

2017 HOUSE HUMAN SERVICES

HCR 3026

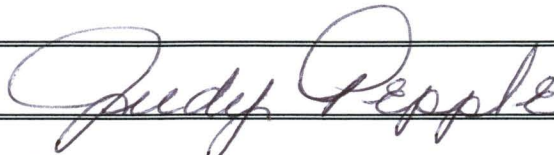
2017 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Fort Union Room, State Capitol

HCR 3026
3/1/2017
28554

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

To consider studying the membership and state supervision of the state's occupational and professional licensing boards in order to retain antitrust law immunity.

Minutes:

1, 2, 3, 4

Chairman Weisz: Called committee to order.
Attendance taken.
Opened the hearing on HCR 3026

Representative Devlin
(Attachment 1)

Chairman Weisz: Are there any questions from the committee? Further testimony in support of HCR?

Duane Houdek, Exe. Sec. Board of Medicine
(Attachment 2)

Chairman Weisz: Are there questions from the committee? Seeing none, is there further testimony in support of HCR 3026.

Mark Hardy, ND Board of Pharmacy
(Attachment 3)

Chairman Weisz: Further testimony in support of HCR 3026?

Rod St. Aubyn
(Attachment 4)
15:30

Chairman Weisz: Are there any questions from the committee? Seeing none.
Is there further testimony in support of HCR 3026?
Is there any testimony in opposition to HCR 3026? Seeing none, we will close the hearing.

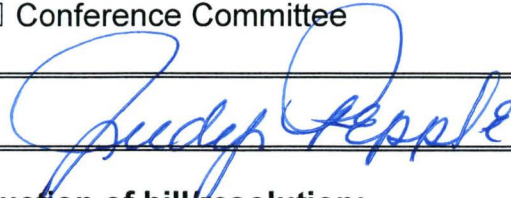
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To consider studying the membership and state supervision of the state's occupational and professional licensing boards in order to retain antitrust law immunity.

Minutes:

Chairman Weisz: Called the committee to order. Is there any discussion on HCR 3026?

Representative Porter: I just have a question for Representative Devlin. Based off of the testimony that was given and add to this as long as the state is going to be looking at these professional boards to look at them also from a uniformity standpoint. We have had this discussion on numerous occasions how all these different professional licensing boards have little quirks that we catch every once in a while depending on which committee they go to. I can tell you a hundred different things, like a public member or continuing education requirement. Do we want to put something in here that as long as we are going to be looking at this issue that we want to look at the uniformity of our licensing boards across the entire spectrum to make sure they are all close to the same? I think that would be something to ponder, but I will leave it up to the bill sponsor.

Representative Devlin: I don't have a problem with that. The concern was the NC case and the supreme court ruling. If we broaden it are we going to risk not getting it through the senate? I think the main concern is the NC case and the ruling. If you want to do that, but I am not so sure that it would be good to put it on here.

Vice Chairman Rohr: It says to consider study. It doesn't say to do a study.

Representative Devlin: Yes, it will be up to the legislative management to decide whether they do it or not. I am fine with that.

Representative McWilliams: I don't really understand what we want to study in this bill in regard to NC.

Representative Devlin: When the Supreme Court ruling came down it said that you can't have a licensing board that is regulating themselves to the extent that they are keeping out

competition. That is the bottom line. We just want to be sure that we have the rules in place in ND so that we don't get sued for that liability. We think this does it.

Representative Porter: Motion for a do pass and to put on the consent calendar.

Representative Seibel: second

Chairman Weisz: the clerk will call the roll for a do pass and put on the consent calendar on HCR 3026.

Vote taken and motion approved unanimously. Yes 14 No 0 Absent 0

Chairman Weisz: do I have a volunteer to carry this one?

Representative Seibel: I will carry it.

Chairman Weisz: HCR 3026 closed.

Date: 3-1-17
Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. HCR 3026

House Human Services Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
Other Actions: Reconsider _____

Motion Made By Rep. Porter Seconded By Rep. Seibel

Representatives	Yes	No	Representatives	Yes	No
Chairman Weisz	✓		Rep. P. Anderson	✓	
Vice Chairman Rohr	✓		Rep. Schneider	✓	
Rep. B. Anderson	✓				
Rep. D. Anderson	✓				
Rep. Damschen	✓				
Rep. Devlin	✓				
Rep. Kiefert	✓				
Rep. McWilliams	✓				
Rep. Porter	✓				
Rep. Seibel	✓				
Rep. Skroch	✓				
Rep. Westlind	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Seibel

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3026: Human Services Committee (Rep. Weisz, Chairman) recommends **DO PASS** and **BE PLACED ON THE CONSENT CALENDAR** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HCR 3026 was placed on the Tenth order on the calendar.

