UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Economics
Bureau of Competition

March 25, 2016

The Honorable Tom Burch
House of Representatives
Kentucky General Assembly
4012 Lambert Avenue
Louisville, KY 40218

Re: Kentucky House Bill 77

Dear Representative Burch:

The staffs of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition[1] appreciate the opportunity to respond to your invitation for comments on Kentucky House Bill 77 ("HB 77" or the "Bill"). As described in your letter, HB 77 "would recognize and regulate denturists."[2] Denturists are trained to make and fit removable partial and full dentures ("dentures"). Currently, Kentucky patients in need of dentures must obtain them through a dentist.[3]

FTC staff recognize the critical importance of patient health and safety. We also appreciate the role of state legislators and regulators in determining the optimal balance of policy priorities when defining the appropriate scope of practice for health care professionals, including dentists. We note, however, that unnecessarily broad scope of practice restrictions can impose significant competitive costs on health care consumers and other payors.[4] For this reason, we generally have encouraged legislatures and regulators to avoid restrictions that are not necessary

[1] This staff letter expresses the views of the FTC's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The letter does not necessarily represent the views of the FTC or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

[2] Letter from the Tom Burch, State Representative, Ky. General Assembly, to Ellen Connelly, Office of Policy Planning, Fed. Trade Comm'n (Feb. 11, 2016).

[3] *See* KY. REV. STAT. ANN. § 313.010(11) (2015) (defining the practice of dentistry as including work done to provide patients with removable dentures).

[4] For example, a 2014 FTC staff policy paper details the competition concerns with unnecessarily broad scope of practice regulations governing advanced practice nurses. *See* FED. TRADE COMM'N STAFF, POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES (2014), https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf [hereinafter FTC STAFF POLICY PERSPECTIVES].

to address well-founded patient safety concerns.[5] It is based on this longstanding policy approach that staff provide these comments for your consideration. We encourage the legislature to include a consideration of the potential benefits of competition in its analysis of HB 77, in addition to the important due diligence it will perform on the safety consequences of the Bill.[6]

I. The FTC's Interest and Experience in Health Care Competition

Competition is the core organizing principle of America's economy,[7] and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, increased access to goods and services, and greater innovation.[8] Because of the importance of health care competition to the economy and consumer welfare, this sector has long been a key focus for the FTC's law enforcement, research, and advocacy activities.[9]

The FTC has examined markets for the provision of dental services in the context of both law enforcement actions and policy initiatives. For example, in 2010, the Commission sued the North Carolina Board of Dental Examiners alleging that the Board illegally thwarted lower-priced competition by engaging in anticompetitive conduct to prevent non-dentists from providing teeth whitening services. In that case, the Supreme Court upheld a Commission ruling

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[5] *See, e.g.*, Letter from FTC Staff to Valencia Seay, Senator, Ga. State Senate (Jan. 29, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-georgia-state-senator-valencia-seay-concerning-georgia-house-bill-684/160201gadentaladvocacy.pdf [hereinafter 2016 Georgia Letter] (regarding removal of direct supervision requirements for dental hygienists); Letter from FTC Staff to Kay Khan, Representative, Mass. House of Representatives (Jan. 14, 2014), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-massachusetts-house-representatives-regarding-house-bill-6-h.2009-concerning-supervisory-requirements-nurse-practitioners-nurse-anesthetists/140123massachusettnursesletter.pdf (regarding removal of supervision requirements for nurse practitioners and nurse anesthetists); Letter from FTC Staff to Maine Bd. of Dental Exam'rs (Nov. 16, 2011), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-maine-board-dental-examiners-concerning-proposed-rules-allow-independent-practice/111125mainedental.pdf [hereinafter Maine Letter] (regarding proposed limitations on the type of x-rays taken by independent practice dental hygienists); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION, Ch. 2, at 25-33 (2004), https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf (considering the competitive impact of licensing restrictions in the health care context).

[6] Our comments are limited to the competition issues raised by professional licensure and scope of practice restrictions. We take no position on the specific mechanisms through which HB 77 attempts to license and regulate denturists and do not comment on any particular health or safety considerations potentially implicated by HB 77.

