

**BARRIERS TO ENTREPRENEURSHIP: EXAMINING
THE ANTI-TRUST IMPLICATIONS OF
OCCUPATIONAL LICENSING**

HEARING
BEFORE THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

HEARING HELD
JULY 16, 2014



Small Business Committee Document Number 113-076
Available via the GPO Website: www.fdsys.gov

U.S. GOVERNMENT PRINTING OFFICE

88-720

WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
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CONTENTS

OPENING STATEMENTS

	Page
Hon. Sam Graves	1
Hon. Nydia Velázquez	2

WITNESS

Mr. Andrew Gavil, Director, Office of Policy Planning, Federal Trade Commission, Washington, DC	3
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APPENDIX

Prepared Statements:	
Mr. Andrew Gavil, Director, Office of Policy Planning, Federal Trade Commission, Washington, DC	14
Questions and Answers for the Record:	
Questions to Mr. Andrew Gavil from Rep. Blaine Luetkemeyer	26
Additional Material for the Record:	
None.	

BARRIERS TO ENTREPRENEURSHIP: EXAMINING THE ANTI-TRUST IMPLICATIONS OF OCCUPATIONAL LICENSING

WEDNESDAY, JULY 16, 2014

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to call, at 1:02 a.m., in Room 2360, Rayburn House Office Building, Hon. Sam Graves [Chairman of the Committee] presiding.

Present: Representatives Graves, Chabot, Luetkemeyer, Tipton, Hanna, Huelskamp, Schweikert, Collins, Velázquez, Schrader, and Meng.

Chairman GRAVES. Good afternoon, everyone, I call this hearing to order. I want to thank everyone for being here.

When folks set out on a career path, they know that some of the jobs require certain licenses, educational backgrounds, and fees. Most people agree that certain professions should be subject to standards to protect the public, such as doctors, lawyers or architects. However, in the United States over the last 60 years, the number of occupations subject to State and local licensure laws have expanded greatly. Today not only do doctors need a license, but in some States professionals such as fortune tellers or interior designers require one as well.

In light of this, it is not surprising that a recent study found that occupational licensing was the number one regulatory burden that faces small firms today.

Understandably, this growing trend is sparking controversy as entrepreneurs question why certain licenses are needed, particularly if the license or educational requirements seem to have little to do with protecting the public. The balance between individual rights to pursue economic opportunities and States' rights to regulate economic activity within their borders appears to be tipping towards more regulation.

As entrepreneurs seek out new opportunities, they are finding more roadblocks in the way of earning a living or creating jobs. Often, these barriers are erected by licensing boards made up of men and women who are currently in the profession or the potential competitors of those seeking to enter the profession. These hurdles are particularly difficult to clear for those with limited financial means or lower levels of education. As entrepreneurs look for solutions, they are starting to file Federal lawsuits alleging that certain occupational licenses violate Federal anti-trust laws.

In my home State of Missouri, we are lucky to be consistently ranked as one of the least burdensome States for occupational licensing. However, in June hair-braiders filed a Federal suit against a Missouri law which requires braiders to obtain a cosmetology license. The State cosmetology license requires 1500 hours of training and two exams with all the various costs that are involved. But according to the suit, neither the training nor the test covers hair braiding. While we want competent and skilled workers in Missouri, and I strongly believe in States' rights to protect the welfare of its citizens, this occupational license, which does not seem tailored to the actual profession, appears to be a way to keep new competition out and infringe on an individual's economic liberty.

Today we are fortunate to have Director Gavil from the Federal Trade Commission, who will highlight some of the concerns and inform us of the actions that the FTC is taking as enforcer of the Federal anti-trust laws to promote competition and reduce unnecessary barriers to work.

Now I yield to Ranking Member Velázquez for her opening statement.

Ms. VELÁZQUEZ. Thank you, Mr. Chairman. Occupational licensing is a process by which states compel those involved in a particular profession or industry to meet specific standards, such as training, education or certain character requirements. The main justification for occupational regulation is to protect the public's health and safety. For example, individuals want to know health practitioners adhere to basic quality standards or that architects have achieved certain training requirements to design structurally sound buildings. However, the rapid growth of licensing requirements across a broad array of job fields has raised questions about the effectiveness of these regulations and potential unintended consequences.

In the 1950s, less than one in every 20 workers was in an occupation requiring occupational licensing. Today roughly, 30 percent of Americans work in a field requiring state licensing, creating additional hurdles for entrepreneurs looking to join a new field.

New licensing laws are almost always crafted with industry input and enjoy broad immunity from federal oversight. The states' power, however, is not absolute. It falls on the Federal Trade Commission to ensure that occupational licensing standards are advancing the goal of protecting the public and not serving intentionally or inadvertently to limit competition in a manner that runs afoul of antitrust laws.