2017 SENATE INDUSTRY, BUSINESS AND LABOR

HCR 3026

2017 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HCR 3026
3/15/2017
Job Number 29223

- Subcommittee
 Conference Committee

Committee Clerk Signature

Eva Libelt

Explanation or reason for introduction of bill/resolution:

Requesting legislative management to consider studying the membership and state supervision of the state's occupational and professional licensing boards in order to retain antitrust law immunity

Minutes:

3 Attachments

Chairman Klein: Opened the hearing.

Representative Devlin: Introduced the bill. Written testimony, see attachment #1. (:15-2:54)

Chairman Klein: This is across the country now, states are looking at this board makeup because of that decision?

Representative Devlin: Absolutely, I think every state will have to do it because all the regulatory boards are under some type of risk. To my knowledge they are all doing a great job. They are doing everything within the supreme court. There is a thirteen-page legal document and I should have brought it along, that tells you some of the things that were done wrong in North Carolina and what has to be done to fix it.

Chairman Klein: In that case someone obviously went after the board and determined because they are part of the state board that the state also has...

Representative Devlin: That is right, if we are going to set up the boards we also have to supervise the boards. We can't just say you can regulate your business community or the people under your care and not have any supervision by the state. The argument is what involves supervision, how much of the supervision is needed and that is why the study has to be done.

Chairman Klein: Does this reach out to the commodity groups, are they a board?

Representative Devlin: I can't answer that.

Chairman Klein: I would suggest because we do have some sort scope of practice with them also.

Representative Devlin: Legislative Counsel could answer that better than I could.

Mark J. Hardy, PharmD, R.RPh, Executive Director: In support. Written testimony, see attachment #2. Also handed out, The Federation of Association of Regulatory Boards Model for Identifying and Addressing Antitrust Issues, see attachment #3. (5:38-8:24)

Chairman Klein: I think over the years from time to time there is an issue with a board or not so much. Isn't it primarily that somebody drifts off and does something that may seem inappropriate and then you have issues. That isn't what we are really talking about here?

Mark J. Hardy: This is really talking about decisions made by the board as far as the regulation of the profession. We have a statute in our law or a rule which is really clear for the boards to make a determination on the effective direction. If they violated a rule, if they violated a law and then if it is a disciplinary action or decision based on that. What happens is when you get into the gray area, decisions that are not clearly in rules or statutes and of course their function is to provide information to the market participants on what that appropriate action is. When you have something like characters on a dental board where they said nobody but licensed dentists can do teeth whitening procedures. When there was nothing in their statute and the rules that give them the clear authority to say that and make that determination. That of course disrupted the market which of course led individuals to assume, which of course got up to the FTC level and then they preceded to take that up to the federal supreme court where they had decided based on that.

Chairman Klein: How are you going to encompass all of the issues that may surround a particular board?

Mark J. Hardy: I think that is the important decision. That has to be a decision of the state as to when those gray areas, how do the boards deal with that. Obviously, each board has an attorney that represents them on behalf of the attorney general's office that helps determine and guide them on direction in those kinds of things. Those other considerations, you may have to pass a rule, you may have go to the legislature and clarify law in certain circumstances that there may be disagreement and not clear direction what the board can pursue. But to make that blanket decision in North Carolina is just not appropriate.

Chairman Klein: Closed the hearing.

Senator Poolman moved a do pass.

Senator Casper seconded the motion.

Roll Call Vote: Yes-7 No-0 Absent-0

Senator Campbell will carry the bill.

**2017 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO .HCR 3026**

Senate Industry, Business and Labor Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Senator Poolman Seconded By Senator Casper

Senators	Yes	No	Senators	Yes	No
Chairman Klein	x		Senator Marcellais	x	
Vice Chairman Campbell	x				
Senator Roers	x				
Senator Burckhard	x				
Senator Casper	x				
Senator Poolman	x				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Senator Campbell

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HCR 3026: Industry, Business and Labor Committee (Sen. Klein, Chairman)
recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
HCR 3026 was placed on the Fourteenth order on the calendar.

