

# COMPETITION IN PROFESSIONAL SERVICES IN THE UNITED STATES

## Introduction

Regulation of professions in the United States occurs at the State governmental level in the form of occupational licensing laws and related business practice regulations. In addition, self-regulating professional associations promulgate recommended standards of practice or codes of ethics. Governmental and private regulations can serve the public interest by ensuring an acceptable standard of competence and integrity of professional services, which in turn promotes the health, safety and well-being of consumers. This is particularly beneficial when it would be difficult for consumers to evaluate the quality of professional services, and factors such as litigation, reputation and guarantees are inadequate to enable consumers to make an informed purchase decision. However, regulations may also restrict professionals' ability to compete effectively, resulting in consumer injury, without providing benefits that outweigh the harm to competition.<sup>1</sup>

For over thirty years, the Federal Trade Commission ("FTC" or "Commission") and the Antitrust Division of the Department of Justice ("DOJ") have undertaken a broad enforcement program designed to eliminate private restrictions on business practices of state-licensed professions that may adversely affect the competitive process and raise the prices or decrease the quality of professional services.<sup>2</sup> In addition, the agencies have submitted numerous comments on the benefits and costs of occupational regulation to state legislatures, regulatory commissions, and others.

The first section of this paper provides an overview of the agencies' enforcement actions; the second section sets out the principles articulated in our advocacy comments to legislatures or regulators and discusses selected advocacies that illustrate the agencies' approach to professional services.

## I. Enforcement Actions

The agencies have successfully challenged anticompetitive restrictions imposed by state regulatory bodies, where the state board regulation extended beyond that which beyond the exemption to the antitrust laws for "state action"<sup>3</sup> and other agreements among competitors, including restraints on advertising and solicitation, price competition, and contract or commercial practice.

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<sup>1</sup> A 1990 report by Federal Trade Commission economists concluded that occupational regulations frequently increase prices and impose substantial costs on consumers without increasing the quality of professional services. Cox and Foster, *The Costs and Benefits of Occupational Regulation*, Federal Trade Commission Bureau of Economics Staff Report, October 1990. The report recommended that the costs and benefits of any regulatory proposal be weighed on a case-by-case basis.

<sup>2</sup> Press releases and information about FTC and DOJ enforcement actions and competition advocacies are available on the FTC (<http://www.ftc.gov>) and DOJ (<http://www.usdoj.gov/atr>) home pages.

<sup>3</sup> This judicial doctrine provides generally that the antitrust laws do not apply to action by a state in its sovereign capacity or to private conduct directed or compelled by the state. Direct action by a state legislature or court is automatically exempt, without further inquiry. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558 (1984); *Bates v. State Bar*, 433 U.S. 350 (1977); *Parker v. Brown*, 317 U.S. 341 (1943). Where the challenged conduct is undertaken by a state agency, local government, or private party, further inquiry is required into whether the conduct followed "clearly articulated and affirmatively expressed state policy" to displace competition and, in the case of a private party, the restraint is subject to "active state supervision." *See, e.g., FTC v. Ticor Title Insurance Co.*, 544 U.S. 621 (1992); *Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48 (1985).

## 1. Restraints on advertising and solicitation

Private professional associations and State boards traditionally imposed restrictions on advertising and solicitation by professionals, claiming this was necessary to protect consumers from false or deceptive advertising or marketing practices. The agencies have examined whether these restrictions are so broad that they also unnecessarily restrict the provision of truthful information to consumers that could enhance competition.

Some of the most important cases that the Commission has brought challenging restrictions on the dissemination of truthful advertising of professional services have been in the health care area. In the seminal case of *American Medical Association ("AMA")*,<sup>4</sup> the Commission found, among other things, that the AMA, through its ethical guidelines, had illegally suppressed virtually all forms of truthful, non-deceptive advertising and similar means of solicitation by doctors and health care delivery organizations. In the decade since the final decision in the *AMA* case, the Commission has challenged private dental,<sup>5</sup> medical,<sup>6</sup> and other professional associations<sup>7</sup> for various restrictions on the dissemination of truthful information, usually imposed through provisions in codes of ethics. The FTC has challenged similar restrictions that were imposed by organizations representing accountants and engineers.<sup>8</sup>

More recently, in August 2004, the FTC charged the Virginia Board of Funeral Directors and Embalmers with violating the antitrust laws and restraining competition by prohibiting funeral directors from advertising discounts for “pre-need” funeral planning and services. The parties agreed to a settlement, and an order bars the Board from prohibiting or restricting truthful price advertising, including enforcing any regulation that might prevent Board licensees from using truthful advertising to notify consumers of prices and discounts for funeral products and services<sup>9</sup>.

