FULL BOARD MEETING
Friday, December 4, 2015

Marriott Los Angeles Airport
5855 West Century Boulevard
Los Angeles, CA 90045

STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY • GOVERNOR EDMUND G. BROWN JR.
DENTAL BOARD OF CALIFORNIA
2005 Evergreen Street, Suite 1550, Sacramento, CA 95815
P (916) 263-2300 F (916) 263-2140 | www.dbc.ca.gov

BOARD MEETING AGENDA
December 4, 2015
Marriott LAX
5855 West Century Blvd.
Los Angeles, CA 90045
949-892-2130 (Hotel) or 916-263-2300 (Board Office)

Members of the Board
Fran Burton, MSW, Public Member, President
Bruce Whitcher, DDS, Vice President
Judith Forsythe, RDA, Secretary

Steven Afriat, Public Member
Stephen Casagrande, DDS
Yvette Chappell-Ingram, Public Member
Katie Dawson, RDH
Luis Dominicis, DDS
Kathleen King, Public Member
Ross Lai, DDS
Huong Le, DDS, MA
Meredith McKenzie, Public Member
Steven Morrow, DDS, MS
Thomas Stewart, DDS
Debra Woo, DDS

During this two-day meeting, the Dental Board of California will consider and may take action on any of the agenda items. It is anticipated that the items of business before the Board on the first day of this meeting will be fully completed on that date. However, should items not be completed, it is possible that it could be carried over and be heard beginning at 9:00 a.m. on the following day. Anyone wishing to be present when the Board takes action on any item on this agenda must be prepared to attend the two-day meeting in its entirety.

Public comments will be taken on agenda items at the time the specific item is raised. The Board may take action on any item listed on the agenda, unless listed as informational only. All times are approximate and subject to change. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum. The meeting may be cancelled without notice. Time limitations for discussion and comment will be determined by the President. For verification of the meeting, call (916) 263-2300 or access the Board's website at www.dbc.ca.gov. This Board meeting is open to the public and is accessible to the physically disabled. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Karen M. Fischer, MPA, Executive Officer, at 2005 Evergreen Street, Suite 1550, Sacramento, CA 95815, or by phone at (916) 263-2300. Providing your request at least five business days before the meeting will help to ensure availability of the requested accommodation.

While the Board intends to webcast this meeting, it may not be possible to webcast the entire open meeting due to limitations on resources.

Friday, December 4, 2015

8:00 A.M. OPEN SESSION – FULL BOARD

6. Call to Order/Roll Call/Establishment of Quorum.

CLOSED SESSION – FULL BOARD
Executive Officer Performance Evaluation
The Board will meet in closed session as authorized by Government Code §11126(a)(1).

RETURN TO OPEN SESSION – FULL BOARD

7. Executive Officer's Report.
   - Staffing Update
   - Strategic Plan and Board Policy and Procedure Manual Update
   - Distributed Costs (Pro Rata)
   - Form 700 Filing
   - Board Member Training and Terms of Office

8. BreEZe Update from the Department of Consumer Affairs.

9. Discussion and Possible Action on the *North Carolina State Board of Dental Examiners vs. Federal Trade Commission Supreme Court* Decision, Attorney General's Opinion Regarding "Active State Supervision," and Federal Trade Commission Guidance on "Active State Supervision".

10. Legislation and Regulations:

    A. 2015 End of Year Legislative Summary Report.

    B. Update on Pending Regulatory Packages:
       - Abandonment of Applications (California Code of Regulations, Title 16, § 1004);
       - Delegation of Authority to the Executive Officer Regarding Stipulated Settlements to Revoke or Surrender a License;
       - Dental Assisting Educational Program and Course Requirements (California Code of Regulations, Title 16, Division 10, Chapter 3, Article 2);
       - Elective Facial Cosmetic Surgery Permit Application and Renewal Requirements (New Regulation);
       - Licensure By Credential Application Requirements (New Regulation);
       - Continuing Education Requirements (Cal. Code of Regs., Title 16, Sections 1016 and 1017);
       - Mobile and Portable Dental Unit Registration Requirements (California Code of Regulations, Title 16, Section 1049).

    C. Discussion and Possible Action Regarding Legislative Proposals for 2016:

- Healing Arts Omnibus Bill

D. Discussion of Prospective Legislative Proposals:
Stakeholders Are Encouraged to Submit Proposals in Writing to the Board Before or During the Meeting for Possible Consideration by the Board at a Future Meeting.

11. Discussion and Possible Action Regarding Notification to Patients by Licensees on Probation.

12. Discussion and Possible Action on the Subcommittee Report Regarding Changes to Licensure By Credential (LBC) Application Requirements.

13. Discussion and Possible Action Regarding the Dental School Application from the Republic of Moldova and Appointments to the Site Evaluation Team.

14. Examinations:
    A. Western Regional Examination Board (WREB) Update
    B. Staff Update on Portfolio Pathway to Licensure

15. Budget Report
    - Fourth Quarter/Year End Expenditure Summary for Fiscal Year 2014/15
    - First Quarter Expenditure Summary for Fiscal Year 2015/16

16. Report on the October 14, 2015 Meeting of the Elective Facial Cosmetic Surgery Permit Credentialing Committee; Discussion and Possible Action to Accept Committee Recommendations for Issuance of Permits.

17. Dental Assisting Council Report
    The Board may take action on any items listed on the attached Dental Assisting Council agenda.

18. Access to Care Committee Report
    The Board may take action on any items listed on the attached Access to Care Committee agenda.

19. Prescription Drug Abuse Committee Report
    The Board may take action on any items listed on the attached Prescription Drug Abuse Committee agenda.

20. Election of Board Officers for 2016.

21. Public Comment on Items Not on the Agenda.
    The Board may not discuss or take action on any matter raised during the Public Comment section that is not included on this agenda, except whether to decide to place the matter on the agenda of a future meeting (Government Code §§ 11125 and 11125.7(a)).

22. Board Member Comments on Items Not on the Agenda.

The Board may not discuss or take action on any matter raised during the Board Member Comments section that is not included on this agenda, except whether to decide to place the matter on the agenda of a future meeting (Government Code §§ 11125 and 11125.7(a)).

23. Adjournment.

CLOSED SESSION

STATE OF CALIFORNIA
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MEMORANDUM

DATE	November 16, 2015
TO	Dental Board of California
FROM	Linda Byers, Executive Assistant
SUBJECT	**Agenda Item 7:** Executive Officer Report

The Executive Officer will give a verbal report on the following:

- Staffing Update
- Strategic Plan and Board Policy and Procedure Manual Updates
- Distributed Costs (Pro Rata)
- Form 700 Filing
- Board Member Training and Terms of Office

DENTAL BOARD OF CALIFORNIA
STRATEGIC PLAN DEVELOPMENT ROADMAP

Average Time to Complete Each Phase

Preliminary Meeting & Set-up	Environmental Scan	Board Meeting Planning Session	Create & Finalize Plan	Action Planning
1 Week	6 Weeks	2 Weeks	3 Weeks	
• Preliminary meeting with client • Introduce facilitators • Set schedule and decide dates • Decide roles • Define process • Create customized development plan for client	• Conduct focus group with staff • Survey stakeholders • Conduct Board member interviews • Executive Officer interview • Compile and analyze data • Review findings with client	• Create facilitation plan • Conduct planning session • Revisit vision • Revisit mission • Revisit values • Review environmental scan results • Establish goals and objectives	• SOLID drafts plan • Review plan with client and make adjustments • Board approval or adoption • Post plan to website	• Prioritize objectives • Establish timeframes • Determine metrics • Assign responsibilities • Draft action plan • Review plan with client and make adjustments

solid
planning solutions

Facilitator Biographies

Dennis Zanchi

Since joining the SOLID team in 2013, Dennis has conducted focus groups for the Department of Justice as well as DCA boards and bureaus. Dennis has worked on strategic plans for Psychology, BPELSG and Optometry. Prior to DCA, Dennis worked with colleges nationwide facilitating interactive sessions on a variety of education-related topics, including sessions designed to draw out opinions, build consensus, and guide groups to discover new solutions. He helped college administrators build a better framework for understanding student loan default prevention, financial literacy, and student retention. He also develops evaluation measurement methods to quantify the success of various initiatives. Prior to working with colleges, Dennis worked with credit unions nationwide to develop consumer research and marketing plans. He is a graduate of CSU, Sacramento.

Elisa Chohan

Elisa Chohan joined the SOLID team in 2013. Since then, Elisa has partnered with the Board of Registered Nursing, the Bureau of Real Estate Appraisers, the Cemetery and Funeral Bureau, the Court Reporters Board and the Structural Pest Control Board to develop their organization's strategic plans. Elisa came directly from the Bureau of Automotive Repair (BAR) Technical Training Unit. At BAR, Elisa was responsible for the implementation of new processes as well as the creation of new curricula with a focus on adult learning theory and collaborative learning strategies. Prior to starting her career in state service, Elisa was a high school teacher in the Sacramento area, where she worked to develop accreditation plans and process improvement measures to increase institutional efficiency. She has extensive experience with classroom management and developed strategies for behavioral and learning challenges. Elisa graduated from University of California, Davis with a B.A. in History and earned her Masters of Education degree in 2012 from Sacramento State University.

Noel Cornelia

Noel brings over 10 years of experience providing innovative ideas for graphic facilitation of strategic planning sessions in the areas of project management, administration, construction, engineering, and employee recognition. Noel leads participants in the areas of team building, strategic visioning, process improvement, planning, conflict resolution, SWOT, brainstorming, reflection, mission statements, and storyboarding. Noel is the State of California's leading expert in Graphic Recording and Graphic Facilitation training and consulting. She is a Certified True Colors instructor whose sole clients were executives and managers. Noel is a consultant for a dynamic government firm, local universities, private sector businesses, and educators seeking to engage audiences visually. Recently, Noel created the first comprehensive academy for visual communication exclusively for the public sector to build teams and strengthen California's leaders. Noel graduated from CSU, Sacramento, is pursuing graduate studies in Art Therapy, and has been a small business owner for over 14 years.

Ted Evans

Ted Joined SOLID in 2014. At DCA he has developed strategic plans for the Architects Board and the Bureau of Security and Investigative Services. Ted previously worked as a Systems Engineer on the new product implementation team at Meridian Systems. While at Meridian, he created deployment plans, training coursework, knowledge base documentation, and testing metrics. Additionally, he created process maps to support and train clients in their transition to new software. Ted also brings over 15 years of operational management expertise, specializing in process improvement. He developed and implemented successful strategic plans and operations analysis for technology service providers and high-volume restaurant/entertainment facilities. Ted has degrees in Information Technology and Physical Science/Mathematics, and a Bachelor of Science from CSU, Sacramento in Business Administration with a concentration in Human Resources & Organizational Behavior.

Brianna Miller

Brianna joined the SOLID team in 2015. Brianna has worked for the Department of Consumer Affairs (DCA) since 2010, serving at the Board of Optometry, the Bureau of Automotive Repair (BAR) and, most recently, as the DCA's Policy Coordinator in the Division of Programs & Policy Review. In her role as Policy Coordinator, Brianna facilitated policy discussions in monthly Policy Review Committee meetings. Additionally, Brianna has drafted procedural guides and handbooks, and has led presentations for DCA staff and stakeholders. Brianna graduated from University of California, Davis with a B.A. in Psychology and is expecting to complete a Master's of Science degree in Industrial/Organizational Psychology in Summer 2015. Brianna brings graduate-level Organizational Development and Organizational Psychology knowledge in psychometrics, data analysis, needs assessments, job analyses and employee behavior to SOLID's clients.

DEPARTMENT OF CONSUMER AFFAIRS
DISTRIBUTED COST METHODOLOGY FOR FY 2016-17

CONSUMER AND CLIENT SERVICES DIVISION (CCSD)

1. ADMINISTRATIVE & INFORMATION SERVICES DIVISION (AISD):

   A. *AISD LESS OFFICE OF INFORMATION SERVICES* (which consists of the Executive Office, Equal Employment Opportunity Office, Internal Audits, Legal Affairs, Legislative & Regulatory Review, SOLID Training Services, Information Security, and the Office of Administrative Services [which consists of Fiscal Operations (Budgets, Accounting, Cashiering), Business Services Office, Office of Human Resources]): Distributed costs to all Boards/Bureaus/Programs based on authorized position count.

   B. *OFFICE OF INFORMATION SERVICES (OIS):* Distributed costs based on service center usage. The cost centers have been refined to more accurately distribute each client's costs and include ATS/CAS, BreEZe, telecom, PC support, LAN/WAN, and Web services among others.

   C. OFFICE OF PROFESSIONAL EXAMINATION SERVICES (OPES): Direct costs based on individual IAAs with Boards/Bureaus/Programs. Small portion of budget distributed to Boards/Bureaus/Programs required to report pursuant to B&P 139 based on authorized position count.

2. COMMUNICATIONS DIVISION:

   A. PUBLIC AFFAIRS: Distributed costs based on authorized position count.

   B. *CONSUMER INFORMATION CENTER (CIC):* Distributed costs based on client's past year workload to determine the client's distributed costs in budget year. Non-jurisdictional call costs distributed to all Boards/Bureaus/Programs based on authorized position count.

   C. *CORRESPONDENCE UNIT:* Distributed costs based on client's past year workload to determine the client's distributed costs in budget year. Non-jurisdictional correspondence costs distributed to all Boards/Bureaus/Programs based on authorized position count.

   D. *PUBLICATIONS, DESIGN AND EDITING:* Distributed costs based on authorized position count. All Boards/Bureaus/Programs incur costs.

3. PROGRAM AND POLICY REVIEW DIVISION:

   A. COMPLAINT RESOLUTION (CRP): Distributed costs based on client's past year workload to determine the client's distributed costs in budget year. Only Bureaus/Programs incur resolution costs.

   B. POLICY REVIEW (PRP): Distributed costs based on authorized position count.

DIVISION OF INVESTIGATION (DOI)

A. *INVESTIGATION*: Fee for service: Based on two-year roll-forward methodology. This methodology uses a client's actual workload/costs in past year to determine the client's budget in budget year (BY), which will cover the BY estimated workload, plus any credit or debit for services already provided.

B. *INVESTIGATIONS AND SERVICES TEAM:* Distributed costs based on authorized position count.

C. HEALTH QUALITY INVESTIGATION UNIT (HQIU): Costs distributed fully to the Medical Board of California. Costs incurred by Allied Health Programs are based on an hourly rate and invoiced directly with reimbursement going to the Medical Board.

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MEMORANDUM

DATE	November 17, 2015
TO	Dental Board of California
FROM	Karen Fischer, Executive Officer
SUBJECT	**Agenda Item 8:** BreEZe Update from the Department of Consumer Affairs

Sean O'Connor, Chief, IT Legislation and Data Governance for the Office of Information Services, Department of Consumer Affairs (DCA) will give a presentation on DCA's new licensing and enforcement system known as BreEZe. The system is being recognized as a one-stop shop for consumers, licensees and applicants; and will enable consumers to verify a professional license and file a consumer complaint on line. Licensees and applicants can submit license applications, renew a license, and change an address among other services.

The Dental Board of California is among eight other boards and bureaus who will be "going live" with the system on January 19, 2016.

Mr. O'Connor will be giving an overview of how the system works; and will be available to answer questions.

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MEMORANDUM

DATE	November 13, 2015
TO	Dental Board of California
FROM	Karen Fischer, Executive Officer
SUBJECT	**Agenda Item 9:** Discussion and Possible Action on *the North Carolina State Board of Dental Examiners vs. Federal Trade Commission* Decision and California Attorney General's Opinion

Spencer Walker, the Board's legal counsel will give a presentation on the February 25, 2015 United States Supreme Court (Court) decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission (FTC).* Copies of the Court's Decision, the California Attorney General's (AG's) Opinion, and the FTC's Guidance document follow this cover page.

The Department of Consumer Affairs' (DCA's) Legal Affairs Division and Kathleen Foote, Senior Assistant Attorney General in the Antitrust Section of the AG's office provided training for Executive Officers and Board Presidents on September 21, 2015 in Sacramento. President Fran Burton and I attended.

Additionally, Senator Jerry Hill conducted a Joint Legislative hearing of the Senate and Assembly Business & Professions Committees on October 22, 2015; and took testimony from stakeholders on the issues surrounding the Court's decision. The Board's President and Executive Officer attended to observe the hearing.

NORTH CAROLINA BOARD OF DENTAL EXAMINERS

v.

FEDERAL TRADE COMMISSION

113 S.Ct. 1101 (2015)

Decided by the United States Supreme Court

February 25, 2015

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS *v.* FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13–534. Argued October 14, 2014—Decided February 25, 2015

North Carolina's Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." The Board's principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is "the practice of dentistry." Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board's motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in

all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 5–18.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker* v. *Brown*, 317 U. S. 341, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 5–6.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if "'the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,' and . . . 'the policy . . . [is] actively supervised by the State.'" *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 6–17.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal*'s two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this

harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 6–10.

(2) There are instances in which an actor can be excused from *Midcal*'s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie* v. *Eau Claire*, 471 U. S. 34, 35. That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni*'s holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U. S., at 374, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 633, and *Phoebe Putney, supra*, at ___. The clear lesson of precedent is that *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 10–12.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal*'s second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. 445 U. S., at 105–106. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra*, at 39. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus,

the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity. Pp. 12–14.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick* v. *Burget*, 486 U. S. 94, 105–106, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 14–16.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 17.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U. S., 100–101. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id.*, at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state

supervision is not an adequate substitute for a decision by the State," *Ticor*, *supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 17–18.

717 F. 3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13–534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER *v.* FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker* v. *Brown*, 317 U. S. 341 (1943).

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. N. C. Gen. Stat. Ann. §90–22(a) (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." §90–22(b).

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See §§90–29 to

90–41. To perform that function it has broad authority over licensees. See §90–41. The Board's authority with respect to unlicensed persons, however, is more restricted: like "any resident citizen," the Board may file suit to "perpetually enjoin any person from . . . unlawfully practicing dentistry." §90–40.1.

The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. §90–22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed by the Governor. *Ibid.* All members serve 3-year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, §138A–22(a), and the Board must comply with the State's Administrative Procedure Act, §150B–1 *et seq.*, Public Records Act, §132–1 *et seq.*, and open-meetings law, §143–318.9 *et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§90–48, 143B–30.1, 150B–21.9(a).

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower

prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Dental Practice Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an

administrative complaint charging the Board with violating §5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. §45. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the Board could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia*, "a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.*, at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F. 3d 359, 370 (2013). This Court granted certiorari. 571 U. S. ___ (2014).

II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1 *et seq.*, serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 632 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id.*, at 635–636, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 133 (1978); see also Easterbrook, Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in *Parker* v. *Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U. S., at 350–351. That ruling

recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 53 (1982). Since 1943, the Court has reaffirmed the importance of *Parker*'s central holding. See, *e.g.*, *Ticor*, *supra*, at 632–637; *Hoover* v. *Ronwin*, 466 U. S. 558, 568 (1984); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 394–400 (1978).

III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (2013) (slip op., at 7) (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

Although state-action immunity exists to avoid conflicts

between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'" *Phoebe Putney*, *supra*, at ___ (slip op., at 7) (quoting *Ticor*, *supra*, at 636).

An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374 (1991). State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. *Hoover*, *supra*, at 567–568.

But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor. See *Parker*, *supra*, at 351 ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover*, *supra*, at 567–568. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of

Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor*, 504 U. S., at 636.