[7] *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1109 (2015) ("Federal antitrust law is a central safeguard for the Nation's free market structures."); 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.").

[8] *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978) (noting that 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] A description of, and links to, the FTC's various health care-related activities can be found at *Competition in the Health Care Marketplace*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care.

that the North Carolina Board's actions were illegal under the antitrust laws.[10] In another enforcement action, in 2003, the Commission alleged that the South Carolina Board of Dentistry illegally had restricted the ability of dental hygienists to provide preventive dental services in schools without prior examination by a dentist,[11] thereby unreasonably restraining competition and depriving thousands of economically disadvantaged schoolchildren of needed dental care.[12] The South Carolina Board ultimately entered into a consent agreement settling the charges.[13]

On the policy side, FTC staff comments have addressed the competitive implications of licensure and scope of practice restrictions relating to oral health professions. For example, most recently, staff urged the Georgia legislature to consider broadening the settings in which dental hygienists are permitted to provide care without the supervision of a dentist.[14] This staff comment followed a 2010 comment to the Georgia Board of Dentistry in which staff urged the Board to fully weigh the costs and benefits of proposed rule changes that would have required indirect supervision by a dentist for dental hygienists providing dental hygiene services at approved public health facilities.[15] Similarly, a 2011 FTC staff comment urged the Maine Board of Dental Examiners to consider the impact of proposed rule changes that would have prevented Independent Practice Dental Hygienists participating in a pilot project designed to improve access to care in underserved areas of the state from taking certain radiographs without a dentist present.[16]

II. House Bill 77

Kentucky law currently allows only licensed dentists to treat patients in need of dentures.[17] A non-dentist may make dentures only upon a written work order from a licensed dentist and only by using models made from impressions taken by a licensed dentist. Additionally, fitting or adjusting dentures is reserved to licensed dentists.[18]

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[10] *See N.C. Dental*, 135 S. Ct. 1101.

[11] *See* S.C. State Bd. of Dentistry, 138 F.T.C. 229, 233-40 (2004).

[12] *See id.* at 232, 268-80.

[13] S.C. State Bd. of Dentistry, 144 F.T.C. 615, 628-635 (2007) (decision and order).

[14] *See* 2016 Georgia Letter, *supra* note 5.

[15] Letter from FTC Staff to the Georgia Bd. of Dentistry (Dec. 30, 2010), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-georgia-board-dentistry-concerning-proposed-amendments-board-rule-150.5-0.3-governing-supervision-dental-hygienists/101230gaboarddentistryletter.pdf (concerning proposed amendments to Board Rule 150.500.3 governing supervision of dental hygienists).

[16] *See* Maine Letter, *supra* note 5.

[17] *See* KY. REV. STAT. ANN. § 313.010(11) (2015) (defining "dentistry" as "the evaluation, diagnosis, prevention, or surgical, nonsurgical, or related treatment of diseases, disorders, or conditions of the oral cavity, maxillofacial area, or the adjacent and associated structures and their impact on the human body provided by a dentist within the scope of his or her education, training, and experience" and defining the practice of dentistry as including the taking of impressions of teeth for the purpose of making "any intraoral appliance," or the making, supplying, reproducing, or repairing of "any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth . . . .").

[18] *Id*. Under certain conditions, a licensed dentist may delegate some activities to other dental professionals, provided the dentist directly supervises the auxiliary personnel. *See Id.* § 313.050.

We understand that HB 77 is intended to recognize and license another type of oral health professional – the "denturist" – to directly treat people in need of dentures. Licensed denturists would be permitted to examine a patient's mouth, take impressions, take bite registration, and make and fit "full or partial dentures or other removable nonorthodontic dental appliance[s]."[19] Patients whom a denturist reasonably believes are in need of medical or dental treatment would be referred to a physician or dentist.[20]

The Bill would create the Kentucky Denturity Board to govern the practice of denturity.[21] The Board would comprise five denturists and two independent members of the public. The Board would issue licenses and would be responsible for approving the educational requirements for licensure.[22]

III. Competitive Considerations Regarding House Bill 77

FTC staff recognize that professional scope of practice regulations may be important to ensure quality and patient safety, and regulation of oral health professionals is no exception. Competition consistent with patient safety, however, also has important consumer benefits. Generally, competition in health care markets benefits consumers by containing costs, expanding access and choice, and promoting innovation. Conversely, unnecessarily strict scope of practice restrictions can suppress these important benefits by limiting the supply of qualified care providers. Additionally, they can inhibit the development of new, collaborative models of care that rely on a continuum of providers to efficiently provide quality care. For these reasons, we recommend that the Kentucky legislature consider the extent to which the Bill may facilitate enhanced competition among qualified providers of dentures, in ways that may benefit consumers. We urge the legislature to maintain only those scope of practice limitations necessary to ensure patient health and safety.

