

The ALLOW Act: Another Helpful Step Against Protectionist Licensing

AntitrustConnect Blog

August 25, 2016

[Steven J. Cernak \(Schiff Hardin LLP\)](#)

Please refer to this post as: Steven J. Cernak, 'The ALLOW Act: Another Helpful Step Against Protectionist Licensing', AntitrustConnect Blog, August 25 2016, <http://antitrustconnect.com/2016/08/25/the-allow-act-another-helpful-step-against-protectionist-licensing/>

Occupational licensing has been under antitrust attack in the last several years, from two Supreme Court cases narrowing the state action exemption to numerous reports on local regulations such as taxi medallions. The proposed Alternatives to Licensing that Lower Obstacles to Work Act (ALLOW) Act could prove to be another step in lightening the load of local regulation on the economy.

Introduced by Sens. Lee (UT) and Sasse (NE), ALLOW would change the licensure requirements in the District of Columbia and in certain national parks and military bases. ALLOW would limit the creation of occupational license requirements only to those circumstances where it is the least restrictive means of protecting the public. Instead of licensing, less burdensome means such as inspections, insurance requirements and voluntary private or public certifications would be promoted. The Act would provide for active supervision of all existing occupational boards and legislative “sunset” review of new and existing licensing requirements.

For several reasons, ALLOW seems like carefully-crafted legislation designed to reduce local regulation of the economy, when appropriate, not just replace it with national regulation. First, while it only applies to the District and parks and bases within Congress’s purview, it serves as a model for states wanting to reform their licensing systems.

Second, the legislation recognizes that some form of local regulation, perhaps even

including licenses, can be appropriate. While there appears to be widespread agreement that, for instance, hair braiders should not need a license, Sen. Lee and some Supreme Court justices seem to agree that brain surgeons should. The Act recognizes that different occupations could benefit from different levels of regulation. As such, the Act doesn't force a national, one-size-fits-all, scheme on all localities but instead would leave it to the states to make these determinations.

The FTC has been at the forefront of this issue for years, including pursuing and winning the two Supreme Court cases. While those two cases did not immediately change the state licensing systems as some thought or hoped, they did narrow the antitrust exemption for such systems and kept the issue of anticompetitive effects from such regulation front and center. Also, the FTC staff has responded to numerous state legislature requests for comments on the potential competitive effects from different state regulatory provisions. Perhaps the FTC commissioners could support such staff efforts by speaking to legislatures, industry groups, and mainstream media more often about the benefits of competition?

It is heartening to see at least one commissioner – and now even the Chairwoman (see here but subscription required) – push back against some in the mainstream media who seem to blame lax antitrust enforcement for any current economic malaise. While antitrust enforcement should and must remain strong, clear and predictable, it would be a shame to trade a reduction in overly-burdensome local regulation for a return to the “bad old days” in national antitrust enforcement.