For decades, the FTC has initiated enforcement actions designed to eliminate restrictions on business practices of state license professions, including restrictions on new competitors, advertising and solicitation, and even price meetings. As a result of FTC's efforts, robust marketplaces thrive in many professions, preserving consumer choice and keeping prices competitive. As always, the key is striking the appropriate balance, preserving occupational licensing systems that serve legitimate consumer protection purposes, while preventing licensure from restricting competition and stymieing entrepreneurship.

It is my hope that today's discussion will shed light on how the commission is advancing that goal and how the committee can be

helpful on this topic. In that regard, I thank the witness for being here, and I am certain your testimony will provide and will shed light and valuable insight.

With that Mr. Chairman, I yield back.

Chairman GRAVES. Our witness today, as I mentioned, is Andrew Gavil, the Director of the Office of Policy Planning at the Federal Trade Commission. Director Gavil has led this office since September of 2012, and he oversees the Office's advocacy efforts to support competition and protect consumers. Prior to this role, Director Gavil taught anti-trust at the Howard University School of Law and authored numerous articles on competition policy. Thanks for being here. We appreciate it.

STATEMENT OF ANDREW GAVIL, DIRECTOR, OFFICE OF POLICY PLANNING, FEDERAL TRADE COMMISSION, WASHINGTON, D.C.

Mr. GAVIL. Thank you, Mr. Chairman. Good afternoon. Chairman Graves, Ranking Member Velázquez, 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, and I am pleased to join you to discuss competition perspectives on the licensing and regulation of occupations, trades, and professions. The Commission's testimony describes 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. 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 service 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.

Occupational regulation can be especially problematic when regulatory authority is delegated to a nominally independent board comprising members of the very occupation to be regulated. When the proverbial fox is put in charge of the hen house, 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, business, and even new 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 even 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 policymakers to integrate competition concerns into their decision making process; specifically, that they consider, one, whether any particular licensure regulations are likely to have a significant and adverse impact on competition; two, whether the particular restrictions are targeted to address actual risks of harm to consumers; and, three, whether the restrictions are narrowly tailored to minimize any burden on competition.

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 the "state action" doctrine was an insufficient defense to the conduct.

As you know, one of these cases, North Carolina State Board of Dental Examiners, is currently pending 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.

I am, of course, happy now to respond to any questions you may have. Please note, however, that as is indicated in the written statement of the Commission, although the prepared statement presents the views of the Federal Trade Commission, my oral testimony and responses to questions reflect my views and do not nec-

essarily reflect the views of the Commission or any particular commissioner. Thank you.

Chairman GRAVES. Mr. Hanna.

Mr. HANNA. How do you navigate that process intellectually? I mean, where do you kind of generally set the bar for what needs to be regulated and what shouldn't be, and isn't that very subjective so that, you said you are not particularly proactive about limiting. Does that mean—well, what does that mean?

Mr. GAVIL. It means, in short, that as a practical matter, we have not found ourselves to be very successful when not invited to the party. When State regulators and legislators are considering legislation, we have found over time that we can be most effective in encouraging them to consider competition when we are invited to do so or when they have indicated a willingness to accept comments, as through public comment periods.

Mr. HANNA. Do you find that they are relatively willing to listen?

Mr. GAVIL. We do, especially when we have those public comment periods and when we are invited. Our recent experience shows that around three-quarters of the time we find that we are at least partially successful in influencing the awareness of the competition concerns that typically are the concerns that we would focus on and explain.

Mr. HANNA. Like what?

Mr. GAVIL. So this goes back to the first part of your question, you know, what is it that we are urging and what is our analysis. We are competition specialists; we are economists and lawyers working together. Many people in our office have decades of experience in particular industries, such as the healthcare industry, and with intellectual property issues. Typically what we would bring to bear on a question of regulation is an understanding of how to evaluate the likely competitive impacts of a particular restriction.

Mr. HANNA. So is it your opinion that regulation—I mean, there are people out there who never saw a thing they didn't want to regulate, and there are other people who believe that free enterprise somehow creates perfect outcomes. I think both are probably misguided. But in general, can you—there are businesses that clearly need licenses, need to be regulated, and those that don't. How do you separate the two and how do you measure the value that is created through kind of letting the market do it on its own? Because, frankly, customers are ultimately the best deciders of the value they receive, and that is part of the process.

Mr. GAVIL. I would completely agree, Congressman, and I think that one of the things we look for is regulations that interfere with that process. The market is going to work best when you see a free interchange between supply and demand, between the suppliers of services or products and consumers.

A recent example, to make it more concrete, we filed comments in Missouri and New Jersey in connection with the practices of auto distribution. Two-thirds of the States prohibit manufacturers from selling directly to consumers. We commented, in both instances, favoring statutes that would withdraw that restriction. The company that was particularly the spur to this was Tesla, but Tesla is the camel's nose under the tent.

The question is whether or not, as in other industries the interchange of manufacturers and customers should be determined based on consumer preferences.

