BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

NOTICE OF PUBLIC MEETING

The Westin Los Angeles Airport
5400 West Century Boulevard, Westchester AB
Los Angeles, California 90045
(310) 216-5858
October 27, 2015
9:30 a.m.

AGENDA

1. **OPEN SESSION** – Call to Order & Establishment of a Quorum
   Sergio Azzolino, D.C., Chair
   Heather Dehn, D.C., Vice Chair
   Julie Elginer, Dr.PH, Secretary
   Dionne McClain, D.C.
   John Roza Jr., D.C.
   Corey Lichtman, D.C.
   Frank Ruffino

2. **Pledge of Allegiance**

3. **Chair's Report**

4. **Approval of Minutes**
   July 30, 2015

5. **Executive Officer's Report**
   A. Administration
   B. Budget
   C. Licensing
   D. Enforcement

6. **Ratification of Approved License Applications**

7. **Ratification of Approved Continuing Education Providers**

8. **Ratification of Denied License Applications in Which the Applicants Did Not Request a Hearing**

9. **BCE Licensing, Continuing Education and Public Relations Committee Meetings Update -** Board may take action on any item on the attached Licensing, Continuing Education and Public Relations Committee meeting agendas.

10. **BCE Government Affairs Committee Meeting Update –** Board may take action on any item on the attached Government Affairs Committee meeting agenda.

11. **Update on Pending Regulations**
    A. Application for Licensure (CCR Section 321)
    B. Consumer Protection Enforcement Initiative
    C. Uniform Standards for Substance Abusing Licensees
    D. Revisions to BCE Disciplinary Guidelines
    E. Mandatory Cardiopulmonary Resuscitation (CPR) Certification for all licensees
    F. Comprehensive Revisions/Updates to CCR Article 4 (Sections 330 – 331.16) – Approved Schools & Qualifications of Applicants (Curriculum Requirements) Continuing Education Requirements (CE Provider and Course Approval)
    G. Chiropractic Records Retention/Disposition of Patient Records Upon Closure of Practice or Death/Incapacity of Licensee
    H. Continuing Education Requirements (CE Provider and Course Approval)
    I. Amend or Repeal CCR Section 354 - Successful Examination (Obsolete provision)

12. **Proposed 2016 Board Meeting Schedule**

13. **Overview of Occupational Analysis Process**

14. **Discussion and Possible Action Regarding BCE Recognition of Chiropractic Specialty Boards**

15. **North Carolina State Board of Dental Examiners v. Federal Trade Commission**

16. **Public Comment for Items Not on the Agenda**
    Note: The Board may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125, 11125.7(a).] Public comment is encouraged; however, if time constraints mandate, comments may be limited at the discretion of the Chair.

17. **Future Agenda Items**

18. **Hearings Re: Petition for Early Termination of Probation and/or Reduction of Penalty**
    A. Nora Oakley, D.C. – DC 19020
    B. Roberta Rendon, D.C.- DC 25023

19. **Hearing Re: Petition for Reinstatement of Revoked License**
    A. Dennis Revere

20. Closed Session

The Board will meet in Closed Session to:

A. Deliberate on Disciplinary Decisions and Petitions Pursuant to California Government Code Section 11126(c)(3)

B. Receive Advice from Legal Counsel Pursuant to California Government Code Section 11126(e) Regarding:

1) Jonathan Widenbaum, D.C. v. California Department of Consumer Affairs/Board of Chiropractic Examiners, Cal.Ct.App. (1st app. Dist.), Case No. A142454

2) Hugh Lubkin, D.C. v. Board of Chiropractic Examiners Workers' Compensation Case No. ADJ7361379

C. Evaluation of the Executive Officer Pursuant to California Government Code Section 11126(a)

21. OPEN SESSION: Announcements Regarding Closed Session

22. Adjournment

Meetings of the Board of Chiropractic Examiners are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. 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. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at www.chiro.ca.gov.

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Valerie James at (916) 263-5355 ext. 5362 or e-mail Valerie.James@dca.ca.gov or send a written request to the Board of Chiropractic Examiners, 901 P Street, Suite 142A, Sacramento, CA 95814. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Approval of Minutes

July 30, 2015

Exhibit 4

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

BOARD OF CHIROPRACTIC EXAMINERS
PUBLIC SESSION MINUTES

July 30, 2015
State Capitol
First Floor, Senate Committee Room 113
Sacramento, CA 95814

Board Members Present
Sergio Azzolino D.C., Chair
Heather Dehn, D.C., Vice Chair
Julie Elginer, Dr.PH, Secretary
Dionne McClain, D.C.
John Roza, Jr., D.C.
Corey Lichtman, D.C.
Frank Ruffino,

Staff Present
Robert Puleo, Executive Officer
Spencer Walker, Attorney III
Linda Shaw, Assistant Executive Officer
Sandra Walker, Staff Services Manager I
Dixie Van Allen, Staff Services Manager I
Valerie James, Management Services Technician
Nikkia Capizzano, Office Technician

Call to Order
Dr. Azzolino called the meeting to order at 9:07 a.m.

Roll Call
Dr. Elginer called the roll. All members were present.

Pledge of Allegiance
Mr. Ruffino led the Pledge of Allegiance.

Chair's Report
Dr. Azzolino welcomed Dr. Elginer' s, Dr. McClain's and Mr. Ruffino' s children and thanked them for attending the meeting. He congratulated Ms. Shaw on her promotion as Assistant Executive Officer. He also highlighted some of the significant projects that each Committee is working on.

DRAFT

Approval of Minutes

Dr. Elginer requested amendments to the minutes as follows:

- Page 1- Roll Call- The April 16, 2015, Minutes should state, "Mr. Ruffino"
- Page 1- Roll Call-The June 22, 2015, Minutes should state, "Dr. Elginer"

MOTION: DR. RUFFINO MOVED TO APPROVE THE APRIL 16, 2015 AND JUNE 22, 2015 MINUTES AS AMENDED.
SECOND: DR. MCCLAIN SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. LICHTMAN-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

Executive Officer's Report

Mr. Puleo gave the Executive Officer Report. The topics covered were Administration, Budget, Licensing and Enforcement.

