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Committee of Dietitians
3605 Missouri Boulevard
P.O. Box 1335
Jefferson City, MO 65102

Re: Regulation of Unlicensed Persons

Dear Committee Members:

The Alliance for Natural Health USA ("ANH-USA") respectfully requests that the Missouri Committee of Dietitians ("Committee") cease unlawfully restricting the practice of nutrition and restricting speech concerning nutrition in the state of Missouri. The current structure and practices of the Committee are in violation of the U.S. Supreme Court's ruling in *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S.Ct. 1101 (2015) and the First Amendment. Appropriate changes must be made in order to come into compliance or the Committee and its members will be vulnerable to federal prosecution and civil damages.

Illegally Monopolizing Nutrition Services:

In *N.C. State Bd. of Dental Exam'rs v. FTC*, the U.S. Supreme Court held that "active market participants cannot be allowed to regulate their own market free from antitrust accountability." 135 S.Ct. at 1111. The Supreme Court found that state licensing bodies may be held liable for anticompetitive actions under the Sherman Antitrust Act when they are comprised of active market participants who use the power of the state to force out competition and protect their own financial interest. 135 S.Ct. 1101. The Missouri Committee of Dietitians is controlled by members of the very trade it purports to regulate and thus is vulnerable to federal felony prosecution and civil damages. Accordingly, the composition of the Committee must be converted to a majority of non-conflicted members or all actions of the Committee must be subject to active state supervision.

If the composition of the Committee is not altered to include a majority of non-conflicted members, state supervision must "provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes safe policy, rather than merely the party's individual interests.'" *Id*. at 1116 (*quoting Patrick v. Burget*, 486 U.S. 94, 100-101 (1988)). The Court in

North Carolina explicitly explains that this supervision must be actual and not theoretical or peripheral, stating "the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it ; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy ; and the mere potential for state supervision is not an adequate substitute for a decision by the State ." 135 S.Ct. at 1116 (omitting internal citations and quotation).

It is for the above reasons that the composition of the Missouri Committee of Dietitians must be reformed to include a majority of non-conflicted members or a state supervision mechanism must be immediately created to insure that all action by the Committee promotes sound public policy rather than the individual interests of Committee members. Without these changes, the actions of the Committee will not qualify for immunity under the state action doctrine,[1] and the Committee and its members are potentially vulnerable to federal prosecution and civil damages.

Violating the First Amendment:

The First Amendment provides protection to persons speaking about nutrition outside of a professional relationship, also referred to in this document as general nutrition advice. Courts will likely invalidate licensing schemes, as applied, if they are used to restrict the commercial or non-commercial speech of those who are neither in the regulated class (licensed dietitian or licensed nutritionist) nor hold themselves out to be, or if they are used to suppress commercial speech that is truthful and non-misleading. In other words, regulating nutrition and diet-related speech is limited to circumstances in which an unlicensed person holds himself out to be or otherwise specifically engages in licensed acts in exchange for compensation.

Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising expert judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing, and as such, is subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring).

Individuals have standing to bring First Amendment claims against licensing bodies when those licensing bodies limit the dissemination of truthful and general advice regarding diet, nutrition, and lifestyle. For instance, the Fourth Circuit Court of Appeals recently held that bloggers who dispensed nutritional advice outside of a practitioner-patient relationship and without claiming a state license, or registration holder had standing to sue licensing bodies that prohibited the dissemination of that content. *See Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013). The North Carolina Board of Dietetics/Nutrition eventually settled with the plaintiff and agreed to promulgate new guidelines permitting unlicensed persons, such as bloggers, and general health, wellness and exercise coaches and instructors, to provide dietary, weight loss and nutritional advice.

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[1] *Parker v. Brown*, 317 U.S. 341 (1943).

Reforms to Anticompetitive Activities:

In light of the U.S. Supreme Court's decision to extend antitrust liability to regulatory bodies and the protection the First Amendment lends to persons providing general nutrition advice and services, ANH-USA respectfully requests that the Committee voluntarily curtail regulation of non-state licensed individuals that provide such services. Specifically, ANH-USA requests that the Committee limit its enforcement action to title defense only, defined as limiting the use of restricted and specific titles including "Licensed Dietitian," "Registered Dietitians," "Dietitian," and "Licensed Nutritionists." ANH-USA also requests that the Committee issue a guidance document to ensure that regulated individuals understand the Committee's new enforcement approach, limited to title defense as explained above. The guidance document should additionally explain the rights of regulated individuals under antitrust law and the First Amendment and to ensure the Committee is not currently acting in conflict with the law.

In order to comply with current federal antitrust law, it is imperative that the composition of the Missouri Committee of Dietitians be reformed to include a majority of non-conflicted members or that a mechanism for active state supervision be created to insure actions by the Committee promote a specific and articulated public policy rather than the individual interests of Committee members and their trade association. Until proper action is taken, the Committee must cease operations contrary to law and public policy.

If the Committee is not able to make the necessary reforms, ANH requests the Committee cease operations entirely until such a time as state law can be changed to reflect the rulings in *North Carolina* and *Cooksey*. Such action will preserve market competition under applicable antitrust and First Amendment laws while providing clarity to state residents regarding the license status of practitioners.

I look forward to engaging with your office on a course of action that will bring the Committee into compliance with federal law and to receiving a timely response to our above stated concerns, explaining an expected course of action.

Sincerely,

Allison Murphy, Esq.
Legislative Director
Alliance for Natural Health USA

cc: Governor
Attorney General
Licensing Committee