Mr. HANNA. So generally new business models that are threatening to existing business models within some geographic or business organization, group of organizations are always somewhat resisted, but in New Jersey you saw someone actually create a law around that, with a business model that isn't really the government's business to judge upon. I guess that is what you—

Mr. GAVIL. Well, what you see sometimes is that the regulations already exist and they are a bar or sometimes new regulations are being introduced that would create a bar.

Mr. HANNA. So it actually inhibits innovation and limits competition and kind of reinforces the status quo?

Mr. GAVIL. Absolutely, and that would be our concern, and we have seen that pattern repeat in many healthcare fields, in auto distribution, and in the taxi industry right now, where what we see is heavily regulated incumbents actually using those regulations to impair innovation from new business models and new products and services.

Mr. HANNA. Thank you very much.

Mr. GAVIL. Thank you.

Mr. HANNA. Yield back.

Chairman GRAVES. Ms. Velázquez.

Ms. VELÁZQUEZ. Thank you. Thank you for being here today. Mr. Gavil, several states have already begun to offer better reciprocity between their licensing regulations to enable workers to start working immediately following a move to a new state. This is especially beneficial for military families. Besides offering portability to increase workers' mobility across state lines, what else can be done to reien in licensing laws?

Mr. GAVIL. Congresswoman, I think that we have actually noted in a number of our comments that these particular issues facing military families are significant, but they are an example of a broader problem. I think reciprocity laws and portability laws can go a long way toward reducing barriers that impede the mobility of the workforce and the ability to move to where the jobs are, so I would applaud that as a general matter personally and think that that is something worth considering in a variety of contexts.

Ms. VELÁZQUEZ. Under antitrust law, the courts have hesitated to rule on cases involving state licensing boards because of the state immunity doctrine, but one recent case suggests this hands-off approach may be changing even when a state board is involved. Can you give a brief overview of this state immunity doctrine and how limiting, not eliminating the state's immunity could serve some purpose?

Mr. GAVIL. Sure. With one caveat. As I indicated, we do have a case pending before the Supreme Court, and I want to be cautious about commenting on that case in particular, but the broad framework I think is a very important one that has been developed by the Supreme Court over a number of decades to try and strike a reasonable balance between the States' sovereignty and autonomy, and the national policy that favors competition, and the state action doctrine is an attempt to implement that balance, and I think

that it has sought to do that by recognizing that States, when acting as themselves, as sovereigns, should have that kind of ability to be exempt from Federal antitrust laws.

The more troubling issues come up when they delegate authority to private parties, and that is the issue squarely before the Supreme Court in North Carolina Dental; it is the degree to which private parties acting with an imprimatur of government regulation should be permitted to go forth without any deterrent from the Federal antitrust laws.

Ms. VELÁZQUEZ. Thank you. Is there a role for the FTC in creating guidance or providing tools on best practices for state occupational licensing boards to improve their transparency, uniformity, and clarity of information they provide the public?

Mr. GAVIL. Yes, and I think we try to do that very much so in our advocacy program. We are consistent in the framework that we try to use, and I have outlined it in our testimony today, and that is the framework that we urge State regulators and legislators to consider as well; to always take into account the competition consequences of any restrictions that they place, including the fact of licensing any new occupation.

Ms. VELÁZQUEZ. Thank you.

Mr. GAVIL. Thank you.

Chairman GRAVES. Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman. You mentioned the taxi issue. Now, in New York State up where I live in Buffalo, we just recently had someone like Uber, it is called Lyft, and they have opened up, or attempted to open up service in New York City, Rochester, Buffalo, and recently there was a lawsuit brought, I am not sure exactly who brought it, but obviously the taxi company's unions and so forth.

Interestingly, the court ruled that they could not operate in New York City, but in fact, could operate in Rochester and Buffalo, and I think the issue gets down to—obviously taxicabs and unions would view them unlicensed, unsafe and so forth, and I think all of us agree we need regulations to make sure the public is safe, they are insured, people know who they are, and all that goes with public safety, which I think can be handled outside of some of the issues the taxicabs are bringing up, the cost of a medallion and so forth and so on.

I am just kind of curious because it is the forefront right now of regulations trying to stifle innovation, you know, what you see going on in things like Uber, Lyft, and so forth.

Mr. GAVIL. I think you are right, Congressman, very much so, that this is just the tip of the iceberg. This is a part of a new and expanding part of the economy. Smartphones have triggered an extraordinary amount of innovation and development through applications that are platforms that allow people to communicate with each other in new ways, and these transportation applications are an expression of that. I would also agree that finding the right balance in terms of regulation and allowing the free market to innovate is a critical question in this area. We have submitted four comments in the last year and a half: One in Colorado; one in Anchorage, Alaska; one in Chicago; and one in the fourth place that I am not remembering right now, but we have done four of those

to try and lay out what we think is an appropriate framework for evaluating how regulators should go about adapting to new innovation, permitting it, encouraging it, and facilitating it while articulating and accounting for any appropriate consumer safety concerns.

