



VOLUME 2 | NUMBER 2 | AUTUMN 2006

Competition Policy International

Identifying, Challenging, and Assigning Political Responsibility for State Regulation Restricting Competition

Maureen K. Ohlhausen

Identifying, Challenging, and Assigning Political Responsibility for State Regulation Restricting Competition

Maureen K. Ohlhausen

This paper examines the role of competition advocacy in combating anti-competitive state regulation. Looking at the constraints facing competition officials such as the state action doctrine, the analysis suggests potential avenues for surmounting these constraints. Relying on experience as the Director of the U.S. Federal Trade Commission's Office of Policy Planning, the author uses real-world examples—real estate brokerage and interstate direct shipment of wine—to demonstrate the ability of a competition agency to use a variety of techniques to improve consumer welfare when enforcement is circumscribed due to state activity.

The author is the Director of the Office of Policy Planning at the U.S. Federal Trade Commission. The views expressed here are the author's own and not necessarily those of the Federal Trade Commission.

I. Introduction

Antitrust conjures visions of large corporations conspiring behind closed doors to fix prices or powerful monopolies crushing upstart rivals. Competition officials must be alert to threats to competition from all sources, however, even from activities that are seemingly open to public scrutiny. Specifically, an important but sometimes overlooked source of anticompetitive harm is the enactment of state laws or promulgation of state regulations that restrict business activities or prohibit some business models altogether. Those concerned about promoting competition must not overlook the serious harm that can be wrought by state legislation and regulation—even well-intentioned actions—that hamper competition by setting prices, mandating offerings, or fencing out certain types of competitors, and which can inflict as much harm on consumers as does private anticompetitive action.

There are strong incentives for competitors to seek through legislation and regulation what they cannot lawfully obtain through private actions. If private price fixers run the risk of prison while government regulation fixing prices is legal, rational competitors looking for shelter from competitive pressures will seek government action to implement such regulation. In addition to being less risky to attain, anticompetitive government restrictions can also be more effective at restraining competition than private restraints. Public restraints are typically open; they appear in public statutes and regulations. They also are easier to enforce. The government keeps out those who would introduce more competition, either by law enforcement against mavericks who try to enter anyway or by providing a limited number of licenses, regardless of need. As the economic theory of regulation posits, consumers are ill-prepared to counter these efforts politically.¹ Their interests are diffuse and the costs of the restriction for any individual are often small. By contrast, those seeking the restrictions are organized firms or professional associations that will reap concentrated benefits from reduced competition. Finally, as regulation increases, so do the opportunities to use the mechanisms of regulation to keep out rivals.²

In the United States, the state action doctrine protects from antitrust enforcement state government action that limits or eliminates competition. When applied properly, this doctrine is necessary to the operation of a representative

1 See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 213 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT 3, 11 (1971).

2 See, e.g., ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 347 (1978) (“In order to enter the market and vie for consumers’ favor, businesses of all types must gain various types of approval from governmental agencies, departments, and officials. Licensing authorities, planning boards, zoning commissions, health departments, building inspectors, public utilities commissions, and many other bodies and officials control and qualify the would-be competitor’s access to the marketplace.”).

democracy in a federal system. The doctrine is not always applied correctly, however, and thus one avenue for limiting consumer harm is to be sure such protection is not interpreted expansively to shield truly private anticompetitive actions. Even when this protection is properly applied and enforcement is not a possibility, however, there are avenues that a competition official can pursue

IN THE UNITED STATES, THE STATE ACTION DOCTRINE PROTECTS FROM ANTITRUST ENFORCEMENT STATE GOVERNMENT ACTION THAT LIMITS OR ELIMINATES COMPETITION.

when faced with a state considering the adoption of an anticompetitive law that is likely to harm consumer welfare.

In this article, I will discuss the constraints facing competition officials in the United States and then identify avenues for combating anticompetitive state regulation despite these

constraints, which may be useful for any competition official faced with similar challenges. In doing this, I will use real-world examples drawn from my experience as the Director of the U.S. Federal Trade Commission's Office of Policy Planning, which oversees the Commission's efforts to persuade policymakers, including state legislators and regulators, to design policies that further competition and preserve consumer choice.

II. The State Action Doctrine

The state action doctrine, which was first articulated in a 1943 U.S. Supreme Court opinion, *Parker v. Brown*,³ protects from the reach of the Sherman Act actions taken by a sovereign state. The Court reasoned that “in light of states’ sovereign status and principles of federalism, Congress would not have intruded on state prerogatives through the Sherman Act without expressly saying so.”⁴ The Court held, therefore, that conduct that could be attributed to the state itself is immunized from antitrust scrutiny. Thus, a threshold inquiry for invoking state action immunity is whether the anticompetitive action was by the sovereign or by a private party.

In *California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc.*,⁵ the U.S. Supreme Court set forth two important limitations on the scope of state action immunity that help to ensure that the immunized conduct is truly that of the state itself, rather than private action. First, the defendant claiming the immunity must demonstrate that the conduct in question was in conformity with a

3 *Parker v. Brown*, 317 U.S. 341 (1943).

