

115TH CONGRESS
1ST SESSION

S. 1649

To help States combat abuse of occupational licensing laws by economic incumbents, to promote competition, to encourage innovation, to protect consumers, and to facilitate the restoration of antitrust immunity to State occupational boards, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 27, 2017

Mr. LEE (for himself, Mr. CRUZ, and Mr. SASSE) introduced the following bill;
which was read twice and referred to the Committee on the Judiciary

A BILL

To help States combat abuse of occupational licensing laws by economic incumbents, to promote competition, to encourage innovation, to protect consumers, and to facilitate the restoration of antitrust immunity to State occupational boards, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Restoring Board Im-
5 munity Act of 2017” or the “RBI Act”.

6 **SEC. 2. STATEMENT OF FINDINGS AND PURPOSE.**

7 Congress finds the following:

1 (1) The prevalence of occupational licensing has
2 increased dramatically in recent decades, in part be-
3 cause private interests have sought licensing in order
4 to limit competition.

5 (2) Occupational licensing often limits opportu-
6 nities for workers, frustrates entrepreneurs seeking
7 to introduce new business models, and raises prices
8 paid by consumers.

9 (3) Licensing should be imposed only to combat
10 real, substantial threats to public health, safety, or
11 welfare and only where other less restrictive regu-
12 latory alternatives are insufficient to protect con-
13 sumers and serve the public interest.

14 (4) Regulators should consider a range of less
15 restrictive alternatives before enacting an occupa-
16 tional licensing regime, which may include inspec-
17 tions, bonding or insurance requirements, registra-
18 tion, and voluntary certification.

19 (5) Voluntary certification provides a particu-
20 larly significant alternative to licensure, as it allows
21 market participants to signal to consumers the at-
22 tainment of personal qualifications without limiting
23 entry into the marketplace.

24 (6) The failure of State governments to adopt
25 less restrictive alternatives to licensing, and less bur-

1 densome requirements in those areas where licensing
2 is deemed necessary, has resulted in significant costs
3 to consumers and the broader economy.

4 (7) The United States Supreme Court re-
5 sponded to these concerns in *North Carolina Board*
6 of Dental Examiners v. FTC, 135 S. Ct. 1101
7 (2015), holding that self-interested licensing boards
8 may be subject to liability under the antitrust laws,
9 but that decision has also created significant uncer-
10 tainty for the States and their licensing boards.

11 (8) Some States have responded to the decision
12 in *North Carolina Board of Dental Examiners* by es-
13 tablishing a layer of bureaucratic oversight that
14 merely monitors board actions for consistency with
15 State licensing laws. This response is a missed op-
16 portunity for reform, as it does not address the spe-
17 cific competition concern raised in *North Carolina*
18 Board of Dental Examiners or the underlying prob-
19 lems with over-reliance on occupational licensure as
20 a regulatory approach and with overly broad enforce-
21 ment of licensing laws as a means to regulate com-
22 mercial activities outside an occupation's scope of
23 practice.

24 (9) Legislation is necessary to clarify the re-
25 quirements of active supervision, both to offer States

a clear and certain mechanism to immunize their occupational boards and to make clear that mere bureaucratic oversight to ensure consistency with State licensing laws does not suffice to confer immunity.

(10) This Act is intended to offer States a choice between two alternative routes to achieve immunity for their occupational licensing boards—either establishing a mechanism for meaningful active supervision of licensing boards by State officials or establishing a mechanism for meaningful judicial review of board actions in the State courts.

SEC. 3. DEFINITIONS.

In this Act:

(1) CERTIFICATION.—The term “certification” means a voluntary program under which—

(A) a private organization (in the case of private certification) or the government of a State (in the case of government certification) authorizes an individual who meets certain personal qualifications to use “certified” as a designated title with respect to the performance of a lawful occupation; and

(B) a non-certified individual may perform the lawful occupation for compensation but may not use the title “certified”.

(2) GOOD FAITH.—The term “good faith”, with respect to performance—

(A) means diligent performance that is directed towards achieving the policies set forth in this Act;

(B) does not include performance that is—

(i) designed to subvert or evade the policies set forth in this Act; or

(ii) carried out in a manner that has the systematic effect of subverting or evading the policies set forth in this Act; and

(C) refers to an objective, rather than subjective, standard.

(3) LAWFUL OCCUPATION.—The term “lawful occupation” means a course of conduct, pursuit, or profession that includes the sale of goods or services that are not themselves illegal to sell irrespective of whether the individual selling the goods or services is subject to occupational licensing laws.

