Statement of
The Federation of State Medical Boards (FSMB)

Committee on the Judiciary
United States Senate

Subcommittee on Antitrust, Competition Policy and Consumer Rights

“License to Compete: Occupational Licensing and the State Action Doctrine”

February 2, 2016
Introduction

On behalf of the Federation of State Medical Boards (FSMB), I am pleased to submit the following letter for the record in accordance with today’s hearing on occupational licensing and the state action doctrine. In light of the recent decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission (NC Dental) and the October 2015 FTC staff guidance on state regulatory boards, this Committee's interest in this topic is timely, and the discussion of the issues is welcome. The FSMB strongly believes that the public is best served when state regulatory boards, duly constituted under state law, are free to make decisions on public health and safety, which involve a balancing of multiple values—including the effect on the health care marketplace—without a second-level and heightened subjugation to federal antitrust law.

The FSMB wishes to make clear the principles of federalism and the uniqueness of the regulation of medicine compared to other endeavors that make state medical boards different. The NC Dental decision arose out of a factual situation that does not generally reflect the nature and current status of state boards of medicine. However, NC Dental and the FTC’s October 2015 guidance have had a chilling effect on the functioning of state medical boards and impinge on the public policy that allows state medical boards the flexibility necessary to safeguard the public health.

About the FSMB

Founded in 1912, the FSMB is the national non-profit organization representing the 70 state medical and osteopathic boards of the United States and its territories. With offices in Texas and Washington, D.C., the FSMB serves as the collective voice for state boards and supports them in protecting public health and safety.

Expanded Application of Antitrust Laws Threatens State Regulation of Medical Professionals

The Tenth Amendment ensures states’ legal authority to license professions such as physicians and attorneys. Traditionally, professional licensure exists within a system of federalism in which the federal government displays respect for the sovereign decisions made by the states to oversee professionals providing services within their boundaries.

In 1889, the United States Supreme Court, in Dent v. West Virginia, affirmed the right of the states to license professions in a manner that serves the interests of the state. Under a line of cases starting with Parker v. Brown, state licensing boards were assumed to be shielded from federal antitrust liability, in the same manner as state courts and legislatures. However, in the recent decision, North Carolina State Board of Dental Examiners v. Federal Trade Commission, the U.S. Supreme Court held that state licensing boards are not automatically exempted from antitrust scrutiny. Under the standard articulated by the Court, if a controlling number of board members are themselves “active market participants,” then the licensing board’s conduct is only immune from antitrust scrutiny if it is: (1) clearly articulated State policy, and (2) actively supervised by the State. The Court refused to define active market participant or prescribe what constituted active supervision but in October 2015, the FTC issued a document entitled Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants that proffered its interpretation of the Court’s decision.

The Sherman Act and related laws were developed to govern private business conduct within a competitive market and ensure efficient operation of that market. These laws were not developed, nor have they been
applied, to accurately reflect the role of state medical boards. State medical boards, faced with difficult policy judgments, must balance multiple values held by the citizens of their state including, but not limited to, protecting patients from harmful or deceptive practices, ensuring a high quality of care, increasing access to care, and the promotion of a robust health care marketplace. When state medical boards regulate, they do so to best serve public health and safety, not necessarily federal competition policy.

Unfortunately, an expansive view of the Court's decision in *NC Dental* and the FTC guidance force state governments to develop new regulatory structures, replacing systems that had been designed to best fit the public health and safety interests of the state with systems designed to meet the desires of federal antitrust policy. State legislatures are being pushed to alter their state regulatory boards and their function in favor of the FTC’s preferences on these matters. As a result, some states are exploring the need to establish a position within state government with oversight powers over regulatory boards, effectively creating a single regulatory czar with powers to approve or veto regulatory decisions.

Aside from the effect on state regulatory structures and function, the FTC, in defining key terms related to the state action doctrine, takes an extreme position. The definition of "control" is expanded beyond a numerical majority, and is presented in a contextual formulation that would allow one member of a board to be considered controlling if there was any sort of deference to their position. The FTC's definition of market participant is similarly expansive, and states that any individual with a license from the board on which they serve is to be considered an active market participant. This would include retired professionals, professionals not providing clinical services, and professionals who do not in any way stand to gain financially from action deemed to be anticompetitive. For example, a physician who is retired from practice but retains a license will be considered an active market participant and any decision he or she makes will be subject to a presumption that it was in self-interest.

