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December 14, 2017

Mr. Paul Andrews
T.O.P.
833 Route 28, Lower Level
South Yarmouth, MA 02664-5254

Re: Massachusetts Companion Bills Addressing
Chiropractic Continuing Education

Dear Paul.

As you know, this law firm acts as legal counsel to the Federation of Chiropractic Licensing Boards (FCLB). Through our interactions with FCLB and its member state chiropractic licensing boards, you have asked for our firm's comments on companion bills introduced in the Massachusetts legislature related to the approval of continuing education providers and/or courses. Specifically, the proposed legislation removes authority from the Massachusetts Board of Registration of Chiropractors (Board) and, instead, vests continuing education provider and/or program approval authority in the state chapter of the trade association, namely, the Massachusetts Chiropractic Society (trade association). We encourage you to seek counsel on this matter but, as requested, we offer our thoughts on the proposed companion bills.

The companion bills do not appear to correctly reference the current statutory language (either in the format available on the Massachusetts Division of Professional Licensure website or those on multiple legal databases). However, from the language available to review and the testimony of individuals knowledgeable of its development, the legislation removes the Board's authority over the approval or recognition of continuing education options available to licensees as part of the governmental licensure renewal process. For context, the Board is statutorily created and delegated by the legislature with the authority to enforce the practice act in the

interest of public protection. The Board is a governmental entity subject to the checks and balances of government, ethics commission oversight, and authorized only to act within the confines of the legislation/practice act. Conversely, the trade association's mission is to "defend, protect, and advance the profession of chiropractic." Vesting exclusive authority in a trade association of approving or recognizing continuing education that is mandated by law is fraught with legal and practical issues. Indeed, it is the opinion of this firm that the trade association plays no part in the governmental determination of licensure eligibility and renewal.

First is the issue of delegation of authority. Certain constitutional principles are implicated when government references in law any private entity as the exclusive approver of a service or criterion mandated by government as a prerequisite to licensure. These principles are exacerbated when that referenced entity is a trade association, whose purpose is to address the profession, economic and financial issues, and generally lobby government for legislative change that protects and benefits the profession. In the current circumstance, the proposed legislation references the trade association as the sole entity that approves or recognizes continuing education and does not appear to provide any parameters as to the criteria necessary to provide high quality, acceptable CE.

Second is the current legal and political climate. In the wake of the United States Supreme Court of the United States (SCOTUS) ruling in the case of *North Carolina State Board of Dental Examiners v. FTC.*, added scrutiny has been placed on the involvement of "active market participants" (licensees) in regulatory activities. While there has been an, in our opinion, overreaction to the SCOTUS decision, one thing is clear: comingling of regulation and trade will draw additional scrutiny from potential plaintiff's lawyers, the FTC, and other interested parties. This added scrutiny will undoubtedly include those persons and entities that may not be approved or recognized by the trade association. Meritless or not, the likelihood of challenges and litigation will increase and be fueled by the perception that the trade is protecting its turf.

Next, it is our understanding that the trade association generates revenue from developing and providing continuing education programs for chiropractors for use by the Board in the licensure renewal process. Under the proposed legislation, the trade association, presumed to be a significant provider of CE in Massachusetts and recipient of corresponding revenue from licensees, will be the sole approver of itself and its competitors for purposes of government recognized criteria for licensure renewal. Such an arrangement invokes obvious conflict of interest principles that cannot be ignored. The potential for litigation by a provider of CE denied recognition under such a structure is obvious. Additionally, the structure in and of itself and without adverse ruling(s) may subject the legislation to a facial challenge. It is inconceivable that such an arrangement is even being considered, let alone has the potential to become law.

The pitfalls of legislatively identifying a private organization, especially a trade association, are numerous and the legal and practical consequences must be carefully reviewed. It is hoped that this letter illustrates some of the issues that are in need of research. As noted, please rely upon your counsel regarding legal advice as you address the issues of the proposed legislation.

Please note that we are copying Dr. Kirk Shilts, who serves on the Board and with whom we've discussed the proposed legislation. We encourage you and others, particularly regulatory boards, to continue recognizing and questioning legislation that would threaten the necessary separation of trade and regulation in the interest of public protection. If we can be of further assistance, please feel free to contact us.

Very sincerely yours,

A handwritten signature in black ink, appearing to read 'A. Richardson', written in a cursive style.

Amy H. Richardson
FOR THE FIRM

Cc. Dr. Kirk Shilts