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Note: The following information is provided to inform member boards of matters concerning Federal Trade Commission (FTC) antitrust actions. It is not intended to serve as legal opinion that might serve, in whole or in part, as a means in which a member board may maintain immunity from federal antitrust actions.

Information and Guidance- – FTC Actions Related to Regulatory Boards:

On February 25, 2015, the United States Supreme Court ruled in the case of *North Carolina State Board of Dental Examiners v. Federal Trade Commission*. The decision is being interpreted differently across the states, resulting in varying approaches intended to satisfy the primary tenets identified by the Supreme Court. There have even been mischaracterizations of the Supreme Court decision resulting in changes or proposed changes to the governance and composition of licensing boards, which may have a detrimental impact on the protection of the public health.

The National Association of Boards of Pharmacy (NABP) is aware that some states have made changes or are considering changes in the governance and/or composition of their boards. **It is important to emphasize that states should not implement any changes without careful review and consideration of the Supreme Court decision and the FTC guidance document, as well as supervision processes already established at state level for regulatory board oversight.**

The Supreme Court decision and the FTC guidance document (published in October 2015) note two areas that a state might consider for reducing potential liability related to a federal antitrust action: " . . . first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct."

What Is "Active State Supervision?"

The Supreme Court decision emphasized that active supervision can manifest itself in many different ways at the state level. Here are a few excerpts from the Supreme Court opinion:

"It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. **Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision**. Rather, the question is whether the State's review mechanisms provide 'realistic assurance' that a non-sovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests."

"The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, . . . the supervisor must have the power to veto or modify

particular decisions to ensure they accord with state policy, . . . and the 'mere potential for state supervision is not an adequate substitute for a decision by the State.' . . . Further, the state supervisor may not itself be an active market participant."

FTC Published Guidance – Active State Supervision

Not Enforceable Law but Provides Insight on FTC's Future Approach

In October 2015, the FTC issued a guidance document on the ramifications of the Supreme Court's decision. This guidance document is not "law" but rather reflects the FTC's current thinking on issues raised in that decision. The FTC guidance document suggests that the following processes would **not constitute active supervision** sufficient to make a board immune from antitrust actions:

- The entity responsible for supervising the regulatory board is itself controlled by professional members in the occupation that the board regulates.
- A state official monitors the actions of the regulatory board and participates in deliberations but lacks the authority to disapprove anticompetitive acts that are inconsistent with state policy.
- A state official serves as a member of the regulatory board with full voting rights. However, this state official lacks the authority to disapprove anticompetitive acts that are inconsistent with state policy.
- A board designated attorney or another state official provides advice to the regulatory board on an ongoing basis.
- An independent state agency is tasked to evaluate then veto or modify particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency.
- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act without undertaking a substantive review of the actions of the regulatory board.

State Level Supervision

Regulatory Review

Many jurisdictions have in place long-standing state supervision processes, which are oftentimes very stringent, to ensure that regulations promulgated by their regulatory boards are founded in public safety. The following are a few examples of state actions that may meet the FTC "Active Supervision" standard:

- Legislative, agency level, cabinet level, attorney general, and/or gubernatorial review process for which each has independent authority to veto or otherwise nullify regulations that exceed statutory authority or that are otherwise inconsistent with the mission of the respective regulatory board.

- Judicial appeal process following the adoption of the regulations. Note that judicial appeals are almost always an available recourse for nearly all board decisions.

Licensure and Disciplinary Board Decision Review

At the outset, it is important to note that the antitrust laws are designed to protect **competition**, **not individual competitors. As others including the FTC have noted, individual disciplinary actions or individual licensure decisions can rarely, if ever, be said to affect competition in a way that implicates the antitrust laws.**

> **FTC Guidance** *(Oct. 2015)*: *"... a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis [limited] effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.*

State level processes designed to review **all** licensure and regulatory decisions may dramatically reduce the operational effectiveness of the regulatory board, as well as diminish the impact of regulatory decisions requiring practice expertise provided by professional members.