Mr. Puleo referred to the Board's outreach pamphlets, one pamphlet provided information about the Board of Chiropractic Examiners and the other providing information about chiropractic and what to expect when being treated by a chiropractor. He also advised the Board Members of the mandatory training required in 2015, which consists of Board Member Orientation, Ethics, Sexual Harassment and Defensive Driving. He provided some highlights on The Health Care Executive Officer Council specific to online participation for public meetings. Lastly, he announced that Ms. Shaw has been appointed as Assistant Executive Officer and Ms. Van Allen has been appointed as the Licensing Unit Manager, which has left the Policy Analyst position vacant.

Mr. Puleo provided an update of the Board's fund condition and advised that there haven't been any significant changes since the last meeting. He introduced Cynthia Dines, Budget Manager and Marisa Ochoa, Budget Analyst, from DCA's Budget Office. Ms. Dines provided an overview of the Board's budget and a brief explanation of the Budget Change Proposal process.

Mr. Puleo summarized the Board's licensing statistics and stated there haven't been any significant changes since the last meeting. He also reported on the Enforcement statistics and provided a brief overview of enforcement activity since the last Board Meeting. There was a discussion surrounding the Continuing Education audit process. Dr. Roza requested that an insert be placed with renewals advising licensees about compliance with Continuing Education requirements.

Ratification of Approved License Applications

MOTION: DR. ELGINER MOVED TO RATIFY THE APPROVED LICENSE APPLICATIONS.
SECOND: DR. DEHN SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. LICHTMAN-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

The Board ratified the attached list of approved license applications incorporated herein (Attachment A).

DRAFT

Ratification of Approved Continuing Education Providers

MOTION: DR. DEHN MOVED TO RATIFY THE APPROVED CONTINUING EDUCATION PROVIDERS.
SECOND: MR. RUFFINO SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. LICHTMAN-AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED
The Board ratified the attached list of approved continuing education providers incorporated herein (Attachment B).

Ratification of Denied License Applications in Which the Applicants Did Not Request a Hearing
There were no denied license applications.

BCE Licensing, Continuing Education and Public Relations Committee Meeting Update
Dr. Dehn reported that the Licensing, Continuing Education (CE) and Public Relations Committee is currently working on Continuing education Regulations as well as Lapel Pins. She gave the history of the revisions to the current CE Regulations. She also provided information on the Providers of Approved Continuing Education (PACE) program, which pre-qualifies CE providers. Dr. Elginer agreed with PACE philosophy. Lastly, Dr. Dehn brought the proposed language for Sections 371 forward for discussion.

MOTION: DR. DEHN MOVED, ON BEHALF OF THE COMMITTEE, TO APPROVE THE PROPOSED LANGUAGE FOR TITLE 16, CALIFORNIA CODE OF REGULATIONS, SECTIONS 371 & 371.1 CARDIOPULMONARY RESUSCITATION/BASIC LIFE SUPPORT TRAINING WITH THE FOLLOWING AMENDMENTS TO SUBDIVISIONS (C), (E1), (F) AND (G1) , OF SECTION 371:

- ***DELETE- ~~CPR/BASIC LIFE SUPPORT CERTIFICATION REQUIREMENTS, IN SECTION 371.1~~***
- ***ADD- THE REQUIREMENTS OF SECTION 371.1.***

VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. LICHTMAN -AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

MOTION: DR. AZZOLINO MOVED TO DIRECT STAFF TO TAKE ALL NECESSARY STEPS TO INITIATE THE FORMAL RULEMAKING PROCESS WITH THE PROPOSED TEXT FOR SECTIONS 371 & 371.1 AND AUTHORIZE THE EXECUTIVE OFFICER TO MAKE ANY NON-SUBSTANTIVE CHANGES TO THE RULEMAKING PACKAGE AND DIRECT STAFF TO INITIATE A 45-DAY COMMENT PERIOD.
SECONDED: DR. DEHN SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. LICHTMAN -AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

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Following the Licensing, Continuing Education (CE) and Public Relations Committee update, Dr. Dehn reported on her participation at the National Board of Chiropractic Examiners (NBCE) Practical Examination Test Committee and gave an overview of the NBCE exam process.

BCE Government Affairs Committee Meeting Update

Dr. Elginer provided a brief overview of the Committee's progress on action items in the Strategic plan. Dr. Elginer requested suggestions on how to fulfill Goal 4.2.5 of the Strategic Plan. Dr. Dehn suggested a summary of staff duties with the Board's organization chart. Dr. Elginer referred to a handout in the Board packets titled "Communications Assessment," which would meet Goal 7.2, to establish open lines of communication with government stakeholders to ensure the Board is well informed about information relevant to the chiropractic profession. Lastly, Dr. Elginer provided status updates and recommended positions on various Legislative bills. There were discussions surrounding Legislative Bills AB 12 (Cooley) – State Govt.: Administrative Regulations: Review, AB 333 (Melendez) - Healing Arts: Continuing Education, AB 410 (Obernolte) – Documents submitted to Legislative Committees, AB 179 (Bonilla) - Healing Arts: Continuing Education. Dr. Elginer volunteered to provide the Board social media training. The Board Members agreed that the Board would benefit from this training and would like to have it at the next Board meeting at the Southern California University of Health Sciences 2016.

MOTION: DR. ELGINER MOVED, ON BEHALF OF THE COMMITTEE, TO TAKE A POSTION OF "OPPOSE" ON AB 85- (WILK) - OPEN MEETINGS
VOTE: 7-0 (DR. AZZOLINO- AYE, DR. DEHN- AYE, DR. ELGINER- AYE, DR. LICHTMAN - AYE, DR. MCCLAIN- AYE, DR. ROZA- AYE, MR. RUFFINO- AYE)
MOTION: CARRIED

MOTION: DR. ELGINER MOVED, ON BEHALF OF THE COMMITTEE, TO TAKE A "NEUTRAL" POSTION ON THE FOLLOWING:
AB 12 (COOLEY) - STATE GOVT.: ADMINSTRATIVE REGULATIONS: REVIEW
AB 333 (MELENDEZ)-HEALING ARTS: CONTINUING EDUCATION
AB 410 (OBERNOLTE) - DOCUMENTS SUBMITTED TO LEGISLATIVE COMMMITTEES
AB 179 (BONILLA) - HEALING ARTS: CONTINUING EDUCATION

Dr. Dehn inquired about the reasons for the neutral recommendation on AB 333. Mr. Puleo stated that while we support the intent of this bill, it only offers licensees a small incentive to take the CPR Courses. Furthermore it's not directly related to the BCE's proposed CPR regulation, the Board wants to adopt. Mr. Walker advised the Board that they could make a new motion if they want to support AB 333 (Melendez) Healing Arts.