4 STATE ACTION TASK FORCE, OFFICE OF POLICY PLANNING, FEDERAL TRADE COMMISSION, REPORT OF THE STATE ACTION TASK FORCE (Sep. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

5 *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

“clearly articulated” state policy. Second, the defendant must demonstrate that the state engaged in “active supervision” of the conduct.

Although this rule seems fairly clear in theory, the parameters of the doctrine become substantially less clear when applied to delegations of state authority to private parties, particularly to industry members regulating the conduct of their competitors. There is little argument that the Sherman Act was not intended to reach the conduct of a state legislature that adopts anticompetitive legislation.⁶ A more contested issue is under what circumstances the Sherman Act can reach, for example, the anticompetitive conduct of a board of professional licensure, dominated by members of the profession.⁷

Thus, one course to explore for competition officials concerned about anticompetitive state regulation is an evaluation of whether the shelter from antitrust enforcement given to state action is unnecessarily broad. For example, the U.S. Federal Trade Commission (FTC) convened a State Action Task Force to reexamine the scope of the state action doctrine; and make recommendations to ensure that the exemption remains closely tied to protecting the deliberate policy choices of sovereign states, and is otherwise applied in a manner that promotes competition and enhances consumer welfare. The Task Force issued a report in September 2003, which concluded that, since *Parker*, the scope of the doctrine has increased considerably and that both the clear articulation and active supervision requirements have been the subject of varied and controversial interpretation, sometimes resulting in unwarranted expansions of the exemption.⁸ To address these problems with the state action doctrine, the *Report of the State Action Task Force* recommended clarifications to bring the doctrine more closely in line with its original objectives, including reaffirming a clear articulation standard tailored to its original purposes and goals, clarifying and strengthening the standards for active supervision, and clarifying and rationalizing the criteria for identifying the quasi-governmental entities that should be subject to active supervision.

6 See, e.g., *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984) (“when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws.” citations omitted). The Court also extended this *ipso facto* exemption to a state supreme court acting in a legislative capacity. *Id.* at 568.

7 This issue is likely to continue to grow in importance as the percentage of the labor force in the United States covered by state licensing laws continues to grow. See MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 1 (2006) (“During the early 1950s, only about 4.5 percent of the [U.S.] labor force was covered by licensing laws at the state level. That number had grown to almost 18 percent of the U.S. workforce in the 1980s, with an even larger number if city and county licenses for occupations are included.”).

8 STATE ACTION TASK FORCE, *supra* note 4.

A. ENFORCEMENT

Despite the lack of clarity regarding the exact parameters of the state action doctrine, it is not necessarily a bar to antitrust enforcement against actions by self-interested state boards, and U.S. antitrust agencies have sued state regulatory boards made of up competitors for restricting competition in ways that the state did not authorize.⁹ The doctrine, however, does present an additional hurdle for enforcers to surmount. For example, in 2003, the FTC brought a complaint against the South Carolina Board of Dentistry, alleging that it violated federal laws by illegally restricting the ability of dental hygienists to provide preventive dental services in schools.¹⁰ After the South Carolina General Assembly amended legislation to make it easier for dental hygienists to provide preventive dental care services to children in schools—by removing the requirement of a pre-examination by a dentist—the Board passed an emergency regulation that contradicted the General Assembly’s amendments by reinstating the requirement that a dentist examine a patient before the patient is eligible for treatment in school. The FTC’s complaint alleged that the Board was not acting pursuant to any clearly articulated state policy to displace competition, thereby suggesting that the conduct would not be immune under the state action doctrine. The Board raised a state action defense, which the FTC ultimately rejected in an adjudicative opinion.¹¹ The FTC held that although the Board was created by state statute, courts have consistently declined to extend *ipso facto* state action protection to non-elected governmental entities, particularly state licensing or regulatory boards composed, at least in part, of members of the regulated industry.¹²

Because the Board was not deemed part of the sovereign, the FTC then evaluated whether its action was taken pursuant to a clearly articulated state legislative policy.¹³ The FTC reasoned that although South Carolina’s statutory

9 State boards that regulate professions have been a particularly rich area for competition scrutiny. See, e.g., *FTC v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987); *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 612-13 (1988); *Kentucky Household Goods Carriers Ass’n*, FTC Dkt No. 9309 (2004).

10 *South Carolina State Board of Dentistry*, FTC Docket No. 9311 (2003) (complaint), available at <http://www.ftc.gov/os/2003/09/socodentistcomp.pdf>.

11 *South Carolina State Board of Dentistry*, FTC Docket No. 9311 (2004), available at <http://www.ftc.gov/os/adjpro/d9311/040728commissionopinion.pdf>.

12 *Id.* at 18 (citing *Southern Motor Carriers*, 471 U.S. at 62-63; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-92 (1975); *Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033, 1040-41 (5th Cir. 1998)).