**State Regulation of the Medical Profession Has Evolved to Reduce Regulatory Capture**

The state statutory choices establishing and empowering state medical boards protects against the well-intentioned but unskilled practices of health care professionals, as well as against those well-intentioned and skilled practices which simply exceed the scope of acceptable health care. The State—through the functions, composition, and powers approved by the legislature and the governor—vests state medical boards with broad discretionary powers to protect the public by policing the medical community through rules and regulations setting forth educational requirements, licensure restrictions, and conditions by which qualified physicians may provide medical treatment to patients.

The decision in *NC Dental* and the FTC guidance fails to recognize the capacity of an individual, often appointed by a governor or approved by the state legislature, to put self-interest aside and act in the public interest during his or her service on a state medical board. Aside from ethical considerations, evidence that state legislatures believe it to be in the public interest to have licensees on state medical boards that should include practicing physicians comes from:

1 The FSMB's *Essentials of a State Medical and Osteopathic Practice Act* states "Whatever the professional regulatory structure established by the government of the jurisdiction, physicians should bear the primary responsibility for licensing and regulating the medical profession for the protection of the public, without abusing physicians in the discharge of that duty. Every Board should include both physician and public members. All Board members shall act to further the interest of the state, and not their personal interests." (Emphasis added).
The fact that all 50 states have physician licensing boards that include practicing physicians; and
The 14 states with separate osteopathic boards have licensed osteopathic physicians on their board

This fact illustrates the universal determination by state legislatures across this country that it is in the best interest of the public for the medical profession to be regulated by knowledgeable health care professionals who have practical experience in the profession that they are regulating. Recognizing the important role licensed professionals play in regulation of the profession, U.S. Supreme Court Justice Samuel Alito, in his dissenting opinion in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* stated that structuring a regulatory board without participation of a licensed professional would "compromise the State’s interest in sensibly regulating a technical profession in which lay people have little expertise." 574 U. S. ____., 135 S.Ct. 1101, 1122 (2015).

Additionally, state medical boards comprised entirely of licensed professionals have become increasingly rare as state legislatures, beginning with California in the 1960s, have chosen to increase public membership on medical boards. This choice responds to society’s continuing demand for more diverse representation in government and involvement of a broader community in decision-making. Combined with the technical expertise provided by licensed professionals, public membership makes state medical boards stronger and less susceptible to regulatory capture by a private interest.

**Preserving Medical Regulation By the States Requires a Cautious Application of Antitrust Law**

Ultimately, the decision in *NC Dental* and the FTC's guidance seems to set forth the principle that a regulatory system established by the state, which balances many different variables that affect the public health and welfare, can only pass muster if it promotes competition. Examination of a state regulatory system by a federal actor with divergent goals is at odds with the constitutional balance of power between federal and state sovereigns. Moreover, it departs from the cautionary advice espoused by the United States Supreme Court in *Goldfarb v. Virginia State Bar*. In *Goldfarb*, the Court noted "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."2

The FSMB urges the Committee to realize the difference between professional licensure and other business activities as it studies the issue of competition and regulation by state licensing bodies. We ask you to acknowledge that regulation of certain licensed professional services may require application of antitrust principles that vary significantly from how they have been applied in other business contexts. This application should be deferential to the preferences of the state regarding the structure, composition, and powers provided to their duly appointed board and must reflect that in performing its duties, a state regulatory body exercises judgment that does not, and should not, solely focus on competition.

**Conclusion**

The FSMB is supportive of efforts to devise appropriate policies that balance underlying concerns of competition, efficiency, and innovation with the principles of federalism and the good public policy of state

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regulatory boards as the protector of the health and safety of the public. The FSMB would be pleased to meet with you to discuss the impact changes to the state action doctrine are having on state medical boards and, more generally, the regulation of health care.

Sincerely,

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Federation of State Medical Boards