One concrete example comes to mind. In Chicago, we commented on a ride-sharing regulation that was proposed, and the initial proposal required three times the level of insurance for an individual person using their car through a ride sharing app as compared to a taxi. Obviously that would impose greater costs on the ride-sharing, and our question was “why?,” what is the justification? Is there any evidence to support an increased concern about safety when individuals are using their cars? If there is, there may be a basis for regulations, but if there isn’t, then you are merely erecting a barrier to competition that may not be justified.

Mr. COLLINS. Now, do you see any nexus at all for the FTC on interstate commerce where you do certainly have the potential in two cities in two different States where someone might be using a ride share service to cross a State line that might give you a nexus to some action different than somebody just running around the city of Buffalo?

Mr. GAVIL. Uh-huh. To go back to my last question, I can’t believe I forgot the fourth one was the District of Columbia, so let me just get that out and clear.

I think that clearly, there is national level competition going on in this industry, but historically, the regulation was very local, and that alone has created some of the tension. You have new national competitors coming in, and they are facing regulations. As you mention, in New York it could be okay in one city and not okay in another city. That is because the legacy regulations are very local. They can be citywide. In some jurisdictions, California and Colorado are examples, there is some Statewide regulation. So that makes it quite complicated for an innovator to come in and try to compete in multiple jurisdictions. They have to understand and adapt to the regulations in multiple jurisdictions. That alone increases the cost of entry.

Mr. COLLINS. Thank you very much. I think that is all I have. Yield back, Mr. Chairman.

Chairman GRAVES. Mr. Schrader.

Mr. SCHRADER. Thank you, Mr. Chairman. I guess I am wondering why we are having the hearing a little bit. I am sure that will come out as we go forward, I guess, but it is my understanding as a past life being in the Oregon State legislature that occupational licensing was a State area of expertise, not Federal Government. Is that still accurate?

Mr. GAVIL. For the most part it is, yes.

Mr. SCHRADER. Okay. So I hope there is no inference that we want the Federal Government to take an increasing role in occupational licensing. Do you feel that is your province, to take on the occupational licensing that has been up to the States, been a States’ rights issue for a while?

Mr. GAVIL. So I would separate my response into two buckets. On the advocacy front, typically what we are doing is commenting to State regulators and to State legislators, not questioning their

authority but trying to introduce a competition perspective to their thought process.

On the enforcement side, I think we do recognize that many of these professions have a significant impact on interstate commerce, and that goes back to the prior question. When they do have a significant impact on interstate commerce, and it involves conduct that is anticompetitive, it does fall within the jurisdiction of the Federal antitrust laws. But honestly, we have used that in a very measured way. Those cases are few and far between, and we try to target them on some of the worst conduct that we find.

Mr. SCHRADER. I would hope so. That sort of argument could be made for Federal intervention in everything, all State, local ordinances, that type of rationale. I appreciate the measured approach that you guys are using here. You talk about the role of the FTC. I think that is fine. A comment had come up and you had agreed that it should be the consumers are the most important piece of this, and they are the best judge of whether or not the licensure is working. I guess I would argue that that would depend. There are a lot of professions that I think are pretty complicated, the consumer has an unrealistic expectation, the medical field in particular, of what medical anesthesiologists, cardiologists can and cannot do. Lawsuits abound based on mythology of accurateness and invincibility of medical technology or medical approaches.

So to me, it seems like there is an opportunity for professions to self-regulate, and the ultimate arbiter is not just the customer but your State legislature, your State courts. Really those folks can probably adjudicate these issues as well or better, having that local perspective and seeing what is actually going on than we at the Federal government, wouldn't you agree?

Mr. GAVIL. I would, and I think that the point you make is a very important one, which is—and the economists would call it situations that involve information asymmetries, which just means that we as consumers don't really know much about how to judge the quality of certain things that happen, especially in health care. In situations like that, that is a classic justification for some degree of regulation. In pricing contexts, even some of them in the taxi area, you wouldn't want to get into a cab not knowing what the rate is going to be that you would be charged.

So we have argued that although jurisdictions should be flexible in allowing new payment models, it is appropriate to think about disclosures to make sure that consumers understand what they are agreeing to, whether it is through an app or getting into a taxi. So, I think, yes, across a broad range of areas, that sort of problem with information is a traditional justification for some degree of regulation. I think what we would argue is try to look for the least restrictive kind of regulation possible to permit the free market to operate.

Mr. SCHRADER. Yeah, I would agree. I remember as a budgeteer in the Oregon State Legislature, there were certain boards that seemed to be building little protective fiefdoms where the requirements only would benefit a select few that would get the good contracts and other very well qualified accountants, surveyors, engineers would be unable to apply. But, again, I think that is where the State legislature, my ways and means group, my budget group

were able to discern that, call the group to the table and have a discussion and oftentimes were able to get them to change their rules and regulations.