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<sup>4</sup> 94 F.T.C. 701 (1979). The Commission’s decision was affirmed and modified by the 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).

<sup>5</sup> See, e.g., *Association of Independent Dentists*, 100 F.T.C. 518 (1982) (general restriction on truthful advertising without Board of Director’s prior approval).

<sup>6</sup> See, e.g., *American Psychological Association*, 115 F.T.C. 993 (1992)(restrictions on truthful advertising, comparative statements on services, testimonials, direct solicitation, and participation in patient referral services); *Connecticut Chiropractors Association*, 114 F.T.C. 708 (1991)(restriction on truthful advertising of free or discounted services, including use of coupons, or ads deemed by the association to be "undignified or not in good taste" or implying "unusual expertise."); *American Academy of Optometry, Inc.* 108 F.T.C. 25 (1986)(restriction on all truthful advertising and solicitation).

<sup>7</sup> See, e.g., *National Association of Social Workers*, 116 F.T.C. 140 (1993)(restrictions on use of testimonials and other forms of truthful advertising or solicitation); *Structural Engineers Association of Northern California*, 112 F.T.C. 530 (1989)(restriction on solicitation).

<sup>8</sup> In 1990, the Commission charged the American Institute of Certified Public Accountants, the dominant professional association in the accounting field, with restricting truthful, non-deceptive advertising by prohibiting members from making truthful claims in self-laudatory or comparative advertisements, or using truthful testimonials. Similarly, in 1993, the Commission entered a consent order with the National Society of Professional Engineers (NSPE) settling charges that the NSPE, through its ethics code, restricted truthful or non-deceptive advertising by its members (*National Society of Professional Engineers*, 116 F.T.C. 787 [1993]). See also *AFSE, the Association of Engineering Firms Practicing in the Geosciences*, 116 F.T.C. 399 (1993)(restrictions on self-laudatory advertising); *Structural Engineers Association of Northern California*, 112 F.T.C. 530 (1989) (code of ethics prohibited advertising work or merit in a self-laudatory manner).

<sup>9</sup> *Virginia Board of Funeral Directors and Embalmers*, (2004), available at <http://www.ftc.gov/os/caselist/0410014/041005do0410014.pdf>.

In acting to eliminate anticompetitive restraints on professional advertising, the Commission has emphasized the important role of professional associations in regulating deceptive advertising and in person solicitation of "vulnerable" persons. The Commission's orders in the *AMA* case and all subsequent cases contain a proviso allowing a professional association to act against advertising claims that it "reasonably believes would be false and deceptive within the meaning of Section 5 of the Federal Trade Commission Act."

## 2. Restraints on price competition

An early DOJ case, *National Society of Professional Engineers v. U.S.*,<sup>10</sup> challenged a professional society's prohibition in its canon of ethics of competitive bidding by its members. In that case, the Supreme Court held that the trial court was justified in refusing to consider the defense that the canon was justified "because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety." The Court held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," and that "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."

In the 1990s the Commission challenged various forms of price restraints by medical and other professional societies including the proscription of: i) underbidding for a contract or agreeing to accept compensation that was "inadequate" in light of the usual fees in the community;<sup>11</sup> ii) offering services at "discounted fees";<sup>12</sup> iii) low pricing and granting favorable credit terms;<sup>13</sup> and, iv) requiring members to uphold the principle of "appropriate and adequate compensation."<sup>14</sup>

During the past ten years, the FTC and the DOJ have addressed a significant number of violations of the antitrust law orchestrated by associations of physicians in numerous places throughout the U.S.<sup>15</sup> The investigated conduct typically included collusion to fix prices in negotiations with insurers and health care plans, as well as refusals to deal with non-complying plans or insurers.<sup>16</sup> In some cases, not only independent practitioners, but also hospitals were part of the collusive scheme.<sup>17</sup> Often, physicians' associations not only set the prices that should be charged by their members, but directly negotiated those prices with insurance companies on behalf of their members,<sup>18</sup> prohibiting them from carrying out any individual negotiation.<sup>19</sup> The agencies found that this conduct forced insurers and health care plans to pay higher fees, which ultimately resulted in higher health care costs for employers and individual consumers.

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<sup>10</sup> 435 U.S. 679 (1978).

<sup>11</sup> *E.g.*, *AMA*, *supra* note 4.

<sup>12</sup> *E.g.*, *Connecticut Chiropractor Association*, *supra* note 6.

<sup>13</sup> *E.g.*, *AFSE, The Association of Engineering Firms Practicing in the Geosciences*, *supra* note 8.

<sup>14</sup> *E.g.*, *Structural Engineers Association of Northern California*, 112 F.T.C. 530 (1989).

