



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

Office of Policy Planning

January 17, 2018

The Honorable Laura Ebke  
State Capitol  
PO Box 94604  
Lincoln, NE 68509-4604

Dear Senator Ebke:

The Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Competition, and Bureau of Economics (collectively, "FTC staff") are pleased to respond to your request for input<sup>1</sup> on Nebraska LB299, the Occupational Board Reform Act ("LB299" or "the Bill").<sup>2</sup> The Bill would provide for the review of both proposed licensing legislation and existing occupational regulations in Nebraska,<sup>3</sup> and would require that Nebraska regulators attempt to promote competition by using "the least restrictive regulation necessary to protect consumers from present, significant, and substantiated harms . . . when competition alone is not sufficient."<sup>4</sup>

Occupational licensing can offer important benefits, such as protecting consumers from actual health and safety risks or supporting other public policy goals. That does not mean, however, that *all* occupations should be licensed, or that restrictions on an occupation *always* yield more benefits than harms. Licensing impedes entry into professions and occupations, which inherently limits competition. Particular licensing requirements can also harm competition and consumers, leading to higher prices, lower quality, and reduced consumer access to services and goods, with few or no offsetting consumer benefits. Licensing regulations may also impede economic and geographic mobility for workers, exacerbating unmet consumer demand for services.

For those reasons, we often urge policymakers to consider the following in reviewing licensing laws and regulations:

- are any restrictions likely to have a significant adverse effect on competition;
- do those restrictions address demonstrable risks of consumer harm;
- are the restrictions narrowly-tailored to minimize burdens on competition; and
- are less restrictive alternatives available?<sup>5</sup>

LB299 reflects the Nebraska legislature's concerns about undue licensing regulations and the harm they can do to competition and consumers, as well as workers and the larger economy. We share those concerns. We support the Bill's approach to occupational regulation, to the extent that it would apply an analytical framework similar to our own, because we believe that this approach tends to foster procompetitive and pro-consumer regulatory reform; and we will continue our support of Nebraska lawmakers' efforts to advance procompetitive reform of your licensing regulations, building on your 2017 legislative record.<sup>6</sup> Below, we expand on some of these shared concerns and discuss some of the

potential benefits of this approach. We point out, however, that implementation of the Bill may pose certain challenges, and we highlight concerns about any potential expansion of antitrust immunity for licensing boards controlled by active market participants.

## **I. Interest and Experience of the FTC Regarding Occupational Licensing**

Competition is at the core of America's economy. Vigorous competition among sellers in an open marketplace can provide consumers the benefits of lower prices, higher quality products and services, and greater innovation. To advance 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.<sup>7</sup> 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.<sup>8</sup> This distinct charge supports the FTC'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. The Commission and its staff have focused on occupational regulations, in particular, for more than thirty years. We have conducted economic and policy studies on occupational licensing,<sup>9</sup> as well as focused inquiries into regulations that apply to particular occupations and their practitioners, such as nurses,<sup>10</sup> eye doctors and vendors of optical goods,<sup>11</sup> lawyers and other providers of legal services,<sup>12</sup> dental hygienists,<sup>13</sup> and the real estate brokers,<sup>14</sup> among others.<sup>15</sup>

Early in 2017, FTC Acting Chairman Maureen K. Ohlhausen convened the FTC Economic Liberty Task Force, to integrate and bolster the Agency's efforts to address occupational licensing and other barriers to economic opportunity.<sup>16</sup> Among other activities, the Task Force held a July 2017 public roundtable to explore ways to streamline license portability across state lines,<sup>17</sup> and a November 2017 roundtable to examine recent and ongoing empirical research into the effects of occupational licensure on competition, consumers, and the workforce.<sup>18</sup> Based on this research, the larger body of economic literature, and its own investigations, the Commission has addressed potentially anticompetitive restrictions on certain occupations through competition advocacy, enforcement, and various forms of education and outreach,<sup>19</sup> including collaboration with elected state leaders and other officials who share our goal of licensing reform.<sup>20</sup>

## **II. Competition Issues Raised by Licensing and Other Occupational Regulations**

Licensing laws and regulations establish conditions for entry into an occupation and define the occupation's metes and bounds or "scope of practice."<sup>21</sup> Licensing has become an increasingly dominant form of occupational regulation, with studies suggesting that approximately 25% of the U.S. workforce works in occupations that require a license.<sup>22</sup> Nebraska roughly fits the national pattern: nearly 25% of Nebraska's workforce holds one of about 200 occupational licenses.<sup>23</sup> Licensing is generally the most stringent form of occupational regulation.<sup>24</sup> Working without a license, or beyond one's scope of practice, may be prohibited by statute or regulation, subject to civil or criminal penalties.<sup>25</sup>

For some occupations, licensing laws and regulations may be an appropriate policy response to consumer protection or safety concerns. Licensing can help to prevent consumer fraud and mitigate the effects of certain types of market failure, such as those associated with persistent information asymmetries between professionals and consumers.<sup>26</sup> Licensing 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 assess quality of care at the time of delivery.