13 *Id.* at 22 (“[W]hile clear articulation does not require a state entity to show ‘express authorization’ for every specific anticompetitive act, . . . it does anticipate that the anticompetitive action will have a significant nexus to, or degree of ‘foreseeability’ stemming from, an identifiable state policy.”) (citing *Southern Motor Carriers*, 471 U.S. at 64; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991)).

regime gave the Board broad general authority to regulate the fields of dentistry and dental hygiene in the state—thus necessarily allowing the Board to displace competition in certain ways—it was not foreseeable that this grant of general supervisory authority encompassed the right to re-impose the pre-examination requirement that the state legislature had just eliminated. Accordingly, the FTC denied the Board’s motion to dismiss the complaint on state action grounds.

B. BEYOND ENFORCEMENT

Enforcement is a highly effective tool to combat private interests that attempt to cloak themselves in a government mantle to attain anticompetitive ends. It is not the only tool, however, and where competition officials cannot pursue enforcement actions because the conduct is either that of the sovereign or is pursuant to a clearly articulated and actively supervised state policy, there are still avenues to pursue. One option is a form of persuasion called competition advocacy, which can be broadly described as the use of expertise in competition, economics, and consumer protection to persuade government actors to tailor their policies to protect or foster competition. In addition to reaching beyond where enforcement can go, competition advocacy can also be a cost-effective way to deploy resources to safeguard consumer welfare,¹⁴ which makes it particularly appealing to small and newly created competition agencies that may have insufficient means to support more resource-intensive enforcement actions.

In addition to being a cost-effective way to reduce consumer harm from anticompetitive state actions, competition advocacy can also serve an important function in the political process. In a leading state action case, *Federal Trade Commission v. Tigor Title Insurance Co.*, the U.S. Supreme Court observed that “[s]tates must accept political responsibility for the actions they intend to take . . . Federalism serves to assign political responsibility, not obscure it.”¹⁵ Competition advocacy, even when unsuccessful in influencing a

ENFORCEMENT IS A HIGHLY EFFECTIVE TOOL TO COMBAT PRIVATE INTERESTS THAT ATTEMPT TO CLOAK THEMSELVES IN A GOVERNMENT MANTLE TO ATTAIN ANTICOMPETITIVE ENDS. IT IS NOT THE ONLY TOOL, HOWEVER, AND WHERE COMPETITION OFFICIALS CANNOT PURSUE ENFORCEMENT ACTIONS BECAUSE THE CONDUCT IS EITHER THAT OF THE SOVEREIGN OR IS PURSUANT TO A CLEARLY ARTICULATED AND ACTIVELY SUPERVISED STATE POLICY, THERE ARE STILL AVENUES TO PURSUE.

14 A 1989 American Bar Association Report observed: “Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission’s entire budget.” AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, REPORT (1989), reprinted in 58 ANTITRUST L.J. 43, 116 (1989).

15 *FTC v. Tigor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

particular state regulation, highlights the costs to consumers of the anticompetitive state regulation and helps assign political responsibility to the state policy-makers endorsing the action.

Viewed through the lens of the economic theory of regulation, competition advocacy “helps solve consumers’ collective action problem by acting within the political system to advocate for regulations that do not restrict competition unless there is a compelling consumer protection rationale for imposing such costs on consumers.”¹⁶ It inserts a voice for otherwise overlooked consumer interests in a political debate typically dominated by organized interests with strong incentives to seek government protection from competition.

III. Overview of the FTC Competition Advocacy Program

The FTC has long had an appreciation for the benefits that advocacy can achieve and has conducted an advocacy program in one form or another for quite some time.¹⁷ Through this program, it has often persuaded state policymakers to eschew anticompetitive proposals or to modify them to reduce the impact on competition or at least drawn public, political, and academic attention to competitive restrictions in the states. Competition advocacy can take a variety of forms, with the most common being letters from the FTC or its staff (sometimes joined by the Antitrust Division of the U.S. Department of Justice (DOJ)) to state legislators, regulatory boards, or governors.¹⁸ The Commission has also filed amicus briefs with state supreme courts considering issues involving state professional licensing requirements,¹⁹ and with national professional associations pro-

16 James C. Cooper, et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1092 (2005).

17 For additional history of the FTC competition advocacy program and various views on it, see *id.* and Arnold J. Celnicker, *The Federal Trade Commission’s Competition and Consumer Advocacy Program*, 33 St. Louis U. L.J. 379 (1988).