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal*, *supra*, at 106 ("The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, *e.g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 501 (1988); *Hoover*, *supra*, at 584 (Stevens, J., dissenting) ("The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence"); see also Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L. J. 486, 500 (1986).

Parker immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.

See *Goldfarb, supra*, at 790; see also 1A P. Areeda & H. Hovencamp, Antitrust Law ¶226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor, supra*, at 634–635. Rather, it is "whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws." *Patrick* v. *Burget*, 486 U. S. 94, 100 (1988).

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, a case arising from California's delegation of price-fixing authority to wine merchants. Under *Midcal*, "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *Ticor, supra*, at 631 (citing *Midcal, supra*, at 105).

Midcal's clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney*, 568 U. S., at ___ (slip op., at 11). The active supervision requirement demands, *inter alia*, "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick, supra*, U. S., at 101.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may

satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor*, *supra*, at 636–637. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Midcal's supervision rule "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick*, *supra*, at 100. Concern about the private incentives of active market participants animates *Midcal*'s supervision mandate, which demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick*, *supra*, at 101.

B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from *Midcal*'s active supervision requirement. In *Hallie* v. *Eau Claire*, 471 U. S. 34, 45 (1985), the Court held municipalities are subject exclusively to *Midcal*'s "'clear articulation'" requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the

expense of more overriding state goals." 471 U. S., at 47. *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id.*, at 45, n. 9. Critically, the municipality in *Hallie* exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U. S., at 45.

Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U. S., at 367–368. The Court disagreed, holding there is no "conspiracy exception" to *Parker*. *Omni*, *supra*, at 374.

Omni, like the cases before it, recognized the importance of drawing a line "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." 499 U. S., at 378. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for "corruption" as vague and unworkable, since "virtually all regulation benefits some

segments of the society and harms others" and may in that sense be seen as "'corrupt.'" 499 U. S., at 377. *Omni* also rejected subjective tests for corruption that would force a "deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

Omni's holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor* the Court affirmed that *Midcal*'s limits on delegation must ensure that "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." 504 U. S., at 633. And in *Phoebe Putney* the Court observed that *Midcal*'s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." 568 U. S., at ___ (slip op., at 8) (quoting *Hallie*, *supra*, at 46–47). The lesson is clear: *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

The Board argues entities designated by the States as agencies are exempt from *Midcal*'s second requirement. That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision

turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See Areeda & Hovencamp ¶227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick*, 486 U. S., at 100–101.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had "joined in what is essentially a private anticompetitive activity" for "the benefit of its members." 421 U. S., at 791, 792. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U. S., at 791; see also *Hoover*, 466 U. S., at 569 (emphasizing lack of active supervision in *Goldfarb*); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 361–362 (1977) (granting the Arizona Bar state-action immunity partly because its "rules are subject to pointed re-examination by the policymaker").

While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market partici-

pants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube*, 486 U. S., at 500. For that reason, those associations must satisfy *Midcal*'s active supervision standard. See *Midcal*, 445 U. S., at 105–106.

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39 (rejecting "purely formalistic" analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See Areeda & Hovencamp ¶227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity.

D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991), and may conclude there are substantial benefits to staffing their

agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48, 64 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, The Hippocratic Oath and the Ethics of Medicine (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (2014); R. Baker, Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of "the privilege and obligation of self-government," has "call[ed] upon dentists to follow high ethical standards," including "honesty, compassion, kindness, integrity, fairness and charity." American Dental Association, Principles of Ethics and Code of Professional Conduct 3–4 (2012). State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky* v. *Delia*, 566 U. S. ___, ___ (2012) (slip op., at 12) (warning in the context of civil rights suits that the "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts"). But this case, which does not

present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb*, 421 U. S., at 792, n. 22; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

> "[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own." *Patrick*, 486 U. S. at 105–106 (footnote omitted).

The reasoning of *Patrick* v. *Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? 162 U. Pa. L. Rev. 1093 (2014).

E

The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes "the practice of dentistry" and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni*, 499 U. S., at 371–372, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticom-

petitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick, supra,* at 100–101; see also *Ticor*, 504 U. S., at 639–640.

The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick*, 486 U. S., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER *v.* FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker* v. *Brown*, 317 U. S. 341 (1943). In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff

them in this way.[1] Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.[2] But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker*, and the answer to that question is clear. Under *Parker*, the Sherman Act (and the Federal Trade Commission Act, see *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 635 (1992)) do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

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[1] S. White, History of Oral and Dental Science in America 197–214 (1876) (detailing earliest American regulations of the practice of dentistry).

[2] See, *e.g.*, R. Shrylock, Medical Licensing in America 29 (1967) (Shrylock) (detailing the deterioration of licensing regimes in the mid-19th century, in part out of concerns about restraints on trade); Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976); Shepard, Licensing Restrictions and the Cost of Dental Care, 21 J. Law & Econ. 187 (1978).

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate "their purely internal affairs." *Leisy* v. *Hardin*, 135 U. S. 100, 122 (1890). In exercising their police power in this area, the States had long enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade.[3]

The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power "to the utmost extent." *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, *e.g.*, *Kidd* v. *Pearson*, 128 U. S. 1, 17–18 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it "exerts a substantial economic effect on interstate commerce." *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital*

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[3] See Handler, The Current Attack on the *Parker* v. *Brown* State Action Doctrine, 76 Colum. L. Rev. 1, 4–6 (1976) (collecting cases).

Building Co. v. *Trustees of Rex Hospital*, 425 U. S. 738, 743, n. 2 (1976) ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in *Parker*.

In *Parker*, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to establish marketing plans for certain agricultural commodities within the State. 317 U. S., at 346–347. Raisins were among the regulated commodities, and so the Commission established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id.*, at 347–348. The *Parker* Court assumed that this program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons," and the Court also assumed that Congress could have prohibited a State from creating a program like California's if it had chosen to do so. *Id.*, at 350. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id.*, at 351.

The Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Con-

gress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U. S., at 351. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical and dental boards, often staffed by doctors or dentists,[4] and had given those boards the authority to confer and revoke licenses.[5] This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent* v. *West Virginia*, 129 U. S. 114, 128 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker* v. *New York*, 170 U. S. 189, 192 (1898), the Court reiterated that a law

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[4] Shrylock 54–55; D. Johnson and H. Chaudry, Medical Licensing and Discipline in America 23–24 (2012).

[5] In *Hawker* v. *New York*, 170 U. S. 189 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.*, at 191–193, n. 1. See also *Douglas* v. *Noble*, 261 U. S. 165, 166 (1923) ("In 1893 the legislature of Washington provided that only licensed persons should practice dentistry" and "vested the authority to license in a board of examiners, consisting of five practicing dentists").

specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

II

As noted above, the only question in this case is whether the North Carolina Board of Dental Examiners is really a state agency, and the answer to that question is clearly yes.

- The North Carolina Legislature determined that the practice of dentistry "affect[s] the public health, safety and welfare" of North Carolina's citizens and that therefore the profession should be "subject to regulation and control in the public interest" in order to ensure "that only qualified persons be permitted to practice dentistry in the State." N. C. Gen. Stat. Ann. §90–22(a) (2013).
- To further that end, the legislature created the North Carolina State Board of Dental Examiners "as the agency of the State for the regulation of the practice of dentistry in th[e] State." §90–22(b).
- The legislature specified the membership of the Board. §90–22(c). It defined the "practice of dentistry," §90–29(b), and it set out standards for licensing practitioners, §90–30. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. §90–41(a).
- The legislature empowered the Board to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from . . . unlawfully practicing dentistry." §90–40.1(a). It authorized the Board to conduct investigations and to hire legal

counsel, and the legislature made any "notice or statement of charges against any licensee" a public record under state law. §§ 90–41(d)–(g).

- The legislature empowered the Board "to enact rules and regulations governing the practice of dentistry within the State," consistent with relevant statutes. §90–48. It has required that any such rules be included in the Board's annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature's Joint Regulatory Reform Committee. §93B–2. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid.*

As this regulatory regime demonstrates, North Carolina's Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

The Board is not a private or "nonsovereign" entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not "'give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.'" *Ante,* at 7 (quoting *Parker*, 317 U. S., at 351). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904), to show what it had in mind. In that case, the Court held that a State's act of chartering a corporation did not shield the corporation's monopolizing activities from federal antitrust law. *Id.*, at 344–345. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and

safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are "controlled by active market participants," *ante*, at 12, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker*, 317 U. S., at 346. If the Commission then agreed that a marketing plan was warranted, the Commission would "select a program committee *from among nominees chosen by the qualified producers*." *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id.*, at 347. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a "sovereign" when it "adopt[ed] and enforc[ed] the prorate program." *Id.*, at 352. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the

Parker doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both "'clearly articulated'" and "'actively supervised by the State itself.'" 445 U. S., at 105. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. And for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina.

Our decision in *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985), which involved Sherman Act claims against a municipality, not a State agency, is similarly inapplicable. In *Hallie*, the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities "are not themselves sovereign." 471 U. S., at 38. But recognizing that a municipality is "an arm of the State," *id.*, at 45, the Court held that a municipality should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), 471 U. S., at 46. That municipalities

are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.

Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N. Y.* v. *Chatham County*, 547 U. S. 189, 193 (2006), and California's sovereignty provided the foundation for the decision in *Parker*, *supra*, at 352. Municipalities are not sovereign. *Jinks* v. *Richland County*, 538 U. S. 456, 466 (2003). And for this reason, federal law often treats municipalities differently from States. Compare *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 71 (1989) ("[N]either a State nor its officials acting it their official capacities are 'persons' under [42 U. S. C.] §1983"), with *Monell* v. *City Dept. of Social Servs., New York*, 436 U. S. 658, 694 (1978) (municipalities liable under §1983 where "execution of a government's policy or custom . . . inflicts the injury").

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court's approach, the North Carolina Board of Dental Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court's analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had

engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *Id.*, at 374. The Sherman Act, we said, is not an anticorruption or good-government statute. 499 U. S., at 398. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U. S., at 374–379. But that is essentially what the Court has done here.

III

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

As a result of today's decision, States may find it necessary to change the composition of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because "active market participants" constitute "a controlling number of [the] decisionmakers," *ante,* at 14, but this test raises many questions.

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circum-

stances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person "active" in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.[6] So why ask only whether

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[6] See, *e.g.*, R. Noll, Reforming Regulation 40–43, 46 (1971); J. Wilson, The Politics of Regulation 357–394 (1980). Indeed, it has even been

the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision.

IV

The Court has created a new standard for distinguishing between private and state actors for purposes of federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

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charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, "The Nader Report" on the Federal Trade Commission vii–xiv (1969); Posner, Federal Trade Commission, Chi. L. Rev. 47, 82–84 (1969).

CALIFORNIA ATTORNEY GENERAL

OPINION 15-402

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OFFICE OF THE ATTORNEY GENERAL
State of California

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Attorney General

OPINION	:	No. 15-402
of	:	September 10, 2015
KAMALA D. HARRIS Attorney General	:	
SUSAN DUNCAN LEE Deputy Attorney General	:	

THE HONORABLE JERRY HILL, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

What constitutes "active state supervision" of a state licensing board for purposes of the state action immunity doctrine in antitrust actions, and what measures might be taken to guard against antitrust liability for board members?

CONCLUSIONS

"Active state supervision" requires a state official to review the substance of a regulatory decision made by a state licensing board, in order to determine whether the decision actually furthers a clearly articulated state policy to displace competition with regulation in a particular market. The official reviewing the decision must not be an active member of the market being regulated, and must have and exercise the power to approve, modify, or disapprove the decision.

Measures that might be taken to guard against antitrust liability for board members include changing the composition of boards, adding lines of supervision by state officials, and providing board members with legal indemnification and antitrust training.

ANALYSIS

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,[1] the Supreme Court of the United States established a new standard for determining whether a state licensing board is entitled to immunity from antitrust actions.

Immunity is important to state actors not only because it shields them from adverse judgments, but because it shields them from having to go through litigation. When immunity is well established, most people are deterred from filing a suit at all. If a suit is filed, the state can move for summary disposition of the case, often before the discovery process begins. This saves the state a great deal of time and money, and it relieves employees (such as board members) of the stresses and burdens that inevitably go along with being sued. This freedom from suit clears a safe space for government officials and employees to perform their duties and to exercise their discretion without constant fear of litigation. Indeed, allowing government actors freedom to exercise discretion is one of the fundamental justifications underlying immunity doctrines.[2]

Before *North Carolina Dental* was decided, most state licensing boards operated under the assumption that they were protected from antitrust suits under the state action immunity doctrine. In light of the decision, many states—including California—are reassessing the structures and operations of their state licensing boards with a view to determining whether changes should be made to reduce the risk of antitrust claims. This opinion examines the legal requirements for state supervision under the *North Carolina Dental* decision, and identifies a variety of measures that the state Legislature might consider taking in response to the decision.

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[1] *North Carolina State Bd. of Dental Examiners v. F. T. C.* (2015) ___ U.S. ___, 135 S. Ct. 1101 (*North Carolina Dental*).

[2] See *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526; *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 819.

I. *North Carolina Dental* Established a New Immunity Standard for State Licensing Boards

A. The *North Carolina Dental* Decision

The North Carolina Board of Dental Examiners was established under North Carolina law and charged with administering a licensing system for dentists. A majority of the members of the board are themselves practicing dentists. North Carolina statutes delegated authority to the dental board to regulate the practice of dentistry, but did not expressly provide that teeth-whitening was within the scope of the practice of dentistry.

Following complaints by dentists that non-dentists were performing teeth-whitening services for low prices, the dental board conducted an investigation. The board subsequently issued cease-and-desist letters to dozens of teeth-whitening outfits, as well as to some owners of shopping malls where teeth-whiteners operated. The effect on the teeth-whitening market in North Carolina was dramatic, and the Federal Trade Commission took action.

In defense to antitrust charges, the dental board argued that, as a state agency, it was immune from liability under the federal antitrust laws. The Supreme Court rejected that argument, holding that a state board on which a controlling number of decision makers are active market participants must show that it is subject to "active supervision" in order to claim immunity.[3]

B. State Action Immunity Doctrine Before *North Carolina Dental*

The Sherman Antitrust Act of 1890[4] was enacted to prevent anticompetitive economic practices such as the creation of monopolies or restraints of trade. The terms of the Sherman Act are broad, and do not expressly exempt government entities, but the Supreme Court has long since ruled that federal principles of dual sovereignty imply that federal antitrust laws do not apply to the actions of states, even if those actions are anticompetitive.[5]

This immunity of states from federal antitrust lawsuits is known as the "state action doctrine."[6] The state action doctrine, which was developed by the Supreme Court

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[3] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1114.

[4] 15 U.S.C. §§ 1, 2.

[5] *Parker v. Brown* (1943) 317 U.S. 341, 350-351.

[6] It is important to note that the phrase "state action" in this context means something

in *Parker v. Brown*,[7] establishes three tiers of decision makers, with different thresholds for immunity in each tier.

In the top tier, with the greatest immunity, is the state itself: the sovereign acts of state governments are absolutely immune from antitrust challenge.[8] Absolute immunity extends, at a minimum, to the state Legislature, the Governor, and the state's Supreme Court.

In the second tier are subordinate state agencies,[9] such as executive departments and administrative agencies with statewide jurisdiction. State agencies are immune from antitrust challenge if their conduct is undertaken pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition.[10] A state policy is sufficiently clear when displacement of competition is the "inherent, logical, or ordinary result" of the authority delegated by the state legislature.[11]

The third tier includes private parties acting on behalf of a state, such as the members of a state-created professional licensing board. Private parties may enjoy state action immunity when two conditions are met: (1) their conduct is undertaken pursuant to a "clearly articulated" and "affirmatively expressed" state policy to displace competition, and (2) their conduct is "actively supervised" by the state.[12] The

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very different from "state action" for purposes of analysis of a civil rights violation under section 1983 of title 42 of the United States Code. Under section 1983, *liability* attaches to "state action," which may cover even the inadvertent or unilateral act of a state official not acting pursuant to state policy. In the antitrust context, a conclusion that a policy or action amounts to "state action" results in *immunity* from suit.

[7] *Parker v. Brown, supra*, 317 U.S. 341.

[8] *Hoover v. Ronwin* (1984) 466 U.S. 558, 574, 579-580.

[9] Distinguishing the state itself from subordinate state agencies has sometimes proven difficult. Compare the majority opinion in *Hoover v. Ronwin, supra*, 466 U.S. at p. 581 with dissenting opinion of Stevens, J., at pp. 588-589. (See *Costco v. Maleng* (9th Cir. 2008) 522 F.3d 874, 887, subseq. hrg. 538 F.3d 1128; *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.* (9th Cir. 1987) 810 F.2d 869, 875.)

[10] See *Town of Hallie v. City of Eau Claire* (1985) 471 U.S. 34, 39.

[11] *F.T.C. v. Phoebe Putney Health Systems, Inc.* (2013) ___ U.S. ___, 133 S.Ct. 1003, 1013; see also *Southern Motor Carriers Rate Conference, Inc. v. U.S.* (1985) 471 U.S. 48, 57 (state policy need not compel specific anticompetitive effect).

[12] *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97, 105 (*Midcal*).

fundamental purpose of the supervision requirement is to shelter only those private anticompetitive acts that the state approves as actually furthering its regulatory policies.[13] To that end, the mere possibility of supervision—such as the existence of a regulatory structure that is not operative, or not resorted to—is not enough. "The active supervision prong . . . requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[14]

C. State Action Immunity Doctrine After *North Carolina Dental*

Until the Supreme Court decided *North Carolina Dental*, it was widely believed that most professional licensing boards would fall within the second tier of state action immunity, requiring a clear and affirmative policy, but not active state supervision of every anticompetitive decision. In California in particular, there were good arguments that professional licensing boards[15] were subordinate agencies of the state: they are formal, ongoing bodies created pursuant to state law; they are housed within the Department of Consumer Affairs and operate under the Consumer Affairs Director's broad powers of investigation and control; they are subject to periodic sunset review by the Legislature, to rule-making review under the Administrative Procedure Act, and to administrative and judicial review of disciplinary decisions; their members are appointed by state officials, and include increasingly large numbers of public (non-professional) members; their meetings and records are subject to open-government laws and to strong prohibitions on conflicts of interest; and their enabling statutes generally provide well-guided discretion to make decisions affecting the professional markets that the boards regulate.[16]

Those arguments are now foreclosed, however, by *North Carolina Dental*. There, the Court squarely held, for the first time, that "a state board on which a controlling

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[13] *Patrick v. Burget* (1988) 486 U.S. 94, 100-101.

[14] *Ibid.*

[15] California's Department of Consumer Affairs includes some 25 professional regulatory boards that establish minimum qualifications and levels of competency for licensure in various professions, including accountancy, acupuncture, architecture, medicine, nursing, structural pest control, and veterinary medicine—to name just a few. (See http://www.dca.gov/about_ca/entities.shtml.)

[16] Cf. 1A Areeda & Hovenkamp, *supra*, ¶ 227, p. 208 (what matters is not what the body is called, but its structure, membership, authority, openness to the public, exposure to ongoing review, etc.).

number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity."[17] The effect of *North Carolina Dental* is to put professional licensing boards "on which a controlling number of decision makers are active market participants" in the third tier of state-action immunity. That is, they are immune from antitrust actions as long as they act pursuant to clearly articulated state policy to replace competition with regulation of the profession, *and* their decisions are actively supervised by the state.