Mr. GAVIL. And we work cooperatively with State antitrust enforcers in many instances. When we see problematic legislation, regulation or conduct at the State level, we often work together with the State enforcers.

Mr. SCHRADER. So your role—it sounds like the best role, from my perspective, that you would play is advisory to the States, legislatures and the local boards to make sure they are doing things the right way and help with competition.

Mr. GAVIL. Absolutely, and that is the core of our advocacy program. It is about trying to encourage people to take a competition perspective, and we act as competition advisers in that role.

Mr. SCHRADER. Very good. Thank you. I yield back, Mr. Chairman.

Chairman GRAVES. Mr. Luetkemeyer.

Mr. LUETKEMEYER. Thank you, Mr. Chairman.

Mr. Gavil, I would like to focus on the enforcement part of what you have been talking about here. I think it can be a barrier to entrepreneurship if it is not done correctly, and that concerns me. While I support the enforcement of the laws and your pursuing of bad actors, I have some concerns. You know, recently the Committee on Oversight and Government Reform did a study and got a hold of a lot of the internal memos at the Department of Justice with regards to Operation Chokepoint, and you are mentioned prominently in there in a couple different spots, and I want to talk about that a little bit with regards to, number one, have you or your office had any communications with DOJ with regard to payment processors?

Mr. GAVIL. We have not been involved in that matter at all in the Office of Policy Planning.

Mr. LUETKEMEYER. Has the Federal Trade Commission been working with DOJ?

Mr. GAVIL. I am honestly not familiar with what might have been going on or coordination between the agencies. It is not a matter that I have had any personal knowledge of.

Mr. LUETKEMEYER. Well, on page 12 of a memo from the Deputy Assistant Attorney General, it says here that they are working with the FTC through information gleaned through FTC's many actions, and as a result, they have even assigned somebody who your principal payment processor expert to work with them.

Mr. GAVIL. Congressman, that may be true, but again, I just don't have any personal knowledge of it. It wasn't my office that was involved in that matter.

Mr. LUETKEMEYER. Well, you just said that you are part of the enforcement of making sure this all works.

Mr. GAVIL. No, the FTC has an enforcement arm. Actually, my office takes principal responsibility for initiating advocacies. We typically do not get directly involved in very much enforcement. On occasion, we do advise enforcers in terms of the competition theory, but in this particular matter we had no role that I know of.

Mr. LUETKEMEYER. You mean your division did not have? FTC may have had?

Mr. GAVIL. I cannot speak for the entire FTC, but my office didn't have any involvement in that matter.

Mr. LUETKEMEYER. Okay. Because I am very concerned because I think it appears that with your cooperation, they are going beyond just enforcement. It appears that they are going on a witch hunt to try and do away with entire industries versus just the bad actors within that industry, and they do that by choking off financial services, and apparently your agency has a lot of history apparently with payment processors; is that correct?

Mr. GAVIL. As far as I know, the agency has done work with payment processors, but again, it hasn't been me or my office.

Mr. LUETKEMEYER. Okay. How do you interact, then, with other Federal agencies in your position?

Mr. GAVIL. In my position? Yes, in a number of ways. As part of our advocacy program sometimes we will engage in, frequently we will engage in what we call informal advocacy, where we confer with sister Federal agencies about competition issues. Other agencies, for example, that are considering regulations that may have an impact on competition, they may invite public comments or they may invite our advice informally to talk about the competition consequences, so that is a kind of work that my office would do that is agency to agency.

Mr. LUETKEMEYER. You don't see that the competition issue here with regards to other activities within an industry and the payment processing connection between those—have you ever heard of Operation Chokeypoint?

Mr. GAVIL. I actually had not followed it and, like I said, I have not worked directly on it in my role as Director of the Office of Policy Planning.

Mr. LUETKEMEYER. Well, it certainly is kind of concerning to me that your agency, which is—part of it you said is enforcement of.

Mr. GAVIL. Yes.

Mr. LUETKEMEYER. In your statement here you talk about it, yet you have no recollection or awareness of the Department's interaction with an enforcement agency. How does that work?

Mr. GAVIL. It would not be unusual, Congressman, that different parts of our agency are working with each other and with other agencies, and we just wouldn't be involved in it. For example—

Mr. LUETKEMEYER. Right hand never knows what the left hand is doing?

Mr. GAVIL. I wouldn't describe it that way. I would say they were working on different projects, and not every one of us is engaged with—

Mr. LUETKEMEYER. I would describe it that way because you are all within the same agency, are you not?

Mr. GAVIL. But none of us are engaged—

Mr. LUETKEMEYER. Part of your agency is enforcement as well. But you have no concern, no knowledge of the enforcement part of your agency?