2017 TESTIMONY

HCR 3026

A.H. 1
HCR 3026
3/1/17

Good Afternoon Chairman Weisz and esteemed members of the Human Services Committee. For the record, I am Rep. Bill Devlin of District 23 which is a rural district covering four and one-half counties in Eastern North Dakota.

HCR 3026 is study related to the U.S. Supreme Court ruling in *North Carolina Board of Dental Examiners v. Federal Trade Commission*. The Supreme Court Decision ruled that in order for a state to provide protection from antitrust liability, states must actively supervise boards and commissions controlled by market participants.

Legislators as well as members of the Legislative Council realize this issue has to be looked at by the state of North Dakota. At least 26 other states have started some type of review process. The council had one of their attorneys attending a multi-state event to look at this issue in 2016. I think we are all convinced the state needs to research this issue thoroughly to make sure and boards are fully protected from Antitrust liability.

- The key issue is that market participants are regulating their competition.
- The US Supreme Court, in the North Carolina case, has determined that market participants have private incentive to limit competition.
- Even the fairest and most ethical board member who will not use his or her influence on the board to influence the market place can create the public perception of fence-building, disciplining someone because of a perceived grudge, or regulation for personal gain.
- A controlling number of decision makers on licensing boards in ND are active market participants. Many boards have a member of the public as a consumer voice, but that person often has some connection to the profession (sometimes because there is little interest from a consumer standpoint to sit on a licensing board).
- The North Carolina decision by the US Supreme Court essentially held that "active supervision" by the state of these licensing boards is required for boards to be immune from antitrust violations.
- What does "active supervision" mean? This is one of the big areas that needs study.
- The FTC, in its guidance document, has said that this is a "fact-specific and context-dependent" analysis. Has ND done such an analysis? I haven't seen it if it has.
- As legislators, we have an obligation to be sure the boards that we create by statute have the protections in place as required by the FTC and the US Supreme Court.

That in a nutshell is why we need to pass this HCR 3026. I hope you will give this a unanimous do-pass recommendation today. Thank you Mr. Chairman and members of the committee.

AH. 2
HCR 3026
3-1-17

House Human Services Committee

House Concurrent Resolution No. 3026

March 1, 2017

Testimony of Board of Medicine

Chairman Weisz, members of the House Human Services Committee, my name is Duane Houdek, executive secretary of the Board of Medicine, and I appear in support of this resolution.

The FTC guidance issued following the United States Supreme Court case of *North Carolina Board of Dental Examiners v. FTC*, makes it fairly clear that individual disciplinary cases prosecuted by a regulatory board which consists of market participants, such as ours, will probably not factually amount to a violation of federal fair trade laws, as it will be hard, factually, to conclude that it harms competition.

But a pattern of disciplinary cases, or rules which are more broadly applicable, may be said to affect market competition, and need to have active state supervision by non-market participants to retain anti-trust immunity.

While our rule making procedures have a review for legality by the Attorney General, and, likewise, this body's Administrative Rules Committee may void a rule if it is found to be beyond statutory authority, there remains a question of whether this is the type of "veto power" for rules that may harm competition described by the Court decision, as interpreted by the FTC.

Furthermore, there is no similar supervision of disciplinary cases which, although prosecuted by special assistant attorneys general, does not vest in them the authority to tell a board it may or may not prosecute a specific case.

The loss of anti-trust immunity is a serious matter for the state and its regulatory boards and board members. Prior to the *North Carolina Dental Board* case, an anti-trust lawsuit could be stopped at its initiation by showing the regulatory board was an entity acting on behalf of state government. That could be shown by statutes establishing the board, and appointments made by the governor. That is no longer true. For regulatory boards controlled by market participants, active state supervision must be shown. If this is not clearly established in a way that can't be factually questioned, boards and board members will be subjected to depositions and other factual discovery processes. Even if we would ultimately win, which I think we would, as our board and the others I know, do not create rules or discipline cases because of competitive market factors, we would have to undergo time and expense that would detract from the purpose and operation of the board.

I know there are varying views of this among state boards, but in our view, this matter is worth studying.