Thus arises the question presented here: What constitutes "active state supervision"?[18]

D. Legal Standards for Active State Supervision

The active supervision requirement arises from the concern that, when active market participants are involved in regulating their own field, "there is a real danger" that they will act to further their own interests, rather than those of consumers or of the state.[19] The purpose of the requirement is to ensure that state action immunity is afforded to private parties only when their actions actually further the state's policies.[20]

There is no bright-line test for determining what constitutes active supervision of a professional licensing board: the standard is "flexible and context-dependent."[21] Sufficient supervision "need not entail day-to-day involvement" in the board's operations or "micromanagement of its every decision."[22] Instead, the question is whether the review mechanisms that are in place "provide 'realistic assurance'" that the anticompetitive effects of a board's actions promote state policy, rather than the board members' private interests.[23]

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[17] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1114; *Midcal*, *supra*, 445 U.S at p. 105.

[18] Questions about whether the State's anticompetitive policies are adequately articulated are beyond the scope of this Opinion.

[19] *Patrick v. Burget*, *supra*, 486 U.S. at p. 100, citing *Town of Hallie v. City of Eau Claire*, *supra*, 471 U.S. at p. 47; see *id.* at p. 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf").

[20] *Patrick v. Burget*, *supra*, 486 U.S. at pp. 100-101.

[21] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1116.

[22] *Ibid.*

[23] *Ibid.*

The *North Carolina Dental* opinion and pre-existing authorities allow us to identify "a few constant requirements of active supervision":[24]

- The state supervisor who reviews a decision must have the power to reverse or modify the decision.[25]
- The "mere potential" for supervision is not an adequate substitute for supervision.[26]
- When a state supervisor reviews a decision, he or she must review the substance of the decision, not just the procedures followed to reach it.[27]
- The state supervisor must not be an active market participant.[28]

Keeping these requirements in mind may help readers evaluate whether California law already provides adequate supervision for professional licensing boards, or whether new or stronger measures are desirable.

II. Threshold Considerations for Assessing Potential Responses to *North Carolina Dental*

There are a number of different measures that the Legislature might consider in response to the *North Carolina Dental* decision. We will describe a variety of these, along with some of their potential advantages or disadvantages. Before moving on to those options, however, we should put the question of immunity into proper perspective.

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[24] *Id. at* pp. 1116-1117.

[25] *Ibid.*

[26] *Id.* at p. 1116, citing *F.T.C. v. Ticor Title Ins. Co.* (1992) 504 U.S. 621, 638. For example, a passive or negative-option review process, in which an action is considered approved as long as the state supervisor raises no objection to it, may be considered inadequate in some circumstances. (*Ibid.*)

[27] *Ibid.*, citing *Patrick v. Burget, supra*, 486 U.S. at pp. 102-103. In most cases, there should be some evidence that the state supervisor considered the particular circumstances of the action before making a decision. Ideally, there should be a factual record and a written decision showing that there has been an assessment of the action's potential impact on the market, and whether the action furthers state policy. (See *In the Matter of Indiana Household Moves and Warehousemen, Inc.* (2008) 135 F.T.C. 535, 555-557; see also Federal Trade Commission, Report of the State Action Task Force (2003) at p. 54.)

[28] *North Carolina Dental, supra*, 135 S.Ct. at pp. 1116-1117.

There are two important things keep in mind: (1) the loss of immunity, if it is lost, does not mean that an antitrust violation has been committed, and (2) even when board members participate in regulating the markets they compete in, many—if not most—of their actions do not implicate the federal antitrust laws.

In the context of regulating professions, "market-sensitive" decisions (that is, the kinds of decisions that are most likely to be open to antitrust scrutiny) are those that create barriers to market participation, such as rules or enforcement actions regulating the scope of unlicensed practice; licensing requirements imposing heavy burdens on applicants; marketing programs; restrictions on advertising; restrictions on competitive bidding; restrictions on commercial dealings with suppliers and other third parties; and price regulation, including restrictions on discounts.

On the other hand, we believe that there are broad areas of operation where board members can act with reasonable confidence—especially once they and their state-official contacts have been taught to recognize actual antitrust issues, and to treat those issues specially. Broadly speaking, promulgation of regulations is a fairly safe area for board members, because of the public notice, written justification, Director review, and review by the Office of Administrative Law as required by the Administrative Procedure Act. Also, broadly speaking, disciplinary decisions are another fairly safe area because of due process procedures; participation of state actors such as board executive officers, investigators, prosecutors, and administrative law judges; and availability of administrative mandamus review.

We are not saying that the procedures that attend these quasi-legislative and quasi-judicial functions make the licensing boards altogether immune from antitrust claims. Nor are we saying that rule-making and disciplinary actions are per se immune from antitrust laws. What we are saying is that, assuming a board identifies its market-sensitive decisions and gets active state supervision for those, then ordinary rule-making and discipline (faithfully carried out under the applicable rules) may be regarded as relatively safe harbors for board members to operate in. It may require some education and experience for board members to understand the difference between market-sensitive and "ordinary" actions, but a few examples may bring in some light.

North Carolina Dental presents a perfect example of a market-sensitive action. There, the dental board decided to, and actually succeeded in, driving non-dentist teeth-whitening service providers out of the market, even though nothing in North Carolina's laws specified that teeth-whitening constituted the illegal practice of dentistry. Counter-examples—instances where no antitrust violation occurs—are far more plentiful. For example, a regulatory board may legitimately make rules or impose discipline to prohibit license-holders from engaging in fraudulent business practices (such as untruthful or

deceptive advertising) without violating antitrust laws.[29] As well, suspending the license of an individual license-holder for violating the standards of the profession is a reasonable restraint and has virtually no effect on a large market, and therefore would not violate antitrust laws.[30]

Another area where board members can feel safe is in carrying out the actions required by a detailed anticompetitive statutory scheme.[31] For example, a state law prohibiting certain kinds of advertising or requiring certain fees may be enforced without need for substantial judgment or deliberation by the board. Such detailed legislation leaves nothing for the state to supervise, and thus it may be said that the legislation itself satisfies the supervision requirement.[32]

Finally, some actions will not be antitrust violations because their effects are, in fact, pro-competitive rather than anti-competitive. For instance, the adoption of safety standards that are based on objective expert judgments have been found to be pro-competitive.[33] Efficiency measures taken for the benefit of consumers, such as making information available to the purchasers of competing products, or spreading development costs to reduce per-unit prices, have been held to be pro-competitive because they are pro-consumer.[34]

III. Potential Measures for Preserving State Action Immunity

A. Changes to the Composition of Boards

The *North Carolina Dental* decision turns on the principle that a state board is a group of private actors, not a subordinate state agency, when "a controlling number of decisionmakers are active market participants in the occupation the board regulates."[35]

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[29] See generally *California Dental Assn. v. F.T.C.* (1999) 526 U.S. 756.

[30] See *Oksanen v. Page Memorial Hospital* (4th Cir. 1999) 945 F.2d 696 (*en banc*).

[31] See *324 Liquor Corp. v. Duffy* (1987) 479 U.S. 335, 344, fn. 6.

[32] 1A Areeda & Hovenkamp, Antitrust Law, *supra*, ¶ 221, at p. 66; ¶ 222, at pp. 67, 76.

[33] See *Allied Tube & Conduit Corp. v. Indian Head, Inc.* (1988) 486 U.S. 492, 500-501.

[34] *Broadcom Corp. v. Qualcomm Inc.* (3rd Cir. 2007) 501 F.3d 297, 308-309; see generally Bus. & Prof. Code, § 301.

[35] 135 S.Ct. at p. 1114.

This ruling brings the composition of boards into the spotlight. While many boards in California currently require a majority of public members, it is still the norm for professional members to outnumber public members on boards that regulate healing-arts professions. In addition, delays in identifying suitable public-member candidates and in filling public seats can result in de facto market-participant majorities.

In the wake of *North Carolina Dental*, many observers' first impulse was to assume that reforming the composition of professional boards would be the best resolution, both for state actors and for consumer interests. Upon reflection, however, it is not obvious that sweeping changes to board composition would be the most effective solution.[36]

Even if the Legislature were inclined to decrease the number of market-participant board members, the current state of the law does not allow us to project accurately how many market-participant members is too many. This is a question that was not resolved by the *North Carolina Dental* decision, as the dissenting opinion points out:

> What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?[37]

Some observers believe it is safe to assume that the *North Carolina Dental* standard would be satisfied if public members constituted a majority of a board. The

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[36] Most observers believe that there are real advantages in staffing boards with professionals in the field. The combination of technical expertise, practiced judgment, and orientation to prevailing ethical norms is probably impossible to replicate on a board composed entirely of public members. Public confidence must also be considered. Many consumers would no doubt share the sentiments expressed by Justice Breyer during oral argument in the *North Carolina Dental* case: "[W]hat the State says is: We would like this group of brain surgeons to decide who can practice brain surgery in this State. I don't want a group of bureaucrats deciding that. I would like brain surgeons to decide that." (*North Carolina Dental, supra*, transcript of oral argument p. 31, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-534_l6h1.pdf (hereafter, Transcript).)

[37] *North Carolina Dental, supra*, 135 S.Ct. at p. 1123 (dis. opn. of Alito, J).

obvious rejoinder to that argument is that the Court pointedly did not use the term "majority;" it used "controlling number." More cautious observers have suggested that "controlling number" should be taken to mean the majority of a quorum, at least until the courts give more guidance on the matter.

North Carolina Dental leaves open other questions about board composition as well. One of these is: Who is an "active market participant"?[38] Would a retired member of the profession no longer be a participant of the market? Would withdrawal from practice during a board member's term of service suffice? These questions were discussed at oral argument,[39] but were not resolved. Also left open is the scope of the market in which a member may not participate while serving on the board.[40]

Over the past four decades, California has moved decisively to expand public membership on licensing boards.[41] The change is generally agreed to be a salutary one for consumers, and for underserved communities in particular.[42] There are many good reasons to consider continuing the trend to increase public membership on licensing boards—but we believe a desire to ensure immunity for board members should not be the decisive factor. As long as the legal questions raised by *North Carolina Dental* remain unresolved, radical changes to board composition are likely to create a whole new set of policy and practical challenges, with no guarantee of resolving the immunity problem.

B. Some Mechanisms for Increasing State Supervision

Observers have proposed a variety of mechanisms for building more state oversight into licensing boards' decision-making processes. In considering these alternatives, it may be helpful to bear in mind that licensing boards perform a variety of

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[38] *Ibid.*

[39] Transcript, *supra*, at p. 31.

[40] *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1123 (dis. opn. of Alito, J). Some observers have suggested that professionals from one practice area might be appointed to serve on the board regulating another practice area, in order to bring their professional expertise to bear in markets where they are not actively competing.

[41] See Center for Public Interest Law, A Guide to California's Health Care Licensing Boards (July 2009) at pp. 1-2; Shimberg, Occupational Licensing: A Public Perspective (1982) at pp. 163-165.

[42] See Center for Public Interest Law, *supra*, at pp. 15-17; Shimberg, *supra*, at pp. 175-179.

distinct functions, and that different supervisory structures may be appropriate for different functions.

For example, boards may develop and enforce standards for licensure; receive, track, and assess trends in consumer complaints; perform investigations and support administrative and criminal prosecutions; adjudicate complaints and enforce disciplinary measures; propose regulations and shepherd them through the regulatory process; perform consumer education; and more. Some of these functions are administrative in nature, some are quasi-judicial, and some are quasi-legislative. Boards' quasi-judicial and quasi-legislative functions, in particular, are already well supported by due process safeguards and other forms of state supervision (such as vertical prosecutions, administrative mandamus procedures, and public notice and scrutiny through the Administrative Procedure Act). Further, some functions are less likely to have antitrust implications than others: decisions affecting only a single license or licensee in a large market will rarely have an anticompetitive effect within the meaning of the Sherman Act. For these reasons, it is worth considering whether it is less urgent, or not necessary at all, to impose additional levels of supervision with respect to certain functions.

Ideas for providing state oversight include the concept of a superagency, such as a stand-alone office, or a committee within a larger agency, which has full responsibility for reviewing board actions de novo. Under such a system, the boards could be permitted to carry on with their business as usual, except that they would be required to refer each of their decisions (or some subset of decisions) to the superagency for its review. The superagency could review each action file submitted by the board, review the record and decision in light of the state's articulated regulatory policies, and then issue its own decision approving, modifying, or vetoing the board's action.

Another concept is to modify the powers of the boards themselves, so that all of their functions (or some subset of functions) would be advisory only. Under such a system, the boards would not take formal actions, but would produce a record and a recommendation for action, perhaps with proposed findings and conclusions. The recommendation file would then be submitted to a supervising state agency for its further consideration and formal action, if any.

Depending on the particular powers and procedures of each system, either could be tailored to encourage the development of written records to demonstrate executive discretion; access to administrative mandamus procedures for appeal of decisions; and the development of expertise and collaboration among reviewers, as well as between the reviewers and the boards that they review. Under any system, care should be taken to structure review functions so as to avoid unnecessary duplication or conflicts with other agencies and departments, and to minimize the development of super-policies not

adequately tailored to individual professions and markets. To prevent the development of "rubber-stamp" decisions, any acceptable system must be designed and sufficiently staffed to enable plenary review of board actions or recommendations at the individual transactional level.

As it stands, California is in a relatively advantageous position to create these kinds of mechanisms for active supervision of licensing boards. With the boards centrally housed within the Department of Consumer Affairs (an "umbrella agency"), there already exists an organization with good knowledge and experience of board operations, and with working lines of communication and accountability. It is worth exploring whether existing resources and minimal adjustments to procedures and outlooks might be converted to lines of active supervision, at least for the boards' most market-sensitive actions.

Moreover, the Business and Professions Code already demonstrates an intention that the Department of Consumer Affairs will protect consumer interests as a means of promoting "the fair and efficient functioning of the free enterprise market economy" by educating consumers, suppressing deceptive and fraudulent practices, fostering competition, and representing consumer interests at all levels of government.[43] The free-market and consumer-oriented principles underlying *North Carolina Dental* are nothing new to California, and no bureaucratic paradigms need to be radically shifted as a result.

The Business and Professions Code also gives broad powers to the Director of Consumer Affairs (and his or her designees)[44] to protect the interests of consumers at every level.[45] The Director has power to investigate the work of the boards and to obtain their data and records;[46] to investigate alleged misconduct in licensing examinations and qualifications reviews;[47] to require reports;[48] to receive consumer complaints[49] and to initiate audits and reviews of disciplinary cases and complaints about licensees.[50]

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[43] Bus. & Prof. Code, § 301.

[44] Bus. & Prof. Code, §§ 10, 305.

[45] See Bus. & Prof. Code, § 310.

[46] Bus. & Prof. Code, § 153.

[47] Bus. & Prof. Code, § 109.

[48] Bus. & Prof. Code, § 127.

[49] Bus. & Prof. Code, § 325.

[50] Bus. & Prof. Code, § 116.

In addition, the Director must be provided a full opportunity to review all proposed rules and regulations (except those relating to examinations and licensure qualifications) before they are filed with the Office of Administrative Law, and the Director may disapprove any proposed regulation on the ground that it is injurious to the public.[51] Whenever the Director (or his or her designee) actually exercises one of these powers to reach a substantive conclusion as to whether a board's action furthers an affirmative state policy, then it is safe to say that the active supervision requirement has been met.[52]

It is worth considering whether the Director's powers should be amended to make review of certain board decisions mandatory as a matter of course, or to make the Director's review available upon the request of a board. It is also worth considering whether certain existing limitations on the Director's powers should be removed or modified. For example, the Director may investigate allegations of misconduct in examinations or qualification reviews, but the Director currently does not appear to have power to review board decisions in those areas, or to review proposed rules in those areas.[53] In addition, the Director's power to initiate audits and reviews appears to be limited to disciplinary cases and complaints about licensees.[54] If the Director's initiative is in fact so limited, it is worth considering whether that limitation continues to make sense. Finally, while the Director must be given a full opportunity to review most proposed regulations, the Director's disapproval may be overridden by a unanimous vote of the board.[55] It is worth considering whether the provision for an override maintains its utility, given that such an override would nullify any "active supervision" and concomitant immunity that would have been gained by the Director's review.[56]

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[51] Bus. & Prof. Code, § 313.1.

[52] Although a written statement of decision is not specifically required by existing legal standards, developing a practice of creating an evidentiary record and statement of decision would be valuable for many reasons, not the least of which would be the ability to proffer the documents to a court in support of a motion asserting state action immunity.

[53] Bus. & Prof. Code, §§ 109, 313.1.

[54] Bus. & Prof. Code, § 116.

[55] Bus. & Prof. Code, § 313.1.

[56] Even with an override, proposed regulations are still subject to review by the Office of Administrative Law.

C. Legislation Granting Immunity

From time to time, states have enacted laws expressly granting immunity from antitrust laws to political subdivisions, usually with respect to a specific market.[57] However, a statute purporting to grant immunity to private persons, such as licensing board members, would be of doubtful validity. Such a statute might be regarded as providing adequate authorization for anticompetitive activity, but active state supervision would probably still be required to give effect to the intended immunity. What is quite clear is that a state cannot grant blanket immunity by fiat. "[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ."[58]

IV. Indemnification of Board Members

So far we have focused entirely on the concept of immunity, and how to preserve it. But immunity is not the only way to protect state employees from the costs of suit, or to provide the reassurance necessary to secure their willingness and ability to perform their duties. Indemnification can also go a long way toward providing board members the protection they need to do their jobs. It is important for policy makers to keep this in mind in weighing the costs of creating supervision structures adequate to ensure blanket state action immunity for board members. If the costs of implementing a given supervisory structure are especially high, it makes sense to consider whether immunity is an absolute necessity, or whether indemnification (with or without additional risk-management measures such as training or reporting) is an adequate alternative.

As the law currently stands, the state has a duty to defend and indemnify members of licensing boards against antitrust litigation to the same extent, and subject to the same exceptions, that it defends and indemnifies state officers and employees in general civil litigation. The duty to defend and indemnify is governed by the Government Claims Act.[59] For purposes of the Act, the term "employee" includes officers and uncompensated servants.[60] We have repeatedly determined that members of a board,

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[57] See 1A Areeda & Hovenkamp, Antitrust Law, *supra*, 225, at pp. 135-137; e.g. *A1 Ambulance Service, Inc. v. County of Monterey* (9th Cir. 1996) 90 F.3d 333, 335 (discussing Health & Saf. Code, § 1797.6).

[58] *Parker v. Brown*, *supra*, 317 U.S. at 351.

[59] Gov. Code, §§ 810-996.6.

[60] See Gov. Code § 810.2.

commission, or similar body established by statute are employees entitled to defense and indemnification.[61]

A. Duty to Defend

Public employees are generally entitled to have their employer provide for the defense of any civil action "on account of an act or omission in the scope" of employment.[62] A public entity may refuse to provide a defense in specified circumstances, including where the employee acted due to "actual fraud, corruption, or actual malice."[63] The duty to defend contains no exception for antitrust violations.[64] Further, violations of antitrust laws do not inherently entail the sort of egregious behavior that would amount to fraud, corruption, or actual malice under state law. There would therefore be no basis to refuse to defend an employee on the bare allegation that he or she violated antitrust laws.