Additional competition among qualified providers of dentures could help to alleviate two important barriers to oral health that are a particular challenge in Kentucky: access and cost.[23]

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[19] H.B. 77, 2016 Leg., Reg. Sess. § 2(4)(b) (Ky. 2016). We note that there is some inconsistency in the Bill regarding the scope of denturists' licensure. For instance, Section 2(4)(a) refers to "prosthetic oral appliances," which are not defined and which it seems could be read broadly to include, for instance, devices meant to treat medical conditions such as sleep apnea as well as fixed prosthetics. Other parts of Section 2 refer to "removable nonorthodontic dental appliances" and "immediate full or partial dentures." These terms could potentially be interpreted to encompass different ranges of dental products. We respectfully suggest clarification of these terms. We limit our comments to address only the licensing of denturists to treat patients in need of removable full or partial dentures.

[20] *Id.* § 2(4)(a)2.

[21] Under the state action doctrine, private actors or state agencies controlled by regulated persons may be immune from the antitrust laws for certain activities when there is a clearly articulated state policy to displace competition and there is active state supervision of the policy or activity. *See* Parker v. Brown, 317 U.S. 341 (1943), FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013), and N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015). This advocacy comment is limited to the competition issues raised by scope of professional licensure and does not address any issues relating to the state action doctrine.

[22] *See* H.B. 77 §§ 4, 8.

[23] *See* ORAL HEALTH PROGRAM, KY. DEP'T FOR PUBLIC HEALTH, HEALTHY KENTUCKY SMILES 3-6, 12-13, 35 (2006), http://chfs.ky.gov/NR/rdonlyres/67ED0872-8504-43A0-8165-8739F320CAC9/0/StrategicPlan.pdf (Kentucky's Oral Health Strategic Plan, highlighting tooth loss as a significant oral health concern in Kentucky,

With respect to access, it is well documented that certain populations in the United States – the elderly, those living in rural areas, and the poor – often have inadequate access to dental care.[24] These populations also tend to suffer the most from tooth loss.[25] As FTC staff and others previously have noted, allowing additional oral health professionals to work to the full range of their training and experience could help alleviate the unmet need for care in these underserved areas.[26]

To the extent the Bill would facilitate market entry by additional oral health professionals, it may help Kentucky prepare for even more critical dental care access issues in the future, which a number of experts have predicted. For instance, in a recent report, the Health Resources and Services Administration ("HRSA") analyzed dental workforce needs. According to the HRSA report, the United States can expect an increasing shortage of dentists, which could "exacerbate access problems for underserved populations who forego basic oral health care because of lack of proximity to a provider, inability to pay for care, and limited oral health literacy."[27] Thus, if denturists can competently serve as substitute providers for patients in need

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finding access to dental care to be a significant problem, and suggesting, among other things, policies to "[c]reate a variety of mid-level dental practitioners for extension of services to underserved areas."). *See also* CTR. FOR HEALTH WORKFORCE STUDIES, SCHOOL OF PUBLIC HEALTH, SUNY ALBANY, ORAL HEALTH IN KENTUCKY 4 (2016), http://chws.albany.edu/archive/uploads/2016/02/Oral_Health_Kentucky_Technical_Report_2016.pdf (finding that "[d]espite statewide initiatives to improve oral health status in Kentucky's population, there remain populations with poor oral health outcomes attributed to a lack of oral health literacy, residence in rural areas, and limited resources to pay for care," the populations at greatest risk included the poor and the elderly, and the supply of oral health workers is "not evenly distributed with the population.").