MOTION: DR. ROZA MOVED TO TAKE A "SUPPORT" POSITION ON AB 333 (MELENDEZ)- HEALING ARTS; CONTINUING EDUCATION INSTEAD OF A "NEUTRAL" POSITION
SECONDED: DR. ELGINER SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO- AYE, DR. DEHN- AYE, DR. ELGINER- AYE, DR. LICHTMAN - AYE, DR. MCCLAIN- AYE, DR. ROZA- AYE, MR. RUFFINO- AYE)
MOTION: CARRIED

MOTION: DR. ELGINER MOVED ON BEHALF OF THE COMMITTEE TO TAKE A "NEUTRAL" POSTION ON THE FOLLOWING:
AB 12 (COOLEY) - STATE GOVT.: ADMINSTRATIVE REGULATIONS: REVIEW
AB 410 (OBERNOLTE) - DOCUMENTS SUBMITTED TO LEGISLATIVE COMMMITTEES
AB 179 (BONILLA) - HEALING ARTS: CONTINUING EDUCATION
VOTE: 7-0 (DR. AZZOLINO- AYE, DR. DEHN- AYE, DR. ELGINER- AYE, DR. LICHTMAN - AYE, DR. MCCLAIN- AYE, DR. ROZA- AYE, MR. RUFFINO- AYE)
MOTION: CARRIED

BCE Enforcement Committee Meeting Update
Dr. Azzolino reported on the SB1441 Uniform Standards Related to Substance Abusing Licensees, The Committee decided to remove the Uniform Standards from the Disciplinary Guidelines proposed language until further notice from DCA's Legal Office. Dr. Elginer asked for clarification on the Language. Specifically to page 8 under Category 1 section 304, to which states "Discipline by another Jurisdiction". Mr. Puleo stated that Section 304 is not being amended, and the Board should keep this language consistent with the existing law, which currently states, "Discipline by another state". Dr. Azzolino reported that the Committee discussed the need for amendments to Government Code Section 11522, which would allow the Board to defer Petitioner hearings for licensee's that have been revoked or suspended to an Administrative Law Judge. The Committee felt strongly about retaining their ability to hold Petition Hearings before the Board. Lastly, the Committee discussed question number 3 on the Petition Application the committee has been advised that concerns regarding this question have been addressed.

MOTION: DR. AZZOLINO MOVED, ON BEHALF OF THE COMMITTEE, TO APPROVE THE PROPOSED REVISIONS TO THE DISCIPLINARY GUIDELINES.
DISCUSSION: *Dr. Elginer inquired about whether the language under page 8 of the CCR Section 304 should say "State or Jurisdiction". Mr. Puleo advised that this should say "State" for consistency with the current Regulatory Language.*
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. LICHTMAN -AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

MOTION: DR. AZZOLINO MOVED TO APPROVE THE PROPOSED REVISED LANGUAGE FOR TITLE 16, CALIFORNIA CODE OF REGULATIONS SECTION 384, AND TO DIRECT STAFF TO TAKE ALL NECESSARY STEPS TO INITIATE THE FORMAL RULEMAKING PROCESS WITH THE PROPOSED TEXT FOR SECTION 384 AND AUTHORIZE THE EXECUTIVE OFFICER TO MAKE ANY NON-SUBSTANTIVE CHANGES TO THE RULEMAKING PACKAGE AND DIRECT STAFF TO INITIATE A 45-DAY COMMENT PERIOD
SECONDED: MR. RUFFINO SECONDED THE MOTION
VOTE: 7-0 (DR. AZZOLINO-AYE, DR. DEHN-AYE, DR. ELGINER-AYE, DR. LICHTMAN -AYE, DR. MCCLAIN-AYE, DR. ROZA-AYE, MR. RUFFINO-AYE)
MOTION: CARRIED

DRAFT

The Board moved to Agenda Item 15- Hearings Re: Reinstatement of Revoked License
Administrative Law Judge, Ann Sarli, presided over and Deputy Attorney General David Brice appeared on behalf of the people of the State of California in the following hearings:

A. Daniel Martello
B. Keith Ohanesian

The Board moved to Agenda Item 16-Hearings Re: Petition for Early Termination of Probation and/or Reduction of Penalty
Administrative Law Judge, Ann Sarli, presided over and Deputy Attorney General David Brice appeared on behalf of the people of the State of California in the following hearing:

A. James Driscoll, D.C. – DC 19102

BCE Curriculum Focus Group
Dr. Dehn gave a brief update on the activates of the Curriculum Focus Group. Dr. Elginer added that the schools have been actively participating.

Discussion and Possible Action Regarding BCE Recognition of Chiropractic Specialty Boards
Dr. Azzolino tabled this item.

Discussion and Possible Action Regarding Specialty Advertising by BCE Licensees
Dr. Azzolino tabled this item.

Public Comment for Items Not on the Agenda
None

Future Agenda Items
Dr. McClain requested staff to post information about the Bagley Keene Act on the Board's website and Social Media.

Following public comment, Mr. Puleo introduced Michelle Stout from the Department of Consumer Affairs Board Relations Office. Ms. Stout commented that she relayed social media concerns to Christine Lally.

Closed Session
Following oral testimonies, the Board went into Closed Session for deliberation and determinations regarding petitioners.

Closed Session to receive advice from Legal Counsel Pursuant to California Government Code Section 11126(e) regarding:

1) Jonathan Widenbaum, D.C. v. California Department of Consumer Affairs/Board of Chiropractic Examiners, Cal.Ct.App. (1st app. Dist.), Case No. A142454
2) Hugh Lubkin, D.C. v. Board of Chiropractic Examiners
3) Workers' Compensation Case No. ADJ7361379

Open Session

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The Board went back into Open Session and moved to agenda item 13.

