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

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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.

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.[2] As you know, one of these cases, *North Carolina State Board of Dental Examiners*,[3] 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).

[5] 15 U.S.C. § 46 (2006).

economic and policy studies,[6] as well as focused inquiries into regulations applying to particular professions such as nursing,[7] eye doctors and vendors of optical goods,[8] legal services,[9] and the real estate brokerage industry.[10] 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.[11] 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

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[6] *See, e.g.*, CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON., FED. TRADE COMM'N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION, 4-12 (1990), http://www.ramblemuse.com/articles/cox_foster.pdf.

[7] FED. TRADE COMM'N STAFF, POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES (2014), http://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf.

[8] FED. TRADE COMM'N, COMPETITION IN THE SALE OF RX CONTACT LENSES: AN FTC STUDY (2005), http://www.ftc.gov/sites/default/files/documents/reports/strength-competition-sale-rx-contact-lenses-ftc-study/050214contactlensrpt.pdf; RONALD S. BOND ET AL., FED. TRADE COMM'N, STAFF REPORT ON THE EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY (1980), http://www.ftc.gov/sites/default/files/documents/reports/effects-restrictions-advertising-and-commercial-practice-professions-case-optometry/198009optometry.pdf.

[9] JACOBS ET AL., CLEVELAND REGIONAL OFFICE & BUREAU OF ECONOMICS, FED. TRADE COMM'N, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (1984).

[10] FED. TRADE COMM'N & U.S. DEP'T JUSTICE, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (2007), http://www.ftc.gov/sites/default/files/documents/reports/competition-real-estate-brokerage-industry-report-federal-trade-commission-and-u.s.department-justice/v050015.pdf.

[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.[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.[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.[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.[15] For example, one recent study suggests that licensing an occupation at the state level

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[12] Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUSTRIAL RELATIONS 2 (2010).

[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. *See, e.g.*, COX & FOSTER, *supra* note 6, at 4-12.

[14] George J. Stigler, *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.").

[15] Regarding licensure generally, see Morris M. Kleiner, *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."); *see also* COX & FOSTER, *supra* note 6, at 21-36.

is associated with a 17% increase in earnings by members of the occupation.[16] In addition, although licensure may be designed to provide consumers with minimum quality assurances, licensure provisions do not always increase service quality.[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.[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.

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

[17] *See, e.g.*, Morris M. Kleiner & Robert T. Kurdle, *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."); *see also* COX & FOSTER, *supra* note 6, at 21-29.

[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. *See generally* POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES, *supra* note 7, at 2, 20-26; *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.[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?

[19] For a general discussion of the FTC's "policy research and development" mission and the role of the advocacy program, see, e.g., WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 92-109; 121-24 (2009), http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf.*See also* James C. Cooper, Paul A. Pautler, & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005); Maureen K. Ohlhausen, *Identifying Challenging, and Assigning Political Responsibility for State Regulation Restricting Competition*, 2 COMPETITION POL'Y INT'L 151, 156-7 (2006) (competition advocacy "beyond enforcement" of the antitrust laws), https://www.competitionpolicyinternational.com/file/view/6289; Tara Isa Koslov, *Competition Advocacy at the Federal Trade Commission: Recent Developments Build on Past Success*, 8 CPI ANTITRUST CHRON. 1 (2012), https://www.competitionpolicyinternational.com/file/view/6732.

- 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? [20]

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[21] and amicus curiae briefs[22] to state and self-regulatory entities on competition policy and antitrust law issues relating to such professionals as real estate brokers,[23] electricians,[24]

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[20] For a more complete exposition of this framework, see POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES, *supra* note 7, at 16-17.

[21] Many of these advocacy comments can be found at http://www.ftc.gov/policy/advocacy/advocacy-filings.

[22] *See, e.g.*, Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Arguments to Vacate Opinion 39 of the Committee on Attorney Advertising Appointed by the Supreme Court of New Jersey, 190 N.J. 250 (N.J. 2007), http://www.ftc.gov/policy/advocacy/amicus-briefs/2007/05/re-petition-review-committee-attorney-advertising-opinion-39; Brief *Amici Curiae* of the United States of America and the Federal Trade Commission on Review of UPL Advisory Opinion No. 2003-2, 277 Ga. 472 (Ga. 2003). For access to the FTC's other recent amicus briefs, see http://www.ftc.gov/policy/advocacy/amicus-briefs.

