

September 13, 2017

Honorable Tom Marino
Chairman
6240 O'Neill Federal Office Building
Washington, D.C. 20515

Honorable David Cicilline
Ranking Member
B-351 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Marino and Ranking Member Cicilline,

On behalf of the American Dental Association (ADA) and our more than 161,000 members, thank you for recognizing the need to ensure restoration of antitrust immunity to state occupational boards. The ADA is very concerned, however, that the "Restoring Board Immunity Act of 2017" (H.R. 3446) as currently written would *not* restore to professional boards the immunity from the antitrust laws that was believed to have existed prior to the opinion of the U.S. Supreme Court in *North Carolina Board of Dental Examiners v. FTC*, 574 U.S. ___ (2015). To the contrary, the ADA believes the bill could have an adverse effect on the ability of state professional boards to regulate in the public interest. As such, the ADA opposes this legislation as currently written.

While one of the stated purposes of the bill is "to facilitate the restoration of antitrust immunity to State occupational boards," a review of the bill demonstrates that its true primary purpose is to address a perceived "abuse of occupational licensing laws by economic incumbents" by potentially eliminating the very occupational boards it purports to protect. Before immunity is even a possibility under this legislation, the state must adopt a policy of using "less restrictive alternatives to occupational licensure," without any distinction among the various occupations and professions for which licensure is currently required. Under H.R. 3446, occupational licensure, even for such professions as medicine and dentistry, must be the exception, and only in instances where the less restrictive alternatives are inadequate to protect the public. It is difficult to believe that the states will be inclined to adopt such a formalistic policy.

Even if the policy relating to licensure is adopted by a state, the promised immunity is available to the boards *only* if the state also creates a complicated bureaucracy and system of supervision and participation headed up by an "Office of Supervision of Occupational Boards" with jurisdiction over all the boards in the state. The effect of this bureaucratic regimen is to formalize the requirements for immunity set forth in *N.C. Dental*, but in a manner that is more burdensome and complex. In addition, the state must also enact legislation providing for a detailed and elaborate system of judicial review that requires a full *de novo* review of the actions taken by the board. Finally, the immunity granted under the bill is apparently illusory in any event: a "Savings Clause" provides that the immunity, even if all conditions are met, "shall not apply to an action unrelated to regulating personal qualifications required to engage in or practice a lawful occupation," thus apparently eliminating the immunity for many of the essential functions of the boards.

H.R. 3446, in order to achieve its objectives, relies totally on the willingness of the states to adopt the policies defined in the bill, but the requirements imposed upon a state to implement a regimen that would result in board immunity are so substantial that no state is likely ever to

attempt to meet them. Moreover, the bill is unduly complicated and ambiguous, the immunity that it purports to confer appears to be illusory, and its apparent effect would be to minimize or eliminate occupational licensure. That goal would be better served by taking on the issue in a more direct, considered and, transparent manner. This is not, in our view, legislation that provides real benefit to members of the healthcare community or to the public in general.

Again, thank you for being willing to address a very necessary and complicated issue. As stated above, the ADA must at this time, oppose passage of H.R. 3446 but the Association stands ready to work with you and your staff to further explain our position and do what we can in legislation to enhance the ability of state professional boards to regulate in the public interest. Please contact Mr. Chris Tampio in the ADA's Washington, D.C. office at tampioc@ada.org or (202) 789-5178 with any questions.

Sincerely,

/s/

Gary Roberts, D.D.S.
President

GR:KO:ct

/s/

Kathleen T. O'Loughlin, D.M.D., M.P.H.
Executive Director