B. Duty to Indemnify

The Government Claims Act provides that when a public employee properly requests the employer to defend a claim, and reasonably cooperates in the defense, "the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed."[65] In general, the government is liable for an injury proximately caused by an act within the scope of employment,[66] but is not liable for punitive damages.[67]

One of the possible remedies for an antitrust violation is an award of treble damages to a person whose business or property has been injured by the violation.[68] This raises a question whether a treble damages award equates to an award of punitive damages within the meaning of the Government Claims Act. Although the answer is not

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[61] E.g., 81 Ops.Cal.Atty.Gen. 199, 200 (1998); 57 Ops.Cal.Atty.Gen. 358, 361 (1974).

[62] Gov. Code, § 995.

[63] Gov. Code, § 995.2, subd. (a).

[64] Cf. *Mt. Hawley Insurance Co. v. Lopez* (2013) 215 Cal.App.4th 1385 (discussing Ins. Code, § 533.5).

[65] Gov. Code, § 825, subd. (a).

[66] Gov. Code, § 815.2.

[67] Gov. Code, § 818.

[68] 15 U.S.C. § 15(a).

entirely certain, we believe that antitrust treble damages do *not* equate to punitive damages.

The purposes of treble damage awards are to deter anticompetitive behavior and to encourage private enforcement of antitrust laws.[69] And, an award of treble damages is automatic once an antitrust violation is proved.[70] In contrast, punitive damages are "uniquely justified by and proportioned to the actor's particular reprehensible conduct as well as that person or entity's net worth . . . in order to adequately make the award 'sting' . . . ."[71] Also, punitive damages in California must be premised on a specific finding of malice, fraud, or oppression.[72] In our view, the lack of a malice or fraud element in an antitrust claim, and the immateriality of a defendant's particular conduct or net worth to the treble damage calculation, puts antitrust treble damages outside the Government Claims Act's definition of punitive damages.[73]

C. Possible Improvements to Indemnification Scheme

As set out above, state law provides for the defense and indemnification of board members to the same extent as other state employees. This should go a long way toward reassuring board members and potential board members that they will not be exposed to undue risk if they act reasonably and in good faith. This reassurance cannot be complete, however, as long as board members face significant uncertainty about how much litigation they may have to face, or about the status of treble damage awards.

Uncertainty about the legal status of treble damage awards could be reduced significantly by amending state law to specify that treble damage antitrust awards are not punitive damages within the meaning of the Government Claims Act. This would put them on the same footing as general damages awards, and thereby remove any uncertainty as to whether the state would provide indemnification for them.[74]

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[69] *Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 783-784 (individual right to treble damages is "incidental and subordinate" to purposes of deterrence and vigorous enforcement).

[70] 15 U.S.C. § 15(a).

[71] *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 981-982.

[72] Civ. Code, §§ 818, 3294.

[73] If treble damages awards were construed as constituting punitive damages, the state would still have the option of paying them under Government Code section 825.

[74] Ideally, treble damages should not be available at all against public entities and public officials. Since properly articulated and supervised anticompetitive behavior is

As a complement to indemnification, the potential for board member liability may be greatly reduced by introducing antitrust concepts to the required training and orientation programs that the Department of Consumer Affairs provides to new board members.[75] When board members share an awareness of the sensitivity of certain kinds of actions, they will be in a much better position to seek advice and review (that is, active supervision) from appropriate officials. They will also be far better prepared to assemble evidence and to articulate reasons for the decisions they make in market-sensitive areas. With training and practice, boards can be expected to become as proficient in making and demonstrating sound market decisions, and ensuring proper review of those decisions, as they are now in making and defending sound regulatory and disciplinary decisions.

V. Conclusions

North Carolina Dental has brought both the composition of licensing boards and the concept of active state supervision into the public spotlight, but the standard it imposes is flexible and context-specific. This leaves the state with many variables to consider in deciding how to respond.

Whatever the chosen response may be, the state can be assured that *North Carolina Dental*'s "active state supervision" requirement is satisfied when a non-market-

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permitted to the state and its agents, the deterrent purpose of treble damages does not hold in the public arena. Further, when a state indemnifies board members, treble damages go not against the board members but against public coffers. "It is a grave act to make governmental units potentially liable for massive treble damages when, however 'proprietary' some of their activities may seem, they have fundamental responsibilities to their citizens for the provision of life-sustaining services such as police and fire protection." (*City of Lafayette, La. v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, 442 (dis. opn. of Blackmun, J.).)

In response to concerns about the possibility of treble damage awards against municipalities, Congress passed the Local Government Antitrust Act (15 U.S.C. §§ 34-36), which provides that local governments and their officers and employees cannot be held liable for treble damages, compensatory damages, or attorney's fees. (See H.R. Rep. No. 965, 2nd Sess., p. 11 (1984).) For an argument that punitive sanctions should never be levied against public bodies and officers under the Sherman Act, see 1A Areeda & Hovenkamp, *supra,* ¶ 228, at pp. 214-226. Unfortunately, because treble damages are a product of federal statute, this problem is not susceptible of a solution by state legislation.

[75] Bus. & Prof. Code, § 453.

participant state official has and exercises the power to substantively review a board's action and determines whether the action effectuates the state's regulatory policies.

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FEDERAL TRADE COMMISSION GUIDELINES

October 2015

FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*

I. Introduction

States craft regulatory policy through a variety of actors, including state legislatures, courts, agencies, and regulatory boards. While most regulatory actions taken by state actors will not implicate antitrust concerns, some will. Notably, states have created a large number of regulatory boards with the authority to determine who may engage in an occupation (*e.g.*, by issuing or withholding a license), and also to set the rules and regulations governing that occupation. Licensing, once limited to a few learned professions such as doctors and lawyers, is now required for over 800 occupations including (in some states) locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers.[1]

In general, a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated. However, across the United States, "licensing boards are largely dominated by active members of their respective industries . . ."[2] That is, doctors commonly regulate doctors, beekeepers commonly regulate beekeepers, and tour guides commonly regulate tour guides.

Earlier this year, the U.S. Supreme Court upheld the Federal Trade Commission's determination that the North Carolina State Board of Dental Examiners ("NC Board") violated the federal antitrust laws by preventing non-dentists from providing teeth whitening services in competition with the state's licensed dentists. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). NC Board is a state agency established under North Carolina law and charged with administering and enforcing a licensing system for dentists. A majority of the members of this state agency are themselves practicing dentists, and thus they have a private incentive to limit

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* This document sets out the views of the Staff of the Bureau of Competition. The Federal Trade Commission is not bound by this Staff guidance and reserves the right to rescind it at a later date. In addition, FTC Staff reserves the right to reconsider the views expressed herein, and to modify, rescind, or revoke this Staff guidance if such action would be in the public interest.

[1] Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny*, 162 U. PA. L. REV. 1093, 1096 (2014).

[2] *Id.* at 1095.

competition from non-dentist providers of teeth whitening services. NC Board argued that, because it is a state agency, it is exempt from liability under the federal antitrust laws. That is, the NC Board sought to invoke what is commonly referred to as the "state action exemption" or the "state action defense." The Supreme Court rejected this contention and affirmed the FTC's finding of antitrust liability.

In this decision, the Supreme Court clarified the applicability of the antitrust state action defense to state regulatory boards controlled by market participants:

> "The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* [*Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)] active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

In the wake of this Supreme Court decision, state officials have requested advice from the Federal Trade Commission regarding antitrust compliance for state boards responsible for regulating occupations. This outline provides FTC Staff guidance on two questions. *First*, when does a state regulatory board require active supervision in order to invoke the state action defense? *Second*, what factors are relevant to determining whether the active supervision requirement is satisfied?

Our answers to these questions come with the following caveats.

- Vigorous competition among sellers in an open marketplace generally provides consumers with important benefits, including lower prices, higher quality services, greater access to services, and increased innovation. For this reason, a state legislature should empower a regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers. The Federal Trade Commission and its staff have frequently advocated that states avoid unneeded and burdensome regulation of service providers.[3]

- Federal antitrust law does <u>not</u> require that a state legislature provide for active supervision of any state regulatory board. A state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust

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[3] *See, e.g.*, Fed. Trade Comm'n Staff Policy Paper, *Policy Perspectives: Competition and the Regulation of Advanced Practice Registered Nurses* (Mar. 2014), https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf; Fed. Trade Comm'n & U.S. Dept. of Justice, Comment before the South Carolina Supreme Court Concerning Proposed Guidelines for Residential and Commercial Real Estate Closings (Apr. 2008), https://www.ftc.gov/news-events/press-releases/2008/04/ftcdoj-submit-letter-supreme-court-south-carolina-proposed.

laws. If the state legislature determines that a regulatory board should be subject to antitrust oversight, then the state legislature need not provide for active supervision.

➢ Antitrust analysis – including the applicability of the state action defense – is fact-specific and context-dependent. The purpose of this document is to identify certain overarching legal principles governing when and how a state may provide active supervision for a regulatory board. We are not suggesting a mandatory or one-size-fits-all approach to active supervision. Instead, we urge each state regulatory board to consult with the Office of the Attorney General for its state for customized advice on how best to comply with the antitrust laws.

➢ This FTC Staff guidance addresses only the active supervision prong of the state action defense. In order successfully to invoke the state action defense, a state regulatory board controlled by market participants must also satisfy the clear articulation prong, as described briefly in Section II. below.

➢ This document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.

II. Overview of the Antitrust State Action Defense

"Federal antitrust law is a central safeguard for the Nation's free market structures . . . . The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *N.C. Dental*, 135 S. Ct. at 1109.

Under principles of federalism, "the States possess a significant measure of sovereignty." *N.C. Dental*, 135 S. Ct. at 1110 (*quoting Community Communications Co. v. Boulder*, 455 U.S. 40, 53 (1982)). In enacting the antitrust laws, Congress did not intend to prevent the States from limiting competition in order to promote other goals that are valued by their citizens. Thus, the Supreme Court has concluded that the federal antitrust laws do not reach anticompetitive conduct engaged in by a State that is acting in its sovereign capacity. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). For example, a state legislature may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. Dental*, 135 S. Ct. at 1109.

Are the actions of a state regulatory board, like the actions of a state legislature, exempt from the application of the federal antitrust laws? In *North Carolina State Board of Dental Examiners*, the Supreme Court reaffirmed that a state regulatory board is not the sovereign. Accordingly, a state regulatory board is not necessarily exempt from federal antitrust liability.

More specifically, the Court determined that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates" may invoke the state action defense only when two requirements are satisfied: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. *N.C. Dental*, 135 S. Ct. at 1114.

- The Supreme Court addressed the clear articulation requirement most recently in *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). The clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id.* at 1013.

- The State's clear articulation of the intent to displace competition is not alone sufficient to trigger the state action exemption. The state legislature's clearly-articulated delegation of authority to a state regulatory board to displace competition may be "defined at so high a level of generality as to leave open critical questions about how

and to what extent the market should be regulated." There is then a danger that this delegated discretion will be used by active market participants to pursue private interests in restraining trade, in lieu of implementing the State's policy goals. *N.C. Dental*, 135 S. Ct. at 1112.

- The active supervision requirement "seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming [antitrust] immunity." *Id.*

Where the state action defense does not apply, the actions of a state regulatory board controlled by active market participants may be subject to antitrust scrutiny. Antitrust issues may arise where an unsupervised board takes actions that restrict market entry or restrain rivalry. The following are some scenarios that have raised antitrust concerns:

- A regulatory board controlled by dentists excludes non-dentists from competing with dentists in the provision of teeth whitening services. *Cf. N.C. Dental,* 135 S. Ct. 1101.

- A regulatory board controlled by accountants determines that only a small and fixed number of new licenses to practice the profession shall be issued by the state each year. *Cf. Hoover v. Ronwin*, 466 U.S. 558 (1984).

- A regulatory board controlled by attorneys adopts a regulation (or a code of ethics) that prohibits attorney advertising, or that deters attorneys from engaging in price competition. *Cf. Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

III. Scope of FTC Staff Guidance

A. This Staff guidance addresses the applicability of the state action defense under the federal antitrust laws. Concluding that the state action defense is inapplicable does not mean that the conduct of the regulatory board necessarily violates the federal antitrust laws. A regulatory board may assert defenses ordinarily available to an antitrust defendant.

1. **Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.**

Example 1: A regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without raising antitrust concerns. A regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Example 2: Suppose a market with several hundred licensed electricians. If a regulatory board suspends the license of one electrician for substandard work, such action likely does not unreasonably harm competition. *Cf. Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc).

2. **The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344 n. 6 (1987).**

Example 3: A state statute requires that an applicant for a chauffeur's license submit to the regulatory board, among other things, a copy of the applicant's diploma and a certified check for $500. An applicant fails to submit the required materials. If for this reason the regulatory board declines to issue a chauffeur's license to the applicant, such action would not be considered an unreasonable restraint. In the circumstances described, the denial of a license is a ministerial or non-discretionary act of the regulatory board.

3. **In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the "sham exception." Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).**

Example 4: A state statute authorizes the state's dental board to maintain an action in state court to enjoin an unlicensed person from practicing dentistry. The members of the dental board have a basis to believe that a particular individual is practicing dentistry but does not hold a valid license. If the dental board files a lawsuit against that individual, such action would not constitute a violation of the federal antitrust laws.

B. Below, FTC Staff describes when active supervision of a state regulatory board is required in order successfully to invoke the state action defense, and what factors are relevant to determining whether the active supervision requirement has been satisfied.

1. **When is active state supervision of a state regulatory board required in order to invoke the state action defense?**

General Standard: "[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental,* 135 S. Ct. at 1114.

Active Market Participants: A member of a state regulatory board will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.

- If a board member participates in any professional or occupational sub-specialty that is regulated by the board, then that board member is an active market participant for purposes of evaluating the active supervision requirement.

- It is no defense to antitrust scrutiny, therefore, that the board members themselves are not directly or personally affected by the challenged restraint. For example, even if the members of the NC Dental Board were orthodontists who do not perform teeth whitening services (as a matter of law or fact or tradition), their control of the dental board would nevertheless trigger the requirement for active state supervision. This is because these orthodontists are licensed by, and their services regulated by, the NC Dental Board.

- A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant.

Method of Selection: The method by which a person is selected to serve on a state regulatory board is not determinative of whether that person is an active market participant in the occupation that the board regulates. For example, a licensed dentist is deemed to be an active market participant regardless of whether the dentist (i) is appointed to the state dental board by the governor or (ii) is elected to the state dental board by the state's licensed dentists.

***A Controlling Number, Not Necessarily a Majority, of Actual Decisionmakers*:**

- Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (*e.g.*, through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.

- Whether a particular restraint has been imposed by a "controlling number of decisionmakers [who] are active market participants" is a fact-bound inquiry that must be made on a case-by-case basis. FTC Staff will evaluate a number of factors, including:

  - ✓ The structure of the regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board's authority.

  - ✓ Whether the board members who are active market participants have veto power over the board's regulatory decisions.

Example 5: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of five board members. Thus, no regulation may become effective without the assent of at least one electrician member of the board. In this scenario, the active market participants effectively have veto power over the board's regulatory authority. The active supervision requirement is therefore applicable.

  - ✓ The level of participation, engagement, and authority of the non-market participant members in the business of the board – generally and with regard to the particular restraint at issue.

  - ✓ Whether the participation, engagement, and authority of the non-market participant board members in the business of the board differs from that of board members who are active market participants – generally and with regard to the particular restraint at issue.

  - ✓ Whether the active market participants have in fact exercised, controlled, or usurped the decisionmaking power of the board.

Example 6: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of a majority of board members. When voting on proposed regulations, the non-electrician members routinely defer to the preferences of the electrician members. Minutes of

board meetings show that the non-electrician members generally are not informed or knowledgeable concerning board business – and that they were not well informed concerning the particular restraint at issue. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

Example 7: The state board of electricians consists of four non-electrician members and three practicing electricians. Documents show that the electrician members frequently meet and discuss board business separately from the non-electrician members. On one such occasion, the electrician members arranged for the issuance by the board of written orders to six construction contractors, directing such individuals to cease and desist from providing certain services. The non-electrician members of the board were not aware of the issuance of these orders and did not approve the issuance of these orders. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

2. What constitutes active supervision?

FTC Staff will be guided by the following principles:

- "[T]he purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control" such that the details of the regulatory scheme "have been established as a product of deliberate state intervention" and not simply by agreement among the members of the state board. "Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." The State is not obliged to "[meet] some normative standard, such as efficiency, in its regulatory practices." *Ticor*, 504 U.S. at 634-35. "The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Id.* at 635.

- It is necessary "to ensure the States accept political accountability for anticompetitive conduct they permit and control." *N.C. Dental*, 135 S. Ct. at 1111. *See also Ticor*, 504 U.S. at 636.

- "The Court has identified only a few constant requirements of active supervision: 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.' Further, the state supervisor may not itself be an active market participant." *N.C. Dental*, 135 S. Ct. at 1116–17 (citations omitted).

- The active supervision must precede implementation of the allegedly anticompetitive restraint.

- "[T]he inquiry regarding active supervision is flexible and context-dependent." "[T]he adequacy of supervision . . . will depend on all the circumstances of a case." *N.C. Dental*, 135 S. Ct. at 1116–17. Accordingly, FTC Staff will evaluate each case in light of its own facts, and will apply the applicable case law and the principles embodied in this guidance reasonably and flexibly.

3. What factors are relevant to determining whether the active supervision requirement has been satisfied?

FTC Staff will consider the presence or absence of the following factors in determining whether the active supervision prong of the state action defense is satisfied.

- The supervisor has obtained the information necessary for a proper evaluation of the action recommended by the regulatory board. As applicable, the supervisor has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies, and reviewed documentary evidence.

  - ✓ The information-gathering obligations of the supervisor depend in part upon the scope of inquiry previously conducted by the regulatory board. For example, if the regulatory board has conducted a suitable public hearing and collected the relevant information and data, then it may be unnecessary for the supervisor to repeat these tasks. Instead, the supervisor may utilize the materials assembled by the regulatory board.

- The supervisor has evaluated the substantive merits of the recommended action and assessed whether the recommended action comports with the standards established by the state legislature.

- The supervisor has issued a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision.

  - ✓ A written decision serves an evidentiary function, demonstrating that the supervisor has undertaken the required meaningful review of the merits of the state board's action.

  - ✓ A written decision is also a means by which the State accepts political accountability for the restraint being authorized.

Scenario 1: Example of satisfactory active supervision of a state board regulation designating teeth whitening as a service that may be provided only by a licensed dentist, where state policy is to protect the health and welfare of citizens and to promote competition.

- The state legislature designated an executive agency to review regulations recommended by the state regulatory board. Recommended regulations become effective only following the approval of the agency.

- The agency provided notice of (i) the recommended regulation and (ii) an opportunity to be heard, to dentists, to non-dentist providers of teeth whitening, to the public (in a newspaper of general circulation in the affected areas), and to other interested and affected persons, including persons that have previously identified themselves to the agency as interested in, or affected by, dentist scope of practice issues.

- The agency took the steps necessary for a proper evaluation of the recommended regulation. The agency:

  - ✓ Obtained the recommendation of the state regulatory board and supporting materials, including the identity of any interested parties and the full evidentiary record compiled by the regulatory board.

  - ✓ Solicited and accepted written submissions from sources other than the regulatory board.

  - ✓ Obtained published studies addressing (i) the health and safety risks relating to teeth whitening and (ii) the training, skill, knowledge, and equipment reasonably required in order to safely and responsibly provide teeth whitening services (if not contained in submission from the regulatory board).

  - ✓ Obtained information concerning the historic and current cost, price, and availability of teeth whitening services from dentists and non-dentists (if not contained in submission from the regulatory board). Such information was verified (or audited) by the Agency as appropriate.

