

# 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 (e) -10

## **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

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

The joint fee negotiation







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/0810167/090220westpennmpt.pdf>.

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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>

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