18 The FTC and its staff also file competition advocacy comments with other federal agencies, typically in response to requests for public comment on pending federal regulations. See, e.g., In the Matter of Request for Comment on Proposed Amendments to the Regulations Implementing the Real Estate Settlement Procedures Act, Docket No. FR-4727-P-01 (Dep’t Housing & Urban Development, Oct. 28, 2002) (Comments of the Staff of the Bureau of Economics, the Bureau of Consumer Protection, and the Office of Policy Planning of the Federal Trade Commission), available at <http://www.ftc.gov/be/v030001.pdf>; In the Matter of Request for Comments on Consumer-Directed Promotion, Docket No. 2003N-0344 (Food & Drug Admin. Dec. 1, 2003) (Comments of the Staff of the Bureau of Consumer Protection, the Bureau of Economics, and the Office of Policy Planning, Federal Trade Commission) available at <http://www.ftc.gov/be/v040002text.pdf>.

19 See, e.g., Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission, *Lorrie McMahon v. Advanced Title Services Co. of West Virginia*, 607 S.E.2d 519 (W. Va. 2004) available at <http://www.ftc.gov/be/V040017.pdf>; Brief *Amicus Curiae* of the Federal Trade Commission, *Cleveland Bar Ass’n v. CompManagement, Inc.*, 104 Ohio St. 3d 168 (2004) available at <http://www.ftc.gov/os/2004/08/040803amicusbriefclevbar.pdf>.

posing model rules that would ultimately be promulgated by state regulatory bodies.²⁰ One of the most influential means of promoting competition has been through in-depth research conducted by FTC legal and economic staff, resulting in staff studies of certain industries, as well as scholarly reports about antitrust doctrines, such as the *Report of the State Action Task Force*, discussed earlier in this paper.²¹ Such studies and reports are often the result of workshops that the FTC staff holds periodically, which focus on specific industries²² or trends affecting competition more broadly.²³ A course of competition advocacy need not follow any particular order—comments may precede or follow workshops and studies may be the starting point or the conclusion of an inquiry. What is crucial to effective competition advocacy is that it be based on a comprehensive understanding of the industry at issue, competition principles, economic theory, and available empirical evidence. In addition to formal actions, informal presentations and contacts can also be helpful. Thus, FTC staff and Commissioners also promote competition principles through a host of activities, such as speeches before associations of state regulators or industry members, interviews with the press, and articles in general interest publications. Finally, the attention competition advocacy brings to a topic often sparks legal and economic research by legal and economic researchers, whose work adds to the body of knowledge about competition issues in a particular industry.

To give a better idea of what competition advocacy may cover and what it can accomplish, I will discuss recent competition advocacy initiatives, describing their genesis, form, and results. These two areas—real estate brokerage and the interstate direct shipment of wine—are particularly good examples of a competition agency using a variety of techniques to improve consumer welfare when its enforcement is circumscribed due to state activity.

A. REAL ESTATE BROKERAGE

The FTC has long been concerned about anticompetitive practices in real estate brokerage, such as efforts by private associations of brokers to disadvantage brokers who use non-traditional listing agreements that are associated with lower

20 See Letter from FTC and the Justice Department to the Task Force on the Model Definition of the Practice of Law of the American Bar Association (Dec. 20, 2002), *available at* <http://www.ftc.gov/opa/2002/12/lettertoaba.htm>.

21 See *also* STAFF OF THE FTC, REPORT, ENFORCEMENT PERSPECTIVES ON THE NOERR DOCTRINE (forthcoming).

22 See, e.g., Federal Trade Commission & U.S. Dep't of Justice, Workshop on Competition in Real Estate Brokerage (Oct. 2005).

23 Federal Trade Commission, Workshop on Possible Barriers to Competition in E-commerce (Oct. 2002).

commission rates or flat fee services.²⁴ This focus has included competition advocacy in connection with a number of issues related to real estate transactions, such as laws that restrict non-attorneys from performing certain aspects of real estate closings²⁵ and minimum-service brokerage laws, which generally require all real estate agents, regardless of their fee structure, to provide most of the services supplied by traditional full-service agents. Also, a number of years ago, the FTC released a comprehensive report on the real estate brokerage industry reflecting years of enforcement activity and industry research,²⁶ and is currently exploring the feasibility of updating this research.

In recent years, technological developments have spurred a number of substantial changes in the real estate industry. Agents are increasingly incorporating the Internet into their business models in a variety of ways, such as offering potential buyers the option to view detailed property listing information online, or using websites to gather lead information on customers who seek real estate services and then selling those leads to real estate professionals. Still other business