<sup>15</sup> See for example: *Southwest Health Alliances, Inc.* (2011), available at

<http://www.ftc.gov/os/caselist/0910013/110715southwestdo.pdf>; *Roaring Fork Valley Physicians, IPA, Inc.* (2010), available at <http://www.ftc.gov/os/caselist/0610172/100409roaringforkdo.pdf>.

<sup>16</sup> *Idaho Orthopaedic Society* (2010), available at <http://www.justice.gov/atr/cases/f262000/262061.pdf>.

<sup>17</sup> *Minnesota Rural Health Cooperative* (2011), available at <http://www.ftc.gov/os/caselist/0510199/110104ruralhealthdo.pdf>.

<sup>18</sup> *Boulder Valley IPA* (2010), available <http://www.ftc.gov/os/caselist/0510252/100406boulderdo.pdf>; *Alta Bates Medical Group, Inc.* (2009), available at <http://www.ftc.gov/os/caselist/0510260/090714abmgdo.pdf>.

<sup>19</sup> *AllCare IPA* (2009), available at <http://www.ftc.gov/os/caselist/0610258/090203allcareipado.pdf>.

The joint fee negotiation did not benefit from any efficiency justification, notably without efficiency-enhancing integration of practice or sharing of risk. In most cases, the consent order barred the association and its members from collectively fixing prices or other terms on which to deal with payors. Associations of physicians were prohibited from participating in the review, communication and negotiation of contracts or terms between a physician and payors and from coordinating members' negotiations with payors for fees and terms in any way.<sup>20</sup> In 2008, the FTC's approach to analyzing collective bargaining among physicians was upheld by the Court of Appeals in the case of *North Texas Specialty Physicians v. FTC*,<sup>21</sup> including the FTC's finding that NTSP's conduct was "inherently suspect" and had "no pro-competitive justification."

Some earlier cases involved price-fixing agreements in the context of joint ventures, typically involving the purchase by physicians of expensive medical equipment. An important issue in these cases has been whether the agreement on price should be considered *per se* unlawful or ancillary to a legitimate joint venture (*i.e.*, whether the collective setting of fees was reasonably necessary to achieve efficiencies from the legitimate joint ownership) and therefore analyzed under the rule of reason.<sup>22</sup>

More recently, in the context of real estate foreclosures in the aftermath of the 2008 economic crisis, the Department of Justice investigated bid rigging and fraud at real estate auctions nationwide, which resulted in charges against numerous individuals and companies. In these cases, DOJ identified a pattern of collusive schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions. Instead of competitively bidding at public auctions for foreclosed properties, groups of real estate speculators work together to keep prices at public foreclosure auctions artificially low by paying each other to refrain from bidding or holding unofficial "knockoff" auctions among themselves. During a period of unprecedented home foreclosure rates, the collusion taking place at public auctions in the U.S. artificially drove down foreclosed home prices and enriched the colluding real estate speculators at the expense of homeowners, municipalities, and lending institutions. The impact of these collusive schemes is far-reaching because they negatively affect home prices in the neighborhoods where the foreclosed properties are located. Similar collusive conduct has been detected among bidders for public tax liens.<sup>23</sup>

In another example, in the legal profession, the Commission charged an attorneys' group in Clark County, Washington with price fixing (2004). The group consisted of 43 independently practicing attorneys who represented criminal indigent defendants. According to the FTC's complaint, the attorneys formed a consortium through which they collectively demanded higher fees from the county for defending certain types of criminal cases and threatened to refuse to take additional cases of these types unless the county agreed to the higher fees. The Commission settled with the group and issued an order barring the attorneys from engaging in similar conduct

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<sup>20</sup> See for example the final consent orders in the matters: *Physician Integrated Services of Denver, Inc.* (2002), available at <http://www.ftc.gov/os/2002/05/pisdagreement.pdf> and *Aurora Associated Primary Care Physicians, L.L.C.* (2002), available at <http://www.ftc.gov/os/2002/05/auroraagreement.pdf>.

<sup>21</sup> 528 F.3d 346 (5th Cir. 2008).

<sup>22</sup> *Urological Stone Surgeons, Inc.; Stone Centers of America, L.L.C.; Urological Services, Ltd.; Donald M. Norris, M.D.; and Marc A. Rubenstein, M.D.* (1998), available at <http://www.ftc.gov/os/1998/04/9310028.do.htm>.