  - ✓ Held public hearing(s) that included testimony from interested persons (including dentists and non-dentists). The public hearing provided the agency with an opportunity (i) to hear from and to question providers, affected customers, and experts and (ii) to supplement the evidentiary record compiled by the state board. (As noted above, if the state regulatory board has previously conducted a suitable public hearing, then it may be unnecessary for the supervising agency to repeat this procedure.)

- The agency assessed all of the information to determine whether the recommended regulation comports with the State's goal to protect the health and

welfare of citizens and to promote competition.

- The agency issued a written decision accepting, rejecting, or modifying the scope of practice regulation recommended by the state regulatory board, and explaining the rationale for the agency's action.

Scenario 2: Example of satisfactory active supervision of a state regulatory board administering a disciplinary process.

A common function of state regulatory boards is to administer a disciplinary process for members of a regulated occupation. For example, the state regulatory board may adjudicate whether a licensee has violated standards of ethics, competency, conduct, or performance established by the state legislature.

Suppose that, acting in its adjudicatory capacity, a regulatory board controlled by active market participants determines that a licensee has violated a lawful and valid standard of ethics, competency, conduct, or performance, and for this reason, the regulatory board proposes that the licensee's license to practice in the state be revoked or suspended. In order to invoke the state action defense, the regulatory board would need to show both clear articulation and active supervision.

- In this context, active supervision may be provided by the administrator who oversees the regulatory board (*e.g.*, the secretary of health), the state attorney general, or another state official who is not an active market participant. The active supervision requirement of the state action defense will be satisfied if the supervisor: (i) reviews the evidentiary record created by the regulatory board; (ii) supplements this evidentiary record if and as appropriate; (iii) undertakes a de novo review of the substantive merits of the proposed disciplinary action, assessing whether the proposed disciplinary action comports with the policies and standards established by the state legislature; and (iv) issues a written decision that approves, modifies, or disapproves the disciplinary action proposed by the regulatory board.

Note that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.

The following do <u>not</u> constitute active supervision of a state regulatory board that is controlled by active market participants:

- The entity responsible for supervising the regulatory board is itself controlled by active market participants in the occupation that the board regulates. *See N.C. Dental*, 135 S. Ct. at 1113-14.

- A state official monitors the actions of the regulatory board and participates in deliberations, but lacks the authority to disapprove anticompetitive acts that fail to accord with state policy. *See Patrick v. Burget*, 486 U.S. 94, 101 (1988).

- A state official (*e.g.*, the secretary of health) serves ex officio as a member of the regulatory board with full voting rights. However, this state official is one of several members of the regulatory board and lacks the authority to disapprove anticompetitive acts that fail to accord with state policy.

- The state attorney general or another state official provides advice to the regulatory board on an ongoing basis.

- An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency. The independent state agency perfunctorily approves the recommendations of the regulatory board. *See Ticor*, 504 U.S. at 638.

- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board. *See Patrick*, 486 U.S. at 104-05.

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MEMORANDUM

DATE	November 9, 2015
TO	Members of the Dental Board of California
FROM	Lusine M Sarkisyan, Legislative & Regulatory Analyst
SUBJECT	**Agenda Item 10A:** 2015 End of Year Legislative Summary Report

Background

Throughout 2015, staff tracked several bills that would impact the Dental Board of California (Board) and healing arts boards in general. Board members and staff have actively partaken in this year's Legislative Session by communicating with Legislators and their staff, and taking positions on proposed bills. The bills that the Board has followed include:

- AB 85 (Wilk) Open Meetings
- AB 178 (Bonilla) Board of Vocational Nursing and Psychiatric Technicians
- AB 179 (Bonilla) Healing Arts
- AB 483 (Patterson) Healing Arts: Licensure Fees: Proration
- AB 502 (Chau) Dental Hygiene
- AB 507 (Olsen) DCA: BreEZe System
- AB 611 (Dahle) Controlled Substances: Prescriptions: Reporting
- AB 648 (Low) Community – Based Services: Virtual Dental Home Program
- AB 880 (Ridley-Thomas) Dentistry: Licensure: Exemption
- SB 52 (Walters) Regulatory Boards: Healing Arts
- SB 800 (Senate Business, Professions and Economic Development Committee) Healing Arts

The following bills were held in committees and did not meet the required legislative deadlines to progress forward:

- AB 648 (Low) Community – Based Services: Virtual Dental Home Program
- SB 52 (Walters) Regulatory Boards: Healing Arts

The following bills have been designated as 2-year bills and will be taken up again by the Legislature in 2016:

- AB 507 (Olsen) Department of Consumer Affairs: BreEZe System: Annual Report
- AB 611 (Dahle) Controlled Substances: Prescriptions: Reporting

The following bills were vetoed by Governor Brown (See attached vetoed messages):

- AB 85 (Wilk) Open Meetings
- AB 483 (Patterson) Healing Arts: Licensure Fees: Proration

The following includes summaries of the bills that have been signed by Governor Brown and will become effective on January 1, 2016:

AB 178 Bonilla (Chapter 429, Statutes of 2015)

BOARD OF VOCATIONAL NURSING & PSYCHIATRIC TECHNICIANS

Existing law, the Vocational Nursing Practice Act and the Psychiatric Technicians Law, requires the Board of Vocational Nursing and Psychiatric Technicians (BVNPT), among other things, appoint an executive officer, who is a licensed vocational nurse, registered nurse, or psychiatric technician. This bill would remove the requirement that the executive officer be a licensed vocational nurse, registered nurse, or psychiatric technician.

Initially, the Board took a "support" position at its May 2015 meeting, because the bill included provisions relating to the registered dental assistant practical examination, however that provision was deleted from this bill and incorporated into AB 179.

AB 179 Bonilla (Chaptered 510, Statutes of 2015)

HEALING ARTS

This bill extends the licensing, regulatory, and enforcement authority of the Dental Board of California (Board) until January 1, 2020. This bill also makes several amendments to the provisions of the Dental Practice Act including but not limited to: increases in the statutorily authorized fee maximums relating to dentist and dental assistant licensure and permitting, collection of email addresses, and elimination of the registered dental assistant examination. Additionally, this bill provides that it is not professional misconduct if a healing arts licensee engages in consensual sexual conduct with his or her spouse when that licensee provides medical treatment and extends the operation of the Board of Vocational Nursing and Psychiatric Technicians (BVNPT).

The Board took a "support" position during the May 2015 meeting.

AB 502 Chau (Chapter 516, Statutes of 2015)

DENTAL HYGIENE
This bill amends the Dental Hygiene Practice Act and the Moscone-Knox Professional Corporation Act; authorizes a registered dental hygienist in alternative practice to incorporate with licensed dentists, registered dental assistants, registered dental hygienists, registered dental hygienists in extended functions, and other registered dental hygienists in alternative practice; and requires licensees to practice within the scope of license.

The Board took a "watch" position during the May 2015 meeting.

AB 880 Ridley-Thomas (Chapter 409, Statutes of 2015)
DENTISTRY: LICENSURE: EXEMPTION
This bill authorizes students enrolled in their final year at a California dental school, approved by the Dental Board of California, to practice dentistry under the supervision of licensed dentists at free sponsored events.

At the May, 2015 meeting, the Board took an "oppose unless amended" position. The position letter, sent to the author in early June, indicated that while the Board recognizes the importance of exposing students to volunteerism and community outreach, it was concerned that protection of underinsured and uninsured citizens of California may be compromised by the unlicensed practice of dentistry by dental students unless safeguards were included in this proposed legislation.

After amendments were received from the Board and the California Society of Pediatric Dentistry (CSPD), in August 2015, Assembly Member Ridley-Thomas accepted the proposed amendments in order to proceed through the legislative process.

During the August 2015 meeting, the Board decided to continue to "watch" the bill, because it was determined that there were too many variables to be considered, before providing a "support" position.

SB 800 Senate Business, Professions and Economic Development Committee (Chapter 426, Statutes of 2015)
HEALING ARTS
This bill makes several non-controversial minor, non-substantive, or technical changes to various provisions pertaining to the health-related regulatory Boards of the Department of Consumer Affairs. This bill updates language to replace the "Board of Dental Examiners" with the "Dental Board of California" for consistency on how the Board is referenced. Additionally, this bill states that the Dental Hygiene Committee of California (DHCC) is a separate entity from the Dental Board of California; states that DHCC must separately create and maintain a

central file of the names of persons who hold a license, certificate, or similar authority; removes a deadline date of January 1, 2010; and repeals fee for examination for licensure as a registered dental hygienist for third and fourth year dental students.

The Board took a “support” position during the May 2015 meeting.

Action Requested:
No action necessary.

2015 CA A 85: Governor's Message - 09/28/2015

To the Members of the California State Assembly:

I am returning Assembly Bill 85 without my signature.

This bill expands the Bagley-Keene Open Meeting Act to include state advisory bodies, regardless of their size.

My thinking on this matter has not changed from last year when I vetoed a similar measure, AB 2058. I believe strongly in transparency and openness but the more informal deliberation of advisory bodies is best left to current law.

Sincerely,

Edmund G. Brown Jr.

2015 CA A 483: Governor's Message - 10/10/2015

To the Members of the California State Senate:

I am returning Assembly Bill 483 without my signature.

This bill would require various programs - but not all - within the Department of Consumer Affairs to prorate license fees, based on how many months have elapsed between the initial issuance of a license and time of renewal.

Creating an equitable licensing fee is a policy I support. Such an endeavor, however, can be crafted more carefully and thoughtfully through regulation.

I am directing the Department of Consumer Affairs to work with each board, bureau, and commission to devise a sound approach to guarantee that each licensee pays a fair amount.

Sincerely,

Edmund G. Brown Jr.

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MEMORANDUM

DATE	November 10, 2015
TO	Members of the Dental Board of California
FROM	Lusine M Sarkisyan, Legislative and Regulatory Analyst
SUBJECT	**Agenda Item 10B:** Update on 2015 Pending Regulatory Packages

Abandonment of Applications (California Code of Regulations, Title 16, Section 1004):

At its May 2013 meeting, the Dental Board of California (Board) approved proposed regulatory language relative to the abandonment of applications and directed staff to initiate the rulemaking. Board staff filed the initial rulemaking documents with the Office of Administrative Law (OAL) on July 23, 2015 and the proposal was published in the California Regulatory Notice Register on Friday, August 7, 2015. The 45-day public comment period began on August 7, 2015 and ended on September 21, 2015. A public regulatory hearing was held in Sacramento on September 22, 2015. The Board did not receive comments. Since, there were no comments the Board adopted the proposed language and directed staff to finalize the rulemaking file.

Staff submitted the final rulemaking file to the Department of Consumer Affairs (Department) on September 28, 2015. The rulemaking file is currently pending approval from the Director of the Department and the Secretary of the Business, Consumer Services and Housing Agency (Agency), and the Director of the Department of Finance (Finance).

Final rulemaking files are required to be approved by the Director of the Department, the Agency Secretary, and the Finance Director. Once approval signatures are obtained, the final rulemaking file will be submitted to the OAL. The OAL will have thirty (30) working days to review the file. Once approved, the rulemaking will be filed with the Secretary of State. Beginning January 1, 2013, new quarterly effective dates for regulations will be dependent upon the timeframe an OAL approved rulemaking is filed with the Secretary of State, as follows:

- The regulation would take effect on January 1 if the OAL approved rulemaking is filed with the Secretary of State on September 1 to November 30, inclusive.

- The regulation would take effect on April 1 if the OAL approved rulemaking is filed with the Secretary of State on December 1 to February 29, inclusive.
- The regulation would take effect on July 1 if the OAL approved rulemaking is filed with the Secretary of State on March 1 to May 31, inclusive.
- The regulation would take effect on October 1 if the OAL approved regulation is filed on June 1 to August 31, inclusive.

The deadline to submit this final rulemaking file to the Office of Administrative Law for review and determination of approval is August 6, 2016.

Delegation of Authority to the Executive Officer (California Code of Regulations, Title 16, Section 1001):

At its May 2014 meeting, the Board approved proposed regulatory language to delegate authority to the Board's Executive Officer to approve settlement agreements for the revocation, surrender, or interim suspension of a license without requiring the Board to vote to adopt the settlement. Board staff filed the initial rulemaking documents with OAL on February 10, 2015 and the proposal was published in the California Regulatory Notice on February 20, 2015. The 45-day public comment period began on February 20, 2015 and ended on April 6, 2015. A regulatory hearing was held on April 7, 2015 in Sacramento. No public comments were received in response to the proposal.

Staff submitted the final rulemaking file to the Department of Consumer Affairs (Department) on June 17, 2015. The final rulemaking file has been approved by the Director of the Department and is pending approval by Agency Secretary and the Director Finance. Once approval signatures are obtained, the final rulemaking file will be submitted to the OAL. The OAL will have thirty (30) working days to review the file. Once approved, the rulemaking will be filed with the Secretary of State. Beginning January 1, 2013, new quarterly effective dates for regulations will be dependent upon the timeframe on OAL approved rulemaking is filed with the Secretary of State, as follows:

- The regulation would take effect on January 1 if the OAL approved rulemaking is filed with the Secretary of State on September 1 to November 30, inclusive.
- The regulation would take effect on April 1 if the OAL approved rulemaking is filed with the Secretary of State on December 1 to February 29, inclusive.
- The regulation would take effect on July 1 if the OAL approved rulemaking is filed with the Secretary of State on March 1 to May 31, inclusive.
- The regulation would take effect on October 1 if the OAL approved regulation is filed on June 1 to August 31, inclusive.

The deadline to submit the final rulemaking file to the Office of Administrative Law for review and determination of approval is February 19, 2016.

Dental Assisting Comprehensive Regulatory Proposal:

The Dental Assisting Council (Council) held a regulatory development workshop on June 19, 2015 to work on the Radiation Safety Course Requirements as part of the Dental Assisting Comprehensive Regulatory Proposal. Board staff anticipates scheduling a series of workshops to develop proposed regulatory language to present to the Board at a future meeting. Once completed, this rulemaking will include educational program and course

requirements, examination requirements, and licensure requirements relating to dental assisting.

Elective Facial Cosmetic Surgery Permit Application Requirements and Renewal:
Regulations are necessary to interpret and specify the provisions contained in Business and Professions Code Section 1638.1 relating to the application and approval process requirements for the issuance of an Elective Facial Cosmetic Surgery permit. Board staff scheduled a teleconference in October where further discussions took place regarding regulatory language. Board staff anticipates proposed language will be considered by the Elective Facial Cosmetic Surgery (EFCS) Permit Credentialing Committee at a future meeting.

Licensure by Credential Application Requirements:
The Board added this rulemaking to its list of priorities for Fiscal Year (FY) 2014-15. Staff has been working with Board Legal Counsel to identify issues and develop regulatory language to implement, interpret, and specify the application requirements for the Licensure by Credential pathway to licensure. A subcommittee was appointed (Drs. Whitcher and Woo) to work with staff to draft regulatory language and to determine if statutory changes are also necessary. Staff met with the subcommittee and the Board Legal Counsel in October. As a result of the meeting, staff has been able to proceed forward in the development of regulatory language to proceed forward in the rulemaking process and the Board will be making recommendations and considering a few policy issues at this meeting.

Continuing Education Requirements and Basic Life Support Equivalency Standards:
In March 2013, the Board's Executive Officer received a letter from Mr. Ralph Shenefelt, Senior Vice President of the Health and Safety Institute, petitioning the Board to amend California Code of Regulations, Title 16, Sections 1016(b)(1)(C) and 1017(d) such that a Basic Life Support (BLS) certification issued by the American Safety and Health Institute (ASHI), which is a brand of the Health and Safety Institute, would satisfy the mandatory BLS certification requirement for license renewal, and the required advanced cardiac life support course required for the renewal of a general anesthesia permit. Additionally, the letter requested an amendment to Section 1017(d) to specify that an advanced cardiac life support course which is approved by the American Heart Association or the ASHI include an examination on the materials presented in the course or any other advanced cardiac life support course which is identical in all respects, except for the omission of materials that relate solely to hospital emergencies or neonatology, to the most recent "American Heart Association Guidelines for Cardiopulmonary Resuscitation and Emergency Cardiovascular Care" published by the American Heart Association.

Additionally, AB 836 (Skinner Chapter 299, statutes of 2013) restricted the continuing education requirement hours for active-retired dentists who provide only uncompensated care at a maximum of 60% of that required for non-retired active dentists, and requires the Board to report on the status of retired active dentists who provide only uncompensated care during its next sunset report. These new requirements will need to be implemented as part of this rulemaking proposal.

The Board deemed the development of a regulatory package relating to Continuing Education and Basic Life Support Equivalency Standards a priority for FY 2014-15.

Board staff is working on the development of proposed language and will present it to the Board for consideration at a future meeting.

Mobile and Portable Dental Unit Registration Requirements (California Code of Regulations, Title 16, Section 1049):

Senate Bill 562 (Galgiani Chapter 562, Statute of 2013) eliminated the one mobile dental clinic or unit limit and required a mobile dental unit or a dental practice that routinely uses portable dental units, a defined, to be registered and operated in accordance with the regulations of the Board. The bill required any regulations adopted by the board pertaining to these matter to require the registrant to identify a licensed dentist responsible for the mobile dental unit or portable practice, and to include requirements for availability to follow-up and emergency care, maintenance and availability of provider and patient records, and treatment information to be provided to patients and other appropriate parties. At its November 2014 meeting, the Board directed staff to add Mobile and Portable Dental Units to its list of regulatory priorities in order to interpret and specify the provisions relating to the registration requirements for the issuance of a mobile and portable dental unit.

Action Requested:

No action necessary.

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MEMORANDUM

DATE	November 18, 2015
TO	Members of the Dental Board of California
FROM	Lusine M Sarkisyan, Legislative and Regulatory Analyst
SUBJECT	**Agenda Item 10(C):** Discussion and Possible Action Regarding Legislative Proposals for 2016: Healing Arts Omnibus Bill

Background:

The Senate Business, Professions, and Economic Development Committee (Committee) will be introducing two omnibus bills for 2016; one bill will be designated for health care board and bureau legislation and the other will be for non-health care board and bureau legislation. The Committee plans to introduce the bills for introduction in early 2016 and typically requests that board and bureau proposals be submitted to the Committee in early January for inclusion in the introduced version of the bill. Omnibus bill proposals should be non-controversial and are intended to be used for clean-up.

Committee staff will review the proposals and consult with the Republican caucus and their staff, as well as Committee member offices to determine if the proposals are suitable for inclusion in the omnibus bills. Boards and bureaus anticipate being notified by late January of the Committee's decision to include proposals.

2016 Omnibus Bill Proposal:

The Joint Commission on National Dental Examinations is implementing the Integrated National Board Dental Examination (INDBE) to replace Part I and Part II of the National Dental Board Examination. This would require a technical change to the Dental Practice Act. The following code sections of the DPA will need to be updated to reflect the necessary change:

1632. (a) The board shall require each applicant to successfully complete the Part I and Part II written examinations of the National Board Dental Examination of the Joint Commission on National Dental Examinations.

Proposed Revision: The board shall require each applicant to successfully complete the ~~Part I and Part II~~ written examination~~s~~ of the National Board Dental Examination of the Joint Commission on National Dental Examinations.

1634.1. (d) Satisfactory evidence of having successfully completed the written examinations of the National Board Dental Examination of the Joint Commission on National Dental Examinations.

