

Questions for the Record
Senator Orrin G. Hatch
Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing: “License to Compete: Occupational Licensing and the State Action Doctrine”
February 2, 2016

Question for Ms. Ohlhausen

1. What do you believe are the proper contours of the state action antitrust immunity doctrine? Does the Supreme Court have it about right, or is the doctrine too broad or too narrow?

Response of Commissioner Ohlhausen:¹

The unique institutional features of the Federal Trade Commission, including our research capabilities, administrative litigation tools, and the composition of the Commission, have allowed us to develop and improve the antitrust laws over time. In my view, the state action area provides an important example of the Commission leading the courts and others in the development of antitrust law toward better outcomes for competition and consumers. In particular, since former Chairman Tim Muris formed the State Action Task Force in 2001,² the Commission has used several of its tools, including law enforcement actions, competition advocacy, and research, to ensure that the state action doctrine remains true to its doctrinal foundations and to shape the doctrine to be more hospitable to the important concepts of competition and consumer welfare.

The Commission’s long-term, bipartisan efforts in the state action area culminated in the Supreme Court’s recent decisions in *North Carolina State Board of Dental Examiners v. FTC*³ and *FTC v. Phoebe Putney Health System, Inc.*⁴ In those decisions, the Court reiterated the crucial role that antitrust plays in our economy, noting that “[f]ederal antitrust law is a central safeguard for the Nation’s free market structures.”⁵ The Court further explained that, “given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored, much as are repeals by implication.’”⁶

¹ This response reflects my views and does not necessarily reflect the views of the Commission or any other Commissioner.

² The State Action Task Force published its findings and recommendations regarding the state action doctrine in FED. TRADE COMM’N, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

³ *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015).

⁴ *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013).

⁵ *N.C. Dental*, 135 S. Ct. at 1109.

⁶ *Id.* at 1110 (citing *Phoebe Putney*, 133 S. Ct. at 1010).

I believe the Supreme Court was correct in limiting the scope of the state action doctrine as it did in *North Carolina Dental* and *Phoebe Putney*. Requiring active supervision of licensing boards on which a controlling number of decision makers are active market participants in the occupation the board regulates, as the Court did in *North Carolina Dental*, ensures that any anticompetitive acts undertaken by private actors are in fact approved by the State as part of its regulatory policy, if such actors are to benefit from state action immunity. In *Phoebe Putney*, the Court recalibrated the standard for clear articulation under the doctrine, clarifying that a general grant of power to act from a state legislature is not sufficient to demonstrate a clearly articulated and affirmatively expressed policy to displace competition. Rather, that standard is met when the displacement of competition is “the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature,” such that “the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its state policy goals.”⁷ Under our system of federalism, states may displace free-market competition with regulation, in pursuit of other policy goals. A more rigorous clear articulation requirement, however, ensures that a state actually has made a deliberate and intended decision to displace the national policy favoring competition.

⁷ *Phoebe Putney*, 133 S. Ct. at 1013.

Hearing before the Senate Committee on the Judiciary
“License to Compete: Occupational Licensing and the State Action Doctrine”
Question for the Record Submitted by Senator Al Franken

Question 1 for FTC Commissioner Ohlhausen: I commend the FTC’s efforts to promote competition among health care professionals in order to improve access to health care. One area where this is particularly necessary is oral health services.

In 2008, Minnesota became the first state to pass legislation to create a training option for midlevel dental health practitioners – what are known as dental therapists – to be licensed. The goal was providing more basic services to underserved rural populations in the state. Now, dental therapists in Minnesota are confirmed to provide cost-effective, high quality care, and consumers want to see them for dental services.

Commissioner Ohlhausen, we heard testimony about the extent to which licensing boards in many jurisdictions stifle competition. Unfortunately, we’ve also seen how entrenched market participants, like the American Dental Association, have erected barriers to new business models. Is it possible to establish a licensing regime that takes account of the need for competition and public health and safety, while also facilitating increased access to care? What more could be done to ease the entry of dental therapists into oral care to address the nation’s shortage of dentists?

Response of Commissioner Ohlhausen:¹

Competition is at the core of America’s economy, and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher-quality products and services, and increased innovation. As discussed in more detail below in response to your second question, the Commission’s recent competition advocacy in the area of dental care has encouraged legislators and policymakers to support the least restrictive supervision and scope-of-practice requirements that also maintain standards of safety, quality, and effectiveness.

State supervision requirements that allow dental therapists and dental hygienists to work without a dentist on the premises are critical to their ability to enhance competition and increase access to dental care in underserved areas where dentists are scarce or unavailable. Supervision levels that require a dentist to be present while a dental therapist or hygienist provides care may result in a duplication of services, undercutting the cost savings that otherwise might arise from the use of lower-cost providers and defeating the very purpose of expanding the supply of providers. In underserved locations where a dentist is not available, requiring a supervising dentist to be on-site prevents dental therapists and dental hygienists from providing any care at all.