[24] *See* COMM. ON ORAL HEALTH ACCESS TO SERVS., INST. OF MED., IMPROVING ACCESS TO ORAL HEALTH CARE FOR VULNERABLE AND UNDERSERVED POPULATIONS 1 (2011) (Report Brief), https://iom.nationalacademies.org/~/media/Files/Report%20Files/2011/Improving-Access-to-Oral-Health-Care-for-Vulnerable-and-Underserved-Populations/oralhealthaccess2011reportbrief.pdf ("While the majority of the U.S. population routinely obtains oral health care in traditional dental practice settings, oral health care eludes many vulnerable and underserved individuals—including racial and ethnic minorities, people with special health care needs, older adults, pregnant women, populations of lower socioeconomic status, and rural populations, among others. Lack of access to oral health care contributes to profound and enduring oral health disparities in the United States."). *See also* DEP'T OF HEALTH AND HUMAN SERVICES, ORAL HEALTH IN AMERICA: A REPORT OF THE SURGEON GENERAL vii (2000), http://silk.nih.gov/public/hck1ocv.@www.surgeon.fullrpt.pdf [hereinafter SURGEON GENERAL'S REPORT] (finding a "silent epidemic" of dental and oral diseases disproportionately affecting "the poor of all ages, with poor children and poor older Americans particularly vulnerable.").

[25] *See* SURGEON GENERAL'S REPORT, *supra* note 24, at 66 (noting that "[o]verall, a higher percentage of individuals living below the poverty line are edentulous than are those living above" and that the rate of edentulism increases with age.). Tooth loss appears to be an important oral health issue in Kentucky. According to 2012 data from the Centers for Disease Control and Prevention, 24.7% of Kentuckians over 65 reported complete tooth loss, and 51.5% reported a loss of six or more teeth. *See Oral Health Data*, CNTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/oralhealthdata/ (last updated Apr. 1, 2015) (Select Kentucky under "Explore Oral Health Data By Location." Kentucky data is from 2012.).

[26] *See generally* 2016 Georgia Letter, *supra* note 5; FTC STAFF POLICY PERSPECTIVES, *supra* note 4; David A. Nash, *Envisioning an Oral Healthcare Workforce for the Future*, 40 COMMUNITY DENTISTRY & ORAL EPIDEMIOLOGY (SUPP. 2) 141, 143 (2012) ("Delegation of an appropriate level of clinical care responsibilities must occur if cost-effective care is to be provided."); COMM. ON ORAL HEALTH ACCESS TO SERVS., *supra* note 24.

[27] *See* NAT'L CTR. FOR HEALTH WORKFORCE ANALYSIS, HEALTH RES. & SERVS. ADMIN., NATIONAL AND STATE LEVEL PROJECTIONS OF DENTISTS AND DENTAL HYGIENISTS IN THE U.S., 2012-2025, at 15 (2015), http://bhpr.hrsa.gov/healthworkforce/supplydemand/dentistry/nationalstatelevelprojectionsdentists.pdf (predicting a significant unmet demand for dentists nationally) [hereinafter HRSA Report]. *See also* Daniel M. Saman, Oscar Arevalo & Andrew O. Johnson, *The Dental Workforce in Kentucky: Current Status and Future Needs*, 70 J. PUB.

of dentures, the availability of denturists may enable more patients to obtain and maintain treatment. Further, to the extent that denturists can serve as complementary providers of oral health services – for example, by safely and competently providing certain types of dental care, while identifying and referring patients in need of treatment by a dentist – both dentists and patients may benefit from a regulatory structure that supports and encourages efficient collaboration between the two types of providers.[28]

In addition to access challenges, many observers have noted that cost can be an additional barrier to oral health care.[29] Certain patients in need of treatment may forego or delay needed care if it is too costly. Cost may be particularly relevant to the patient populations most in need of dentures. For example, dentures may be excluded from Medicaid coverage for adults,[30] and Medicare generally excludes dental coverage.[31] Allowing competent oral health professionals, such as denturists, to deliver care at a level commensurate with their training and experience could help to ensure that more patients have access to affordable providers. Conversely, unnecessarily excluding oral health professionals, such as denturists, from providing care at a level consistent with their training and experience may limit price competition among providers serving these patients, which may result in patients going without needed care.[32]

For these reasons, we encourage the legislature to consider whether patient welfare can be appropriately promoted by allowing denturists to treat patients in need of dentures. We note that, for many years, a number of other states have allowed denturists to make and fit dentures,

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HEALTH DENTISTRY 188, 193-94 (2010) (finding fewer dentists in rural and poorer Kentucky counties and suggesting the creations of additional types of mid-level dental providers as a possible partial solution to Kentucky's disparities in dental care).