AH.3
HCR 3026
3/1/17

The Federation of Associations of Regulatory Boards Model for Identifying and Addressing Antitrust Issues

This **Model for Identifying and Addressing Antitrust Issues** provides a reasoned and balanced approach to regulation in response to the 2015 Supreme Court of the United States ruling in *North Carolina State Board of Dental Examiners v. FTC*. Legislative and legal responses exceeding those necessary to adequately address the issues have emerged, ignoring the foundation of the established administrative regulatory system. Examples of legislative responses range from the formation of oversight commissions to altering the board membership. The composition of state boards has become the focus of criticism, rather than the underlying nature of the contemplated board action.

Supreme Court Ruling

The Supreme Court ruling has prompted varied legal and political reactions including challenges to the basic need for an administrative regulatory system; suggested additional bureaucratic layers of government decision makers; and modifications to the composition of the regulatory boards. The judicial decision characterized a state regulatory board as "non-sovereign" for purposes of applying the immunity principles under the state action doctrine. This state action doctrine is a common law defense and provides antitrust immunity to state actors. Based upon the involvement of licensees, referred to as "active market participants," the Supreme Court imposed the two part test generally reserved to private actors seeking immunity from antitrust liability. The two part test includes a clearly articulated state policy to displace competition and active supervision by the state. In spite of the checks and balances in place to curb self-serving interests and the existence and application of relevant ethics laws applicable to volunteer state board members, the Court found the need for satisfaction of the two prong test and focused on the state oversight requirement.

FARB offers this Model as a method by which boards may address the concerns in the opinion, balancing economic factors and the public protection needs met by an effective and efficient state based licensure system.

FARB Model for Identifying and Addressing Antitrust Issues

Engage Counsel



Determine Scope



Decide Course



Rulemaking

Declaratory Judgement

Statutory Changes

STEP ONE: Engage legal counsel

It is strongly recommended that state licensing boards engage and regularly involve legal counsel. Attendance and participation by counsel at all board meetings provides ongoing opportunities for counsel to identify, research, and advise on important legal consequences to decisions. It is here where counsel can proactively identify board actions and relevant antitrust issues.

STEP TWO: Determine the scope of the proposed action

In conjunction with legal counsel, assess whether the proposed board action implicates antitrust laws. Decisions to grant or deny an individual applicant a license or pursue administrative prosecution of a licensee generally do not constitute anti-competitive behavior. Adoption of policy positions that may affect virtually all practitioners or preclude others from entering the market are the types of board actions which should not take place without prior assessment of compliance with antitrust laws.

STEP THREE: Choose the appropriate course of action

If a decision has potential antitrust implications and the issue is not addressed by current statute or rules, state licensing boards can seek the necessary oversight to satisfy the second prong of the immunity test. Such oversight can be addressed in one or more of the following options.

OPTION ONE: Rulemaking

Subject the licensing board determination to the rulemaking process, which involves notice, an opportunity for comment(s), and hearings. In many jurisdictions, legislative and/or executive approval is required before new rules are effectuated. Rulemaking involves oversight from multiple perspectives.

OPTION TWO: Declaratory judgement

Seek a declaratory ruling from a court regarding the encompassing position of the licensing board. The board will be required to substantiate its position to justify the entry of a court order. If successful, the judicial order would provide oversight and justification for the proposed action.

OPTION THREE: Statutory changes

Provide data to the legislature to stimulate statutory changes to address the encompassing issue(s). To the extent the practice act is in need of and does change, the board would clearly be acting under oversight of the legislative branch.

These options, individually and/or collectively, will involve time, costs, and effort, and may contain some uncertainty. However, such checks and balances provide state oversight while maintaining the expertise on the boards to promote effective and efficient public protection legislation.

AH. 4
HCR 3026
3-1-17

Testimony on HCR 3026
House Human Services Committee
March 1, 2017

Chairman Weisz and members of the House Human Services Committee, for your record I am Rod St. Aubyn. I appear here today representing myself to support HCR 3026. I have observed several occupational and professional boards and have noted several issues in the past. As has been spelled out in the resolution, the US Supreme Court has previously ruled that a state regulatory board was not exempt from Federal antitrust laws simply because they were granted authority by the state. According to the FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants they state,

“More specifically, the Court determined that a “a state board on which a controlling number of decisionmakers are active market participant in the occupation the board regulates” may invoke the state action defense only when two requirements are satisfied; first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. N.C. Dental, 135 S. Ct. at 1114”

I want to specifically address the second point made by the court. It appears that occupational boards are staffed by a representative from the AG’s office or someone appointed by the AG’s office. However, their role is to advise and not specifically supervise the board. I have noted and filed complaints about violations of our open meetings/open records laws in the past regarding some of these boards and have been successful. In addition, I previously asked for an AG opinion via the Senate Majority Leader in 2015 concerning an illegal activity (hiring a lobbyist using licensing fees – public funds) and the AG agreed that the occupational board had indeed violated the law.