(4) LEAST RESTRICTIVE REGULATION.—The term “least restrictive regulation” means, from least to most restrictive:

(A) One or more of the following, each of which shall be considered equally restrictive:

(i) Market competition.

1 (ii) Industry or consumer-related rat-
 2 ings and reviews.

3 (iii) Private certification.

4 (iv) A specific private civil cause of
 5 action to remedy consumer harm.

6 (v) A deceptive trade practice act.

7 (vi) A regulation of the process of
 8 providing the specific goods or services to
 9 consumers.

10 (vii) Inspections.

11 (viii) Bonding or insurance.

12 (ix) Registration.

13 (x) Government certification.

14 (B) Specialty occupational license for med-
 15 ical reimbursement.

16 (C) Occupational license.

17 (5) LESS RESTRICTIVE ALTERNATIVES TO OC-
 18 CUPATIONAL LICENSING.—The term “less restrictive
 19 alternatives to occupational licensing”—

20 (A) means regulations that achieve the
 21 public health or safety goals asserted by the
 22 government to justify licensing while imposing a
 23 less onerous restriction on entry into the mar-
 24 ketplace; and

1 (B) includes the alternative forms of regu-
 2 lation described in paragraph (4)(A).

3 (6) MEMBER, OFFICER, OR EMPLOYEE.—The
 4 term “member, officer, or employee”, with respect to
 5 an occupational licensing board, means an individual
 6 appointed by a State to the board.

7 (7) OCCUPATIONAL LICENSE.—The term “occu-
 8 pational license” means a nontransferable authoriza-
 9 tion under law for an individual to perform a lawful
 10 occupation for compensation based on meeting per-
 11 sonal qualifications established by the State govern-
 12 ment.

13 (8) OCCUPATIONAL LICENSING BOARD.—The
 14 term “occupational licensing board” or “board”
 15 means an entity established under State law—

16 (A) the express purpose of which is to reg-
 17 ulate the personal qualifications required to en-
 18 gage in or practice a particular lawful occupa-
 19 tion;

20 (B) that has authority conferred by State
 21 law to interpret or enforce the occupational li-
 22 censing laws of the State; and

23 (C) not less than $\frac{2}{3}$ of the members of
 24 which are appointed by an elected official of the
 25 State.

1 (9) OCCUPATIONAL LICENSING LAW.—The term
2 “occupational licensing law”—

3 (A) means a State statute that allows an
4 individual to work in a lawful occupation and
5 use an occupational title; and

6 (B) does not include a business license, fa-
7 cility license, building permit, or zoning and
8 land use regulation, except to the extent that
9 the law regulates an individual’s personal quali-
10 fications to engage in or practice a lawful occu-
11 pation.

12 (10) OCCUPATIONAL REGULATION.—The term
13 “occupational regulation”—

14 (A) means a statute, rule, practice, policy,
15 or other law that substantially burdens an indi-
16 vidual’s ability to work in a lawful occupation;

17 (B) includes a regulation requiring reg-
18 istration, certification, or an occupational li-
19 cense; and

20 (C) does not include a business license, fa-
21 cility license, building permit, or zoning and
22 land use regulation except to the extent that
23 such a requirement or restriction substantially
24 burdens an individual’s ability to work in a law-
25 ful occupation.

1 (11) PERSONAL QUALIFICATIONS.—The term
 2 “personal qualifications” means criteria related to
 3 an individual’s personal background and characteris-
 4 tics, including completion of an approved educational
 5 program, satisfactory performance on an examina-
 6 tion, work experience, other evidence of attainment
 7 of requisite skills or knowledge, moral standing,
 8 criminal history, and completion of continuing edu-
 9 cation.

10 (12) REGISTRATION.—The term “registration”
 11 means a requirement that an individual give notice
 12 to the government of a State that may include—

13 (A) the individual’s name and address;

14 (B) the individual’s agent for service of
 15 process;

16 (C) the location of the activity to be per-
 17 formed; and

18 (D) a description of the service the indi-
 19 vidual provides.

20 (13) SPECIALTY OCCUPATIONAL LICENSE FOR
 21 MEDICAL REIMBURSEMENT.—The term “specialty
 22 occupational license for medical reimbursement”
 23 means a nontransferable authorization in law for an
 24 individual to qualify for payment or reimbursement
 25 from a government agency for the non-exclusive pro-

1 vision of medical services based on meeting personal
 2 qualifications established by the State legislature.

3 (14) STATE.—The term “State” means—

4 (A) each of the several States; and

5 (B) the District of Columbia.