24 See *In the Matter of Austin Board of Realtors*, File No. 0510219 (F.T.C. Jul. 13, 2006), available at <http://www.ftc.gov/os/caselist/0510219/0510219.htm>; *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, 116 F.T.C. 972 (1993), available at <http://www.ftc.gov/bc/realstate/cases/UnitedRealEstateBrokersofRocklandLtd116FTC972.pdf>; *In the Matter of American Industrial Real Estate Association*, 116 F.T.C. 704 (1993), available at <http://www.ftc.gov/bc/realstate/cases/AmericanIndustrialRealEstateAssociationetal116FTC704.pdf>; *In the Matter of Puget Sound Multiple Listing Association*, Docket No. C-3300 (F.T.C. Aug. 2, 1990), available at <http://www.ftc.gov/bc/realstate/cases/PugetSoundMultipleListingAssociation113FTC733.pdf>; *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, Docket No. C-3299 (F.T.C. Aug. 2, 1990), available at <http://www.ftc.gov/bc/realstate/cases/Bellingham-WhatcomCountyMultipleListingBureau113FTC724.pdf>; *In the Matter of Metro MLS, Inc.*, 115 F.T.C. 305 (1990), available at <http://www.ftc.gov/bc/realstate/cases/MetroMLS113FTC305.pdf>; *In the Matter of Multiple Listing Service of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985), available at <http://www.ftc.gov/bc/realstate/cases/MultipleListingServiceoftheGreaterMichiganCityAreaInc106FTC95.pdf>; *In the Matter of Orange County Board of Realtors, Inc.*, 106 F.T.C. 88 (1985), available at <http://www.ftc.gov/bc/realstate/cases/OrangeCountyBoardofRealtorsIncetal106FTC88.pdf>.

25 See Letter from FTC & U.S. Dep't of Justice to Massachusetts State Representative Paul Kujawski (Oct. 6, 2004); Letter from FTC & U.S. Dep't of Justice to Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); Letters from the FTC & U.S. Dep't of Justice to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Mar. 28, 2003); Letter from the FTC & U.S. Dep't of Justice to President of the North Carolina State Bar (July 11, 2002); Letter from the FTC & U.S. Dep't of Justice to Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); Letter from the FTC & U.S. Dep't of Justice to the Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); Letter from the FTC & U.S. Dep't of Justice to the Supreme Court of Virginia (Jan. 3, 1997); Letter from the FTC & U.S. Dep't of Justice to the Virginia State Bar (Sept. 20, 1996), available at <http://www.ftc.gov/be/advofile.htm>. See also, Brief *Amicus Curiae* of the United States of America and the Federal Trade Commission, *Lorrie McMahon v. Advanced Title Services Co. of West Virginia*, 607 S.E.2d 519 (W. Va. 2004), available at <http://www.ftc.gov/be/V040017.pdf>; Brief *Amicus Curiae* of the Federal Trade Commission and the United States of America, *On Review of ULP Advisory Opinion 2003-2* (Ga. July 28, 2003), available at <http://www.ftc.gov/os/2003/07/georgiabrief.pdf>.

26 See STAFF OF THE FTC, REPORT, THE RESIDENTIAL REAL ESTATE BROKERAGE INDUSTRY (1983), available at <http://www.ftc.gov/bc/realstate/workshop/index.htm>.

models use the Internet to match home buyers and sellers. The increased ease with which home sellers can perform tasks that once were the exclusive domain of brokers likely has been an important factor in the increased demand for innovative, non-traditional brokerage services. One form of non-traditional brokerage service is limited-service brokerage, pursuant to which a home seller might choose to pay a broker only for the service of listing the home in the local multiple listing services and placing advertisements, and choose to handle negotiations and paperwork himself or herself. This model gives the consumer the choice to save potentially thousands of dollars in commissions in exchange for taking on more work.

As alternative brokerage models have grown in prominence, several state legislatures and real estate commissions—at the urging of state real estate agent associations—have considered or adopted minimum-service requirements, which would have the effect of forcing consumers to purchase a state-mandated bundle of real estate brokerage services that conform more closely to the array of services offered by traditional, full-service brokers.²⁷

In 2005, the FTC, along with the DOJ's Antitrust Division, sent letters to the Texas Real Estate Commission,²⁸ the Alabama Senate,²⁹ the governor of the state of Missouri,³⁰ and to a Michigan state senator³¹ providing analysis of the likely competitive effects of proposed minimum-service laws. The comments asserted that by effectively eliminating many of the most popular packages offered by limited-service brokers, these minimum-service laws would reduce consumer choice and competition among traditional brokerage models and limited-service models. They further noted the dearth of evidence that such laws are necessary to protect consumers and that staff was never presented with evidence of actual consumer harm from the limited-service brokerage model. In the end, Texas, Alabama, and Missouri adopted minimum-service laws. The advocacy filing

27 It is common for industry specific (and at times even identical) anticompetitive prohibitions on entry by certain types of competitors or restrictions on certain business models to appear in a number of states at the same time. See generally, *supra* note 25; A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. Rev. 409, 486 (1999).

28 Letter from the FTC & U.S. Dep't of Justice to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm'n. (Apr. 20, 2005), available at http://www.usdoj.gov/atr/public/press_releases/2005/208653a.htm.

29 Letter from the FTC & U.S. Dep't of Justice to Alabama Senate (May 12, 2005), available at <http://www.ftc.gov/os/2005/05/050512ltralabamarealtors.pdf>.

30 Letter from the FTC & U.S. Dep't of Justice to Governor Matt Blunt (May 23, 2005), available at <http://www.ftc.gov/opa/2005/05/mrealestate.htm>.