<sup>23</sup> *US. v. Wiley C. Chandler et al* (2012), available at <http://www.justice.gov/atr/cases/f280700/280734.pdf>.

in the future.<sup>24</sup> This case was similar to an earlier case in which the Supreme Court upheld a FTC finding in a separate but similar case, involving a boycott by members of the Superior Court Trial Lawyers Association in order to force the District of Columbia to increase their compensation as court-appointed counsels for indigent persons constituted an unlawful price-fixing agreement.<sup>25</sup>

### **3. Exclusion of competitors**

In the health care sector the Commission has a long record of challenging concerted efforts to exclude new competitors and forms of competition. The cases have addressed incumbent competitors obstructing entry by HMOs (Health Maintenance Organizations),<sup>26</sup> non-physician providers (nurse midwives),<sup>27</sup> hospital-sponsored clinics,<sup>28</sup> and other "alternative" arrangements (physical therapists working under an employment agreement with a physician, provision of services in a retail location, or through corporate practice).<sup>29</sup>

In the early 1990s, the Commission issued a series of orders against physicians who allegedly threatened boycotts to prevent local hospitals from pursuing an affiliation with the Cleveland Clinic, a nationally-known provider of comprehensive health care services.<sup>30</sup> The Clinic, which operated as a multispecialty group medical practice, offered a pre-determined "global fee" or "unit price" covering all aspects of many services, such as surgery. The Commission's complaints alleged that when the Clinic sought to establish a facility in Florida, local physicians sought to prevent its physicians from gaining hospital privileges by threatening to boycott the hospitals.

More recently, the FTC issued an administrative complaint on July 17, 2010 alleging that the North Carolina Board of Dental Examiners (the "Dental Board") harmed competition by blocking non-dentists from providing teeth-whitening services in the state. The FTC charged that the Dental Board impermissibly ordered non-dentists to stop providing teeth-whitening services, thereby making it more difficult and expensive for North Carolina consumers to obtain these services. According to the FTC's administrative complaint, teeth-whitening services are much less expensive when performed by non-dentists than when performed by dentists.<sup>31</sup>

During the last decade the FTC has investigated restrictive practices in the residential real estate industry, including efforts by private associations of brokers and real estate agents to impede competition from brokers who use non-traditional listing arrangements. The FTC brought several enforcement actions against associations of realtors or brokers who adopted rules that withheld

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<sup>24</sup> *Robert Lewis et al.* (2004), available at <http://www.ftc.gov/os/caselist/0310155/040730do0310155.pdf>.

<sup>25</sup> *FTC v. Superior Ct. TLA*, 493 U.S. 411 (1990).

<sup>26</sup> *Forbes Health System Medical Staff*, 94 F.T.C. 1042 (1978).

<sup>27</sup> *State Volunteer Mutual Insurance Corp.*, 102 F.T.C. 1232 (1983).

<sup>28</sup> *Medical Staff of Dickinson County Memorial Hospital*, 112 F.T.C. 33 (1989); *Medical Staff of John C. Lincoln Hospital & Health Center*, 106 F.T.C. 291 (1985).

<sup>29</sup> See, e.g., *Iowa Chapter of American Physical Therapy Association*, 111 F.T.C. 199 (1988); *Michigan Optometric Association*, 106 F.T.C. 342 (1985); *Sherman A. Hope, M.D.*, 98 F.T.C. 58 (1981).

<sup>30</sup> *Dirian Seropian, M.D.*, 115 F.T.C. 891 (1992); *Medical Staff of Holy Cross Hospital*, 114 F.T.C. 555 (1991); *Medical Staff of Broward General Medical Center*, 114 F.T.C. 542 (1991).

<sup>31</sup> See *North Carolina Board of Dental Examiners* (2011), available at <http://www.ftc.gov/os/adipro/d9343/111207ncdentalorder.pdf> (appeal pending).

the valuable benefits of the association-controlled Multiple Listing Services (MLSs) from consumers who chose to enter into non-traditional (such as internet-based), and often less expensive, listing contracts with real estate brokers. A multiple listing service is a joint venture of real estate brokers that combines its members' home listings information into an electronic database that is made available to all member brokers. Access to the database – and therefore membership in the association operating it – is critical for any broker seeking to service clients in the area. Therefore associations' policies restricting the access to the database for competitors using non-traditional listing arrangements limit home sellers' ability to choose a listing type that best serves their specific needs.

In 2005, the Department of Justice challenged policies of the National Association of Realtors (NAR). One policy required multiple listing services to permit traditional brokers to withhold their listings from brokers who serve their customers through virtual office websites, even though the NAR does not permit brokers to withhold their listings from traditional broker members. The second policy prevented a broker from educating customers about homes for sale through a virtual office website and then referring those customers, for a referral fee, to other brokers, who would help customers view homes in person and negotiate contracts for them. A 2008 consent order required the NAR to allow Internet-based residential real estate brokers to compete with traditional brokers. Under the terms of the settlement, NAR committed to repealing its anticompetitive policies and to requiring affiliated multiple listing services to repeal their rules that were based on those policies. The NAR settlement was one of the most significant actions that the Department pursued in the real estate brokerage industry.