6 **SEC. 4. ANTITRUST IMMUNITY.**

7 (a) IN GENERAL.—Subject to subsection (b), the
 8 Sherman Act (15 U.S.C. 1 et seq.) shall not apply to any
 9 action of an occupational licensing board of a State, or
 10 any action of a member, officer, or employee of the board
 11 acting in the official capacity of that member, officer, or
 12 employee, if—

13 (1) the requirements under section 5 of this Act
 14 are satisfied; or

15 (2) the requirements under section 6 of this Act
 16 are satisfied.

17 (b) REQUIREMENT OF GOOD FAITH.—The immunity
 18 provided under subsection (a) shall not apply to any action
 19 of an occupational licensing board of a State, or any action
 20 of a member, officer, or employee of the board acting in
 21 the official capacity of that member, officer, or employee,
 22 unless the State acts in good faith to perform the applica-
 23 ble requirements under section 5 or 6.

24 (c) EXISTING ENTITIES OR PROCEDURES.—The fact
 25 that a State governmental entity or procedure was estab-

1 lished before the date of enactment of this Act shall not
 2 prevent an occupational licensing board of the State, or
 3 a member, officer, or employee of that board, from quali-
 4 fying for immunity under subsection (a) if the State gov-
 5 ernmental entity or procedure satisfies the applicable re-
 6 quirements under section 5 or 6.

7 (d) SAVINGS CLAUSE.—The immunity provided
 8 under subsection (a) shall not apply to an action unrelated
 9 to regulating the personal qualifications required to en-
 10 gage in or practice a lawful occupation, such as rules of
 11 an occupational licensing board governing minimum prices
 12 or residency requirements.

13 **SEC. 5. ACTIVE SUPERVISION.**

14 (a) IN GENERAL.—The immunity under section 4(a)
 15 shall apply to any action of an occupational licensing
 16 board of a State, or any action of a member, officer, or
 17 employee of that board acting in the official capacity of
 18 that member, officer, or employee, if—

19 (1) the actions of the occupational licensing
 20 board or member, officer, or employee are author-
 21 ized by a non-frivolous interpretation of the occupa-
 22 tional licensing laws of the State;

23 (2) the State adopts a policy of using less re-
 24 strictive alternatives to occupational licensing to ad-
 25 dress real, substantial threats to public health, safe-

1 ty, or welfare, in accordance with subsection (b) of
2 this section; and

3 (3) the State enacts legislation providing for ac-
4 tive supervision of the actions of an occupational li-
5 censing board and any member, officer, or employee
6 of such a board, in accordance with subsection (c)
7 of this section.

8 (b) POLICY.—The State shall adopt a policy pro-
9 viding that—

10 (1) occupational licensing laws should be con-
11 strued and applied to—

12 (A) protect public health, safety, and wel-
13 fare; and

14 (B) increase economic opportunity, pro-
15 mote competition, and encourage innovation;

16 (2) regulators should displace competition
17 through occupational licensing laws only if less re-
18 strictive alternatives to occupational licensing will
19 not suffice to protect consumers from real, substan-
20 tial threats to public health, safety, or welfare; and

21 (3) an occupational licensing law should be en-
22 forced against an individual only to the extent the
23 individual sells goods or services that are included
24 explicitly in the statute or regulation that defines
25 the occupation's scope of practice.

1 (c) ACTIVE SUPERVISION.—

2 (1) IN GENERAL.—The legislation enacted
3 under subsection (a)(3) shall satisfy each of the re-
4 quirements under this subsection.

5 (2) DAY-TO-DAY SUPERVISION.—

6 (A) ESTABLISHMENT OF OFFICE OF SU-
7 PERVISION OF OCCUPATIONAL BOARDS.—The
8 State shall establish an Office of Supervision of
9 Occupational Boards (referred to in this sub-
10 section as the “Office”) to review the actions of
11 occupational licensing boards to ensure compli-
12 ance with the policy adopted under subsection
13 (b).

14 (B) DUTIES.—The Office shall—

15 (i) review and explicitly approve or re-
16 ject in writing any occupational regulation
17 proposed by a board before the board may
18 adopt or implement the occupational regu-
19 lation;

20 (ii) play a substantial role in the de-
21 velopment of a board’s rules and policies to
22 ensure they benefit consumers and do not
23 serve the private interests of providers of
24 goods and services regulated by the board;

1 (iii) disapprove in writing the use of
2 any board rule or policy relating to an oc-
3 cupational regulation and terminate any
4 enforcement action, including any such ac-
5 tion pending on the date of enactment of
6 this Act, that is inconsistent with the pol-
7 icy adopted under subsection (b);

8 (iv) exercise control over each board
9 by reviewing and affirmatively approving in
10 writing only occupational regulations that
11 are consistent with the policy adopted
12 under subsection (b);

13 (v) use the analysis conducted under
14 paragraph (5) and conduct reasonable in-
15 vestigations to gain additional information,
16 including about less restrictive regulatory
17 approaches, to promote compliance with
18 subsection (b);

19 (vi)(I) be staffed by not less than 1
20 attorney; and

21 (II) prohibit attorneys working in the
22 Office from providing general counsel to
23 any board; and

24 (vii)(I) approve board actions explic-
25 itly in writing, rather than implicitly; and

1 (II) clearly establish that silence or
2 inaction does not constitute approval.