31 Letter from FTC & U.S. Dep't of Justice to Michigan State Sen. Alan Sanborn (Oct. 18, 2005), available at <http://www.ftc.gov/os/2005/10/051020commmihousebill4849.pdf>.

appears to have had more immediate success in Michigan, where the proposal failed to pass in the legislature's most recent term.

Despite this limited success in directly persuading state policymakers to reject anticompetitive restrictions on non-traditional business models, there are still other avenues to pursue. One path is to conduct a careful analysis of the marketplace that policymakers and opinion leaders—and eventually the public—may come to rely on in evaluating the conduct of the industry and the state officials who have adopted anticompetitive restrictions favorable to the entrenched business interests. Thus, the FTC and DOJ held a workshop addressing competition policy and the real estate industry in late 2005 to provide a forum to discuss current issues affecting the competitiveness of this important market. At the workshop, a variety of panelists, including practitioners, economists, and state administrators, provided their various views on competition in the real estate brokerage industry. In addition, the agencies received almost 400 submissions in response to their request for public comment in connection with the workshop. The FTC and the DOJ plan to release a report in late 2006 based on information gathered in connection with the workshop and research conducted by staff. To aid those interested in following these activities more closely, the Commission also has launched a website that allows the public to find all of the FTC's work in the real estate area through one central portal.³²

The sustained focus on competition in real estate brokerage has spurred ongoing press interest, with numerous stories in national newspapers.³³ The U.S. Congress has also taken up the issue, with the House Subcommittee on Housing and Community Opportunity holding hearings on competition in the real estate brokerage industry in July 2006.³⁴ These inquiries raise consumer awareness of their state representatives' actions that may not advance consumer welfare, thereby helping to assign political responsibility to those policymakers.

B. INTERSTATE DIRECT SHIPMENT OF WINE

Another recent area of extensive competition advocacy activity involves the ability of wineries to ship their wines directly to consumers throughout the United States. Alcohol is heavily regulated in the United States, and the 21st Amendment to the U.S. Constitution, which repealed Prohibition, gives the

32 See FTC Bureau of Competition, *Competition in the Real Estate Market Place* (last modified Jul. 19, 2006), available at <http://www.ftc.gov/bc/realestate/index.htm>.

33 See, e.g., *Realtor Racket*, WALL ST. J., Aug. 12, 2005, available at <http://online.wsj.com/article/0,,SB112381069428011613,00.html>.

34 See *Hearing on the Real Estate Market and the Development of the Internet in the Real Estate Sector Before the Subcomm. on Hous. & Community Opportunity of the House Comm. on Financial Services*, 109th Cong. (2006) (The author testified in her capacity as Director of the Office of Policy Planning at the FTC), available at <http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=497&comm=5>.

states special authority to regulate it. Pursuant to this authority, all fifty states have required wine to pass through a wholesaler and bricks and mortar retailer before reaching consumers. In recent years, however, the Internet has become a popular avenue to buy wine. Consumers can buy literally thousands of varieties over the Internet directly from the winery, often at lower prices than elsewhere. Direct shipment is a particularly attractive channel for small wineries, which often have difficulty getting distributors to carry their offerings.³⁵ Not surprisingly, some traditional firms—primarily wholesalers—perceived the Internet as a significant threat, and they successfully lobbied a number of state legislatures to prohibit wineries from shipping directly to consumers, largely on the theory that underage drinkers could buy wine online. Seven states even made it a felony to ship wine directly.

In 2002, the FTC held a workshop on possible barriers to e-commerce that, among other topics, examined issues surrounding the interstate direct shipment of wine. At the workshop, FTC staff heard testimony from all sides of the wine issue, including wineries, wholesalers, and state regulators. The staff also gathered evidence from package delivery companies, the U.S. Alcohol and Tobacco Tax and Trade Bureau, and regulators in states that allow direct shipping. In addition, FTC staff conducted the first empirical study of a wine market in a state that banned interstate direct shipping.

In 2003, the FTC staff issued a report (*Wine Report*) on state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers.³⁶ The staff report, reflecting the unique interest and sensitivity of the Commission to both competition and consumer protection concerns, concluded that states could significantly enhance consumer welfare by allowing the direct shipment of wine as a purchase option. The report supported this conclusion with a study conducted by FTC economists that showed that many wines available to consumers online are not available in local retail outlets and that consumers could save money if they purchased their more expensive wines online.³⁷ Using the *Wine & Spirits* list of the “Top 50 Wines” in America, the study found that 15 percent of a sample of wines available online was not available from retail wine

35 The U.S. Supreme Court recently noted that “many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. This has led many small wineries to rely on direct shipping to reach new markets.” *Granholm v. Heald*, 125 S. Ct. 1885, 1892 (2005) (citation omitted).