Proposed Revision: Satisfactory evidence of having successfully completed the written examination~~s~~ of the National Board Dental Examination of the Joint Commission on National Dental Examinations.

Board Action Requested:

After consideration of the proposed amendments, staff requests the Board accept, reject, or modify the recommendation. If the Board approves a proposal, direct staff to prepare the proposal for submission to the Committee for inclusion in the 2016 healing arts board omnibus bill.

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MEMORANDUM

DATE	November 16, 2015
TO	Members of the Dental Board of California
FROM	Lusine M Sarkisyan, Legislative and Regulatory Analyst
SUBJECT	**AGENDA ITEM 10 (D):** Discussion of Prospective Legislative Proposals

Stakeholders are encouraged to submit proposals in writing to the Board before or during the meeting for possible consideration by the Board at a future meeting.

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MEMORANDUM

DATE	November 16, 2015
TO	Dental Board of California
FROM	Karen Fischer, Executive Officer
SUBJECT	**Agenda Item 11:** Discussion and Possible Action Regarding Notification to Patients by Licensees on Probation

During the Board's sunset review hearings in March 2015, Senator Marty Block asked whether or not the Board had considered requiring licensees who are on probation to notify the patients of the probation. The Board's response was "no".

This issue first came up during the Board's sunset review hearings in 2011 when a complainant, who had filed complaints with the Board in 2006 and 2007, testified before the Legislature that she was permanently disfigured by a dentist who was on probation at the time of her treatment. The complainant's cases were reviewed by two Dental Board subject matter experts who independently determined that the complainant's treatment was within the standard of care; and the cases were closed. Following receipt of the closure letters, the complainant telephoned and wrote letters to the Board expressing dissatisfaction with the outcome. In particular, she expressed strong disappointment that she was not personally made aware of the dentist's probationary status. She has been strongly advocating for legislation that would require dentists who are on probation to notify his/her patients of the probation.

The Board has made improvements to assist consumers in researching a dentist prior to scheduling an appointment. In 2005, the Board began publishing all disciplinary actions, including Accusations and Decisions, and the current license status of all licensees on the Board's website. Additionally, the Board has promulgated regulations to require the posting of a notice in all dental offices that notifies patients of the Board's contact information so that if patients have any questions or concerns about a dentist, they can contact the Board.

The Medical Board of California (MBC) is facing a similar question. The MBC received an Administrative Petition from the Consumers Union Safe Patient Project calling for the MBC to require that physicians on probation inform their patients of the physician's probation. The issue was taken up at the MBC meeting which was held October 30,

2015. While the Medical Board voted down the petition, it did agree to study the issue further and to enlist comments from stakeholders. Please refer to the following link to view this discussion: http://www.mbc.ca.gov/About_Us/Meetings/2015/
The discussion begins at approximately 32:00 minutes on Webcast 2.

The MBC Executive Officer contacted 26 Boards within the Department of Consumer Affairs and six other States to inquire about a requirement that licensees notify consumers of probation. Twenty-five boards do not require licensees on probation to notify consumers; and none of the states that were contacted have such a provision.

Dental Board staff will include any follow up to suggestions, concerns, or recommendations coming from this meeting into a subsequent meeting agenda.

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MEMORANDUM

DATE	November 13, 2015
TO	Members of the Dental Board of California
FROM	Lusine M Sarkisyan, Legislative & Regulatory Analyst
SUBJECT	**Agenda Item 12:** Discussion and Possible Board Action on the Subcommittee Report Regarding Changes to Licensure By Credential (LBC) Application Requirements.

BACKGROUND

In 1996, the Joint Legislative Sunset Review Committee recommended that the Dental Board of California (Board) pursue licensure by credential (LBC) as a method for increasing the number of dentists who could practice in California. As a result, Assembly Bill 1428 (Chapter 507, Statutes of 2001) was signed into law, authored by Assembly Member Sam Aanestad.

After the enactment of AB 1428, there were numerous discussions about applicants' experiences not being up-to-date and the need for application process clarifications. Therefore, Governor Schwarzenegger signed into law Senate Bill 928 (Chapter 464, Statutes of 2004), authored by Senator Sam Aanestad, which requiref an out-of-state applicant to provide proof that he or she has either been in active clinical practice or a full-time faculty member in an accredited dental education program and in active clinical practice, for a total of at least 5,000 hours in five of the seven years immediately preceding his or her application. This bill clarified that the total 5,000-hour clinical practice requirement may be satisfied over a period of seven consecutive years prior to application to accommodate disruptive circumstances like disability or medical leave, military service obligations, etc. Additionally, Senate Bill 299 (Chapter 4, Statutes of 2006), authored by Senator Wesley Chesbro, was enacted into law to provide that the five year clinical practice requirement could be met by the applicant contracting to practice dentistry full time for two years in a specified licensed primary care clinic or teach two years in an accredited dental education program.

The Board does not currently have regulations in place to interpret the statutory provisions relating to the LBC Licensure pathway and it has become necessary to clarify application requirement via regulation.

As a result, the Board has voted to include Licensure by Credential Application requirements to its list of priority rulemakings for Fiscal Years 2014/2015 and 2015/2016.Staff has worked with Legal Counsel to develop proposed regulatory language for the Board's consideration. The language was hand carried to the meeting in November 2014, however due to the length of the document and the Board not having had an opportunity to review it before the meeting, the item was tabled for the February 2015 meeting.

At the February 2015 meeting, the Board appointed Doctors Bruce Whitcher, DDS and Debra Woo, DDS to the subcommittee on LBC to work with staff and Legal Counsel in addressing and clarifying issues relating to the application process for the LBC pathway.

SUBCOMMITTEE MEETING

In October, staff scheduled a teleconference with the subcommittee and Legal Counsel for the purpose of obtaining feedback to staff's questions relating to LBC application requirements and the development of the proposed regulatory language. Staff is still in the process of preparing the proposed regulatory language to bring to the Board for consideration at a future meeting; however, the subcommittee recommended a couple of policy issues be forwarded to the Board for consideration and discussion so as to provide staff with the feedback necessary to continue developing the regulatory language.

The subcommittee requests the Board to discuss and provide feedback on the following issues:

1. What proof should be required of applicants who are self-employed in another state?

    a. Would an explanation of benefits be sufficient for documentation purposes or should there be a statement included stating, "Other documents as deemed necessary by the Board"?

2. Pursuant to Business and Professions Code (PBC 1635.5(a)(3)(A), if documentation is submitted demonstrating that the applicant completed a residency training program accredited by the American Dental Association Commission on Dental Accreditation, the applicant will receive credit for two of the five years required.

    a. Should the applicant, who has completed a one year residency program, receive credit for two years as stated in statute? Or

    b. Should the applicant receive one year credit for every one year of residency completed?

3. Pursuant to BPC 1635.5(a)(3)(A), an applicant may receive credit for two of the five years of clinical practice by demonstrating completion of a residency training program accredited by the American Dental Association Commission on Dental

Accreditation, including, but not limited to, a general practice residency, an advanced education in general dentistry program, or a training program in a specialty recognized by the American Dental Association.

a. Should a CODA recognized specialty in Oral & Maxillofacial Radiology, or other similar specialty satisfy the “active clinical practice” requirement?

b. If not, what CODA recognized specialties would the Board not consider as qualifying under “active clinical practice”?

ACTION REQUESTED

Staff requests that the Board provide further recommendations and input in drafting the regulatory language relating to the Licensure by Credential Application requirements to present to the Board at a future Board meeting. The statutory language has been attached to this agenda item and has been labeled as “Attachment 1” for reference.

State of California
BUSINESS AND PROFESSIONS CODE
DIVISION 2. HEALING ARTS
CHAPTER 4. DENTISTRY
Article 2. Admission and Practice
§ 1635

1635.5. (a) Notwithstanding Section 1634, the board may grant a license to practice dentistry to an applicant who has not taken an examination before the board, if the applicant submits all of the following to the board:

(1) A completed application form and all fees required by the board.

(2) Proof of a current license issued by another state to practice dentistry that is not revoked or suspended or otherwise restricted.

(3) Proof that the applicant has either been in active clinical practice or has been a full-time faculty member in an accredited dental education program and in active clinical practice for a total of at least 5,000 hours in five of the seven consecutive years immediately preceding the date of his or her application under this section. The clinical practice requirement shall be deemed met if documentation of any of the following is submitted:

(A) The applicant may receive credit for two of the five years of clinical practice by demonstrating completion of a residency training program accredited by the American Dental Association Commission on Dental Accreditation, including, but not limited to, a general practice residency, an advanced education in general dentistry program, or a training program in a specialty recognized by the American Dental Association.

(B) The applicant agrees to practice dentistry full time for two years in at least one primary care clinic licensed under subdivision (a) of Section 1204 of the Health and Safety Code or primary care clinic exempt from licensure pursuant to subdivision (c) of Section 1206 of the Health and Safety Code, or a clinic owned or operated by a public hospital or health system, or a clinic owned and operated by a hospital that maintains the primary contract with a county government to fill the county's role under Section 17000 of the Welfare and Institutions Code. The board may periodically request verification of compliance with these requirements, and may revoke the license upon a finding that the employment requirement, or any other requirement of this subparagraph, has not been met. Full-time status shall be defined by the board for the purposes of this subparagraph, and the board may establish exemptions to this requirement on a case-by-case basis.

(C) The applicant agrees to teach or practice dentistry full time for two years in at least one accredited dental education program as approved by the Dental Board of California. The board may periodically request verification of compliance with these requirements, and may revoke the license upon a finding that the employment

requirement, or any other requirement of this subparagraph, has not been met. Full-time status shall be defined by the board for the purposes of this subparagraph, and the board may establish exemptions to this requirement on a case-by-case basis.

(4) Proof that the applicant has not been subject to disciplinary action by any state in which he or she is or has been previously licensed to practice dentistry. If the applicant has been subject to disciplinary action, the board shall review that action to determine if it presents sufficient evidence of a violation of Article 4 (commencing with Section 1670) to warrant the submission of additional information from the applicant or the denial of the application for licensure.

(5) A signed release allowing the disclosure of information from the National Practitioner Data Bank and the verification of registration status with the federal Drug Enforcement Administration. The board shall review this information to determine if it presents sufficient evidence of a violation of Article 4 (commencing with Section 1670) to warrant the submission of additional information from the applicant or the denial of the application for licensure.

(6) Proof that the applicant has not failed the examination for licensure to practice dentistry under this chapter within five years prior to the date of his or her application for a license under this section.

(7) An acknowledgment by the applicant executed under penalty of perjury and automatic forfeiture of license, of the following:

(A) That the information provided by the applicant to the board is true and correct, to the best of his or her knowledge and belief.

(B) That the applicant has not been convicted of an offense involving conduct that would violate Section 810.

(8) Documentation of 50 units of continuing education completed within two years of the date of his or her application under this section. The continuing education shall include the mandatory coursework prescribed by the board pursuant to subdivision (b) of Section 1645.

(9) Any other information as specified by the board to the extent it is required of applicants for licensure by examination under this article.

(b) The board shall provide in the application packet to each out-of-state dentist pursuant to this section the following information:

(1) The location of dental manpower shortage areas that exist in the state.

(2) Those not-for-profit clinics and public hospitals seeking to contract with licensees for dental services.

(c) (1) The board shall review the impact of this section on the availability of dentists in California and report to the appropriate policy and fiscal committees of the Legislature by January 1, 2008. The report shall include a separate section providing data specific to those dentists who intend to fulfill the alternative clinical practice requirements of subparagraph (B) of paragraph (3) of subdivision (a). The report shall include, but not be limited to, all of the following:

(A) The total number of applicants from other states who have sought licensure.

(B) The number of dentists from other states licensed pursuant to this section, as well as the number of licenses not granted and the reasons why each license was not granted.

(C) The location of the practice of dentists licensed pursuant to this section.

(D) The number of dentists licensed pursuant to this section who establish a practice in a rural area or in an area designated as having a shortage of practicing dentists or no dentists at all.

(E) The length of time dentists licensed pursuant to this section maintained their practice in the reported location. This information shall be reported separately for dentists described in subparagraphs (C) and (D).

(2) In identifying a dentist's location of practice, the board shall use medical service study areas or other appropriate geographic descriptions for regions of the state.

(3) If appropriate, the board may report the information required by paragraph (1) separately for primary care dentists and specialists.

(d) The board is authorized to contract with a third party or parties to review applications filed under this section and to advise the board as to whether the applications are complete. The contracting party, its agents, and its employees shall agree to be bound by all provisions of law applicable to the board, its members, and staff, governing custody and confidentiality of materials submitted by applicants for licensure.

(e) The board, in issuing a license under this section to an applicant qualified under subparagraph (B) or (C) of paragraph (3) of subdivision (a), may impose a restriction authorizing the holder to practice dentistry only in the facilities described in subparagraph (B) of paragraph (3) of subdivision (a) or only to practice or teach dentistry at the accredited dental education programs described in subparagraph (C) of paragraph (3) of subdivision (a). Upon the expiration of the two-year term, all location restrictions on the license shall be removed and the holder is authorized to practice dentistry in accordance with this chapter in any allowable setting in the state.

(f) Notwithstanding any other provision of law, a holder of a license issued by the board before January 1, 2006, under this section who committed to complete the remainder of the five years of clinical practice requirement by a contract either to practice dentistry full time in a facility described in subparagraph (B) of paragraph (3) of subdivision (a) or to teach or practice dentistry full time in an accredited dental education program approved by the board, shall be required to complete only two years of service under the contract in order to fulfill his or her obligation under this section. Upon the expiration of that two-year term, all location restrictions on the license shall be removed and the holder is authorized to practice dentistry in accordance with this chapter in any allowable setting in the state.

(g) A license issued pursuant to this section shall be considered a valid, unrestricted license for purposes of Section 1972.

(Amended by Stats. 2006, Ch. 4, Sec. 1. Effective January 30, 2006.)

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MEMORANDUM

DATE	November 16, 2015
TO	Dental Board of California
FROM	Karen Fischer, Executive Officer
SUBJECT	**Agenda Item 13:** Discussion and Possible Action Regarding the Dental School Application from the Republic of Moldova and Appointments to the Site Evaluation Team

Background:
The Subcommittee of Drs. Huong Le and Steve Morrow met with me in Sacramento on September 28, 2015 to continue to review and discuss the multiple volumes of documents supporting the application that were submitted by the Republic of Moldova Dental School. The Subcommittee determined that there remain questions regarding the responses to the survey and supporting documentation that can only be answered during the on-site evaluation; therefore the Subcommittee will be recommending that the Board accept the Moldova Dental School application as complete at the December meeting and to move to appoint an On-Site Evaluation Team (Site Team).

At its meeting on September 28th, the Subcommittee expressed concern that because the Board has received multiple submissions of the application from the dental school in Moldova, some documentation unsolicited and other documentation in response to deficiencies, it is difficult to determine whether or not the applicant has submitted a complete survey and supporting documentation. In response to this concern, Senator Polanco, his associate, and I reviewed the information that had been submitted in Sacramento on November 6th. The meeting resulted in a final complete application submission.

The on-site evaluation will take approximately seven to nine days including travel. The Site-Team will travel to Moldova on a Saturday, arriving on Sunday. The evaluation will take place Monday-Thursday. Report writing will take place at the hotel on Friday before the Teams departure back to the United States. In the Board's recruitment of Site Team members, we will be asking for candidates to confirm availability for either **March 12 - March 20, 2016 or March 5 - March 13, 2016**. The school has confirmed that these dates are acceptable. After the appointments are made, Site Team members will be sent the documentation and allowed 6-8 weeks to review it prior to traveling to Moldova.

In accordance with California Code of Regulations Section 1024.6(a)(2), the site team shall consist of four persons: either one dentist board member, or one member of the board's staff; two recognized California licensed dental educator consultants with expertise in accreditation, and one California licensed dentist who has extensive knowledge of the applicant's educational process and is fluent in the language of instruction. The last member shall be selected by the board from a list of three California licensed dentists submitted by board staff. The school will be provided with the names of three dentists and may challenge for cause any of the staff's recommendations for this position within 30 days from the date the list of names was mailed to the school. Staff continues to recruit for the Site Team and will bring a list of candidates to the December meeting.

Action Requested:
The Subcommittee is recommending that the Board accept the Moldova Dental School application as complete; and appoint members to an On-Site Evaluation Team.

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MEMORANDUM

DATE	November 16, 2015
TO	Dental Board of California
FROM	Tina Vallery, Licensing Analyst
SUBJECT	**Agenda Items 14 A & B:** Western Regional Examination Board (WREB) Update; Portfolio Pathway to Licensure Update

A. Western Regional Examination Board (WREB)

Dr. Huong Le will provide a verbal report.

B. Portfolio Pathway to Licensure Update

The University of California, San Francisco (UCSF) notified staff on September 23, 2015 that it has trained and calibrated its faculty in compliance with the Board's requirements; and has requested candidate numbers for 105 students.

The University of Southern California (USC) submitted to staff on September 9, 2015, a list of its 22 potential Portfolio examiners who are in the process of being calibrated.

The University of California, Los Angeles (UCLA) requested candidate numbers for 2 students on September 3, 2015.

The University of the Pacific (UOP) notified staff on November 12, 2015 that it has trained and calibrated its faculty in compliance with the Board's requirements; and has requested candidate numbers for 119 students.

The Board sent out revised Portfolio grade sheets to all schools on October 20, 2015. Currently each factor on a grade sheet is signed off by the examiner; and staff found it difficult to read the signatures in order to verify that the examiner is Board approved. To remedy this situation, grade sheets were modified to require examiners to print their name, in addition to applying their signature.

Staff is currently working on the addition of a portfolio page to the website.

Dr. Steve Morrow will give a verbal report about Portfolio presentations that were made at meetings of the American Dental Educators Association and the American Dental Student Association.

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MEMORANDUM

DATE	November 16, 2015
TO	Members of the Dental Board of California
FROM	Tammy White, Budget Analyst
SUBJECT	**Agenda Item 15:** Budget Report

The Board manages two separate funds: (1) Dentistry Fund and (2) Dental Assisting Fund. The funds are not comingled. The following is intended to provide a summary of expenses for the fourth quarter/year-end of fiscal year (FY) 2014-15 and the first quarter of FY 2015-16 for the Dentistry and Dental Assisting funds. The summaries of the expenditure reports for both funds are included with this budget report.

Attachment 1: The Dentistry Fund fourth quarter/year-end - Fiscal Month (FM) 13
Attachment 2: The Dentistry Fund first quarter – FM 3
Attachment 3: The Dental Assisting Fund fourth quarter/year-end – FM 13
Attachment 4: The Dental Assisting Fund first quarter – FM 3

Dentistry Fund Overview

Fourth Quarter/Year-End Expenditure Summary for Fiscal Year 2014-15

The fourth quarter expenditures are based upon the year-end budget report, FM13, released by the Department of Consumer Affairs (DCA) in August 2015. This report reflects actual expenditures for July 1, 2014 through June 30, 2015. The Board spent roughly $10.7 million or 86% of its total Dentistry Fund appropriation for FY 2014-15 and had a net surplus of roughly $1.5 million or 12% of its total Dentistry Fund appropriation. Approximately 50% of the expenditures were for Personnel Services and 50% were for Operating Expense & Equipment (OE&E) for this fiscal year compared to the net appropriation.

Fund Title	Appropriation	Expenditures Through 6-30-14
Dentistry Fund	$12,427,000	$10,932,000

*** Expenditures include actual spending plus encumbrances.**

Analysis of Fund Condition

Without future fee increases, the Dentistry Fund is heading towards insolvency for FY 2018-19. The fund has an annual average of $1,000,000 in estimated savings for the next three fiscal years.