The Board moved to Agenda Item 13-Updates on Proposed Regulations and Proposed Regulatory Changes

Mr. Walker reported that the Business Consumer Services and Housing Agency and the Department of Consumer Affairs require the Boards and Bureaus to move forward with the Regulations for Uniform Standards for Substance Abusing Licensees. Ms. Van Allen commented that CPR, Application for Licensure and Uniform Standards are top priority Rulemaking packages. She also stated that Sponsored Free Health Care Events package is complete. The Board prioritized pending Rulemaking packages into the following groups:

	Group A
1	Application for Licensure (CCR Section 321)
2	Consumer Protection Enforcement Initiative
3	Uniform Standards for Substance Abusing Licensees
	Group B
1	Revisions to BCE Disciplinary Guidelines
2	Mandatory Cardiopulmonary Resuscitation (CPR) Certification for all licensees
3	Comprehensive Revisions/Updates to CCR Article 4 (Sections 330 – 331.16) – Approved Schools & Qualifications of Applicants (Curriculum Requirements) Continuing Education Requirements (CE Provider and Course Approval
	Group C
1	Chiropractic Records Retention/Disposition of Patient Records Upon Closure of Practice or Death/Incapacity of Licensee
2	Continuing Education Requirements(CE Provider and Course Approval)
3	Amend or Repeal CCR Section 354 - Successful Examination (Obsolete provision)

Adjournment

Dr. Azzolino adjourned the meeting at 3.48 p.m.

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(ATTACHMENT A)

Approval by Ratification of Formerly Approved License Applications
April 1, 2015 – June 30, 2015

Name (First, Middle, Last)			Date Issued	DC#
Parker	Clive	Dominique	4/9/2015	33251
Joseph	Quincy	Fair	4/9/2015	33252
Deanna	Frances	Hartsough	4/9/2015	33253
Lisa	Michell	Ortiz	4/9/2015	33254
Danny	Louis	Rives	4/9/2015	33255
Dana	Marie	Robinson	4/9/2015	33256
Patrick	Lester	Sau	4/9/2015	33257
Erick	Carl	Swenson	4/9/2015	33258
Chris	Allen	Hengesteg	4/13/2015	33259
Trevor	Ka'eo	Minton	4/13/2015	33260
Cynthia	Denise	Smith	4/13/2015	33261
Sirlina	Charise	Cook	4/13/2015	33262
Anna	Christine	Nusslock	4/13/2015	33263
John	Tecumseh-Wallace	Ball	4/16/2015	33264
Derek	Kenneth	Ko	4/16/2015	33265
John	Edward	Wolfgang	4/16/2015	33266
Margaret	Noel	Zepfel	4/16/2015	33267
Krystal	Marie	Drwencke	4/23/2015	33268
Derek	James	Libby	4/23/2015	33269
Torrey	Lynn	Schroeder	4/23/2015	33270
Abby	Marie	Sirovica	4/23/2015	33271
Seth	Matthew	Towner	4/23/2015	33272
Noah	Stephen	Djuric	4/29/2015	33273
Theresa	Marie	Fleege	4/29/2015	33274
Melissa	Marie	Hoar	4/29/2015	33275
Sungho		Jang	4/29/2015	33276
Meagan	Aylene	Kitt	4/29/2015	33277
Nasim		Nemat-Gorgani	4/29/2015	33278
Alan	Rillorta	Floresca	5/4/2015	33279
Bria	Lauren	Iacini	5/4/2015	33280
Andy		Chiang	5/5/2015	33281
Timothy	David	Lanier	5/5/2015	33282
Su Joung		Youk	5/5/2015	33283

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Joshua	Natan	Caya	5/6/2015	33284
Monica	Liliana	Grove	5/6/2015	33285
Andrew	Edmund	Magsumbol	5/6/2015	33286
Joseph	Richard	Martinez, Jr.	5/7/2015	33287
Jennifer	Lynn	McCleary	5/7/2015	33288
Sarah	Marie	Alfon	5/8/2015	33289
Josephine	Inez	Morales	5/8/2015	33290
Rebecca	Jane	Fidler	5/19/2015	33291
Steven	Wayne	Fleek	5/19/2015	33292
David	Kun Ju	Chen	5/29/2015	33293
Jordan	Bernard	Cohen	5/29/2015	33294
Haron	Hashmat	Kazem	5/29/2015	33295
Maria	Anjoline	Lopez	5/29/2015	33296
Andrea	Kimberly	Cavalla	6/3/2015	33297
Shane	Anthony	Edwards	6/3/2015	33298
Hanmo		Gu	6/3/2015	33299
Ahmad	Naweed	Kazem	6/3/2015	33300
Manasseh	Chibuzor	Nwaigwe, Jr.	6/3/2015	33301
Sydne	Michelle	Pomin	6/3/2015	33302
Kristina	Herrera	Portillo	6/3/2015	33303
Jonathan	Rickie	Price	6/3/2015	33304
Jaime	Sebastian	Tojos	6/3/2015	33305
Juan	Carrasco	Torres	6/3/2015	33306
Gilbert	Mathew	Ziebell IV	6/3/2015	33307
Souren		Alexanian	6/11/2015	33308
Jesse	Ellis	Call	6/11/2015	33309
Patrick	James	Cucarola	6/11/2015	33310
Aimee	Rose	Duarte	6/11/2015	33311
Charles	Richard	Fagenholz	6/11/2015	33312
Monica		Felix	6/11/2015	33313
Nicholas	Popplein	Hall	6/11/2015	33314
Melisa		Keo	6/11/2015	33315
Rupeshbhai	Arvindbhai	Patel	6/11/2015	33316
Anne	Marjorie	Yeakel	6/11/2015	33317
Karl	Joseph	Baune	6/12/2015	33318
Christopher	John	Boman	6/12/2015	33319
Joshua	David	Paredes	6/12/2015	33320
Ashlyn	Elizabeth	Lanes	6/15/2015	33321
Amber	Jean	Truelove	6/15/2015	33322
Cordie	Lee	Williams	6/15/2015	33323
Zayneb		El-Shibib	6/23/2015	33324
Fereshteh		Saeeda	6/23/2015	33325

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Geoffrey	Ronald	Hargett	6/25/2015	**33326**
Alexsandra		Kaykov	6/25/2015	**33327**
John	Knox	Maltby II	6/25/2015	**33328**
Douglas	Thomas	Morris	6/25/2015	**33329**
Jordan	Curtis	Wishmyer	6/25/2015	**33330**
Roni		Yani	6/25/2015	**33331**
Ren-Tsz		Yeh	6/25/2015	**33332**
Ronnie	Jon	Boesch	6/26/2015	**33333**
Sarah	Ashlee	Ferguson	6/26/2015	**33334**
Gary	Thomas	Wilson	6/26/2015	**33335**
Yi-Chen		Chen	6/30/2015	**33336**
Kristyn	Lynn	Silver	6/30/2015	**33337**

