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Subcommittee on Antitrust, Competition Policy and Consumer Rights

"License to Compete: Occupational Licensing and the State Action Doctrine"

February 2, 2016

Chairman Lee, Ranking Member Klobuchar, and Members of the Committee, thank you for the opportunity to appear before you today. I am Commissioner Maureen K. Ohlhausen, and I am pleased to join you to discuss competition perspectives on the licensing and regulation of occupations, trades, and professions.[1]

The Commission and its staff recognize that occupational licensing can offer many important benefits. It can protect consumers from health and safety risks and support other valuable public policy goals. However, not all licensure is warranted. More importantly, in our experience, not every restriction imposed on an occupation may yield benefits that sufficiently 39 ( )Tj 0.245 0

benefits. Typically, we urge policy makers to integrate competition concerns into their decision-making process—specifically, that they consider whether the restrictions are: (1) targeted to address specific risks of harm to consumers; (2) likely to have a significant and adverse effect on competition; and (3) narrowly tailored to minimize harm to competition, meaning less restrictive alternatives are not available or feasible. [3]

Second, the Commission has employed its enforcement authority to challenge anticompetitive conduct by regulatory boards composed of private actors. These enforcement actions have included challenges to agreements among competitors that restrain truthful and non-deceptive advertising, price competition, and contracting or other commercial practices. The Commission has also challenged direct efforts to prohibit competition from new rivals where there is not a legitimate justification for doing so. The Commission can bring these actions when the challenged conduct falls outside of the scope of protected "state action."

Principles of federalism limit the application of the federal antitrust laws when restraints on competition are imposed by a state. A state acting as a sovereign may impose occupational licensing or other restrictions that displace competition in favor of other goals and values that are important to its citizens. The so-called state action doctrine was first articulated by the Supreme Court in 1943 and is rooted in the understanding that Congress, in passing the Sherman Act, did not intend to impinge upon the sovereign regulatory power of the states.[4] However, as explained below, that does not mean that all state regulators are exempt from antitrust scrutiny. The Court has cautioned that "[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]."[5]

As one of two federal agencies charged with enforcing U.S. antitrust laws, the Commission is committed to ensuring that the state action doctrine remains true to its doctrinal foundations. As discussed below, the Commission has played an active role in the development of this doctrine, including early litigation against a tobacco board of trade[6] and a trade association for common carriers,[7] and continuing with cases in the 1990s that included an important ruling from the Supreme Court in the area of collective rate-making.[8] Then in 2003, Commission staff issued a report that outlined concerns about certain over-broad judicial interpretations of the state action doctrine, especially in the area of governmental entities composed of market participants.[9] Through enforcement actions challenging the conduct of state licensing boards, the Commission has helped

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[3] For an overview of the Commission's advocacy efforts in the area of occupational licensing and regulation, *ε* , 113th Cong. 14 (2014) (statement of Fed. Trade Comm'n on Competition and the Potential Costs and Benefits of Professional Licensure), https://www.ftc.gov/public-statements/2014/07/prepared-statement-federal-trade-commission-competition-potential-costs.

[4] Parker v. Brown, 317 U.S. 341 (1943).

[5] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980).

[6] Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959).

[7] Mass. Furniture & Piano Movers Ass'n, Inc. v. FTC, 773 F.2d 391 (1st Cir. 1985).

[8] FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992).

[9] FTC Office of Policy Planning, (2003), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf.

to define the contours of the state action doctrine for actions taken by state boards consisting of private actors, culminating in last year's decision by the Supreme Court in *N*[illegible].[10]

This testimony focuses on the Commission's competition enforcement work relating to regulatory boards and will highlight a few recent competition advocacy efforts related to state des1(t)-1(o)169.22s61( )-I.2 -0 0 455 0 Td (.)Tj EM0.er st'

licensing system for dentists. A majority of the members of the Board were themselves practicing dentists. As such, they had a private financial incentive to limit competition from non-dentist providers of teeth whitening services. When non-licensed teeth whitening practitioners began offering teeth whitening services at lower prices than dentists, the Board acted

2015, FTC staff issued guidance on how states can satisfy the "active supervision" requirement of the state action doctrine with respect to regulatory boards controlled by market participants.[31] Although this guidance does not have the force of law, it may help state officials determine the appropriate level of oversight needed for a regulatory board controlled by market participants to benefit from state action immunity.

The staff guidance emphasizes that antitrust analysis – including the applicability of the state action defense – is fact-specific and context-dependent. A one-size-fits-all approach to active supervision is neither possible nor warranted. Moreover, 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.

III. Antitrust Analysis of Restraints Imposed by Regulatory Boards Not Protected by the State Action Doctrine

Where the state action defense is not available, conduct taken by regulatory boards that are controlled by competing market participants is subject to traditional antitrust principles. With respect to joint conduct among competitors, a violation of Section 1 of the Sherman Act requires proof of two elements: (1) a contract, combination, or conspiracy; (2) that imposes an unreasonable restraint of trade. Unless the restraint is per se illegal, the Commission applies the antitrust "rule of reason," assessing whether a restraint is unreasonable by examining both the procompetitive benefits and the anticompetitive effects of the agreement. In general, "reasonable"

Commission considered whether the dentist-members of the Board acted by agreement (or in concert) to exclude non-dentists from providing teeth whitening services in North Carolina. The Commission concluded that these dentist-members had acted in concert.[34] Indeed, the record showed that on several occasions, dentist-members of the Board discussed teeth whitening services provided by non-dentists and then voted to take action to restrict these services.

The Commission next evaluated the likely impact of the Board's actions upon consumers and co

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 certain additional restrictions on APRN licenses, such as mandatory supervision arrangements, 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 such as the Institute of Medicine have concluded that APRNs are safe and effective as independent providers of many health care services within the scope of their training, licensure, certification, and current practice.[38] Therefore, staff have suggested that states carefully consider whether there is any health or safety justification for mandatory physician supervision of APRNs.

In some cases, the FTC has expressed the view that there is no plausible public benefit justifying licensure restrictions. For example, in 2011, the Commission filed an amicus brief in [illegible],[39] clarifying the meaning and intent of the Commission's "Funeral Rule." The plaintiffs, monks at St. Joseph Abbey who built and so]TJ76 Tmsio my whi m caTJ76 er2(l)-2(e)-[(c)

supports the entry of these new sources of competition into the market, others have maintained existing regulations that disproportionately affect new entrants or sought to adopt new regulations that would impede the development of these new services seemingly without valid justification. The FTC has urged these jurisdictions to carefully consider the adverse consequences of limiting competition and examine the basis for any restrictions advocated by incumbent industry participants.[41]

V. Conclusion

State regulation of occupations and professions can serve important public policy goals