the antitrust laws.”).


26 Feinstein, supra note 24, at 9.

27 These widely shared policy goals are central to the Accountable Care Organizations contemplated under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3022, 14 Stat. 119, 395 (“Affordable Care Act”). Ctrs. Medicare & Medicaid Servs., Fast Facts, All Shared Savings Program and Pioneer ACOs Combined (Apr. 2015) (404 shared savings ACOs and 19 Pioneer ACOs with 7.92 million assigned beneficiaries in 49 states plus Washington, DC and Puerto Rico). The FTC has not challenged any of these 423 ACOs. See also Medicare Program; Medicare Shared Savings Program: Accountable Care Organizations, 76 Fed. Reg. 67,802, 67,822 (Nov. 2, 2011) (codified at 42 C.F.R. pt. 425) (“[T]he intent of the Shared Savings Program and the focus of antitrust enforcement are both aimed at ensuring that collaborations between health care providers result in improved coordination of care, lower costs, and higher quality, including through investment in infrastructure and redesigned care processes for high quality and efficient service delivery.”).


29 See id.; Feinstein, supra note 24. As Feinstein points out, antitrust challenges to mergers involving health care providers of complementary – or “vertical” – services are rare. For example, the FTC has not once “challenged a purely vertical merger involving a hospital and a physician practice.” Feinstein, supra note 24, at 8.

30 Alabama Senate Bill 243, § 9(a)(8).
Id. § 4(b).


In general, the Supreme Court has flatly rejected the notion that members of the learned professions should be free from antitrust scrutiny: “The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act . . . nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions.” Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975); see also Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978) (Supreme Court rejection of argument that competition itself poses a “potential threat . . . to the public safety”); FTC v. Indiana Fed’n of Dentists, 476 U.S. 447 (1986).

For example, the legislature might consider whether some of the corporate powers the Bill would vest in the authorities—such as the power of eminent domain—would serve not to level the competitive playing field but further distort it, potentially in ways that are both costly and largely unrelated to academic medicine.


Phoebe Putney, 133 S. Ct. at 1015 (state legislature’s objective of improving access to affordable health care does not logically suggest contemplation of anticompetitive means, and “restrictions [imposed upon hospital authorities] should be read to suggest more modest aims.”). As the U.S. Court of Appeals for the Fourth Circuit has observed, “[f]orewarned by the [Supreme Court’s] decision in National Society of Professional Engineers . . . that it is not the function of a group of professionals to decide that competition is not beneficial in their line of work, we are not inclined to condone anticompetitive conduct upon an incantation of ‘good medical practice.’” Virginia Acad. of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476, 485 (4th Cir. 1980).

39 Gaynor & Town, Impact of Hospital Consolidation, supra note 38, at 1 (citing, e.g., Deborah Haas-Wilson & Christopher Garmon, Hospital Mergers and Competitive Effects: Two Retrospective Analyses, 18 INT’L J. ECON. BUS. 17, 30 (2011) (post-merger review of Agency methods applied to two hospital mergers; data “strongly suggests” that large price increases in challenged merger be attributed to increased market power and bargaining leverage); see also Leemore Dafny, Estimation and Identification of Merger Effects: An Application to Hospital Mergers, 52 J. L. & ECON. 523, 544 (2009) (“hospitals increase price by roughly 40 percent following the merger of nearby rivals”); Joseph Farrell et al., Economics at the FTC: Retrospective Merger Analysis with a Focus on Hospitals, 35 REV. INDUS. ORG. 369 (2009) (mergers between not-for-profit hospitals can result in substantial anticompetitive price increases); Cory Capps & David Dranove, Hospital Consolidation and Negotiated PPO Prices, 23 HEALTH AFFAIRS 175, 179 (2004) (“Overall, our results do not support the argument that efficiencies from consolidations among competing hospitals lead to lower prices. Instead, they are broadly consistent with the opposing view that consolidations among competing hospitals lead to higher prices.”)).


41 Cooper et al., supra note 38, at 2.

42 Id. at 33.

43 Id.

44 Haas-Wilson & Garmon, supra note 39, at 27.

45 Id. at 28.

46 Id. at 30.

47 See, e.g., Nicholas Bloom et al., The Impact of Competition on Management Quality: Evidence from Public Hospitals, 82 REV. ECON. STUDIES 457, 457 (2015) (“We find that higher competition results in higher management quality.”).

48 Indeed, similar arguments made by engineers and lawyers in defense of anticompetitive agreements on price—that competition fundamentally does not work in certain markets, and in fact is harmful to public policy goals—have been rejected by the courts, and private restraints on competition have been condemned. See, e.g., FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 424 (1990); Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 695 (1978).