[28] *See* Nash, *supra* note 26, at 145 ("Replacement of missing teeth with partial or complete dentures should be delegated to oral prosthetists to enable dentists to provide the level of care that only they are educated and trained to provide.").

[29] *See* HRSA Report, *supra* note 27, at 15 (listing cost as one of several reasons patients forego dental care).

[30] *See* MEDICAID AND CHIP PAYMENT & ACCESS COMM'N, REPORT TO CONGRESS ON MEDICAID AND CHIP 24 (2015), https://www.macpac.gov/wp-content/uploads/2015/06/June-2015-Report-to-Congress-on-Medicaid-and-CHIP.pdf. It appears that Kentucky's Medicaid program does not cover dentures for adults. *See* DEP'T FOR MEDICAID SERVS., COMMONWEALTH OF KY., MEMBER HANDBOOK 18 (2014), http://chfs.ky.gov/nr/rdonlyres/f6b5f330-ee69-4cc8-83a8-1a1c0dc4bf46/0/finalhandbook62014.pdf. *See also Dental Services*, KY.: CABINET FOR HEALTH & FAMILY SERVS., http://chfs.ky.gov/dms/dental.htm.

[31] *See* COMM. ON ORAL HEALTH ACCESS TO SERVS., INST. OF MED., IMPROVING ACCESS TO ORAL HEALTH CARE FOR VULNERABLE AND UNDERSERVED POPULATIONS 197-98, 210 (2011) (Report), http://www.nap.edu/catalog/13116/improving-access-to-oral-health-care-for-vulnerable-and-underserved-populations (click "Download Free PDF"; registration required) (noting "strong evidence that dental coverage is positively tied to access to and utilization of oral health care" even if the causal relationship is unclear, that millions of Americans, in particular children and the elderly, lack dental coverage, and that Medicare excludes dental care.). *See also Medicare Dental Coverage*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/Medicare/Coverage/MedicareDentalCoverage/index.html?redirect=/MedicareDentalcoverage/ (last updated Nov. 19, 2013).

[32] We note that the Kentucky Legislative Research Commission, in a 2000 study of denturity, cited research from other states that seemed to support the notion that denturists provide lower cost services. *See* MICHAEL GREER & ANN MAYO PECK, LEGISLATIVE RESEARCH COMM'N, A STUDY OF DENTURITRY 20-21 (2000), http://www.lrc.ky.gov/lrcpubs/RR292.pdf. More recent reliable data on the cost differential between dentists and denturists was not available.

sometimes with limitations or other requirements.[33] The experience of these other states may be informative as the legislature considers the Bill.

IV. Conclusion

Competition among oral health care professionals has the potential to benefit consumers by improving access to care, containing costs, and encouraging the development of more effective care delivery models. If denturists can provide safe, quality care to patients, allowing them to practice at a level commensurate with their training may bring benefits to Kentuckians in the form of increased access to care, more choice in how their care is delivered, and more cost-effective treatment. Because these benefits of competition could be significant to Kentuckians who need dentures, we encourage the legislature to carefully consider whether denturists can appropriately provide dentures, consistent with patient health and safety.

We appreciate this opportunity to present our views.

Respectfully submitted,

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[33] Currently, Arizona, Idaho, Maine, Montana, Oregon, and Washington recognize denturists as a profession and allow them to make and/or fit dentures to some degree. ARIZ. REV. STAT. ANN. § 32-1293 (2016); IDAHO CODE § 54-3303 (2016); ME. STAT. tit. 32, § 1100-B (2016); MONT. CODE ANN. § 37-29-101, *et seq.* (2016); OR. REV. STAT. § 680.500 (2016); WASH. REV. CODE § 18.30.010 (2016).