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

Northbrook, IL - The Federation of Associations of Regulatory Boards (FARB) is pleased to announce the development of the **FARB Model for Identifying and Addressing Antitrust Issues**. The Model 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 the following 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.

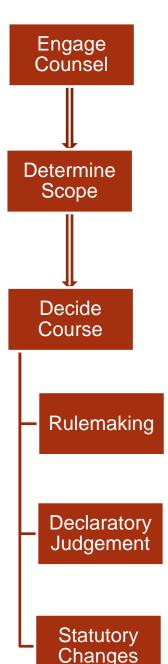
#### **About FARB**

FARB is a not for profit, 501(c)(3) organization incorporated in 1974 to promote public protection and provide a forum for information exchange for associations of regulatory boards and their stakeholders with interests in professional regulation. The mission of FARB is to advance excellence in regulation of the professions in the interest of public protection. FARB looks forward to continued dialogue with relevant stakeholders on important topics related to effective and efficient regulation of the professions.

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## **FARB Model for Identifying and Addressing Antitrust Issues**



#### 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.