Authorities such as the Institute of Medicine recommend that state legislatures increase access to basic oral health care by amending dental practice acts to allow allied dental professionals to work to the full extent of their education and training under evidence-supported

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supervision levels.² Such appropriately-tailored supervision requirements could allow allied dental professionals to address oral care needs in locations where dentists are unavailable. Dental therapists would be able to provide basic dental services, and hygienists could provide preventive services.

Now that the Commission on Dental Accreditation has accreditation standards for dental therapy in place,³ more states may adopt laws to establish a dental therapy profession. As they do so, continued encouragement for states to adopt the least restrictive supervision and scope-of-practice requirements for dental therapists could help to establish a nationwide dental therapy profession that could provide care where dentists are unavailable and help address the nation's shortage of dentists.

Question 2 for FTC Commissioner Ohlhausen:

Commissioner Ohlhausen, what is the FTC doing right now to ensure access to necessary oral health services and what are the varieties of tools the FTC can use to promote competition in the dental arena?

Response of Commissioner Ohlhausen:

The Commission has addressed competition issues related to oral health care in several recent law enforcement actions and policy initiatives. For example, in 2003, the Commission sued the South Carolina Board of Dentistry charging that the Board had illegally restricted the ability of dental hygienists to provide preventive dental services in schools without a prior examination by a dentist. To address concerns that many schoolchildren, particularly those in low-income families, were not receiving any preventive dental care, the South Carolina legislature had eliminated a statutory requirement that a dentist examine each child before a hygienist could perform preventive care in schools. But according to the FTC's complaint, the Board re-imposed the dentist examination requirement, which was clearly inconsistent with the policy established by the legislature. The complaint alleged that the Board's action unreasonably restrained competition in the provision of preventive dental care services, deprived thousands of economically disadvantaged schoolchildren of needed dental care, and that its harmful effects on competition and consumers could not be justified. The Board ultimately entered into a consent agreement settling the charges.⁴

The FTC has also engaged in various competition advocacy efforts relating to licensing requirements in the area of oral health care.⁵ Most recently, in January 2016, the Commission

² See *A Vision for the Delivery of Oral Health Care to Vulnerable and Underserved Populations*, in COMMITTEE ON ORAL HEALTH ACCESS TO SERVICES, INSTITUTE OF MEDICINE AND NATIONAL RESEARCH COUNCIL, IMPROVING ACCESS TO ORAL HEALTH CARE FOR VULNERABLE AND UNDERSERVED POPULATIONS 234-35 (2011).

³ See Accreditation Process for Dental Therapy Education Programs Approved by the Commission on Dental Accreditation (CODA), https://www.adha.org/resources-docs/ADHA_CODA_Statement_8-10-15.pdf.

⁴ See S.C. State Bd. of Dentistry, 138 F.T.C. 229 (2004).

⁵ See, e.g., Comment from FTC Staff to the Texas State Bd. of Dental Exam'rs (Oct. 6, 2014) (concerning proposed restrictions on the ability of Texas dentists to enter into agreements with non-dentists for administrative services), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/10/ftc-staff-comment-texas-state-board-dental->

authorized FTC staff to issue a comment supporting Georgia HB 684, which would broaden the settings where dental hygienists are allowed to provide care without the direct supervision of a dentist, thereby enhancing competition and expanding access for Georgia consumers. The comment concluded that fewer restrictions likely would enhance competition in the provision of preventive dental care services and expand access to care, especially for Georgia's most vulnerable populations. In 2013, the Commission authorized FTC staff to submit comments encouraging the Commission on Dental Accreditation to drop restrictive supervision and scope-of-practice standards from its proposed accreditation standards for dental therapy education programs. In November 2011, FTC staff urged the Maine Board of Dental Examiners not to adopt proposed rules that would have restricted the scope of practice of Independent Practice Dental Hygienists participating in a pilot project designed to improve access to care in underserved areas of the state, by preventing them from taking certain radiographs without a dentist present.

The oral health care area, much like health care more generally, will undoubtedly remain a significant focus of the Commission's law enforcement and competition advocacy efforts.

[examiner-0](#); FTC Staff Comment Before the Georgia Board of Dentistry Concerning Proposed Amendments to Board Rule 150.5-0.3 Governing Supervision of Dental Hygienists (Dec. 30, 2010) (concerning rules requiring indirect supervision by a dentist for dental hygienists providing dental hygiene services at approved public health facilities), <http://ftc.gov/os/2010/12/101230gaboarddentistryletter.pdf>; Comment from FTC Staff to the La. State Bd. of Dentistry (Dec. 18, 2009) (concerning proposed rules on the practice of portable and mobile dentistry), <http://www.ftc.gov/os/2009/12/091224commentladentistry.pdf>.