In 2007, the Missouri Board of Embalmers and Funeral Directors (Board) agreed to a FTC consent order to settle charges that it deterred competitive entry in the retail sale of caskets by adopting a rule that only licensed funeral directors could sell caskets to consumers on an at-need basis. Under the proposed settlement, the Board was required to inform the public that it was not necessary to obtain a license from the Board to offer for retail sale caskets and other funeral merchandise to customers in Missouri.<sup>32</sup>

Claims such as exclusion from professional associations or provider-sponsored health plans, and denial of accreditation or certification require careful analysis. Membership organizations perform valuable functions and cannot exist without membership rules, which can be pro-competitive. But exclusion can harm competition if excluded professionals are unable to compete effectively without access to the group.

#### **4. Restrictions on contract and commercial practice**

In a number of cases, the Commission successfully challenged professional associations' ethical guidelines and membership requirements that restricted their members' contractual or commercial practices. In the *AMA* case discussed above, the Commission found that the AMA's "contract practice" rules adversely affected competition by preventing the development of potentially more efficient forms of business format or practice. Under these rules, the AMA deemed it unethical for a physician, among other things, to provide medical services to patients

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<sup>32</sup> *Missouri Board of Embalmers and Funeral Directors* (2007), available at <http://www.ftc.gov/os/caselist/0610026/080624msbefdd&o.pdf>.

under a salaried contract with a hospital or health maintenance organization that was not controlled by doctors or to enter into any partnership or other arrangement that involved sharing fees with non-physicians. In the 1990s, the FTC challenged similar restraints imposed on veterinarians.<sup>33</sup>

The Commission also has issued consent orders requiring professional societies to cease restricting their members from practicing in other "nontraditional" ways such as in a franchise arrangement or in "commercial settings."<sup>34</sup> For example, the FTC challenged the American Academy of Optometry's requirement that its members "practice in locations consistent with the majority of other health professions in the area."<sup>35</sup> The Commission charged that it restricted optometrists' choice of practice location to the traditional private office and prevented them from practicing in shopping centers and other locations customarily considered "commercial" in nature. As a result, the Commission alleged, consumers were "deprived of the potential cost savings, convenience, and efficiency benefits of optometric practice locations in commercial settings in their purchases of optometric services and optical products."

In 2003, the FTC also filed an administrative complaint challenging a South Carolina Board of Dentistry regulation that prohibited licensed dental hygienists from providing basic preventive dental care services in a school setting unless the patient first had been seen by a dentist and a treatment plan had been established. The FTC found that the Board's action artificially insulated dentists from competition that licensed and trained hygienists could provide, and thus deprived children, particularly economically disadvantaged children, of important preventive dental health care.<sup>36</sup>

In the real estate brokers industry, various local association rules in several States were challenged because they caused consumers buying or selling homes to pay more for real estate brokerage services.<sup>37</sup> These rules – often formulated as prerequisites to membership – generally required brokers to perform a prescribed set of services, thereby excluding competitors who might offer innovative options and preventing customers from performing some tasks on their own to save money. Such rules prevented some brokers, including those who competed most aggressively on the level of sales commissions, from listing homes for sale. Other rules prevented members of the association from offering home sellers the opportunity to avoid paying a broker's commission if the seller located a buyer on his or her own,<sup>38</sup> or limited brokers that

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<sup>33</sup> See, e.g., *Oklahoma State Board of Veterinary Medical Examiners*, 113 F.T.C. 138 (Jan. 31, 1990) (consent order against the Oklahoma State Board of Veterinary Medical Examiners for allegedly restricting veterinarians from being partners with, employed by, or otherwise associated with non-veterinarians or veterinarians licensed in other states). See also *Madison County Veterinary Medical Association*, 114 F.T.C. 495 (Aug. 16, 1991) (consent order against the Madison County, Alabama Veterinary Medical Association and four individually named respondents to prevent restraints on price competition in the provision of spaying and neutering services and the advertising of veterinary services)

<sup>34</sup> E.g., *Iowa Chapter of American Physical Therapy Association*, 111 F.T.C. 199 (1988); *Michigan Optometric Association*, 106 F.T.C. 342 (1985).

<sup>35</sup> *American Academy of Optometry*, 108 F.T.C. 25, 27 (1986).

<sup>36</sup> *South Carolina State Board of Dentistry* (2007), available at <http://www.ftc.gov/os/adjpro/d9311/070911decision.pdf>.

<sup>37</sup> See for example: *Williamsburg Area Association of Realtors, Inc.* (2006), available at <http://www.ftc.gov/os/caselist/0610268/0610268do061128.pdf>; *Monmouth County Association of Realtors* (2006), available at <http://www.ftc.gov/os/caselist/0510217/0510217do061128.pdf>; *RealComp II Ltd* (2009) <http://www.ftc.gov/os/adjpro/d9320/091102realcomporder.pdf>.