49 See note 8 supra.
By His Excellency
CHARLES D. BAKER
GOVERNOR

EXECUTIVE ORDER NO. 567

TO ENSURE PROPER REVIEW OF THE REGULATION OF PROFESSIONAL LICENSING BY INDEPENDENT BOARDS

WHEREAS, the Commonwealth regulates a wide variety of specialized professions by vesting oversight authority in independent licensing boards consisting of persons engaged in active practice in those professions;

WHEREAS, these independent licensing boards are charged with protecting the health, safety, and welfare of the public by establishing requirements for qualification for licensure in the professions under their supervision and by establishing policies to ensure that practice within these fields will be safe and conducted in accordance with appropriate professional standards;

WHEREAS, in order to fulfill these responsibilities, independent licensing boards must establish rules, regulations, and policies to ensure that persons and entities practicing within each field have adequate training, education, and qualifications, and independent licensing boards must also monitor actual practice within these fields to ensure that persons licensed to practice do so in a manner consistent with appropriate professional standards;

WHEREAS, in order to ensure that these licensing boards, while independent, act in accord with policies of the Commonwealth established by the General Court and the executive department, the General Court has specified in General Laws Chapter 112, Section 1 and Chapter 13, Section 10A, that the work of certain independent licensing boards be supervised by either the director of professional licensure or the commissioner of public health, as appropriate to each field of practice;

WHEREAS, the General Court, by enacting General Laws Chapter 93, has recognized the value of free and open competition in ensuring economic growth and advancing the general welfare; and
WHEREAS, the Commonwealth’s authority to regulate, limit, or restrict the practice of a profession in order to protect the health, safety, and welfare of the public should be exercised in consideration of the public’s broad interest in maintaining meaningful competition in the relevant market for professional services;

NOW, THEREFORE, I, CHARLES D. BAKER, Governor of the Commonwealth of Massachusetts, by virtue of the authority vested in me by the Constitution, Part 2, c. 2, Section 1, Art. 1, do hereby order as follows:

Section 1. I instruct the director of professional licensure and the commissioner of public health to include as part of their active supervision of these boards a careful review of any act, rule, regulation, or policy proposed by an independent licensing board that has the potential to reduce competition in a relevant market for professional services. Where an act, rule, regulation, or policy proposed by an independent licensing board may have an anti-competitive effect, I direct the director of professional licensure or the commissioner of public health to consider whether the proposed act, rule, regulation, or policy furthers an important policy goal of the Commonwealth as established by the General Court and the executive department notwithstanding the proposal’s potential anti-competitive effect. Ensuring the health, safety, and welfare of the public is an important policy goal for both the General Court and the executive department.

I further instruct the director of professional licensure or the commissioner of public health to disapprove any act, rule, regulation, or policy proposed by an independent licensing board that may have an anti-competitive effect where the proposal does not further another important policy goal of the Commonwealth. In such a circumstance, the director of professional licensure or the commissioner of public health may advise the issuing licensing board to amend its proposed course of action, and the director or the commissioner may then approve a modified proposal from the independent licensing board. An act, rule, regulation, or policy that is disapproved by the director or the commissioner on these grounds shall not be published, implemented, facilitated, or advanced by any employee or agent of the Commonwealth.

Section 2. The director of professional licensure or the commissioner of public health shall give particular attention to the possibility of anti-competitive consequences when an act, rule, regulation, or policy proposed by an independent licensing board falls into one or more of the following categories:

a. rules regulating or actions affecting scope of practice
b. requirements for licensure
c. price regulations
d. restrictions on advertising or soliciting customers
e. territorial allocations
f. restrictions on market participation (dealings with non-licensees); or
g. restrictions on competitive bidding

The director of professional licensure and the commissioner of public health may consult the Attorney General when there is a question whether an act, rule, regulation, or policy
proposed by an independent licensing board may have an anti-competitive effect. The director and the commissioner may also seek guidance from the Attorney General in fulfilling any of their duties under this Executive Order.

Section 3. After reviewing any act, rule, regulation, or policy proposed by an independent licensing board under this Executive Order, the director of professional licensure or the commissioner of public health shall provide to the licensing board a written statement indicating whether the director or commissioner approves or disapproves the proposal. A written statement of approval shall identify the policy goals served by the proposal and explain why, in the determination of the director or the commissioner, those goals justify adoption notwithstanding the potential for some anti-competitive effect. A written statement of disapproval shall explain the reasons relied on by the director or commissioner in disapproving the proposal.

The director of professional licensure and the commissioner of public health shall provide to the relevant licensing board a written statement of approval or disapproval for any act, rule, regulation, or policy reviewed under this order. Statements of approval and disapproval shall be available for public inspection.