In another case I observed that an occupational board was taking voice votes on many of their actions, which was clearly a violation of the state’s open records/open meetings laws. In NDCC 44-04-21 it states that “Unless otherwise specifically provided by law, all votes of whatever kind taken at any public meeting governed by the provisions of section 44-04-19 must be open, public votes, and all nonprocedural votes must be recorded roll call votes, with the votes of each member being made public at the open meeting. “ In this particular case I brought the issue up to a board member who was unaware of the requirement and they proceeded to change their process to be in compliance to the law. My point is this – in my opinion occupational boards are not supervised.

To further illustrate my point, an occupational board held a special meeting via telephone to discuss some legislation being considered in 2015. The meeting was recorded by one of the people interested in the meeting. The board members talked about the legislation and argued that they opposed the legislation. One board member who was not one of the predominant members of the occupation of the board spoke up somewhat in favor of the legislation. The Board President verbally criticized and intimidated this other board member, saying that she knew nothing about the issue. After I heard the recording, I went to see if that Board President could be removed from that board because of his behavior. I was told by the AG's office and the Governor's office that neither had the authority to remove a board member for cause. I looked at the Century Code for many of these boards. In some cases, there is a specific provision for the removal of Board members, but in most others it is silent.

I have heard some say that there is "active supervision" of our occupation boards because the state has the Administrative Rules Committee to oversee proposed rules. While that is true, what if the board refuses to consider rules by an entity that is regulated by this board dominated by another profession. In addition, this board has the authority to deny licensure for an individual. The Administrative Rules Committee would never be involved in those circumstances.

Mr. Chairman and committee members, I applaud the members who have introduced this study resolution. We have many problems with our occupational boards that need to be addressed. I fear that we are prime for an anti-trust complaint and also for other issues that could occur because of our state's lack of supervision of these occupation boards. We urgently need this study to avoid future lawsuits and federal complaints. I would urge a Do Pass on HCR 3026 and would be willing to try to answer any questions.

2

Good morning Chairman Klein and esteemed members of the Senate IBL Committee. For the record, I am Rep. Bill Devlin of District 23 which is a rural district covering four and one-half counties in Eastern North Dakota.

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- What does "active supervision" mean? This is one of the big areas that needs study.
- The FTC, in its guidance document, has said that this is a "fact-specific and context-dependent" analysis. Has ND done such an analysis? I haven't seen it if it has.
- As legislators, we have an obligation to be sure the boards that we create by statute have the protections in place as required by the FTC and the US Supreme Court.

That in a nutshell is why we need to pass this HCR 3026. I hope you will give this a unanimous do-pass recommendation today. Thank you Mr. Chairman and members of the committee.



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Mark J. Hardy, PharmD, R.Ph.
Executive Director

House Concurrent Resolution No 3026 – Licensing Boards Antitrust Immunity

Senate Industry, Business and Labor Committee – Roosevelt Room

10:45 AM - Wednesday – March 15, 2017

Chairman Klein, members of the Senate Industry, Business and Labor Committee, for the record I am Mark J. Hardy, PharmD, Executive Director of the North Dakota State Board of Pharmacy. I appreciate the opportunity to be here to speak to you today.

I am here in support of HCR 3026 looking at studying the membership and state supervision of the state's occupational and professional Boards in order to retain antitrust law immunity. The basis of these actions of course is the 2015 case of *North Carolina State Board of Dental Examiners vs FTC* Supreme Court decision. Attached is information regarding state recommended actions by the Federation of Association Regulatory Boards, which we use as a strong resource on best practices for regulatory boards and legal guidance such as this. I wanted to make sure that this information is brought forward to be considered by legislative management when studying this issue.

It is important to note that the decision made by the NC Dental Examiners was very much self-serving, specifically to restrict teeth whitening practices, in which they did not have a clear statute or rule to stand on when taking such actions. This decision is certainly not appropriate and should have been condemned. There are many opinions on the consequences of this decision and many are overreactions. Unfortunately the guidance provided by the Federal Trade Commission does not clearly articulate a process and leaves much up to interpretation from states. The immunity provision is something the state needs to ensure is studied for the state and confirm that there are appropriate safeguards on this provision in place.