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(ATTACHMENT B)

Ratification for New Continuing Education Providers

CONTINUING EDUCATION PROVIDERS	DATE APPROVED
1. Chiropractic Best Practice Continuing Education Online	07/30/15
2. Dan Schultz	07/30/15
3. EMS Training Institute, Inc	07/30/15
4. Gage Continuing Education	07/30/15
5. JetSet Rehab Education	07/30/15
6. Leslie J Prins, DC	07/30/15
7. Susan T Green, DC	07/30/15
8. 413 Medical Billing & Service	07/30/15
9. Donna Elane Lee	07/30/15
10. David J Getoff	07/30/15
11. Kenneth Muhich, D.C.	07/30/15
12. Steve Costales	07/30/15
13. Brain Injury Association of California	07/30/15
14. Robert Steven Fleischner	07/30/15
15. CHIROCLAIMS	07/30/15
16. INLP Center	07/30/15
17. Mary Trumpi, DC	07/30/15
18. James V Thompson, DC	07/30/15
19. GMC Success Academy	07/30/15
20. Rex Stevens	07/30/15
21. Health Claims Services, Inc.	07/30/15
22. David Knepp, DC	07/30/15
23. James Raker, DC	07/30/15

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BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Executive Officer's Report

Exhibit 5A, 5B, 5C, 5D

Department of Consumer Affairs
State Board of Chiropractic Examiners
October 2015

BOARD MEMBERS (7)

Authorized Positions: 19

Robert Puleo
Executive Officer
620-110-8862-001

SSMII
Linda Shaw
Assistant Executive Officer
620-110-4801-001

SSM I
Vacant
Compliance Manager
620-110-4800-006

SSM I
Dixie Van Allen
Admin/Licensing/CE Manager
620-110-4800-008

Admin/Licensing
Valerie James
Management Services Technician
620-110-5278-001

ENFORCEMENT

Compliance Unit

Lavella Matthews
Assoc. Gov. Program Analyst
620-110-5393-002

Christina Bell
Assoc. Gov. Program Analyst
620-110-5393-005

Beckie Rust
Assoc. Gov. Program Analyst
620-110-5393-004

Marlene Valencia
Assoc. Gov. Program Analyst
620-110-5393-800

Summer Thomas
Staff Services Analyst
620-110-5157-004

FIELD OPERATIONS

Field Operations North

Maria Martinez
Special Investigator
620-110-8612-001

Denise Robertson
Special Investigator
620-110-8612-002

Field Operations South

Yanti Soliman
Special Investigator
620-110-8612-003

ADMIN/LICENSING

Policy/Admin

Marcus McCarther
Assoc. Gov. Program Analyst
620-110-5393-003

Admin/Licensing

Brianna Lauziere
Staff Services Analyst
620-110-5157-008

Tammi Pitto
Staff Services Analyst
620-110-5157-007

Nikkia Capizzano
Office Technician (T)
620-110-1139-008

Alyssa Vasquez
Office Technician (T)
620-110-1139-009

Licensing/Continuing Education

Genie Mitsuhara
Staff Services Analyst
620-110-5157-005

Executive Officer _____

Personnel Office _____

ositions are designated CORI

Rev. 10/01/15

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Summary of Positions

Will be Handed Out at Board Meeting

Exhibit 5A

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Executive Officer's Report

Budget

Will be Handed Out at Board Meeting

Exhibit 5B

BOARD OF CHIROPRACTIC EXAMINERS
LICENSING TRENDS

Month	Received	Issued
July	23	25
August	24	22
September	12	13

Total Population of Chiropractic Licenses
New Chiropractic License Issued

Month	Total Licenses
July	13,318
August	13,302
September	13,294

Number of Restored Cancelled Licenses

Month	Received	Issued
July	1	2
August	3	1
September	4	5

New Satellite Office Certificates Issued

Month	Received	Issued
July	103	153
August	123	67
September	108	88

Corporation Registrations Issued

Month	Received	Issued
July	10	4
August	10	8
September	9	7

Licensing Population as of September 30, 2015

License Type	Clear Licenses
Chiropractors	13,294
Satellite Offices	3,831
Corporation Registrations	1,389

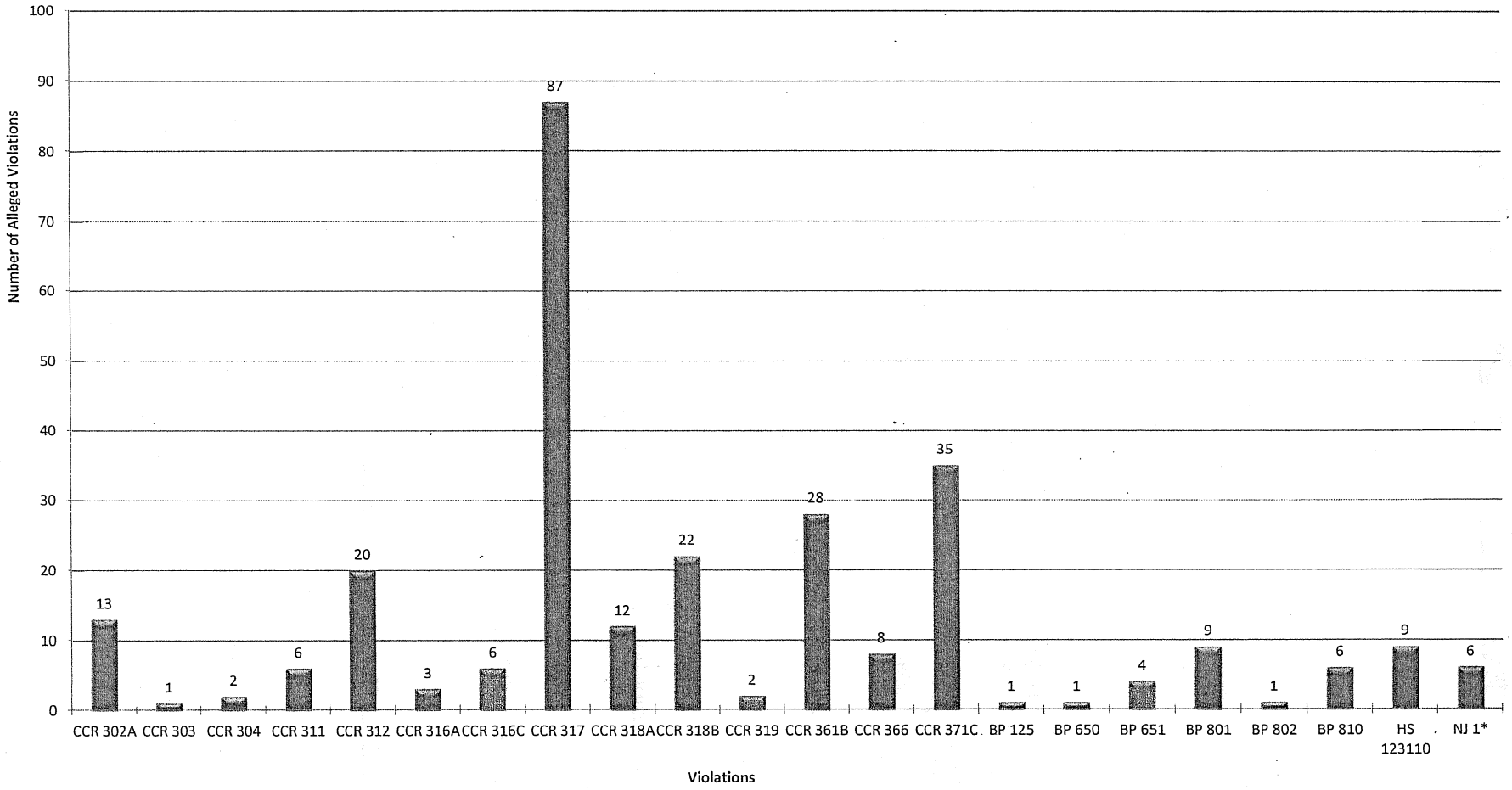
Applications Received and Processed – July 1, 2015 through September 30, 2015