<sup>38</sup> See for example: *Multiple Listing Service of Hilton Head Island Inc.* (2008), available at <http://www.justice.gov/atr/cases/t233900/233901.htm>.

could utilize its services by mandating that each broker have a traditional full-time listing agreement with their seller.<sup>39</sup>

The Court of Appeals recently upheld a case in which the Commission challenged anti-competitive restrictions in the real estate industry. The Commission had found that Realcomp II – a Michigan-based realtors’ group – violated federal law by restricting the ability of member real estate agents to offer consumers lower-priced alternatives to traditional real estate services. Realcomp excluded discount real estate listings by refusing to transmit them through its own and other publicly available Web sites, which restricted access to these listings and harmed competition. The U.S. Court of Appeals for the Sixth Circuit upheld the FTC’s ruling, which required Realcomp to provide its members nondiscriminatory access to non-traditional and lower-priced listings on its Multiple Listing Service (MLS) and to stop preventing such listings from being sent to its public real estate sites.<sup>40</sup>

## II. Advocacy Comments

The goal of the agencies’ competition advocacy programs is to prevent or reduce possible competition and consumer injury, which can be caused by federal, state or local laws and regulations, or self-regulatory standards that interfere with the proper functioning of the marketplace. The Commission and DOJ pursue this goal by advising governmental and self-regulatory entities of the potential effects of proposed legislation or regulation on competition and consumers.<sup>41</sup> Since the late 1970s, the Commission staff has submitted several hundred comments or *amicus curiae* briefs to state and self-regulatory entities concerning various professionals, including accountants, lawyers, dentists, dental hygienists, physicians, advanced practice registered nurses (APRNs), optometrists, chiropractors, podiatrists, architects, paralegals, and veterinarians.<sup>42</sup>

Occupational regulation can have benefits and costs, both of which should be considered. For example, regulation may promote or assure a standard of service quality to consumers, especially when consumers may have difficulty judging service quality for themselves. However, consumers often can obtain information about service quality by other means, including experience, advertising, and reputation. Moreover, some regulations can inhibit competition and reduce consumer welfare without providing any demonstrable benefits to consumers.

Restrictions on the business or commercial aspects of professional practice do not always benefit consumers, a conclusion that is supported by economic studies that have found little relationship between such restrictions and the quality of care provided,<sup>43</sup> and also can limit professionals’ ability to compete effectively with each other. Moreover, restrictions on professions can make it more difficult and costly for professionals to provide their services, and these higher costs may be passed on to consumers in the form of increased prices and reduced services.

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<sup>39</sup> See for example: *West Penn Multi-List* (2009), available at <http://www.ftc.gov/os/caselist/0810167/090220westpenncmpt.pdf>.

<sup>40</sup> *Realcomp II v. FTC* (2011), available at <http://www.ca6.uscourts.gov/opinions.pdf/11a0084p-06.pdf>.

<sup>41</sup> Most FTC staff comments to State legislatures are provided in response to a state legislator’s specific request.

<sup>42</sup> For a comprehensive list of FTC advocacies, see [http://www.ftc.gov/opp/advocacy\\_date.shtm](http://www.ftc.gov/opp/advocacy_date.shtm) (advocacy filings listed by date) and [http://www.ftc.gov/opp/advocacy\\_subject.shtm](http://www.ftc.gov/opp/advocacy_subject.shtm) (advocacy filings by subject).

<sup>43</sup> See, e.g., Cox and Foster, *supra* note 1.



As a result of these potential harms, advocacy comments have recommended the removal of business and commercial practice restrictions, such as regulations that prohibit the location of professional offices in commercial locations or prohibit professionals from being employed by corporations or other non-professionals.<sup>44</sup> For example, the agencies' staff have contended that location restrictions serve no apparent purpose other than to inhibit the formation of more convenient and higher-volume commercial practices, which can take advantage of volume purchase discounts and other economies of scale that may be passed on to consumers as lower prices and provide increased access and convenience to consumers.

In the **health care sector**, the agencies have commented on various state laws or legislative proposals that would likely harm competition and consumer welfare. For example, the agencies have opposed state proposals to grant antitrust exemptions: for public hospitals,<sup>45</sup> health care providers in state-certified "cooperative arrangements,"<sup>46</sup> and health care organizations composed of hospitals, physicians and other providers.<sup>47</sup> The agencies noted that because antitrust laws already allow pro-competitive collaborations among competitors, an antitrust exemption is unnecessary to achieve cost savings or promote improved quality and access to health care. The wholesale exemption of coordinated activities of health care providers, especially when the collaboration of these organizations involves negotiating reimbursement contracts with insurance companies, would eliminate price competition. Such exemptions would likely lead to increased costs and decreased access to health care.

