

SENATE COMMERCE COMMITTEE

STATEMENT TO

SENATE, No. 2963

STATE OF NEW JERSEY

DATED: OCTOBER 15, 2018

The Senate Commerce Committee reports favorably Senate Bill No. 2963.

This bill directs a regulatory officer to establish and implement a protocol for the review and approval of regulations, actions and decisions proposed by a professional board to determine whether the proposed regulation, action, or decision has the potential to displace competition. The regulatory officer would also determine whether a proposal is consistent with and furthers or promotes clearly articulated and affirmatively expressed State policy or the inherent, logical, or ordinary result of that policy.

The bill defines “board” as a board, committee, commission, or any other entity created by law to act on behalf of the State of New Jersey to license or otherwise regulate a profession or occupation in this State. “Regulatory officer” means the Attorney General or the Attorney General’s designee or designees, in the case of the boards located within the Division of Consumer Affairs in the Department of Law and Public Safety, or the commissioner or the commissioner’s designee or designees, in the case of a board located within another principal department of the Executive Branch of State government.

The bill also provides that if a regulatory officer determines, as a result of the officer’s review, that a board’s proposed regulation, action, or decision is not consistent with and does not further or promote clearly articulated and affirmatively expressed State policy, or is not the inherent, logical or ordinary result of the board’s statutorily-delegated authority, or both, the regulatory officer must disapprove, veto, modify, amend, or remand to the board for the development of a factual record of the proposed regulation, action or decision, as may be necessary or appropriate.

Under the provisions of the bill, a board’s proposed regulation, action, or decision will not take effect unless the regulatory officer has conducted the review authorized by the provisions of the bill and taken additional action as may be necessary or appropriate under the bill, provided that no provision of the bill is to be construed to create a private right of action or preclude any action to address possible anticompetitive impacts after the proposed regulation, action, or decision has taken effect. The bill provides that no person licensed by the board whose action or decision is

under review pursuant to the protocol is permitted to serve as a regulatory officer's designee for the review of that board's actions or decisions.

The bill provides that a person serving as a member of a board will not be liable in any action for damages to any person in a civil action as a result of any action taken or recommendation or decision made within the scope of the person's function as a member of the board which was subject to review in accordance with the protocol established pursuant to the provisions of the bill, unless the person acted in bad faith or with malice. The Attorney General must defend the person in any civil suit and the State must provide indemnification for any damages awarded in any resulting civil action, unless the person acted in bad faith or with malice.

Finally, the bill permits any person to file a complaint relating to a proposed regulation, action, or decision of a board that the person alleges is potentially anticompetitive. The regulatory officer would review the complaint if:

- (1) the regulation, action, or decision was not reviewed pursuant to the bill's provisions but is potentially anticompetitive; or
- (2) the complaint provides new information that was not previously considered during the review, in which case the regulatory officer would take this information into account.

The bill is intended to maintain antitrust immunity for professional and occupational licensing boards consistent with federal law, specifically the decision of the United States Supreme Court in North Carolina State Board of Dental Examiners v. Federal Trade Commission. In that decision, the Court held that if a controlling number of a board's members are active market participants in the profession or occupation the board regulates, then the board may invoke state-action antitrust immunity only if it is subject to active supervision by the state. The provisions of this bill direct the appropriate regulatory officer to provide active supervision of any professional or occupational licensing board that is subject to the provisions of the bill.