36 STAFF OF THE FTC, REPORT, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE—WINE (July 2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

37 The study appears as an appendix to the FTC staff report. *Id.* It was published separately as ALAN E. WISEMAN & JERRY ELLIG, HOW MANY BOTTLES MAKE A CASE AGAINST PROHIBITION? (FTC Bureau of Economics Working Paper No. 258, Mar. 2003) and later published as Alan E. Wiseman & Jerry Ellig, *Marketing and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia*, 6 BUS. & POL. 4 (Aug. 2004), available at <http://www.bepress.com/bap/vol6/iss2/art4>. The authors explicitly note that a full welfare analysis of the removal of restrictions would require additional data.

stores within ten miles of McLean, Virginia. Given that the wines studied are the most popular wines of many of America's largest wineries, it is likely that the wines of less-popular or smaller wineries are even more difficult to locate in wine retailers. Moreover, the same study suggested that, if consumers use the least expensive shipping method, they could save an average of 8-13 percent on wines costing more than US\$20 per bottle, and an average of 20-21 percent on wines costing more than US\$40 per bottle. Less expensive wines may be cheaper in bricks and mortar stores, given that fixed shipping costs will be proportionately larger for less expensive wines.

At the workshop, some parties expressed concern and offered anecdotes suggesting that interstate direct shipping might have the unintended effect of increasing underage access to alcohol or undermining tax compliance. To determine whether these concerns were factually grounded, FTC staff contacted numerous officials from states that allow direct shipping to gather systematically information about whether these problems have occurred.

Given that underage drinking is a serious health and safety issue, the *Wine Report* undertook an in-depth analysis of this issue. The report concluded, however, that there is no systematic evidence of problems of Internet-related shipments to minors. The *Wine Report* stated that, in general, state officials report that they have experienced few, if any, problems with direct shipments of wine to minors, especially when compared with the problem of underage access to alcohol through traditional distribution channels. In addition, several states that permit interstate direct shipping have adopted various procedural safeguards and enforcement mechanisms to prevent sales to minors. These include such precautions as requiring labeling of packages containing wine and requiring an adult signature at the time of delivery. For example, the state of New Hampshire developed penalty and enforcement schemes in coordination with its enforcement agencies.

The *Wine Report* also found that some states also have adopted less restrictive means of protecting tax revenues while permitting direct shipping, such as by requiring out-of-state suppliers to obtain permits and to collect and remit taxes. Most of these states reported few, if any, problems with tax collection.

Finally, the report uncovered little actual evidence to support the distinction found in several states that permit intrastate direct shipment of wine but prohibit interstate shipment. While some parties provided theoretical justifications for the distinction, the report found no evidence based on the experience of state law enforcement authorities to justify the distinction in practice.

The issue of whether states could prohibit out-of-state sellers from shipping wine to consumers while allowing in-state wine producers to do so ultimately came before the U.S. Supreme Court.³⁸ In striking down two state bans on the

38 Granholm, 125 S. Ct. 1885 (2005).

interstate direct shipping of wine, the U.S. Supreme Court relied heavily on the FTC's wine report in its analysis to determine whether such discriminatory treatment of out-of-state and in-state interests was necessary to advance valid state concerns, such as reducing underage drinking and collecting taxes. The Court found that, as the FTC staff *Wine Report* concluded, prohibitions on the direct shipment of wine were not necessary to protecting these interests.

Since the U.S. Supreme Court decision, a number of states are reconsidering their laws regulating the direct shipment of wine. Legislators in Ohio and Florida asked the FTC staff for its views on bills that would permit the direct shipment of wine to consumers in those states. In these advocacy comments, FTC staff stated that allowing interstate direct shipping likely would allow consumers to purchase both a greater variety of wines and many wines at lower prices.³⁹

C. THE EFFECTIVENESS OF COMPETITION ADVOCACY

Unlike enforcement actions, where the competition agency either succeeds or fails in stopping the anticompetitive conduct based on a court's decision or a settlement with the defendants, the effectiveness of competition advocacy can be more difficult to measure. Occasionally, a state policymaker stops an anticompetitive measure and gives specific credit to a particular advocacy. For example, in vetoing a bill in 2004, Governor Schwarzenegger of the state of California cited the FTC's arguments about the potential unintended effects of the bill as a key reason.⁴⁰ Even without such explicit acknowledgement as the U.S. Supreme Court's extensive reliance on the FTC *Wine Report* or Governor Schwarzenegger's nod to the FTC, it seems likely that certain competition advocacy work has affected the decision of policymakers to reject anticompetitive proposals or to tailor them to reduce their anticompetitive impact. One study, published in 1989, attempted a systematic measurement of the FTC's competition advocacy filings at the state and local levels from June 1, 1985, to June 1, 1987.⁴¹ It surveyed recipients of the filings during this time period and asked them questions about the effectiveness of the advocacy filing, whether it provided information or perspectives not presented by other sources or not well understood by the decision maker; and the weight given to the advocacy filing. The study found that a majority of

39 Letter from FTC Staff to Ohio State Senator Eric D. Fingerhut (Mar. 22, 2006), available at <http://www.ftc.gov/os/2006/03/V060010CommentReOhioSB179DirectShipmentofWine.pdf>. See Letter from FTC Staff to New York State Rep. William Magee et al. (Mar. 29, 2004) ("New York Letter"), available at <http://www.ftc.gov/be/v040012.pdf>. New York ultimately enacted legislation permitting (interstate and intrastate) direct shipping of wine to its consumers. See N.Y. ALCO. BEV. CONT. LAW §§ 79-c, 79-d (McKinney 2005).