First Quarter Expenditure Summary for Fiscal Year 2015-16

The first quarter expenditure projections are based upon the September 2015 budget report released by the DCA in October 2015. The report reflects expenditures for July 1, 2015 through September 30, 2015. The Board's current expenditures are roughly $3.1 million or 24% of its total Dentistry Fund appropriation for FY 2015-16. Of that amount, approximately $1.3 million is for Personnel Services and roughly $1.9 million is for OE&E.

For comparison purposes, current expenditures are running slightly lower than last year's first quarter expenditures. At this time last year the Board had spent roughly 31% of its FY 2014-15 Dentistry Fund appropriations. Spending for this month is slightly lower than last year's including the encumbrances. Monthly budget reports from Cal Stars include encumbrances into the calculations for current spending because they are funds promised, or set aside for a specific future purpose (e.g., contracts, building lease, purchase orders, pro rata, etc.). Encumbered funds remain accounted for until the obligations are paid, or until the Board requests the DCA Budget Office to unencumber the funds (e.g., cancelled contract, cancelled purchase order, etc.).

Fund Title	Appropriation	Expenditures* Through 9-30-15
Dentistry Fund	$12,788,000	$3,090,000

*** Expenditures include actual spending plus encumbrances.**

Analysis of Fund Condition

Attachment 5 displays four fiscal years and projects that without future fee increases the Dentistry Fund will be insolvent by FY 2018-19. The fund has an annual average of $1,000,000 in estimated savings for the next three fiscal years.

Dental Assisting Fund Overview

Fourth Quarter/Year-End Expenditure Summary for Fiscal Year 2014-15

The fourth quarter expenditures are based upon the year-end budget report, FM13, released by the DCA in August 2015. This report reflects actual expenditures for July 1, 2014 through June 30, 2015. The Board spent roughly $1.7 million or 85% of its total Dental Assisting Fund appropriation for FY 2014-15 and had a net surplus of roughly $292,000 or 15% of its total Dental Assisting Fund appropriation. Approximately 30%

was spent for Personnel Services, and roughly 55% was for OE&E compared to the net appropriation.

Fund Title	Appropriation	Expenditures Through 6-30-14
Dental Assisting Fund	$1,971,000	$1,679,000

*** Expenditures include actual spending plus encumbrances.**

Analysis of Fund Condition

Without future fee increases, the Dental Assisting Fund is heading towards insolvency for FY 2018-19.

First Quarter Expenditure Summary for Fiscal Year 2015-16

The first quarter expenditure projections are based upon the September 2015 budget report released by the DCA in October 2015. The report reflects expenditures for July 1, 2015 through September 30, 2015. The Board's current expenditures are roughly $577,000 or 23% of its total Dental Assisting Fund appropriation. Approximately $143,000 spent is for Personnel Services and roughly $434,000 is for OE&E.

Current expenditures are on track with first quarter spending last year. At this time last year, the Board had spent roughly 26% of its FY 2014-15 Dental Assisting Fund appropriation.

Fund Title	Appropriation	Expenditures* Through 9-30-15
Dental Assisting Fund	$2,528,000	$576,600

*** Expenditures include actual spending plus encumbrances.**

Analysis of Fund Condition

Attachment 6 displays four fiscal years and projects that without future fee increases the Dental Assisting Fund will be insolvent by FY 2018-19.

DENTAL BOARD - FUND 0741
BUDGET REPORT
FY 2014-15 EXPENDITURE PROJECTION

FM 13

OBJECT DESCRIPTION	FY 2013-14 ACTUAL EXPENDITURES (MONTH 13)		FY 2014-15 BUDGET STONE 2014-15	CURRENT YEAR EXPENDITURES FM 13 (2015)	PERCENT SPENT	ACTUALS YEAR END	UNENCUMBERED BALANCE
PERSONNEL SERVICES							
Salary & Wages (Staff)	3,375,369		**3,788,194**	3,423,184	90%	**3,423,184**	365,010
Statutory Exempt (EO)	98,202		**100,596**	104,411	104%	**104,411**	(3,815)
Temp Help (Expert Examiners)	0		**40,000**	0	0%	**0**	40,000
Physical Fitness Incentive	1,105		**0**				0
Temp Help Reg (907)	192,380		**199,000**	152,995	77%	**152,995**	46,005
Temp Help (Exam Proctors)	0		**45,447**	0	0%	**0**	45,447
BL 12-03 Blanket	36,821			33,224		**33,224**	(33,224)
Board Member Per Diem (901, 920)	18,100		**45,950**	20,474	45%	**20,474**	25,476
Committee Members (911)	3,700		**58,686**	4,000	7%	**4,000**	54,686
Overtime	9,572		**25,208**	16,262	65%	**16,262**	8,946
Staff Benefits	1,631,117		**2,058,353**	1,744,941	85%	**1,744,941**	313,412
TOTALS, PERSONNEL SVC	5,366,366	0	**6,361,434**	**5,499,491**	**86%**	**5,499,491**	861,943
OPERATING EXPENSE AND EQUIPMENT							
General Expense	102,809		**100,153**	144,462	144%	**144,462**	(44,309)
Fingerprint Reports	15,562		**25,777**	16,343	63%	**16,343**	9,434
Minor Equipment	69,049		**21,875**	45,199	207%	**45,199**	(23,324)
Printing	38,259		**42,134**	48,239	114%	**48,239**	(6,105)
Communication	51,568		**57,815**	41,183	71%	**41,183**	16,632
Postage	58,315		**59,435**	68,234	115%	**68,234**	(8,799)
Insurance	2,632		**2,100**	6,211	296%	**6,211**	(4,111)
Travel In State	115,280		**108,976**	161,046	148%	**161,046**	(52,070)
Travel, Out-of-State			**0**	3,125		**3,125**	(3,125)
Training	4,731		**6,907**	3,352	49%	**3,352**	3,555
Facilities Operations	388,541		**360,656**	408,859	113%	**408,859**	(48,203)
C & P Services - Interdept.	343,154		**77,129**	50,097	65%	**50,097**	27,032
C & P Services - External	231,249		**194,146**	215,793	111%	**215,793**	(21,647)
DEPARTMENTAL SERVICES:							
OIS Pro Rata	594,427		**801,731**	783,624	98%	**783,624**	18,107
Admin/Exec	661,140		**740,266**	740,436	100%	**740,436**	(170)
Interagency Services	0		**881**	0	0%	**0**	881
IA w/ OER	0		**0**	36,722		**36,722**	(36,722)
DOI-ProRata Internal	21,220		**23,192**	19,659	85%	**19,659**	3,533
Public Affairs Office	24,505		**22,635**	22,799	101%	**22,799**	(164)
PCSD	27,124		**26,624**	25,979	98%	**25,979**	645
INTERAGENCY SERVICES:							
Consolidated Data Center	23,390		**17,517**	21,621	123%	**21,621**	(4,104)
DP Maintenance & Supply	18,265		**11,118**	15,166	136%	**15,166**	(4,048)
Central Admin Svc-ProRata	530,145		**582,361**	582,361	100%	**582,361**	0
EXAMS EXPENSES:							
Exam Supplies	0		**43,589**	0	0%	**0**	43,589
Exam Freight	0		**166**	0	0%	**0**	166
Exam Site Rental	0		**196,586**	0	0%	**0**	196,586
C/P Svcs-External Expert Administration	116,606		**6,709**	103,913	1549%	**103,913**	(97,204)
C/P Svcs-External Expert Examiners	0		**238,248**	0	0%	**0**	238,248
C/P Svcs-External Subject Matter	842			4,846		**4,846**	(4,846)
Other Items of Expense	8,862		**661**	2,934	444%	**2,934**	(2,273)
Tort Pymts-Punitive	2,500					**0**	0
ENFORCEMENT:							
Attorney General	1,021,186		**1,778,310**	1,117,956	63%	**1,117,956**	660,354
Office Admin. Hearings	206,201		**406,720**	331,993	82%	**331,993**	74,727
Court Reporters	12,204			31,418		**31,418**	(31,418)
Evidence/Witness Fees	425,161		**243,959**	453,715	186%	**453,715**	(209,756)
DOI - Investigative	15,075		**0**			**0**	0
Vehicle Operations	55,609		**60,000**	36,460	61%	**36,460**	23,540
Major Equipment	151,904		**74,000**	155,332	210%	**155,332**	(81,332)
TOTALS, OE&E	5,337,515	0	**6,332,376**	5,699,077	90%	**5,699,077**	633,299
TOTAL EXPENSE	10,703,881	0	**12,693,810**	11,198,568	176%	**11,198,568**	1,495,242
Sched. Interdepartmental	(235)						0
Sched. Reimb. - Fingerprints	(15,086)		**(53,000)**	(15,296)	29%	**(15,296)**	(37,704)
Sched. Reimb. - Other	(14,230)		**(214,000)**	(9,400)	4%	**(9,400)**	(204,600)
Unsched. Reimb. - External/Private	(46,438)			(48,311)		**(48,311)**	48,311
Probation Monitoring Fee - Variable	(124,961)			(110,914)		**(110,914)**	110,914
Invest Cost Recover FTB Collection	(405)			(1,383)		**(1,383)**	1,383
Unsched. - DOI ICR Civil Case Only							0
Unsched. - Investigative Cost Recovery	(381,589)			(296,399)		**(296,399)**	296,399
NET APPROPRIATION	10,120,938	0	**12,426,810**	10,716,865	86%	**10,716,865**	**1,709,945**
			51%	49%		**SURPLUS/(DEFICIT):**	**13.8%**

DENTAL BOARD - FUND 0741
BUDGET REPORT
FY 2015-16 EXPENDITURE PROJECTION

FM 3

OBJECT DESCRIPTION	FY 2014-15 ACTUAL EXPENDITURES (MONTH 13)	FY 2014-15 PRIOR YEAR EXPENDITURES 9/30/2014	FY 2015-16 BUDGET STONE 2015-16	FY 2015-16 CURRENT YEAR EXPENDITURES 9/30/2015	FY 2015-16 PERCENT SPENT	FY 2015-16 PROJECTIONS TO YEAR END	FY 2015-16 UNENCUMBERED BALANCE
PERSONNEL SERVICES							
Salary & Wages (Staff)	3,423,184	923,936	**3,872,129**	834,920	22%	**3,743,862**	128,267
Statutory Exempt (EO)	104,411	25,653	**100,596**	27,084	27%	**105,696**	(5,100)
Temp Help (Expert Examiners)	0		**40,000**		0%	**0**	40,000
Physical Fitness Incentive			**0**	0		**0**	0
Temp Help Reg (907)	152,995	38,560	**199,000**	12,666	6%	**153,000**	46,000
Temp Help (Exam Proctors)	0		**45,447**		0%	**0**	45,447
BL 12-03 Blanket	33,224	9,076	**0**	16,415		**60,000**	(60,000)
Board Member Per Diem (901, 920)	20,474	3,800	**45,950**	3,100	7%	**18,600**	27,350
Committee Members (911)	4,000	400	**58,686**	400	1%	**4,000**	54,686
Overtime	16,262	8,687	**25,208**	2,534	10%	**15,204**	10,004
Staff Benefits	1,744,941	428,424	**2,064,390**	450,358	22%	**2,019,449**	44,941
TOTALS, PERSONNEL SVC	5,499,491	1,438,536	**6,451,406**	**1,347,477**	**21%**	**6,119,811**	331,595
OPERATING EXPENSE AND EQUIPMENT							
General Expense	144,462	28,144	**95,314**	20,026	21%	**120,100**	(24,786)
Fingerprint Reports	16,343	3,687	**25,777**	2,320	9%	**16,000**	9,777
Minor Equipment	45,199		**6,000**		0%	**0**	6,000
Printing	48,239	21,185	**42,134**	16,882	40%	**40,000**	2,134
Communication	41,183	6,120	**33,020**	6,484	20%	**39,000**	(5,980)
Postage	68,234	17,656	**59,435**	16,308	27%	**63,000**	(3,565)
Insurance	6,211	6,211	**2,100**	6,211	296%	**6,211**	(4,111)
Travel In State	161,046	36,804	**108,976**	16,961	16%	**102,000**	6,976
Travel, Out-of-State	3,125		**0**			**3,125**	(3,125)
Training	3,352	300	**6,907**	250	4%	**3,000**	3,907
Facilities Operations	408,859	398,828	**360,656**	421,966	117%	**421,966**	(61,310)
C & P Services - Interdept.	50,097	324,302	**77,129**	7,445	10%	**44,700**	32,429
C & P Services - External	215,793	227,791	**268,146**	376,473	140%	**376,473**	(108,327)
DEPARTMENTAL SERVICES:							
OIS Pro Rata	783,624	174,201	**1,233,803**	269,500	22%	**1,233,803**	0
Admin/Exec	740,436	178,708	**618,830**	193,750	31%	**618,830**	0
Interagency Services	0		**881**		0%	**0**	881
IA w/ OER	36,722	22,928	**0**	61,030		**61,030**	(61,030)
DOI-ProRata Internal	19,659	5,602	**22,406**	5,500	25%	**22,406**	0
Public Affairs Office	22,799	5,459	**22,836**	5,750	25%	**22,836**	0
PCSD	25,979	6,456	**26,825**	6,750	25%	**26,825**	0
INTERAGENCY SERVICES:							
Consolidated Data Center	21,621	6,378	**17,517**	6,556	37%	**22,200**	(4,683)
DP Maintenance & Supply	15,166	8,000	**11,118**	985	9%	**6,000**	5,118
Central Admin Svc-ProRata	582,361	145,590	**607,361**	151,799	25%	**607,361**	0
EXAMS EXPENSES:							
Exam Supplies	0		**43,589**		0%	**0**	43,589
Exam Freight	0		**166**		0%	**0**	166
Exam Site Rental	0		**196,586**		0%	**0**	196,586
C/P Svcs-External Expert Administration	103,913	17,486	**6,709**	20,675	308%	**122,800**	(116,091)
C/P Svcs-External Expert Examiners	0		**238,248**		0%	**0**	238,248
C/P Svcs-External Subject Matter	4,846		**0**	1,054		**4,846**	(4,846)
Other Items of Expense	2,934	4,320	**661**	1,920	290%	**3,000**	(2,339)
Tort Pymts-Punitive						**0**	0
ENFORCEMENT:							
Attorney General	1,117,956	258,801	**1,778,310**	183,833	10%	**1,103,000**	675,310
Office Admin. Hearings	331,993		**406,720**		0%	**332,000**	74,720
Court Reporters	31,418	4,264		1,264		**9,300**	(9,300)
Evidence/Witness Fees	453,715	65,338	**243,959**	50,253	21%	**301,500**	(57,541)
DOI - Investigative			**0**			**0**	0
Vehicle Operations	36,460	7,347	**5,055**	6,664	132%	**33,000**	(27,945)
Major Equipment	155,332		**36,420**		0%	**40,000**	(3,580)
TOTALS, OE&E	5,699,077	1,981,906	**6,603,594**	1,858,609	28%	**5,806,312**	797,282
TOTAL EXPENSE	11,198,568	3,420,442	**13,055,000**	3,206,086	49%	**11,926,123**	1,128,877
Sched. Interdepartmental							0
Sched. Reimb. - Fingerprints	(15,296)	(4,018)	**(53,000)**	(3,140)	6%	**(53,000)**	0
Sched. Reimb. - Other	(9,400)	(2,820)	**(214,000)**	(2,585)	1%	**(214,000)**	0
Unsched. Reimb. - External/Private	(48,311)	(12,096)		(12,301)			0
Probation Monitoring Fee - Variable	(110,914)	(22,111)		(23,782)			0
Invest Cost Recover FTB Collection	(1,383)	(1,383)					0
Unsched. - DOI ICR Civil Case Only							0
Unsched. - Investigative Cost Recovery	(296,399)	(63,421)		(74,428)			0
NET APPROPRIATION	10,716,865	3,314,593	**12,788,000**	3,089,850	24%	**11,659,123**	**1,128,877**
						SURPLUS/(DEFICIT):	**8.8%**

DENTAL ASSISTING PROGRAM - FUND 3142
BUDGET REPORT
FY 2014-15 EXPENDITURE PROJECTION

FM 13

OBJECT DESCRIPTION	FY 2013-14 ACTUAL EXPENDITURES (MONTH 13)		FY 2014-15 BUDGET STONE 2014-15	CURRENT YEAR EXPENDITURES FM 13 (2015)	PERCENT SPENT	ACTUALS YEAR END	UNENCUMBERED BALANCE
PERSONNEL SERVICES							
Salary & Wages (Staff)	319,271		**372,498**	329,737	89%	**329,737**	42,761
Statutory Exempt (EO)			**0**			**0**	0
Temp Help (Expert Examiners)			**0**				0
Temp Help (Consultants)			**0**				0
Temp Help Reg (907)	18,947		**0**	19,981		**19,981**	(19,981)
Temp Help (Exam Proctors)			**0**			**0**	0
Board Member Per Diem (901, 920)	4,200		**0**	3,900		**3,900**	(3,900)
Overtime	10,835		**0**	6,938		**6,938**	(6,938)
Staff Benefits	223,426		**231,750**	238,182	103%	**238,182**	(6,432)
TOTALS, PERSONNEL SVC	576,679	0	**604,248**	**598,738**	**99%**	**598,738**	5,510
OPERATING EXPENSE AND EQUIPMENT							
General Expense	8,265		**33,958**	9,122	27%	**9,122**	24,836
Fingerprint Reports	0		**7,780**	0	0%	**0**	7,780
Minor Equipment			**0**			**0**	0
Printing	12,451		**19,001**	6,650	35%	**6,650**	12,351
Communication	28		**9,500**	30	0%	**30**	9,470
Postage	23,692		**35,991**	23,965	67%	**23,965**	12,026
Insurance			**0**			**0**	0
Travel In State	65,563		**63,733**	52,084	82%	**52,084**	11,649
Training	250		**4,119**	0	0%	**0**	4,119
Facilities Operations	74,876		**63,950**	45,546	71%	**45,546**	18,404
C & P Services - Interdept.	0		**288,439**	0	0%	**0**	288,439
C & P Services - External	0		**532**	3,000	564%	**3,000**	(2,468)
DEPARTMENTAL SERVICES:							
OIS ProRata	245,105		**357,976**	344,648	96%	**344,648**	13,328
Admin/Exec	92,842		**103,738**	103,661	100%	**103,661**	77
Interagency Services	0		**72,554**	0	0%	**0**	72,554
IA w/ OPES	25,984		**0**			**0**	0
DOI-ProRata Internal	2,962		**3,245**	2,685	83%	**2,685**	560
Public Affairs Office	3,423		**3,172**	3,115	98%	**3,115**	57
PCSD	3,384		**3,445**	3,008	87%	**3,008**	437
INTERAGENCY SERVICES:							0
Consolidated Data Center	0		**1,576**	0	0%	**0**	1,576
DP Maintenance & Supply	0		**1,369**	0	0%	**0**	1,369
Statewide ProRata	67,323		**85,731**	85,731	100%	**85,731**	0
EXAMS EXPENSES:							
Exam Supplies	6,834		**3,946**	17,071	433%	**17,071**	(13,125)
Exam Site Rental - State Owned	40,062			39,729		**39,729**	(39,729)
Exam Site Rental - Non State Owned	28,125		**69,939**	36,710	52%	**36,710**	33,229
C/P Svcs-External Expert Administration	23,545		**30,877**	2,827	9%	**2,827**	28,050
C/P Svcs-External Expert Examiners	0		**47,476**	0	0%	**0**	47,476
C/P Svcs-External Expert Examiners						**0**	0
C/P Svcs-External Subject Matter	158,189			150,469		**150,469**	(150,469)
Other Items of Expense	0		**285**	0	0%	**0**	285
ENFORCEMENT:							
Attorney General	170,033		**67,536**	128,138	190%	**128,138**	(60,602)
Office Admin. Hearings	0		**2,740**	0	0%	**0**	2,740
Evidence/Witness Fees	0		**87**	23,964	27545%	**23,964**	(23,877)
TOTALS, OE&E	1,052,936	0	**1,382,695**	1,082,153	78%	**1,082,153**	300,542
TOTAL EXPENSE	1,629,615	0	**1,986,943**	1,680,891	177%	**1,680,891**	306,052
Sched. Reimb. - Fingerprints	(1,421)		**(13,000)**	(1,078)	8%	**(1,078)**	(11,922)
Sched. Reimb. - Other	(705)		**(3,000)**	(705)	24%	**(705)**	(2,295)
NET APPROPRIATION	1,627,489	0	**1,970,943**	1,679,108	85%	**1,679,108**	**291,835**
			64%	36%	**SURPLUS/(DEFICIT):**		**14.8%**