Mr. GAVIL. I don't think that fairly characterizes what I said. I said I had no knowledge of this particular activity. I think I did say I do have knowledge of some enforcement options and some enforcement actions when I am consulted and when my office is con-

sulted. We had no role to play in this matter, so I really don't have any knowledge about it.

Mr. LUETKEMEYER. That is a head scratcher. I yield back. Thank you, Mr. Chairman.

Chairman GRAVES. Dr. Gavil, in your written testimony you provided a framework for analyzing licensing requirements. Can you walk us through a couple of examples, one where it would be deemed appropriate for that licensing and one where it would impede competition, just as examples.

Mr. GAVIL. Sure. So we recently issued a policy paper on the regulation of advanced practice registered nurses. APRNs are sometimes described as a mid-level professional, more advanced training than a registered nurse but not the same training as a physician. And in many States, we have seen regulations that would mandate by law that such APRNs can only function under the direct supervision of a physician, even though their training would allow them to do certain things independently.

So in our policy paper we questioned whether these sorts of restrictions can really be justified, and one way to think about is a mismatch. There clearly is some concern about public safety, but when we surveyed the evidence on public safety, there was a lot of evidence to support the ability of APRNs to do certain things independently and to practice independently.

In a time where access to health care is especially important, APRNs may provide a less expensive and more accessible kind of health care. So our policy paper tries to collect that evidence and sets out the case for why those sorts of regulations may not be justified. And we asked States to consider, and we filed a number of comments, and a number of States actually consistent with our comments have been abandoning those very strict supervision requirements, and we have been pleased to see that development.

Another one that was actually just in the news this week, The Washington Post had an editorial yesterday about dental therapists, and dental therapists in some sense is an analogue to APRNs. It is a mid-level professional, more skilled than a dental hygienist, more education and training than a dental hygienist, but not quite a dentist. But in areas where there is a shortage of dental care, dental therapists may be a new and emerging model that would allow for greater access and lower cost dental care, and we filed a comment with the Commission on Dental Accreditation, which is the accrediting body of the American Dental Association, urging them in a similar way to avoid using the accreditation process to mandate supervision by dentists and not allow these dental therapists to autonomously provide certain basic services. So those are two recent examples where we felt like the regulation was a mismatch, it was excessive and inappropriate.

In the taxi cases, to give you an example where we do think some regulation might be appropriate, the issue has been whether the regulation is greater than necessary to meet the needs of consumers. Certainly we all care about safety and quality, but as I mentioned earlier, an example would be insurance. Would we concede that some insurance requirements, some inspection requirement might be appropriate? Yes. But when we see disparate requirements that would create a competitive disadvantage, we

would question those and ask whether they really have some factual basis and can be justified.

Chairman GRAVES. Well, I want to thank you for testifying today and shedding some light on the role that obviously the FTC plays in protecting competition and ensuring that entrepreneurs have an opportunity to enter various occupations. We very much appreciate you coming in, and with that, I would ask unanimous consent that members have 5 legislative days to submit statements and supportive materials for the record. Without objection, that is so ordered, and with that, the hearing is adjourned. Thank you.

Mr. GAVIL. Thank you, Congressman.

[Whereupon, at 1:41 p.m., the committee was adjourned.]

A P P E N D I X

**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

WASHINGTON, D.C.

JULY 16, 2014

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 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.

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

¹This 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.

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.

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

²The 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).

•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 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 Related to 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 li-

⁴The 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).

⁵15 U.S.C. § 46 (2006).

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.

⁷FED. 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>.

⁸FED. 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>.

⁹JACOBS 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).

¹⁰FED. TRADE COMM’N & U.S. DEPT’S 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>.

censed 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 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 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

¹¹This 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.

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

¹³For 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.

¹⁴George 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.”).

¹⁵Regarding 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.

¹⁶Morris 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).

¹⁷See, 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.

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.

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:

¹⁸For 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 <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>.

¹⁹For 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 POLY 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 there significant and non-speculative consumer health and safety issues, or other legitimate public policy purposes, that warrant some form of licensure?
- 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 comments²¹ and amicus curiae briefs²² to state and self-regulatory entities on competition policy and antitrust law issues relating to such professionals as real estate brokers,²³ elec-

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

²¹Many 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>.

²³FTC 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), 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.

tricians,²⁴ accountants,²⁵ lawyers,²⁶ dentists²⁷ 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 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

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/130125tennesseeadvertisingletter.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.

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).

evidence and experience, expert bodies have concluded that APRNs are safe and effective as independent providers of many health care services within the scope of their training, licensure, certification, and current practice.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 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 concerned that it could effectively constrain the discretion of the states in defining scope of practice and

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. Dept. 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).

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.

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 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

³⁸See, 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>.

³⁹The 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.

⁴⁰The 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.