Having regulatory boards that provide clear and concise direction to market participants is important to both the business community and North Dakota at large. While there certainly are individual situations which could be brought up in North Dakota, which could look bad for how Boards operate, generally the Boards and the members that serve on an executive level do a great job in regulating the individual jurisdiction they control.

I appreciate your time and consideration and would be glad to answer any questions you may have.



The Federation of Associations of Regulatory Boards Model for Identifying and Addressing Antitrust Issues

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FARB offers this Model as a method by which boards may address the concerns in the opinion, balancing economic factors and the public protection needs met by an effective and efficient state based licensure system.



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Determine Scope



Decide Course



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In conjunction with legal counsel, assess whether the proposed board action implicates antitrust laws. Decisions to grant or deny an individual applicant a license or pursue administrative prosecution of a licensee generally do not constitute anti-competitive behavior. Adoption of policy positions that may affect virtually all practitioners or preclude others from entering the market are the types of board actions which should not take place without prior assessment of compliance with antitrust laws.

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These options, individually and/or collectively, will involve time, costs, and effort, and may contain some uncertainty. However, such checks and balances provide state oversight while maintaining the expertise on the boards to promote effective and efficient public protection legislation.



The Federation of Associations of Regulatory Boards (FARB) promotes common sense regulation through efficient and effective state-based licensure of professions. FARB supports state licensing boards which provide essential health, safety, and welfare protections of the public through the enforcement of applicable statutes and regulations.

Effective State Regulation

- The constitutional rights of the states to regulate the professions in the interest of the protection of the health, safety, and welfare of the public should be recognized and respected.
- Common sense state regulation of the professions through legislatively enacted statutes that create and delegate authority to the state licensing board should be recognized and respected.
- State statutes should establish the standards and criteria necessary for licensure and enforcement.
- The state licensing board appointment process should include reasoned policies and procedures regarding the nomination, evaluation, appointment, and oversight of board members to ensure an understanding of their regulatory obligations.
- Recognition of the need for professional expertise on the licensing boards is essential to effectively and efficiently fulfill their mandate to protect the public.
- Comprehensive training ensures that board appointees clearly understand and adhere to their public protection roles and responsibilities in regulating the profession.



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Board Composition

- A well-structured state licensing board is comprised of active licensed practitioners, public members, experienced administrative staff, and legal counsel.
- Volunteer active licensed practitioners provide the board with subject matter expertise that contributes to the effectiveness and efficiencies in fulfilling the legislative mandates.
- Public members provide the balance of perspectives that contribute to the effectiveness and efficiencies in fulfilling the legislative mandates.
- This balance of representation provides much needed expertise and consumer perspectives and allows for informed decisions in the interest of the health, safety and welfare of the public.
- Informed, efficient decisions involve board operations and meetings, legislative interpretation, rulemaking, assessment of complaints and investigations, administrative proceedings, and defense of decisions.
- A well-structured state licensing board provides fiscal accountability and operational benefits by diminishing the need for paid subject matter experts necessary to conduct investigations, provide opinions, and assist in resolving practice-related questions.
- A well-structured state licensing board ensures that board decisions are consistent, fair, comply with applicable due process requirements, and promote deference to the board decisions by the judiciary when challenges and appeals are filed.



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Active State Supervision

- To rely on the state action immunity doctrine defense as a shield to antitrust allegations, state boards comprised of active licensed practitioners must operate under active state supervision.
- Relatively few board activities, such as individual disciplinary actions, implicate the antitrust laws.
- Boards are represented by attorneys, usually from the attorney general's office, which consider and advise the board regarding activities and decision making.
- Active state supervision is a fact-specific determination and supervision can exist in numerous forms, such as attorney general representation, executive branch appointment, training of board members, and legislative mandates in statutes.
- Active state supervision through the creation of additional agencies removes the expertise necessary to assess and determine factual findings specific to the profession and may also result in decisions that are more likely susceptible to legal challenge on appeal.
- Active state supervision through the creation of additional agencies adds redundancy, slows the decision making process, and contributes to the inefficient use of government resources.
- Alternative options exist whereby the board can request legislative changes, promulgate regulations, and/or seek declaratory rulings from the judicial branch.