DENTAL ASSISTING PROGRAM - FUND 3142
BUDGET REPORT
FY 2015-16 EXPENDITURE PROJECTION

FM 3

OBJECT DESCRIPTION	FY 2014-15 ACTUAL EXPENDITURES (MONTH 13)	FY 2014-15 PRIOR YEAR EXPENDITURES 9/30/2014	FY 2015-16 BUDGET STONE 2015-16	FY 2015-16 CURRENT YEAR EXPENDITURES 9/30/2015	FY 2015-16 PERCENT SPENT	FY 2015-16 PROJECTIONS TO YEAR END	FY 2015-16 UNENCUMBERED BALANCE
PERSONNEL SERVICES							
Salary & Wages (Staff)	329,737	90,116	**477,974**	84,456	18%	**365,194**	112,780
Statutory Exempt (EO)			**0**			**0**	0
Temp Help (Expert Examiners)			**0**				0
Temp Help (Consultants)			**0**				0
Temp Help Reg (907)	19,981	9,747	**0**			**20,000**	(20,000)
Temp Help (Exam Proctors)			**0**			**0**	0
Board Member Per Diem (901, 920)	3,900	1,000	**0**	800		**4,800**	(4,800)
Overtime	6,938		**0**			**7,000**	(7,000)
Staff Benefits	238,182	60,318	**289,746**	57,936	20%	**250,520**	39,226
TOTALS, PERSONNEL SVC	598,738	161,181	**767,720**	**143,192**	**19%**	**647,514**	120,206
OPERATING EXPENSE AND EQUIPMENT							
General Expense	9,122		**37,021**	599	2%	**9,122**	27,899
Fingerprint Reports	0		**7,780**		0%	**0**	7,780
Minor Equipment			**0**	6,369		**0**	0
Printing	6,650	590	**20,001**	672	3%	**6,650**	13,351
Communication	30	7	**12,500**	8	0%	**30**	12,470
Postage	23,965	4,177	**36,991**	6,049	16%	**23,965**	13,026
Insurance			**0**			**0**	0
Travel In State	52,084	8,175	**55,459**	7,210	13%	**46,000**	9,459
Training	0		**5,119**		0%	**0**	5,119
Facilities Operations	45,546	44,609	**63,950**	70,786	111%	**70,786**	(6,836)
C & P Services - Interdept.	0		**288,439**		0%	**0**	288,439
C & P Services - External	3,000	16,000	**14,532**	14,000	96%	**14,000**	532
DEPARTMENTAL SERVICES:							
OIS ProRata	344,648	70,941	**696,763**	144,750	21%	**696,763**	0
Admin/Exec	103,661	25,019	**13,077**	32,750	250%	**32,750**	(19,673)
Interagency Services	0		**72,554**		0%	**0**	72,554
IA w/ OPES			**0**			**0**	0
DOI-ProRata Internal	2,685	783	**4,133**	1,000	24%	**4,133**	0
Public Affairs Office	3,115	764	**4,057**	1,000	25%	**4,057**	0
PCSD	3,008	836	**5,342**	1,250	23%	**5,342**	0
INTERAGENCY SERVICES:							0
Consolidated Data Center	0		**1,576**		0%	**0**	1,576
DP Maintenance & Supply	0		**1,369**		0%	**0**	1,369
Statewide ProRata	85,731	21,433	**91,731**	22,916	25%	**91,731**	0
EXAMS EXPENSES:							
Exam Supplies	17,071	5,289	**3,946**	7,938	201%	**22,000**	(18,054)
Exam Site Rental - State Owned	39,729			37,685		**50,000**	(50,000)
Exam Site Rental - Non State Owned	36,710	12,510	**69,939**	20,010	29%	**50,000**	19,939
C/P Svcs-External Expert Administration	2,827	2,010	**30,877**	1,004	3%	**3,000**	27,877
C/P Svcs-External Expert Examiners	0		**47,476**		0%	**0**	47,476
C/P Svcs-External Expert Examiners			**0**			**0**	0
C/P Svcs-External Subject Matter	150,469	34,249	**0**	40,204		**160,000**	(160,000)
Other Items of Expense	0		**285**		0%	**0**	285
ENFORCEMENT:							
Attorney General	128,138	28,308	**172,536**	17,418	10%	**105,000**	67,536
Office Admin. Hearings	0		**2,740**		0%	**0**	2,740
Court Reporters						**0**	0
Evidence/Witness Fees	23,964		**87**		0%	**24,000**	(23,913)
Vehicle Operations			**0**			**0**	0
Major Equipment			**16,000**			**0**	16,000
Special Items of Expense					#DIV/0!		0
Other (Vehicle Operations)					#DIV/0!		0
TOTALS, OE&E	1,082,153	275,700	**1,776,280**	433,618	24%	**1,419,329**	356,951
TOTAL EXPENSE	1,680,891	436,881	**2,544,000**	576,810	43%	**2,066,843**	477,157
Sched. Reimb. - Fingerprints	(1,078)	(294)	**(13,000)**	(196)	2%	**(1,421)**	(11,579)
Sched. Reimb. - Other	(705)		**(3,000)**		0%	**(705)**	(2,295)
NET APPROPRIATION	1,679,108	436,587	**2,528,000**	576,614	23%	**2,064,717**	**463,283**
						SURPLUS/(DEFICIT):	**18.3%**

0741 - Dental Board of California
Analysis of Fund Condition

(Dollars in Thousands)

2015 Budget Act

		ACTUAL 2014-15	Budget Act CY 2015-16	BY 2016-17	BY+1 2017-18	BY+2 2018-19
BEGINNING BALANCE		$ 6,086	$ 5,634	$ 4,605	$ 3,186	$ 1,499
Prior Year Adjustment		$ -28	$ -	$ -	$ -	$ -
Adjusted Beginning Balance		$ 6,058	$ 5,634	$ 4,605	$ 3,186	$ 1,499
REVENUES AND TRANSFERS						
Revenues:						
125600	Other regulatory fees	$ 77	$ 69	$ 72	$ 72	$ 72
125700	Other regulatory licenses and permits	$ 957	$ 969	$ 966	$ 966	$ 966
125800	Renewal fees	$ 9,159	$ 9,653	$ 9,582	$ 9,582	$ 9,582
125900	Delinquent fees	$ 87	$ 69	$ 70	$ 70	$ 70
131700	Misc. Revenue from Local Agencies	$ 1	$ 1	$ 1	$ 1	$ 1
141200	Sales of documents	$ -	$ -	$ -	$ -	$ -
142500	Miscellaneous services to the public	$ -	$ -	$ -	$ -	$ -
150300	Income from surplus money investments	$ 13	$ 14	$ 10	$ 4	$ -
150500	Interest Income From Interfund Loans	$ -	$ -	$ -	$ -	$ -
160100	Settlements and Judgements	$ 2	$ -	$ -	$ -	$ -
160400	Sale of fixed assets	$ -	$ -	$ -	$ -	$ -
161000	Escheat of unclaimed checks and warrants	$ 4	$ 4	$ 4	$ 4	$ 4
161400	Miscellaneous revenues	$ 3	$ 3	$ 3	$ 3	$ 3
164300	Penalty Assessments	$ -	$ -	$ -	$ -	$ -
Totals, Revenues		$ 10,303	$ 10,782	$ 10,708	$ 10,702	$ 10,698
Transfers from Other Funds						
F00001	Repayment Per Item 1250-011-0741, Budget Act of 2003	$ -	$ -	$ -	$ -	$ -
Totals, Revenues and Transfers		$ 10,303	$ 10,782	$ 10,708	$ 10,702	$ 10,698
Totals, Resources		$ 16,361	$ 16,416	$ 15,313	$ 13,888	$ 12,197
EXPENDITURES						
Disbursements:						
0840 State Controller (State Operations)		$ -	$ -	$ -	$ -	$ -
8880 Financial Information System of California (State Operations)		$ 10	$ 23	$ 23	$ 23	$ 23
1110 Program Expenditures (State Operations)		$ 10,718	$ 12,788	$ 13,103	$ 13,365	$ 13,632
Estimated Savings			**$ -1,000**	**$ -1,000**	**$ -1,000**	
Total Disbursements		$ 10,728	$ 11,811	$ 12,127	$ 12,389	$ 13,656
FUND BALANCE						
Reserve for economic uncertainties		$ 5,634	$ 4,605	$ 3,186	$ 1,499	$ -1,459
Months in Reserve		5.7	4.6	3.1	1.3	-1.3

NOTES:

A. ASSUMES WORKLOAD AND REVENUE PROJECTIONS ARE REALIZED IN BY+1 AND ON-GOING.

B. ASSUMES APPROPRIATION GROWTH OF 2% PER YEAR BEGINNING IN BY+1

C. ASSUMES INTEREST RATE AT 0.3%.

3142 - Dental Assisting Program
Analysis of Fund Condition

10/8/2015

(Dollars in Thousands)

2015 Budget Act

	Actual 2014-15	CY 2015-16	BY 2016-17	BY + 1 2017-18	BY + 2 2018-19
BEGINNING BALANCE	$ 2,826	$ 2,840	$ 1,975	$ 1,053	$ 77
Prior Year Adjustment	$ 33	$ -	$ -	$ -	$ -
Adjusted Beginning Balance	$ 2,859	$ 2,840	$ 1,975	$ 1,053	$ 77
REVENUES AND TRANSFERS					
Revenues:					
125600 Other regulatory fees	$ 18	$ 18	$ 18	$ 18	$ 18
125700 Other regulatory licenses and permits	$ 264	$ 301	$ 278	$ 278	$ 278
125800 Renewal fees	$ 1,275	$ 1,265	$ 1,270	$ 1,270	$ 1,270
125900 Delinquent fees	$ 90	$ 70	$ 69	$ 69	$ 69
141200 Sales of documents	$ -	$ -	$ -	$ -	$ -
142500 Miscellaneous services to the public	$ -	$ -	$ -	$ -	$ -
150300 Income from surplus money investments	$ 8	$ 6	$ 3	$ -	$ -
160400 Sale of fixed assets	$ -	$ -	$ -	$ -	$ -
161000 Escheat of unclaimed checks and warrants	$ 1	$ 1	$ 1	$ 1	$ 1
161400 Miscellaneous revenues	$ 6	$ 5	$ 5	$ 5	$ 5
164300 Penalty Assessments	$ -	$ -	$ -	$ -	$ -
Totals, Revenues	$ 1,662	$ 1,666	$ 1,644	$ 1,641	$ 1,641
Totals, Revenues and Transfers	$ 1,662	$ 1,666	$ 1,644	$ 1,641	$ 1,641
Totals, Resources	$ 4,521	$ 4,506	$ 3,619	$ 2,694	$ 1,718
EXPENDITURES					
Disbursements:					
0840 State Controller (State Operations)	$ -	$ -	$ -	$ -	$ -
8880 Financial Information System for CA (State Operations)	$ 2	$ 3			
1110 Program Expenditures (State Operations)	$ 1,679	$ 2,528	$ 2,566	$ 2,617	$ 2,670
Total Disbursements	$ 1,681	$ 2,531	$ 2,566	$ 2,617	$ 2,670
FUND BALANCE					
Reserve for economic uncertainties	$ 2,840	$ 1,975	$ 1,053	$ 77	$ (952)
Months in Reserve	13.5	9.2	4.8	0.3	-4.2

NOTES:

A. ASSUMES WORKLOAD AND REVENUE PROJECTIONS ARE REALIZED IN BY+1 AND ONGOING.

B. ASSUMES APPROPRIATION GROWTH OF 2% PER YEAR BEGINNING IN BY+1.

C. ASSUMES INTEREST RATE AT 0.3%.

STATE OF CALIFORNIA
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BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY • GOVERNOR EDMUND G. BROWN JR.
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MEMORANDUM

DATE	November 16, 2015
TO	Members of the Dental Board of California
FROM	Nellie Forgét, Program Coordinator Elective Facial Cosmetic Surgery Permit Program
SUBJECT	**Agenda Item 16:** Report on the October 14, 2015 Meeting of the Elective Facial Cosmetic Surgery Permit Credentialing Committee; Discussion and Possible Action to Accept Committee Recommendations for Issuance of Permit

Background :

On September 30, 2006, Governor Arnold Schwarzenegger signed Senate Bill 438 (Midgen, Chapter 909, Statutes of 2006), enacting Business and Professions Code (Code) Section 1638.1, which took effect on January 1, 2007. Code Section 1638.1 authorizes the Dental Board of California (Board) to issue Elective Facial Cosmetic Surgery (EFCS) permits to qualified licensed dentists and establishes the EFCS Credentialing Committee (Committee) to review the qualifications of each applicant for a permit.

Pursuant to Code Section 1638.1(a)(2), an EFCS permit that is issued by the Board is valid for a period of two (2) years and is required to be renewed by the permit-holder at the time his or her dental license is renewed. Additionally, every six (6) years, prior to the renewal of the permit-holder's license and permit, the permit-holder is required to submit evidence acceptable to the Committee that he or she has maintained continued competence to perform the procedures authorized by the permit. The Committee is authorized to limit a permit consistent with Code Section 1638.1(e)(1) if it is not satisfied that the permit-holder has established continued competence.

Code Section 1638.1 does not expressly provide the requirements a permit-holder must meet to establish continuing competency, therefore it has become necessary to promulgate a regulation to implement, interpret, and make specific the provisions of Code Section 1638.1 for the purpose of clarifying the necessary requirements that would establish continuing competency for the EFCS permit.

October 14, 2015 Update:

The Committee met on October 14, 2015 via teleconference to consider proposed regulatory language and application revisions, to discuss potential fee increases, and to review one (1) application for issuance of a permit.

Regulatory Language and Application Revisions:
At the meeting, staff presented the regulatory language and revised EFCS permit application. The Committee tabled this discussion until staff finalizes the regulatory language, specific to the six year continued competency requirements, to incorporate continuing medical education (CME) specific to facial cosmetics into the language.

At the January 2016 EFCS Committee meeting, the Committee will review the revisions to the draft regulatory language, and if approved, will recommend the Board initiate the rulemaking process at the following meeting.

Potential Fee Increase Discussion:
The Committee discussed the potential fee increases specific to the EFCS permit. Staff reported recommendations from the contractor who conducted the Board's fee audit, explaining that a $3,600 initial application fee and $800 renewal fee were the necessary fees to cover program expenses. The Committee reviewed a proposed application fee of $1,500 and renewal fee of $500 made by the Board's subcommittee at the August 2015 meeting. The Committee suggested that both the initial application fee and renewal fee be a mid-range of the recommended fees so as not to deter future applicants. The Committee suggested making both the initial application and renewal fees $850 each and asked that Dr. Whitcher, Board Liaison to the Committee, take the recommendation to the Board for consideration.

Recommendation for Issuance of EFCS Permit:
Additionally, the Committee considered an application from Michael P. Morrissette, DDS. The Committee made the following recommendation regarding issuance of an EFCS permit to Dr. Morrissette:

Applicant: Michael P. Morrissette, DDS, currently holds an EFCS permit for Category I - Limited to facial implants Category II – Limited to : submental liposuction, Botox and fillers, chemical peels, and upper and lower blepharoplasties. He recently applied for an EFCS permit with unlimited privileges for Category I (cosmetic contouring of the osteocartilaginous facial structure, which may include, but not limited to, rhinoplasty and otoplasty) and Category II (cosmetic soft tissue contouring or rejuvenation, which may include, but not limited to, facelift, blepharoplasty, facial skin resurfacing, or lip augmentation).

Based on consideration of the application at its October 14, 2015 meeting, the Committee recommends the Board issue a permit for unlimited Category I and Category II privileges.

Action Requested:
Staff requests the Board take the following actions:
1. Accept the EFCS Credentialing Committee Report, and
2. Accept the Committee's recommendation to issue Michael P. Morrissette, DDS, an EFCS Permit a permit for unlimited Category I and Category II privileges

COMMITTEE REPORTS

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MEMORANDUM

DATE	November 9, 2015
TO	Dental Board of California
FROM	Linda Byers, Executive Assistant
SUBJECT	**Agenda Item 20:** Election of Board Officers for 2016

Background:
Pursuant to Business and Professions Code Section 1606, the Dental Board of California (Board) is required to elect a president, vice president, and a secretary from its membership.

Pursuant to the Board's *Policy and Procedure Manual, Adopted 2/28/2014*, it is the Board's policy to elect officers at the final meeting of the calendar year for service during the next calendar year, unless otherwise decided by the Board. The newly elected officers shall assume the duties of their respective offices on January 1st of the New Year.

Roles and Responsibilities of Board Officers and Committee Chairs:
President:

- Acts as spokesperson for the Board (attends legislative hearings and testifies on behalf of the Board, attends meetings with stakeholders and Legislators on behalf of Board, talks to the media on behalf of the Board, and signs letters on behalf of the Board).
- Meets and/or communicates with the Executive Officer (EO) on a regular basis.
- Provides oversight to the Executive Officer in performance of the EO duties.
- Approves leave requests, verifies accuracy and approves timesheets, approves travel and signs travel expense claims for the EO.
- Coordinates the EO annual evaluation process including contacting DCA Office of Human Resources to obtain a copy of the Executive Officer Performance Evaluation Form, distributes the evaluation form to members, and collates the ratings and comments for discussion.
- Communicates with other Board Members for Board business.

- Authors a president's message for every quarterly board meeting and published newsletters.
- Approves Board Meeting agendas.
- Chairs and facilitates Board Meetings.
- Chairs the Executive Committee.
- Signs specified full board enforcement approval orders.
- Establishes Committees and appoints Chairs and members.
- Establishes 2-Person subcommittees to research policy questions when necessary.

Vice President:

- Is the Back-up for the duties above in the President's absence.
- Is a member of Executive Committee.
- Coordinates the revision of the Board's Strategic Plan.

Secretary:

- Calls the roll at each Board meeting and reports that a quorum has been established.
- Is a member of Executive Committee.

Committee Chair:

- Reviews agenda items with EO and Board President prior to Committee meetings.
- Approves the Committee agendas.
- Chairs and facilitates Committee meetings.
- Reports the activities of the Committee to the full Board.

ADJOURNMENT