For example, it might be very hard for a patient to assess a doctor's abilities prior to treatment; and both the patient and the public health might be at risk if charlatans could practice as doctors. Requiring physician licensure is one way for the state to provide key quality information – signaling to consumers that licensed practitioners have met certain basic education and training requirements – and set a basic floor of mandatory qualifications for medical practice.

At the same time, licensing inherently constrains competition, albeit to varying degrees.<sup>27</sup> When a law or regulation establishes required entry conditions for an occupation, only individuals who satisfy those conditions can legally 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.<sup>28</sup> In addition, while licensing may be intended to provide minimum quality assurances, licensing does not always increase service quality,<sup>29</sup> and more stringent licensing provisions do not always improve service quality.<sup>30</sup> Licensing costs and burdens 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.<sup>31</sup>

For some occupations, it is difficult to imagine a good rationale to require licensing. For example, a few states require that interior designers be licensed, even if there are no apparent market failures or substantial consumer risks posed by interior design services.<sup>32</sup> On somewhat different grounds, Nebraska eliminated redundant licensure requirements for automobile and motorcycle salespersons when it enacted LB346, noting that the pertinent consumer protection restrictions already applied to the dealerships employing those salespersons.<sup>33</sup>

For other occupations, there might be a convincing rationale for some, but not all, licensing requirements. For example, even if state policymakers see a strong case for licensing physicians (as discussed above), they might seek to reduce some licensing-based restrictions on medical practice that impose costly – and unnecessary – limits on doctors' abilities to deliver needed services by telehealth,<sup>34</sup> or in collaboration with other health care professionals, such as advanced practice registered nurses.<sup>35</sup> Such restrictions may limit the ability of patients to access treatment from qualified caregivers and institutional providers.<sup>36</sup> We note that lawmakers in Nebraska have sought to reduce excessive burdens on several other licensed occupations, including real estate brokers, dental hygienists, nurses, and audiologists.<sup>37</sup>

The total impact of licensing is substantial. Licensing is estimated to result in 10-15% higher wages for licensed workers relative to unlicensed workers, after adjusting for differences in education, training, and experience,<sup>38</sup> and numerous studies have shown that licensing leads to higher prices for consumers.<sup>39</sup>

The risk of anticompetitive harm may be even greater when restrictions on one occupation are imposed by a regulatory board that is controlled by members of another, overlapping occupation that provides complementary or substitute services,<sup>40</sup> and the board members are themselves active market participants with a financial stake in the outcome.<sup>41</sup>

### III. LB299 Provisions on Licensing Review

LB299 recognizes the potential competitive costs (or harms) of occupational regulations, particularly licensure, and stipulates procompetitive state policy goals for all occupational regulations, both as required elements of legislative and regulatory review and as principles of statutory construction.<sup>42</sup> In particular, the Bill would establish a “Legislative Office of Occupational Regulations” (“Office”) charged with a form of “sunrise” review of “each legislative bill or amendment to a legislative bill which would enact or modify occupational regulations.”<sup>43</sup> In addition, the Bill would provide for a systematic and periodic review of existing occupational regulations, covering regulations pertaining to approximately 20% of regulated occupations each year and those pertaining to all regulated occupations every five years.<sup>44</sup> The Office would report its findings on legislative bills or amendments to the appropriate legislative committee,<sup>45</sup> and would submit its regulatory reports to the Clerk of the Legislature.<sup>46</sup>

The Bill would require that the Office focus on competitive considerations and economic impact in reviewing Nebraska’s licensing laws and regulations. For example, the Office would “evaluate the effects of ... proposed legislation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs, and any other relevant issues;” it would consider “whether proposed legislation meets the requirement of using the least restrictive regulation necessary to protect consumers;”<sup>47</sup> and it would recommend regulatory approaches tailored to particular types of consumer protection goals.<sup>48</sup>

Several of the Bill’s provisions would apply to workers with felony convictions.<sup>49</sup> While FTC staff recognizes that these aspects of the Bill may address important policy issues for Nebraska, we express no view on the merits of those provisions, or the preferred administrative structure for evaluating petitions by workers with felony records.