The FTC staff has also commented on proposed bills that would affect the ability of advanced practice registered nurses (APRNs) to provide patient care. Recent reports by the Institute of Medicine (IOM) have identified a key role for advanced practice nurses in improving the delivery of health care.<sup>48</sup> The IOM, established in 1970 as the health arm of the National Academy of Sciences, provides expert advice to policy makers and the public and has conducted an intensive examination of issues surrounding advanced nursing practice. Among other things, the IOM found that advanced practice nurses play a key role in improving access to health care and "[r]estrictions on scope of practice. . . have undermined [nurses'] ability to provide and improve both general and advanced care."<sup>49</sup> Thus, the IOM has recommended that nurses be permitted by state licensing laws to practice to the full extent of their education and training.<sup>50</sup> Based in part on this IOM report, FTC staff have recommended to state legislatures that they remove certain supervision requirements, as well as requirements that APRNs who want to

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<sup>44</sup> See, e.g., FTC Staff Comment to Alabama (2012), available at <http://www.ftc.gov/os/2012/04/120426alabamaletter.pdf> (commenting favorably on the bill and discussing the harm that can result from restrictions on the business practices of state-licensed professionals); FTC Staff Comment to Tennessee (1996), available at <http://www.ftc.gov/be/v960005.shtml> (commenting favorably on a bill to eliminate restrictions on veterinarians being employed by non-veterinarians); FTC Staff Comment to Texas (1992), available at <http://www.ftc.gov/be/healthcare/docs/AF%2017.pdf> (comments on review of legislation governing various professional boards, including dentists, veterinarians, and physicians, noting "studies have found little relationship between restrictions on professionals' business practices and the quality of care provided").

<sup>45</sup> Tennessee: <http://www.justice.gov/atr/public/comments/271584.htm>.

<sup>46</sup> Connecticut: <http://www.ftc.gov/os/2011/06/110608chc.pdf>.

<sup>47</sup> Texas: <http://www.ftc.gov/os/2011/05/1105texashealthcare.pdf>.

<sup>48</sup> See generally INSTITUTE OF MEDICINE, THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH (2011) [hereinafter IOM NURSING REPORT] (especially Summary, 1-15).

<sup>49</sup> *Id.* at 4. See also *id.* at 85-161, 98-99 (discussing nursing scope-of-practice issues and quality of care, including numerous quality of care studies); About the Institute of Medicine, available at <http://www.iom.edu/About-IOM.aspx>.

<sup>50</sup> IOM NURSING REPORT, *supra* note 49 at 85-161; see especially *id.* at 98 (with respect to many primary care services, "the contention that APRNs are less able than physicians to deliver care that is safe, effective, and efficient is not supported by the decades of research that has examined this question") (internal citations omitted).

prescribe medications have a collaborative agreement with a physician.<sup>51</sup> In a recent comment to West Virginia, the FTC staff noted that removing the collaborative agreement requirement for APRNs who want to prescribe medication has the potential to benefit consumers by expanding choices for patients, containing costs, and improving access. Maintaining an unnecessary and burdensome requirement is likely to deprive consumers of the benefits that increased competition can provide. Thus, the FTC staff recommended that “Absent countervailing safety concerns regarding APRN prescribing practices, removing the collaborative agreement for prescriptive authority appears to be a procompetitive improvement in the law that would benefit West Virginia health care consumers.”<sup>52</sup>

Similarly, the FTC staff urged the Georgia Board of Dentistry to reject a proposal that would have prohibited dental hygienists from providing basic preventive dental services in approved public health settings except under the indirect supervision of a dentist.<sup>53</sup> It also encouraged the Louisiana State Board of Dentistry to avoid discriminating between mobile and office-based dentistry and not to prohibit dentists from offering in-school services.<sup>54</sup> The FTC staff explained that, while there is no evidence that such provisions are necessary to prevent harm to dental patients, they likely would raise the cost of dental services and reduce the number of consumers receiving dental care.