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 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,⁷ 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 optometry⁴⁸ and dentistry⁴⁹ have sought to suppress information that could be useful to consumers of their services. The FTC has also challenged 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 eth-

⁴¹ In re South Carolina State Board of Dentistry, Complaint (2003) (Dkt. No. 9311), <http://www.ftc.gov/os/2003/09/socodentistcomp.pdf>. See also In re South Carolina Board of Dentistry, Opinion and Order of the Commission (2004) (Dkt. No. 9311), <http://www.ftc.gov/os/adjpro/d9311/04072Scommissionopinion.pdf>.

⁴² In re South Carolina State Board of Dentistry, Decision and Order (2007) (Dkt. No. 93 I D), available at <http://www.ftc.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).

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).

ical 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.

Questions for the Record from
Rep. Blaine Luetkemeyer (MO-3)
Committee on Small Business
U.S. House of Representatives

“Barriers to Entrepreneurship: Examining the Anti-Trust Implications of
Occupations Licensing”

July 16, 2014

Questions to Andrew Gavil, Director of the Office of Policy Planning,
Federal Trade Commission

The Office of Policy Planning has not been involved with any policy initiatives or enforcement actions involving payment processors. To be responsible, I have asked the appropriate staff in the Commission’s Bureau of Consumer Protection to provide substantive responses to certain questions. Those responses follow mine below.

1. The Office of Policy Planning is responsible for developing and implementing long-range competition and consumer protection policy initiatives. As I understand it, your office also advises Federal Trade Commission staff on cases raising new or complex policy issues. In carrying out these responsibilities, has your office been involved over the past two years with any policy initiatives relating to payment processors? Has your office had to provide advice to the Federal Trade Commission on cases involving payment processors that raise new or complex policy issues?

No. In the past two years, the Office of Policy Planning (“OPP”) has not been involved with any policy initiatives relating to payment processors and has not provided advice to the Commission regarding cases involving payment processors.

2. As a matter of agency policy, would your office have to study any potential changes in Federal Trade Commission enforcement policy with respect to payment processing before they are adopted? Has your office conducted such a study?

No. There is no FTC policy requiring OPP involvement in any particular consideration of enforcement policy. I am not aware of any potential changes being considered regarding the FTC’s enforcement policy with respect to payment processors and OPP has not conducted any study of potential changes in FTC enforcement policy with regard to payment processors during my time as OPP director. In addition, I am not aware of any such OPP study prior to my tenure here.

3. Has your office or any office within the Federal Trade Commission conducted any examination or study relating to

payment processing? If so, what was the nature of those studies and what was their conclusion?

OPP has not conducted any examination or study relating to payment processing during my time as OPP director and I am not aware of any such OPP examination or study prior to my tenure here.

Bureau of Consumer Protection Response: As part of its efforts to stop fraud and cut off the supply of money to fraudulent operations, the Commission has had a long-standing enforcement program directed at payment processors that engage in unlawful conduct. For more than a decade, the Commission has charged a variety of nonbank payment processors and other intermediaries with engaging in unfair acts and practices in violation of the FTC Act, 16 U.S.C. §45, and/or with providing substantial assistance to telemarketers in violation of the Telemarketing Sales Rule, 16 C.F.R. Part 310.

The payment methods involved in the Commission's cases have included credit and debit cards,¹ Automated Clearing House ("ACH") debits,² unsigned demand drafts known as Remotely Created Checks ("RCCs"), and electronic versions of RCCs, known as Remotely Created Payment Orders ("RCPOs").³ Regardless of the payment method, the Commission's cases have highlighted red flags that should have put the defendants on notice of a high likelihood of illegal activity. These signs include unusually high rates of returned or reversed transactions (or chargeback rates in connection with credit cards), sales scripts or websites containing statements that are facially false or highly likely to be false, consumer complaints, and inquiries from law enforcement or regulators.

Any decision about whether to take law enforcement action is largely defined by the facts of a particular case. The Commission will continue to carefully consider the relevant facts of each case—including the processor's relationship to the merchant, its participation in the merchant's illegal activities, and the extent of its knowledge of the illegal activities—to determine whether law enforcement is appropriate.

In addition, the Commission has worked with NACHA—The Electronic Payments Association, Visa and MasterCard, as well as the Electronic Transactions Asso-

¹*E.g.*, *FTC v. Innovative Wealth Builders*, Civ. No. 13-CV-00123 (M.D. Fla. June 11, 2014) (Stip. Perm. Inj.) (alleging that credit card processor violated the TSR by assisting telemarketers of debt relief services); *FTC v. Loewen*, 2013 WL 5816420 (W.D. Wash. Oct. 29, 2013) (Summ. J.) (finding defendants' activities, including credit card processing, violated the TSR).

²*E.g.*, *FTC v. Your Money Access, LLC*, Civ. No. 07-5147 (E.D. Pa. Aug. 11, 2010) (Stip. Perm. Inj.) (alleging ACH and RCC payment processor unfairly debited or attempted to debit more than \$200 million from consumer accounts on behalf of fraudulent telemarketers); *FTC v. Electronic Financial Group*, No. W-03-CA-211 (W.D. Tex. Mar. 23, 2004) (Stip. Perm. Inj.) (settlement requiring defendants to pay \$1.5 million).