### IV. Discussion

As noted above, the Bill’s approach to occupational regulation shares key features with the approach recommended by the FTC and its staff.<sup>50</sup> For example, the Office would scrutinize licensing bills, amendments, and regulations to determine whether they “protect consumers from present, significant, and substantiated harms . . . when competition alone is not sufficient.”<sup>51</sup> Reviews also would consider alternative regulatory approaches and ask whether less costly or restrictive regulations would be adequate to address consumer protection concerns.

We support this general approach to licensing reform. The Commission and its staff have consistently recommended a similar approach because we believe that good licensure policy must incorporate these types of considerations. As described above, regulatory restrictions on occupations are far-reaching, as are their implications for consumers, workers, and the economy as a whole. Systematic consideration of the goals, potential benefits, *and* potential harms of occupational restrictions may be of tremendous value to consumer welfare and is a worthwhile focus of your legislature’s procompetitive, pro-consumer, and pro-worker reform of licensing laws and regulations.

While we are supportive of the goals of the Bill, we encourage the legislature to consider several aspects that may raise concerns.

First, the Bill would require identification of the “least restrictive” means available to achieve legitimate policy goals. We question whether this will always be practical or possible. We do,

however, support the idea of asking whether occupational restrictions are narrowly-tailored to achieve legitimate policy goals and whether less restrictive regulatory alternatives are available.<sup>52</sup> On a related note, we question whether the detailed 13-level hierarchy of increasingly restrictive categories of regulation is justified by economic learning, or whether it might be too rigid when applied to certain occupations.<sup>53</sup> A simpler hierarchy might be preferable, with a focus on demonstrable costs and benefits of regulations.

Second, we note that the Bill envisions a comprehensive and resource-intensive statutory and regulatory review, and that the personnel and other resources allocated to the task are uncertain.<sup>54</sup> The ability of the Office to provide detailed, accurate assessments, across such a large and diverse body of regulatory restrictions, will depend greatly upon the expertise and other resources assigned to it.

Third, we urge the legislature to consider how the Bill might affect claims of antitrust immunity for regulatory boards under the state action doctrine. As the Supreme Court rightly observed, such immunity is to be “disfavored.”<sup>55</sup> While the state action doctrine protects direct exercises of sovereign state authority – and provides considerable leeway to states regarding delegation of that authority<sup>56</sup> – the Court has explicitly recognized that licensing boards controlled by financially interested market participants must be “actively supervised” by the state.<sup>57</sup> FTC staff do not believe that the regulatory review contemplated under the Bill would be adequate to support claims of state action immunity.<sup>58</sup> Competition and consumers are harmed when state action immunity is expanded to cover anticompetitive board conduct, including both anticompetitive regulation and anticompetitive administration;<sup>59</sup> and we recommend that the Nebraska legislature exercise caution in considering any amendments to its licensing laws that might work against the procompetitive intent of the Bill by supporting additional claims of immunity. Otherwise, there is a risk that untested processes of regulatory oversight, if tied to broad claims of state action immunity, could lead to far-reaching consumer harm, to the extent that regulatory boards dominated by active market participants can sometimes use regulatory processes to engage in anticompetitive conduct.

## **V. Conclusion**

LB299 continues Nebraska lawmakers’ welcome attempts at procompetitive and pro-consumer policy reform. We share concerns about the harms of undue licensing regulation, and we support the Bill’s approach to scrutinizing occupational restrictions, to the extent that the Bill would apply a similar analytical framework to that consistently recommended by the FTC and its staff.

Implementation of the Bill is likely to demand significant resources of the legislature, the Office, and regulatory boards. The Bill’s effectiveness will depend heavily on how such implementation challenges might be resolved, as well as any unintended consequences that might expand the application of state action immunity to anticompetitive conduct by Nebraska licensing boards.

Respectfully submitted,

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<sup>1</sup> Letter from the Hon. Laura Ebke, Nebraska Senate, to Tara I. Koslov, Acting Dir., Off. Pol’y Plan., Fed. Trade Comm’n (Oct. 4, 2017).

<sup>2</sup> These comments express the views of the FTC’s Office of Policy Planning, Bureau of Competition, and Bureau of Economics. They do not necessarily represent the views of the FTC or any individual Commissioner. The Commission, however, has voted to authorize staff to submit this comment.