Application Type	Received	Issued	Denied	Pending
Initial	59	60	0	97
Reciprocal	2	0	0	20
Restorations (Cancelled & Forfeiture)	25	25	0	9
Corporation	29	19	0	16

COMPLIANCE UNIT STATS

Fiscal Year	11/12	12/13	13/14	14/15	15/16
COMPLAINTS					
Received	391	386	487	557	138
Pending	125	159	214	270	191
Closed with Insufficient Evidence	89	57	88	57	62
Closed with No Violation	93	84	140	100	42
Closed with Merit	120	95	148	220	70
Letter of Admonishment	1	2	5	3	1
Citations and Fines Issued (Total Fine Amount)	26($37,400)	33($19,400)	26($18,500)	16($12,400)	6($3,400)
ACCUSATIONS					
Filed	41	34	38	22	7
Pending	99	73	56	64	60
Revoked	14	11	12	9	0
Revocation Stayed: Probation	20	31	15	7	1
Revocation Stayed: Suspension and Probation	12	5	4	2	0
Suspension	0	0	0	0	0
Suspension Stayed: Probation	0	0	0	0	0
Suspension and Probation	0	0	0	0	0
Voluntary Surrender of License	7	11	8	8	1
Dismissed/Withdrawn	21	9	3	3	2
STATEMENT OF ISSUES					
Filed	5	1	5	2	0
Denied	0	0	2	1	0
Probationary License	4	3	1	2	0
Withdrawn	0	1	2	1	0
Granted	0	0	0	1	0
PETITION FOR RECONSIDERATION					
Filed	2	4	3	0	0
Granted	0	0	0	0	0
Denied	0	2	2	0	0
PETITION FOR REINSTATEMENT OF LICENSE					
Filed	7	6	5	8	1
Granted	2	2	1	1	1
Denied	6	5	3	4	2
PETITION FOR EARLY TERMINATION OF PROBATION					
Filed	1	6	11	4	0
Granted	1	1	0	0	0
Denied	1	1	3	5	0
PETITION FOR MODIFICATION OF PROBATION					
Filed	0	0	3	2	0
Granted	0	0	0	1	0
Denied	0	0	1	1	0
PETITION BY BOARD TO REVOKE PROBATION					
File	6	2	11	5	3
Revoked	8	3	5	2	1
PROBATION CASES					
Active	89	139	135	123	116

Fiscal Year 2015/2016
July 1, 2015- September 30, 2015
Total Number of Complaints Opened - 138
Total Number of Alleged Violations - 282
(A complaint may contain multiple violations)



Violation Codes/Descriptions

The Chiropractic Initiative Act of California (ACT):

10 – Rules of Professional Conduct
15 – Noncompliance With and Violations of Act

California Code of Regulations (CCR):

302(a) – Scope of Practice
302.5 – Use of Laser
303 – Filing of Addresses
304 – Discipline by Another State
308 – Display of License
311 – Advertisements
312 – Illegal Practice
316 – Responsibility for Conduct on Premises
317 – Unprofessional Conduct
318 – Chiropractic Patient Records/Accountable Billing
319 – Free or Discount Services
319.1 – Informed Consent
361(b) – 24 Hour CE Requirement
366 – Continuing Education Audits
367.5 – Application, Review of Refusal to Approve (corporations)
367.7 – Name of Corporation
371(c) – Renewal and Restoration

Business and Professions Code (BP):

801 (a) – Professional Reporting Requirements (Ins-malpractice settlements)
802 (a) – Professional Reporting Requirements (Lic-malpractice settlements)
810 – Insurance Fraud
1051 – Apply for a Corporation with the Board
1054 – Name of Chiropractic Corporation
17500 – Unlawful Advertising

Health and Safety Code (HS):