³*E.g.*, *FTC v. Automated Electronic Checking, Inc.*, Civ. No. 13-00056-RCJ-WGC (D. Nev. Feb. 5, 2013) (Stip. Perm. Inj.) (payment processor of RCCs and RCPOs); *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104 (S.D. Cal. Sept. 16, 2008), *aff'd*, 604 F.3d 1150, 1158 (9th Cir. 2010) (Perm. Inj.) (Internet-based check creation and delivery service).

ciation to learn about standard industry practices and to promote self-regulatory initiatives. Self-regulation, if it is sufficiently robust, can serve as an important complement to law enforcement in this area. Industry standards, such as those from Visa and MasterCard, have been in place for many years and have assisted processors and banks in ferreting out entities engaged in illegal conduct.

4. Has your office or any other office at the Federal Trade Commission cooperated with the Department of Justice and/or any federal banking regulator in any fashion on Operation Choke Point?

As I testified, OPP has not been involved in what some may have described as “Operation Choke Point.”

Bureau of Consumer Protection Response: The Commission participated in an inter-agency working group—the Consumer Protection Working Group of the Financial Fraud Enforcement Task Force—that, among other things, focused on payment processors engaged in unlawful conduct. The members of the working group, which included the Department of Justice (“DOJ”) and federal banking regulators, exchanged information about payment processors, and coordinated their work in this area to maximize the efficient use of government resources in order to protect consumers from fraud. As discussed above, the Commission has brought enforcement actions against payment processors engaged in unlawful conduct for more than a decade; and FTC staff has shared information with DOJ even prior to the Working Group’s formation in 2012. The term “Operation Choke Point” was developed by DOJ staff to refer to its own work in this area. The Commission does not use this term in reference to its work involving payment processors, which again preceded our involvement in the inter-agency working group described above.

5. In what manner does the Federal Trade Commission cooperate with law enforcement agencies and federal banking agencies?

OPP interacts on a regular basis with other federal and state government agencies regarding competition policy matters, including competition advocacy, workshops, and industry studies. We have also participated in the preparation of various antitrust enforcement guidelines. OPP does not cooperate with other agencies directly in any law enforcement matters.

Bureau of Consumer Protection Response: With regard to consumer protection matters, the FTC partners with various civil and criminal agencies on matters of overlapping jurisdiction or expertise. The FTC frequently works with the Consumer Protection Branch of DOJ’s Civil Division, which has authority to bring civil penalties for viola-

tions of FTC administrative orders and FTC rules.⁴ The Commission's Criminal Liaison Unit also partners with DOJ (including the U.S. Attorneys' Offices) and other federal and state criminal law enforcers to promote criminal prosecution of consumer frauds. This is consistent with Section 6(k) of the FTC Act, 16 U.S.C. §46(k), which grants the FTC authority to refer matters to DOJ for criminal law enforcement and share information with DOJ attorneys. The FTC and the Consumer Financial Protection Bureau share concurrent enforcement authority over most non-bank financial entities. The agencies coordinate their work through a Memorandum of Understanding, which is designed to ensure consistency in approach, facilitate information sharing, and prevent duplication. The FTC also coordinates with other banking agencies informally on enforcement issues to ensure consistency and avoid duplication.

6. Documentation provided by the Department of Justice to the House Oversight and Government Reform Committee indicates that at least one Federal Trade Commission attorney was assigned to the Department of Justice to work on Operation Choke Point. Please provide all information related to that assignment. How many Federal Trade Commission staff have been assigned to the Department of Justice to work on Operation Choke Point and/or similar initiatives? How many Federal Trade Commission staff are working internally on Operation Choke Point and/or similar initiatives.

As indicated above in response to Question 4, OPP has not been involved in "Operation Choke Point."

Bureau of Consumer Protection Response: On or about June 2013, one FTC staff attorney was designated a Special Assistant United States Attorney to assist in the investigation and possible criminal prosecution of suspects who work in the payment processor industry. Approximately 50% of the attorney's time was spent working on the criminal matter, with the remainder spent working on FTC matters. No other attorneys have been assigned to DOJ to work on matters involving payment processors. As discussed above, the FTC has brought enforcement actions against payment processors for more than a decade. During that period, several attorneys and investigators have worked on more than a dozen enforcement actions filed by the Commission.

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⁴See, e.g., *U.S. v Sonkei Communications*, No. SACV11-1777-AG (C.D. Cal. Apr. 15, 2014) (Stip. Perm. Inj.) (resolving allegations that the defendants violated the FTC's Telemarketing Sales Rule by helping clients make illegal robocalls, call phone numbers on the National Do Not Call Registry, and mask Caller ID information).