3 (3) INTERNAL REVIEW.—

4 (A) COMPLAINT.—The State shall estab-
5 lish a mechanism under which a person who is
6 a resident of or has a license to operate a busi-
7 ness in the State may file a complaint with the
8 Office about an occupational regulation of an
9 occupational licensing board in the State that
10 the person believes is inconsistent with the pol-
11 icy adopted under subsection (b).

12 (B) OFFICE RESPONSE.—Not later than
13 90 days after the date on which a person files
14 a complaint under subparagraph (A), the Office
15 shall—

- 16 (i) investigate the complaint;
17 (ii) identify remedies and instruct the
18 board to take action, where appropriate;
19 and
20 (iii) respond in writing to the com-
21 plainant.

22 (C) REVIEW.—The State shall establish a
23 mechanism for review of a determination made
24 by the Office under subparagraph (B), under
25 which a complainant may appeal the determina-

tion to the general division of the trial court of the State if the challenged occupational regulation would substantially burden the complainant's ability to—

(i) engage in a lawful occupation; or

(ii) employ or contract other individuals for the performance of a lawful occupation; and

(4) RIGHT TO RAISE DEFENSE.—

(A) IN GENERAL.—The State shall authorize an individual to assert as a defense, in any administrative or judicial proceeding to enforce an occupational regulation, that the regulation does not comply with the policy adopted under subsection (b).

(B) PROCEDURES.—In a proceeding described in subparagraph (A)—

(i) an individual who asserts a defense under this paragraph has the initial burden of proof that the occupational regulation being enforced substantially burdens the individual's ability to engage in a lawful occupation;

(ii) if an individual meets the burden of proof under clause (i), the State shall be

1 required to demonstrate by clear and con-
2 vincing evidence that the occupational reg-
3 ulation—

4 (I) advances an important gov-
5 ernment interest in protecting against
6 real, substantial threats to public
7 health, safety, or welfare; and

8 (II) is substantially related to
9 achievement of the important govern-
10 ment interest described in subclause
11 (I), in light of the availability of less
12 restrictive alternatives to occupational
13 licensing; and

14 (iii) in reviewing an alleged violation
15 of the policy adopted under subsection (b),
16 an administrative agency or a court—

17 (I) shall make its own findings of
18 fact and conclusions of law;

19 (II) may not rely on a legislative
20 finding of fact presented in admissible
21 form to the agency or court; and

22 (III) may not grant any pre-
23 sumption to a legislative determina-
24 tion—

- 1 (aa) of harm to public
 2 health, safety, or welfare; or
 3 (bb) that the occupational
 4 regulation is substantially related
 5 to achievement of the important
 6 government interest described in
 7 clause (ii)(I).

8 (5) PERIODIC ADVISORY REVIEW.—

9 (A) IN GENERAL.—The State shall estab-
 10 lish a mechanism for periodic non-binding re-
 11 view of existing occupational regulations, and
 12 non-binding review of new proposed occupa-
 13 tional regulations, to ensure that the occupa-
 14 tional regulations comply with the policy adopt-
 15 ed under subsection (b).

16 (B) SCOPE OF REVIEW.—The entity con-
 17 ducting the review under subparagraph (A)—

18 (i) shall publish an annual written re-
 19 port encompassing approximately 20 per-
 20 cent of the occupations subject to occupa-
 21 tional regulations within the State, such
 22 that the entity will review all occupational
 23 regulations within the State during each 5-
 24 year period; and

1 (ii) shall publish a written report as-
2 sessing any proposed occupational licensing
3 law, or other proposed law that would ex-
4 pand the authority of an occupational li-
5 censing board to impose occupational regu-
6 lations, before the proposed law is sub-
7 mitted to a vote by the State legislature.