<sup>3</sup> LB299 (Neb. 2017). These comments regard the draft of the Bill reflected in the October 30, 2017 amendments to LB299; except where noted, citations to LB299 refer to the Bill as amended, instead of the Bill as introduced in January 2017.

<sup>4</sup> *Id.* at § 14; *see also id.* at §§ 16(2)(a) (incorporating the policies specified in § 14) and 18 (applying the “criteria in section 16” to regulatory review and reporting).

<sup>5</sup> Regarding the general framework or approach commonly recommended by the Commission and its staff, *see Prepared Statement of the Federal Trade Commission on Competition and Occupational Licensure Before the H. Comm. on the*

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Judiciary, Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 115<sup>th</sup> Cong. 10-12 (Sept. 12, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1253073/house\\_testimony\\_licensing\\_and\\_rbi\\_act\\_sept\\_2017\\_vote.pdf](https://www.ftc.gov/system/files/documents/public_statements/1253073/house_testimony_licensing_and_rbi_act_sept_2017_vote.pdf); *License to Compete: Occupational Licensing and the State Action Doctrine*, Hearing Before the S. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Pol’y and Consumer Rights, 114th Cong., 2 (Feb. 2, 2016), [https://www.ftc.gov/system/files/documents/public\\_statements/912743/160202occupationallicensing.pdf](https://www.ftc.gov/system/files/documents/public_statements/912743/160202occupationallicensing.pdf); Prepared Statement of the Federal Trade Commission on Competition and the Potential Costs and Benefits of Professional Licensure, Before the H. Comm. on Small Business, 113<sup>th</sup> Cong., 8-9 (July 16, 2014), [https://www.ftc.gov/system/files/documents/public\\_statements/568171/140716professionallicensurehouse.pdf](https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf). For a slightly expanded version of the framework, see DANIEL J. GILMAN & TARA ISA KOSLOV, FED. TRADE COMM’N STAFF, POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES, 16-17 (2014), <http://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf>.

<sup>6</sup> See FTC Staff Comments to the Nebraska State Senate regarding a Number of Proposed Senate Bills that would Loosen or Eliminate Certain Occupational Licensing Requirements in Nebraska (Mar. 2017), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2017/03/ftc-staff-comments-nebraska-state-senate-regarding-number> (FTC staff comments); cf. Press Release, Off. Gov. Pete Ricketts, Gov. Ricketts, Senators Unveil Occupational Licensing Reforms (Jan. 10, 2017), <https://governor.nebraska.gov/press/gov-ricketts-senators-unveil-occupational-licensing-reforms> (regarding proposals to amend Nebraska licensure laws for 20 occupations).

<sup>7</sup> 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).

<sup>8</sup> 15 U.S.C. § 46 (2006).

<sup>9</sup> See, e.g., CAROLYN COX & SUSAN FOSTER, FED. TRADE COMM’N, BUREAU OF ECON., THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION, 4-12 (1990), available at <http://www.ftc.gov/be/consumerbehavior/docs/reports/CoxFoster90.pdf>.

<sup>10</sup> GILMAN & KOSLOV, *supra* note 5.

<sup>11</sup> 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>.

<sup>12</sup> JACOBS ET AL., CLEVELAND REGIONAL OFF. & BUREAU OF ECON., FED. TRADE COMM’N, IMPROVING CONSUMER ACCESS TO LEGAL SERVS.: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (1984).

<sup>13</sup> J. NELLIE LIANG & JONATHAN OGUR, RESTRICTIONS ON DENTAL AUXILIARIES: AN ECONOMIC POL’Y ANALYSIS, FED. TRADE COMM’N, BUREAU OF ECON. STAFF REPORT (1987).

<sup>14</sup> FED. TRADE COMM’N & U.S. DEP’T JUSTICE, COMPETITION IN THE REAL ESTATE BROKERAGE INDUS. (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>.

<sup>15</sup> COX & FOSTER, *supra* note 9, (considering occupational regulation generally, as well as certain particular occupations).

<sup>16</sup> Fed. Trade Comm’n, Economic Liberty, <https://www.ftc.gov/policy/advocacy/economic-liberty>.

<sup>17</sup> Fed. Trade Comm’n, Streamlining Licensing Across State Lines, Initiatives to Enhance Occupational License Portability, <https://www.ftc.gov/news-events/events-calendar/2017/07/streamlining-licensing-across-state-lines-initiatives-enhance>.