[23] FTC and Department of Justice Comment to Governor Jennifer M. Granholm Concerning Michigan H.B. 4416 to Impose Certain Minimum Service Requirements on Real Estate Brokers (2007),

accountants,[25] lawyers,[26] dentists[27] and dental hygienists,[28] nurses,[29] eye doctors and opticians,[30] and veterinarians.[31] 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

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http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-governor-jennifer-m.grahholm-concerning-michigan-h.b.4416-impose-certain-minimum-service-requirements-real-estate-brokers/v050021.pdf.

[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), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.glen-repp-concerning-texas-h.b.252-establish-system-voluntarily-license-electricians-and-electrical-contractors/v890034.pdf.

[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), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-honorable-jean-silver-concerning-washington-administrative-code-4-25-710-require/v960006.pdf; FTC Staff Comment to the Hon. Jim Hill Concerning Oregon H.B. 2785 to Propose Certain Restrictions on Competition Among Accountants (1989), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.jim-hill-concerning-oregon-h.b.2785-propose-certain-restrictions-competition-among-accountants/v890073.pdf.

[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), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-supreme-court-tennessee-concerning-proposed-amendments-tennessee-rules-professional/130125tennesseadvertisingletter.pdf.

[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), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-letter-nc-representative-stephen-laroque-concerning-nc-house-bill-698-and-regulation/1205ncdental.pdf.

[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), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-maine-board-dental-examiners-concerning-proposed-rules-allow-independent-practice/111125mainedental.pdf.

[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), http://www.ftc.gov/os/2011/01/1101ncopticiansletter.pdf; Letter from Maureen K. Ohlhausen *et al*. to Arkansas State Representative Doug Matayo (Oct. 4, 2004), http://www.ftc.gov/os/2004/10/041008matayocomment.pdf. *Cf.* FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), http://www.ftc.gov/be.v020007.htm.

[31] FTC Staff Comment Before the Virginia Board of Veterinary Medicine Concerning Regulations to Remove Restrictions on Advertising and Non-Veterinarian Relationships (1996), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-virginia-board-veterinary-medicine-concerning-regulations-remove-restrictions/p864641.pdf.

registered nurses (APRNs).[32] 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.[33] 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*,[34] clarifying the meaning and intent of the

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[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.").

[34] Brief for the Federal Trade Commission as Amicus Curiae Supporting Neither Party, St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013).

Commission's "Funeral Rule."[35] 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."[36]

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.[37] Although the standard would not be binding on state legislatures, FTC staff were

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[35] 47 Fed. Reg. 42260 (1982).

[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).

[37] FTC Staff Comment Before the Commission on Dental Accreditation Concerning Proposed Accreditation Standards for Dental Therapy Education Programs (2013), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-commission-dental-accreditation-concerning-proposed-accreditation-standards-dental/131204codacomment.pdf.

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

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[38] *See, e.g.*, FTC Staff Comment to the Honorable Brendan Reilly Concerning Chicago Proposed Ordinance O2014-1367 Regarding Transportation Network Providers (2014), http://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-brendan-reilly-concerning-chicago-proposed-ordinance-o2014-1367/140421chicagoridesharing.pdf.Regarding new methods of retail sales of automobiles, see, e.g., FTC Staff Comment Before the Missouri House of Representatives Regarding House Bill 1124, Which Would Expand the Current Prohibition on Direct-to-Consumer Sales by Manufacturers of Automobiles (2014), http://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/05/ftc-staff-comment-missouri-house-representatives-0.

enforcement authority to challenge anticompetitive conduct by independent regulatory boards that falls outside of the scope of protected "state action."[39] 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.[40]

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.[41] 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.

[41] In re South Carolina State Board of Dentistry, Complaint (2003) (Dkt. No. 9311), http://www.fic.gov/os/2003/09/socodentistcomp.pdf. *See also* In re South Carolina State Board of Dentistry, Opinion and Order of the Commission (2004) (Dkt. No. 9311), http://www.fic.gov/os/adjpro/d9311/04072Scommissionopinion.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 optometry[48] and dentistry[49] have sought to suppress information that could be useful to consumers of their services. The FTC has also challenged

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[42] In re South Carolina State Board of Dentistry, Decision and Order (2007) (Dkt. No. 93 I I), *available at* http://www.fic.gov/os/adjpro/d93111070911decision.pdf.

[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).

[49] Louisiana State Bd. of Dentistry, 106 F.T.C. 65 (1985) (consent order).

advertising restraints imposed by private self-regulatory associations. In the seminal case of *American Medical Association* ("AMA"),[50] 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.

[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).