40 Letter of Governor Arnold Schwarzenegger to Members of the California State Assembly Returning Assembly Bill 1960 Without Signature (Sep. 29, 2004), available at http://www.governor.ca.gov/govsite/pdf/vetoes/AB_1960_veto.pdf.

41 Celnicker, *supra* note 17, at 392-93.

recipients who replied to the survey reported that the advocacy filings had some positive effect: forty percent stated that the advocacy filings were at least moderately effective, meaning that “the governmental entity’s actions were totally or in large part consistent with all of the FTC’s recommendations, and that any action taken was largely or partly because of those recommendations,” and an additional eleven percent reported that the comments were slightly effective, meaning that “the governmental entity’s actions were to a small degree consistent with at least some of the FTC recommendations, and that any action taken was largely or partly because of those recommendations.”⁴² As for providing additional perspectives, one state attorney general’s office responded that “state or local entities are often totally *unaware* of any antitrust problems.”⁴³

A more recent examination of competition advocacy at the FTC identified a number of factors affecting the success of competition advocacy.⁴⁴ On the state level, these factors include situations in which one industry, or subgroup of an industry, seeks regulation that favors it at the expense of a rival industry or group. The article theorized that the most important factor is if the competition advocacy is consistent with organized opposition by an industry group rather than supporting consumers and possible (currently unidentified) new entrants alone. Another factor the article identified is empirical substantiation for the proposition that the regulation will hurt consumer welfare.

The Office of Policy Planning at the FTC is currently conducting a new survey to measure the effectiveness of its advocacy filings between 2001 and 2006, and also to gain a better understanding of the factors that contribute to the success and failure of advocacies. Thus, in addition to the types of questions posed in the 1987 survey, this new survey also asks whether there was substantial local press coverage of the proposed regulation, whether there was press coverage of the advocacy comment, and whether the FTC comment was influential due to the publicity and press coverage attending the FTC’s involvement in the matter.

D. PUTTING IT ALL TOGETHER

The FTC’s long experience with challenging competitive restrictions that claim the mantle of state approval, combined with the insights from the studies of advocacy, suggest several guidelines for successfully reducing consumer harm in this area:

- Competition officials should examine closely any anticompetitive restriction, particularly those proposed by regulatory bodies dominated by industry members, to determine whether it is actually an action of

⁴² *Id.* at 391.

⁴³ *Id.* at 396.

⁴⁴ COOPER ET AL., *supra* note 16, at 1106-10.

the state or the product of private conduct that occurs in the shadow of state regulation but is not actively sanctioned by the state.

- To the extent immunities protect certain anticompetitive restrictions, examine whether they are being interpreted expansively to shelter conduct unnecessarily. If there is a problem, work to improve the state of the law through scholarly reports, amicus briefs, and testimony before relevant policymakers.⁴⁵
- In industries that seem to lack competition, competition officials should engage in in-depth inquiries to identify the source and mechanism of competitive problems, whether from government regulation, private conduct, or otherwise. Such inquiries may require empirical economic research; workshops with industry members, state officials, and academic researchers; and consultations with industry-specific regulatory agencies.
- Using expertise gained through enforcement and inquiries, competition officials should seek to persuade policymakers evaluating anticompetitive state restrictions to forgo such restrictions or to modify them to reduce the negative impact on competition. For example, policymakers concerned about lack of consumer understanding about new offerings in the market can consider requiring a consumer disclosure instead of prohibiting the sale of the new offerings.
- In all of these endeavors, competition officials should not neglect the importance of informing the debate on competitive issues—through formal and informal actions—both to serve as the voice of diffuse consumer interests and to help assign political responsibility for state actions that harm consumer interests.

IV. Conclusion

Identifying, challenging, and assigning political responsibility for state regulation that restricts competition requires competition officials to exercise many talents, not the least of which is creativity in crafting ways to attack restraints that are immune from the frontal assault of enforcement. However, judicious enforcement, careful legal and economic analysis, in-depth inquiry, well-reasoned scholarship and advocacy, and sheer persistence have produced many successes for the FTC. Other competition officials concerned about the harm from anticompetitive state restrictions may want to use the FTC's multi-pronged approach as a guide in this area. ▼

⁴⁵ For example, the FTC staff testified before the U.S. Antitrust Modernization Commission about the state action doctrine. See Maureen K. Ohlhausen, Prepared Statement on the State Action Doctrine (Sep. 29, 2005), available at <http://www.ftc.gov/os/2005/09/050929antitrustmod.pdf>.