<sup>18</sup> Fed. Trade Comm’n Roundtable, The Effects of Occupational Licensure on Competition, Consumers, and the Workforce: Empirical Research and Results, <https://www.ftc.gov/news-events/events-calendar/2017/11/effects-occupational-licensure-competition-consumers-workforce>.

<sup>19</sup> See *supra* note 5.

<sup>20</sup> Fed. Trade Comm’n, Economic Liberty, State-Based Initiatives: Selected Examples, <https://www.ftc.gov/policy/advocacy/economic-liberty/state-based-initiatives>.

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- <sup>21</sup> U.S. DEP'T TREASURY, COUNCIL OF ECONOMIC ADVISORS & DEP'T LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS, n.6 and accompanying text (2015) [hereinafter OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS].
- <sup>22</sup> *See id.* at 17-18; Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. 173 (2013); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT J. INDUS. REL. 2 (2010).
- <sup>23</sup> Press Release, Office of Governor Pete Ricketts, Gov. Ricketts, Senators Unveil Occupational Licensing Reforms (Jan. 10, 2017), <https://governor.nebraska.gov/press/gov-ricketts-senators-unveil-occupational-licensing-reforms>
- <sup>24</sup> *See* COX & FOSTER, *supra* note 9, at ch. V (regarding alternatives to licensing).
- <sup>25</sup> George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 13 (1971).
- <sup>26</sup> 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 9, at 4-12.
- <sup>27</sup> *See* Stigler, *supra* note 25, at 13-17.
- <sup>28</sup> 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 9, at 21-36.
- <sup>29</sup> OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS, *supra* note 21, at 13-14, App. Table 1.
- <sup>30</sup> *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 9, at 21-29.
- <sup>31</sup> 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* GILMAN & KOSLOV, *supra* note 5, at 2, 20-26.
- <sup>32</sup> *See, e.g.*, Morris M. Kleiner, *Reforming Occupational Licensing Policies*, Brookings, Hamilton Project Discussion Paper, Table 3 (2015), [http://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/reforming\\_occupational\\_licensing\\_morris\\_kleiner\\_final.pdf](http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf).
- <sup>33</sup> [https://nebraskalegislature.gov/bills/view\\_bill.php?DocumentID=31370](https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=31370).
- <sup>34</sup> *See, e.g.*, Federal Trade Commission Closes Investigation of Texas Medical Board After Texas Passes Law Expanding Telemedicine and Telehealth Services (June 21, 2017), <https://www.ftc.gov/news-events/press-releases/2017/06/federal-trade-commission-closes-investigation-texas-medical-board>.
- <sup>35</sup> FTC Staff Comment to the Department of Veterans Affairs: Proposed Rule Regarding Advanced Practice Registered Nurses (July 2016), <https://www.ftc.gov/policy/advocacy/advocacy-filings/2016/07/ftc-staff-comment-department-veterans-affairs-proposed-rule>; FTC Staff Comment to the Hon. Kent Leonhardt, Senator, Senate of West Virginia, Concerning the Competitive Impact of WV Senate Bill 516 on the Regulation of Certain Advanced Practice Registered Nurses (Feb. 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-senate-west-virginia-concerning-competitive-impact-wv-senate-bill-516-regulation/160212westvirginiacomment.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-senate-west-virginia-concerning-competitive-impact-wv-senate-bill-516-regulation/160212westvirginiacomment.pdf).
- <sup>36</sup> *Id.*
- <sup>37</sup> Sarah Curry, Platte Institute, *Strong Jobs Nebraska: The 2017 Occupational Licensing Review* (July 11, 2017), <http://www.platteinstitute.org/research/detail/strong-jobs-nebraska-the-2017-occupational-licensing-review#SuccessfulReformin2017>.
- <sup>38</sup> Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 British J. Industrial Relations 676 (2010); *see also* 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); COX & FOSTER, *supra* note 9, at 28-31 (reviewing studies of effects of licensing on the prices of dental, legal, and optometric services).

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<sup>39</sup> OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICY MAKERS, *supra* note 21, at 14.

<sup>40</sup> A FRAMEWORK FOR POLICY MAKERS, *supra* note 21, at 30; Daniel J. Gilman & Julie Fairman, *Antitrust and the Future of Nursing: Federal Competition Policy and the Scope of Practice* 24 HEALTH MATRIX 143, 157 (2014).