The Supreme Court opinion and FTC guidance document, as well as recent antitrust suits against regulatory boards, clearly indicate that each state should review and consider if current state-level review processes deliver appropriate oversight of licensure and disciplinary decisions that affect a large number of licensees (or, as in the North Carolina Dental Board case, large numbers of nonlicensed entities) that could be considered to affect competition and thus give rise to federal antitrust action.

The following excerpts taken from a recently published California attorney general opinion are useful to illustrate the differences between board actions that are extremely unlikely to implicate the antitrust laws and those that may implicate the antitrust laws. Obviously, this memo reflects only the opinion of one state's attorney general, but its discussion may prove useful as you consider appropriate steps in your own state:

California Attorney General Opinion, 15-402, September 10, 2015

"There are two important things [to] keep in mind: (1) the loss of immunity, if it is lost, does not mean that an antitrust violation has been committed, and (2) even when board members participate in regulating the markets they compete in, many – if not most – of their actions do not implicate the federal antitrust laws."

" . . . 'market-sensitive' decisions (that is, the kinds of decisions that are most likely to be open to antitrust scrutiny) are those that create barriers to market participation, such as rules or enforcement actions regulating the scope of unlicensed practice; licensing requirements imposing heavy burdens on applicants; marketing programs; restrictions on advertising; restrictions on competitive bidding; restrictions on commercial dealings with suppliers and other third parties; and price regulation, including restrictions on discounts."

" . . . assuming a board identifies its market-sensitive decisions and gets active state supervision for those, then ordinary rule-making and discipline . . . may be regarded as relatively safe harbors for board members to operate in."

"North Carolina Dental presents a perfect example of a market-sensitive action. There, the dental board decided to, and actually succeeded in, driving non-dentist teeth-whitening service providers out of the market, even though nothing in North Carolina's laws specified that teeth-whitening constituted the illegal practice of dentistry."

" . . . suspending the license of an individual license holder for violating the standards of the profession is a reasonable restraint and has virtually no effect on a large market, and therefore would not violate antitrust laws."

"Another area where board members can feel safe is in carrying out the actions required by a detailed anticompetitive statutory scheme . . . Such detailed legislation leaves nothing for the state to supervise, and thus it may be said that the legislation itself satisfies the supervision requirement."

Regulatory Board Composition – Majority Public Members

The Supreme Court's decision also noted that a board would be immune from antitrust suits if the board is made up of less than a "controlling number" of practitioners in the field being regulated. Some policy makers have taken this discussion to mean that the composition of boards of pharmacy should be reconstituted to consist solely of, or the majority of, public members.

The FTC guidance document commentary opines: " . . . a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated."

Historically, state legislatures have crafted regulatory board composition in a manner that emphasizes the need for practice experience and expertise to most rationally regulate for the protection of public safety. The Supreme Court decision recognized this:

"The States have a sovereign interest in structuring their governments, . . . and may conclude there are substantial benefits to staffing their agencies with experts in complex and technical subjects. . . . There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling."

The California attorney general opinion expanded on this need:

"In the wake of North Carolina Dental, many observers' first impulse was to assume that reforming the composition of professional boards would be the best resolution, both for state actors and for consumer interests. Upon reflection, however, it is not obvious that sweeping changes to board composition would be the most effective solution."

"Most observers believe that there are real advantages in staffing boards with professionals in the field. The combination of technical expertise, practiced judgment, and orientation to prevailing ethical norms is probably impossible to replicate on a board composed entirely of public members."

"In addition, delays in identifying suitable public-member candidates and in filling public seats can result in de facto market-participant majorities."

Moreover, neither the Supreme Court's decision nor the FTC guidance document define what a "controlling number" of market participants on a board would be. The Supreme Court could have said "majority," but it did not. So, in addition to losing the critical expertise needed for effective public safety protection, a reduction in the number of practitioners on a board could very well not even provide immunity from antitrust law.

NABP will continue to monitor this important issue and assist our member state boards of pharmacy in fulfilling their responsibilities to protect the public health objectively and implement appropriate measures founded within the legal framework of the Supreme Court decision.