Section 4. General Laws Chapter 112, Section 1 directs the director of professional licensure and the commissioner of public health to report to the Governor on the work of the independent licensing boards under their supervision as the Governor may require. I hereby instruct the director and the commissioner to report to me any instance in which an independent licensing board under their supervision persists in pursuing a course of action that the director or the commissioner has disapproved in acting under this Order.

Section 5. Consistent with the provisions of Chapter 112, Section 1, under this Executive Order the director of professional licensure shall be responsible for approving or disapproving any act, rule, regulation, or policy that is proposed by any of the boards of registration and examination listed on Schedule A and that falls within the categories outlined in section 2 of this Order.

Consistent with the provisions of Chapter 112, Section 1 and Chapter 13, Section 10A, the commissioner of public health shall be responsible for approving or disapproving any such act, rule, regulation, or policy proposed by any of the boards listed on Schedule B.

I urge other independent licensing boards not addressed in Chapter 112, Section 1 or subject to a similar form of State supervision to comply with the intent of this Order by seeking review from an appropriate State official prior to taking any act or issuing any rule, regulation, or policy that may fall into one or more of the categories listed in Section 2 of this Order. The attached Schedule C identifies State officials qualified to provide review for certain of these other independent licensing boards.

Schedules A and B shall be updated as necessary to include any additional independent licensing boards that the General Court may in the future place under the supervision of the director of professional licensure or the commissioner of public health. Schedule C shall be
updated as necessary to identify a State official qualified to review acts, rules, regulations, or policies proposed by other independent licensing boards.

The director of professional licensure and the commissioner of public health may delegate some or all of their responsibilities under this Order to appropriate representatives. The director may request that the Secretary of Housing and Economic Development or his designee assume his responsibilities and the commissioner may request that the Secretary of Health and Human Services or her designee assume her responsibilities under this Order when the circumstances could reasonably create the appearance of a conflict of interest because the director or the commissioner is a member of the same profession that is subject to the act, rule, regulation, or policy that is presented for review.

Given at the Executive Chamber in Boston this 28th day of March in the year of our Lord two thousand sixteen and of the Independence of the United States of America two hundred and forty.

CHARLES D. BAKER
GOVERNOR
Commonwealth of Massachusetts

WILLIAM FRANCIS GALVIN
Secretary of the Commonwealth

GOD SAVE THE COMMONWEALTH OF MASSACHUSETTS
Schedule A

Boards Under the Supervision of the Director of Professional Licensure

1. Board of Allied Health Professions
2. Board of Registration of Allied Mental Health and Human Services Professions
3. Board of Registration of Architects
4. Board of Registration of Chiropractors
5. Board of Registration of Cosmetology and Barbering
6. Board of Registration of Dietitians and Nutritionists
7. Board of Registration of Dispensing Opticians
8. Board of Certification of Operators of Drinking Water Supply Facilities
9. Board of State Examiners of Electricians
10. Board of Registration of Professional Engineers and of Land Surveyors
11. Board of Registration in Embalming and Funeral Directing
12. Board of Certification of Health Officers
13. Board of Registration of Hearing Instrument Specialists
14. Board of Registration of Home Inspectors
15. Board of Registration of Landscape Architects
16. Board of Registration of Massage Therapy
17. Board of Registration in Optometry
18. Board of State Examiners of Plumbers and Gas Fitters
19. Board of Registration in Podiatry
20. Board of Registration of Psychologists
21. Board of Public Accountancy
22. Board of Registration of Real Estate Appraisers
23. Board of Registration of Real Estate Brokers and Salespersons
24. Board of Registration of Sanitarians
25. Board of Examiners of Sheet Metal Workers
26. Board of Registration of Social Workers
27. Board of Registration for Speech-Language Pathology and Audiology
28. Board of Registration in Veterinary Medicine
Schedule B

Boards Under the Supervision of the Commissioner of Public Health

1. Board of Registration in Nursing
2. Board of Registration in Pharmacy
3. Board of Registration of Physician Assistants
4. Board of Registration of Perfusionists
5. Board of Registration of Nursing Home Administrators
6. Board of Registration in Dentistry
7. Board of Registration of Respiratory Therapists
8. Board of Registration in Medicine
Schedule C

State Officials Qualified to Review Actions by Other Independent Licensing Boards

Director of Professional Licensure

1. Automobile Damage Appraiser Licensing Board
2. Commissioners of Pilots

Commissioner of Public Health

1. Board of Genetic Counselors
2. Board of Certification of Community Health Workers

Commissioner of the Department of Public Safety

1. Board of Elevator Regulations
2. Board of Elevator Appeals
3. Board of Elevator Examiners
4. Bureau of Pipefitters, Sprinkler Fitters, and Refrigeration Technicians
5. Board of Building Regulations and Standards
6. Recreational Tramway Board