The FTC staff sent comments to the North Carolina Board of Opticians explaining that a Board’s proposal to restrict the sale of contact lenses, eyeglasses, and other optical goods in the state was likely to raise costs to consumers unnecessarily. Several provisions of the proposed rule raised competitive concerns, including sections that would redefine prescriptions so that opticians would not have to give consumers the measurements needed to fill their prescriptions and impose new requirements on Internet, but not brick-and-mortar, sellers and on out-of-state, but not in-state, sellers. The FTC staff suggested that the provisions were likely to restrict competition among optical goods providers in North Carolina, leading to likely increased prices and decreased consumer access to these products. Therefore, it suggested that the Board consider whether there were consumer benefits that outweigh the costs likely to be imposed by the new, more restrictive regulations.<sup>55</sup>

In the area of **legal services**, the Commission and the DOJ submitted joint comments to state bar associations that were trying to restrict non-lawyers (including tenants’ or consumers’ associations, real estate agents, income tax preparers, and accountants) from competing with lawyers, typically by adopting broad definitions of “practice of law,” with the likely consequence to deprive consumers of non-lawyer competition for a range of services for which specialized legal knowledge and training was not demonstrably necessary to protect consumers.<sup>56</sup>

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<sup>51</sup> See, e.g., FTC Staff Letters to Louisiana, 2012, at <http://www.ftc.gov/os/2012/04/120425louisianastaffcomment.pdf>; Kentucky, 2012, at [http://www.ftc.gov/os/2012/03/120326ky\\_staffletter.pdf](http://www.ftc.gov/os/2012/03/120326ky_staffletter.pdf); Texas, 2011, at <http://www.ftc.gov/os/2011/05/V110007texasaprn.pdf>; Florida, 2011, at <http://www.ftc.gov/os/2011/03/V110004campbell-florida.pdf>.

<sup>52</sup> FTC staff comment to West Virginia, 2012, at <http://www.ftc.gov/os/2012/09/120907wvatestimony.pdf>.

<sup>53</sup> See <http://www.ftc.gov/os/2010/12/101230gaboarddentistryletter.pdf>.

<sup>54</sup> See <http://www.ftc.gov/os/2009/12/091224commentladentistry.pdf>.

<sup>55</sup> <http://www.ftc.gov/os/2011/01/1101ncopticiansletter.pdf>.

<sup>56</sup> See for example Hawaii, 2009: <http://www.ftc.gov/os/2009/04/V080004hiunauthorizedpracticeoflaw.pdf>; Massachusetts, 2005: <http://www.ftc.gov/os/2004/12/041216massuplltr.pdf> and Kansas, 2005: <http://www.ftc.gov/be/v050002.pdf>.

In May 2006, the FTC staff filed comments with the Texas Bar Association's Professional Ethics Committee concerning the Committee's opinion that Texas attorneys' participation in online legal matching services was unethical.<sup>57</sup> The FTC comments analyzed the opinion's likely effects on consumers, and concluded that such a restriction likely would harm Texas consumers by increasing the costs associated with finding legal representation and, ultimately, the price for legal services.

In March 2007, the FTC staff filed comments before the Louisiana State Bar Association Rules of Professional Conduct Committee regarding proposed rules on lawyer advertising and solicitation.<sup>58</sup> The FTC staff recognized that false and deceptive advertising by attorneys should be prohibited, but noted that consumers are worse off when states ban an entire class of attorney advertising without evidence that such advertising is either actually or inherently deceptive or misleading. FTC staff expressed concern that the revised rules would prohibit many forms of non-deceptive attorney advertisements, and that the proposed pre-screening provision raised competitive concerns.

The FTC staff also encouraged public utility commissions, for example in Colorado, to allow new providers of **taxi services** to enter the market, stating that deregulation of taxicab markets has not led to significant harm to consumers or competition and has even, in some instances, generated consumer benefits in the form of lower prices and improved services.<sup>59</sup>

In the **real estate services** market, the FTC staff and DOJ have jointly opposed states' legislative proposals, for example in Michigan, that would have introduced minimum service requirements for consumers of real estate brokerage services and restricted the ability of real estate professionals to offer customized services.<sup>60</sup> Minimum service requirements tend to harm consumers by limiting options available to them and protecting full-service brokers (offering a bundle of individual services) from having to respond to competition from non-traditional brokers.

## Conclusion

During more than three decades, the Federal Trade Commission and the Department of Justice have pursued an active policy, through law enforcement actions and advocacy, of opposing unjustified anticompetitive restraints on the provision of professional services. During this period, the markets for the provision of many professional services have been substantially liberalized and deregulated, in many cases following advocacy comments. The elimination of restraints on conduct, such as advertising, discount pricing, and contractual and commercial practices, has resulted in increased competition, providing substantial welfare gains for consumers.

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<sup>57</sup> See <http://www.ftc.gov/os/2006/05/V060017CommentsonaRequestforAnEthicsOpinionImage.pdf>.

<sup>58</sup> <http://www.ftc.gov/os/2007/08/V070013larules.pdf>.

<sup>59</sup> <http://www.ftc.gov/os/2008/11/V090000cotaxis.pdf>.

<sup>60</sup> <http://www.ftc.gov/be/v050021.pdf>.