8 (C) REQUIREMENTS FOR ANALYSIS.—In
9 conducting the review required under subpara-
10 graph (A), the entity shall—

11 (i) determine whether the law or other
12 regulation satisfies the policy adopted
13 under subsection (b) of using the least re-
14 strictive regulation necessary to protect
15 consumers from real, substantial threats to
16 public health, safety, or welfare;

17 (ii) evaluate the effects of the law or
18 other regulation on opportunities for work-
19 ers, consumer choices and costs, general
20 unemployment, market competition, gov-
21 ernmental costs, and other effects;

22 (iii) compare the law or other regula-
23 tion to whether and how other States regu-
24 late the applicable occupation; and

1 (iv) if the applicable occupation is
 2 subject to an occupational licensing law,
 3 evaluate—

4 (I) the feasibility of entering into
 5 reciprocity compacts with one or more
 6 other States to improve worker mobil-
 7 ity and labor market flexibility; and

8 (II) the advisability of endorsing
 9 occupational licenses granted by other
 10 States to spouses of active service
 11 military members as if those occupa-
 12 tional licenses were granted by the
 13 State conducting the review.

14 **SEC. 6. JUDICIAL REVIEW.**

15 (a) IN GENERAL.—The immunity under section 4(a)
 16 shall apply to any action of an occupational licensing
 17 board of a State, or any action of a member, officer, or
 18 employee of that board acting in the official capacity of
 19 that member, officer, or employee, if—

20 (1) the actions of the occupational licensing
 21 board or member, officer, or employee are author-
 22 ized by a non-frivolous interpretation of the occupa-
 23 tional licensing laws of the State;

24 (2) the State adopts a policy of using less re-
 25 strictive alternatives to occupational licensing to ad-

1 dress real, substantial threats to public health, safe-
2 ty, or welfare, in accordance with section 5(b); and

3 (3) the State enacts legislation providing for ju-
4 dicial review of occupational licensing laws, in ac-
5 cordance with subsection (b) of this section.

6 (b) JUDICIAL REVIEW LEGISLATION.—Legislation
7 enacted by a State under subsection (a)(3)—

8 (1) shall—

9 (A) prohibit the State and any occupa-
10 tional licensing board from imposing an occupa-
11 tional licensing law unless the State—

12 (i) identifies an important government
13 interest in protecting against real, substan-
14 tial threats to public health, safety, or wel-
15 fare; and

16 (ii) demonstrates that the occupa-
17 tional licensing law is substantially related
18 to achievement of the important govern-
19 ment interest described in clause (i), in
20 light of the availability of less restrictive
21 alternatives to occupational licensing;

22 (B) provide an affirmative defense against
23 enforcement of any occupational licensing law
24 of the State under which the State shall be re-

1 quired to demonstrate that the standard under
2 subparagraph (A) has been met;

3 (C) establish a cause of action under
4 which—

5 (i) a person may bring an action for
6 injunctive relief against enforcement of an
7 occupational licensing law of the State;

8 (ii) the plaintiff bears the initial bur-
9 den to prove that the challenged occupa-
10 tional licensing law substantially burdens
11 the plaintiff's ability to engage in a lawful
12 occupation; and

13 (iii) once the plaintiff makes the ini-
14 tial showing under clause (ii), the State is
15 required to demonstrate that the standard
16 under subparagraph (A) has been met;

17 (D) provide for an award of reasonable
18 costs and attorney fees to a person who success-
19 fully challenges the application of an occupa-
20 tional licensing law of the State by—

21 (i) raising an affirmative defense
22 under subparagraph (B); or

23 (ii) bringing an action under subpara-
24 graph (C); and

1 (E) provide for independent judicial review
 2 of the occupational licensing laws of the State
 3 to ensure that the standard set forth in sub-
 4 paragraph (A) has been met; and
 5 (2) may not authorize a court to—

6 (A) uphold enforcement of an occupational
 7 licensing law of the State simply because the
 8 court believes the law is rationally related to a
 9 legitimate governmental purpose;

10 (B) rely on hypothetical risks to public
 11 safety, not substantiated by evidence in the
 12 record, to uphold enforcement of an occupa-
 13 tional licensing law of the State;

14 (C) defer to factual or legal conclusions of
 15 another person or entity, rather than exercising
 16 independent review; or

17 (D) rely on a post hoc justification for the
 18 action of an occupational licensing board that
 19 was not put forward by the board at the time
 20 of the challenged action.

21 (c) RULE OF CONSTRUCTION.—Nothing in sub-
 22 section (b) shall be construed to require legislation enacted
 23 by a State under subsection (a)(3) to provide a right to

- 1 recover monetary damages, other than reasonable costs
- 2 and attorney fees as provided under subsection (b)(1)(D).