<sup>41</sup> *Prepared Statement of the Federal Trade Commission on Competition and Occupational Licensure*, *supra* note 5, at 3-4; *License to Compete: Occupational Licensing and the State Action Doctrine*, *supra* note 5, at 1; *cf.* N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114 (2015).

<sup>42</sup> *Id.* at §§ 14, 16, 18.

<sup>43</sup> LB299 § 16.

<sup>44</sup> *Id.* at § 18.

<sup>45</sup> *Id.* at § 16(2)(e).

<sup>46</sup> *Id.* at § 18.

<sup>47</sup> *Id.* at § 16(2).

<sup>48</sup> *Id.* at § 16(4)(a)-(g).

<sup>49</sup> *Id.* at § 15.

<sup>50</sup> *See supra* note 5 and accompanying text.

<sup>51</sup> *Id.* at § 14.

<sup>52</sup> *See supra* note 5 and accompanying text.

<sup>53</sup> For example, although certification – or “right to title” – restrictions are commonly less of a barrier to entry than licensure – or “right to practice” restrictions, the particular burdens imposed by certification and licensure requirements can vary significantly state-by-state, and occupation-by-occupation. *See, e.g.*, COX & FOSTER, *supra* note 9, at 43-44; Morris M. Kleiner & Evgeny Vorotnikov, *Analyzing Occupational Licensing Among the States*, 52 J. REGUL. ECON. ONLINE p. 3 (pub. online Jun. 2017); Kleiner, Hamilton Project Discussion Paper, *supra* note 32, at 11. Also, although the Bill stipulates the “private certification” is the third least-restrictive form of regulation and “government certification” the eighth, the distinction between them is unclear to the extent that certification requirements vary greatly across occupations, and to the extent that private entities often act as statutorily-recognized certifying bodies.

<sup>54</sup> The Bill would demand detailed review of all bills and regulatory restrictions pertaining to at least 171 enumerated occupations. That is not necessarily a criticism: the procompetitive and pro-consumer benefits of such a review might be substantial, and even a preliminary review might prompt valuable regulatory reform. Still, the Bill allows only that “[t]he Executive Board of the Legislative Council shall assign existing legislative staff to direct the office ... including a legal counsel, a committee clerk, or any other required staff, from any senator's office or any office or division of the Legislature.” LB299 § 16(1).

<sup>55</sup> N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1110 (2015) (quoting *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013), *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)) (“[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored, much as are repeals by implication.’”); *Phoebe Putney Health Sys.*, 133 S. Ct. at 1016 (“federalism and state sovereignty are poorly served by a rule of construction that would allow ‘essential national policies’ embodied in the antitrust laws to be displaced by state delegations of authority ‘intended to achieve more limited ends.’”). Prior Commission testimony provides additional details on the history and scope of the state action exemption. *See License to Compete*, *supra* note 5; *see also* FED. TRADE COMM’N OFF. POL’Y PLAN., REPORT OF THE STATE ACTION TASK FORCE (2003), [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/report-state-action-task-force/stateactionreport.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf).

<sup>56</sup> Intervention under the federal antitrust laws requires conduct under delegated authority that is anticompetitive, demonstrably harmful to consumers, in violation of the particular substantive and procedural requirements of federal antitrust law, and in excess of any clearly delegated authority and/or unsupervised by the state.

<sup>57</sup> N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1115 (2015) (“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.”); *see also* *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 US 97, 105 (1980).

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<sup>58</sup> We cannot attempt a complete analysis here, in part because such an analysis would need to be “context-dependent,” accounting for, among other things, the facts and circumstances of Nebraska’s regulatory review, as implemented. *N.C. State Bd. of Dental Examiners v. FTC*, 135 S.Ct. at 1116. Still, we note that *Midcal*’s “active supervision” requirement, for example, depends upon the supervisor’s power to veto and modify particular decisions by regulatory boards, and that decisions include, but are not limited to, rule making. *See, e.g.*, *N.C. State Bd. of Dental Examiners v. FTC*, 135 S.Ct. at 1116-1117 (no active supervision of administrative actions of dental board); *see also*, *Patrick v. Burgett*, 486 U.S. 94, 102-103 (1988); *Ticor*, 504 U.S. at 638).

<sup>59</sup> Provisions regarding “active supervision” in LB299, as introduced in January 2017, see [https://nebraskalegislature.gov/bills/view\\_bill.php?DocumentID=31200](https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=31200), may raise heightened concerns about state action doctrine implications.