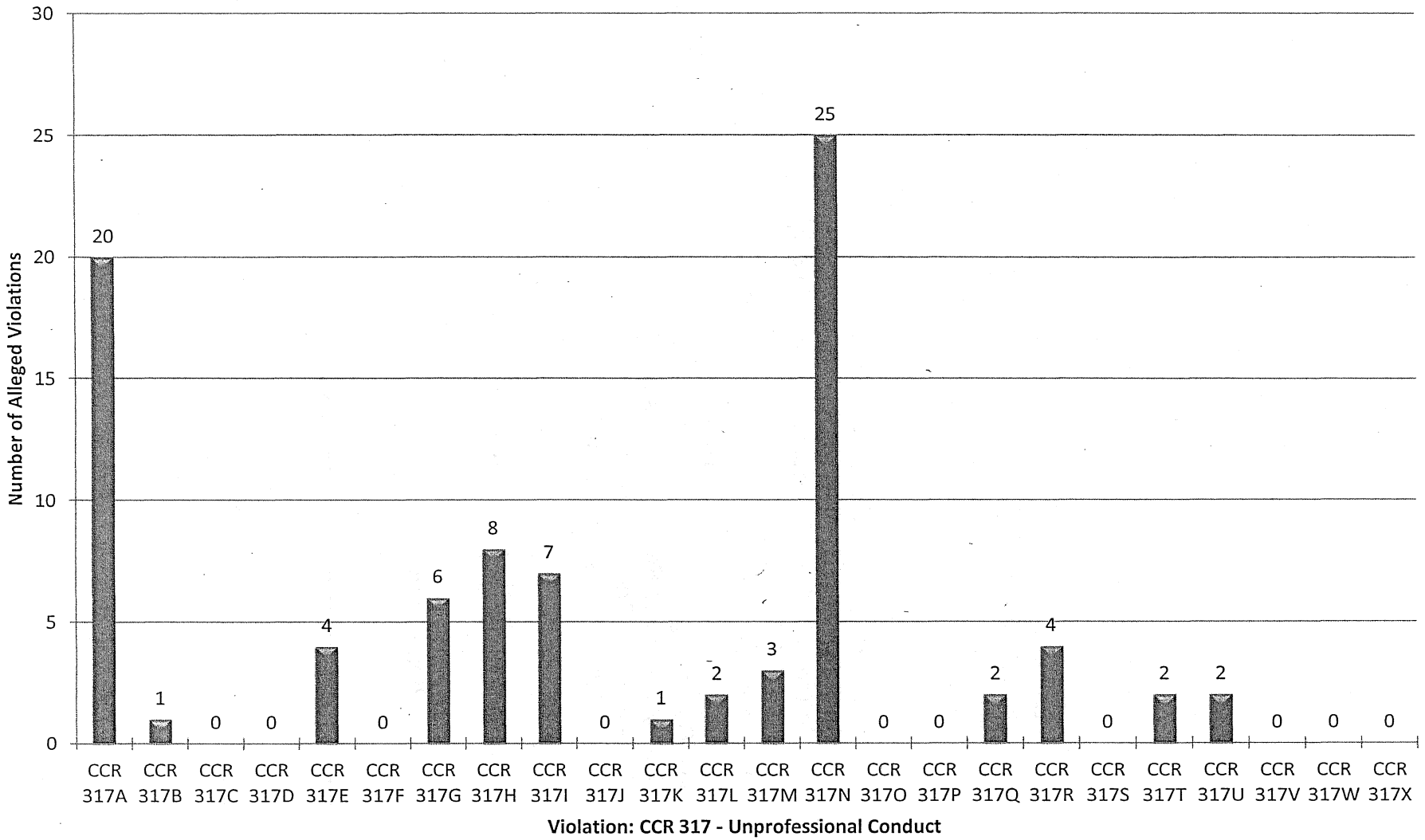
123110 – Patient Access to Health Records

Fiscal Year 2015/2016

July 1, 2015 - September 30, 2015

Number of Complaints Opened Alleging Violation of CCR 317 - 87

(A complaint may contain multiple violations)

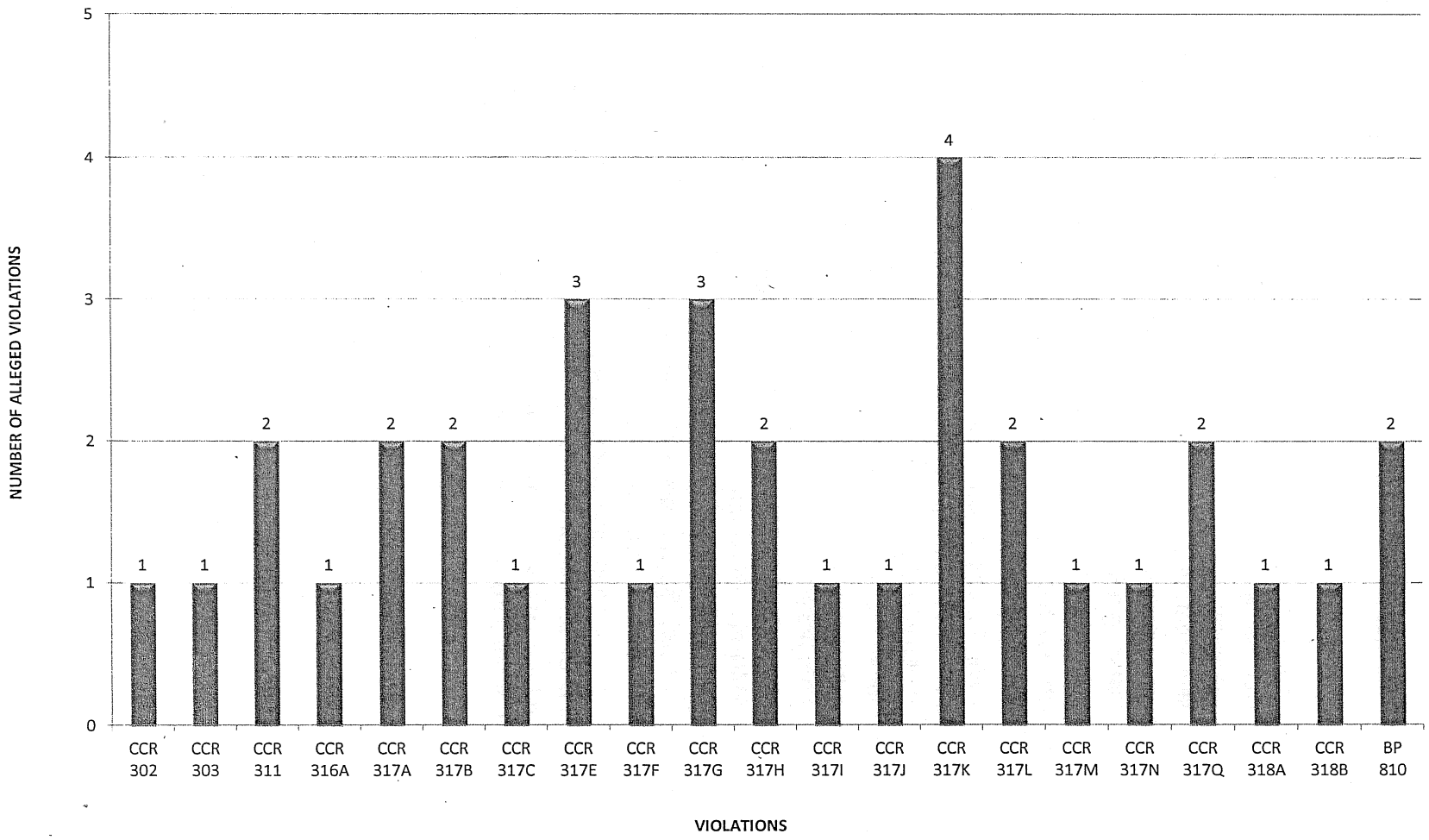


Violation Codes/Descriptions

California Code of Regulations (CCR) Section 317 – Unprofessional Conduct:

(a) Gross Negligence
(b) Repeated Negligent Acts
(c) Incompetence
(d) Excessive Treatment
(e) Conduct Endangering Public
(f) Administering to Oneself Drugs/Alcohol
(g) Conviction of a Crime Related to Chiropractic Duties
(h) Conviction of a Crime Involving Moral Turpitude/Physical Violence/etc.
(i) Conviction of a Crime Involving Drugs or Alcohol
(j) Dispensing Narcotics/Dangerous Drugs/etc.
(k) Moral Turpitude/Corruption/etc.
(l) False Representation
(m) Violation of the ACT/Regulations
(n) False Statement Given in Connection with an Application for Licensure
(o) Impersonating an Applicant
(p) Illegal Advertising related to Violations of Section 17500 BP
(q) Fraud/Misrepresentation
(r) Unauthorized Disclosure of Patient Records
(s) Employment/Use of Cappers or Steerers
(t) Offer/Receive Compensation for Referral
(u) Participate in an Illegal Referral Service
(v) Waiving Deductible or Co-Pay
(w) Fail to Refer Patient to Physician/Surgeon/etc.
(x) Offer or Substitution of Spinal Manipulation for Vaccination

Fiscal Year 2015/2016
July 1, 2015- September 30, 2015
Number of Accusations Filed- 7
Total Number of Alleged Violations - 35
A complaint may contain multiple violations)



BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Ratification of Approved License Applications

Exhibit 6

STATE OF CALIFORNIA

BOARD OF CHIROPRACTIC EXAMINERS | EDMUND G. BROWN JR., GOVERNOR

MEMORANDUM

Date: October 15, 2015

To: **Board Members**

From: Robert Puleo
Executive Officer

Subject: **Ratification of Formerly Approved Doctors of Chiropractic for Licensure**

This is to request that the Board ratify the attached list of individuals as Doctors of Chiropractic at the October 27, 2015, public meeting.

Between July 1, 2015 and September 30, 2015, staff reviewed and confirmed that the applicants met all statutory and regulatory requirements.

If you have any questions or concerns, please contact me at your earliest opportunity.

Approval By Ratification of Formerly Approved License Applications
July 1, 2015 – September 30, 2015

Name (First, Middle, Last)			Date Issued	DC#
Christopher	Joseph	Alegria	7/3/2015	**33338**
Justin	Kyle	Cheng	7/3/2015	**33339**
Saul	Ethan	Sclamberg	7/3/2015	**33340**
Heather		Creed	7/9/2015	**33341**
Veronica	Isabel	Diaz	7/9/2015	**33342**
Joshua	John	Ellis	7/9/2015	**33343**
Walter	Raymund	Fermin	7/9/2015	**33344**
Nicholas	Allen	Garcia	7/9/2015	**33345**
Dustin	William	Martinez	7/9/2015	**33346**
Carlos		Castro	7/10/2015	**33347**
Michael	Andrew	Torrez	7/10/2015	**33348**
Dominador	Lorenzo	Ang Jr.	7/17/2015	**33349**
Troy	Mark	Benfield	7/23/2015	**33350**
Timothy	Tanh	Cambridge	7/23/2015	**33351**
Peter	Alexander	Rehl	7/23/2015	**33352**
German		Arellano	7/29/2015	**33353**
Masi	Brede	Bayless	7/29/2015	**33354**
Michael	James	Behymer	7/29/2015	**33355**
Casey	Jay	Derr	7/29/2015	**33356**
Rachel	Michelle	Hamel	7/29/2015	**33357**
Manvel		Simonyan	7/29/2015	**33358**
Belin	Sibel	Tekin	7/29/2015	**33359**
Christopher		Chang	7/31/2015	**33360**
Tiffany	Wuu	Chen	7/31/2015	**33361**
Daniel	Joseph	Saenz	7/31/2015	**33362**
Justin	Lee	Jobelius	8/12/2015	**33363**
Naxielly	Maritza	Rodriguez de Cordoba	8/12/2015	**33364**
Brittany	Christine	Falcone	8/17/2015	**33365**
Neils	Conrad	Larson	8/17/2015	**33366**
Emily	Katherine	Mayo	8/17/2015	**33367**
Noah	Daniel	Perlman	8/17/2015	**33368**
Jordan	Scott	Fairley	8/18/2015	**33369**
Joon	Sung	Kang	8/18/2015	**33370**
Alexandra		Threadgill-Inouye	8/18/2015	**33371**
Alia	Hussain	Tomaszewski	8/18/2015	**33372**

Andrew	Salvatore	Vercellino	8/18/2015	**33373**
Gurwinder	Kaur	Bath	8/25/2015	**33374**
Jordan	Alice	Millar	8/25/2015	**33375**
Kyle	Kyunghyun	Park	8/25/2015	**33376**
Brandon	Michael	Thomas	8/25/2015	**33377**
Arnott	Aaron	Adler	8/26/2015	**33378**
Joel	Joseph	Dickson	8/26/2015	**33379**
Bilal	Bashir	Khan	8/26/2015	**33380**
Troy	Daniel	Schott	8/26/2015	**33381**
Thomas	Robert	Surnock	8/26/2015	**33382**
Natasha		Fallahi	8/31/2015	**33383**
Ellen	Leigh	Koehler	8/31/2015	**33384**
Jacqueline	Louise	Beres	9/11/2015	**33385**
Adam	Scott	McBride	9/11/2015	**33386**
Gerald	Arpad	Ferencz	9/15/2015	**33387**
Erik		Frederiksen	9/15/2015	**33388**
Ariel	Electra	Thorpe	9/15/2015	**33389**
Ronald	James	Watson III	9/15/2015	**33390**
Jeffrey	Michael	Kay	9/15/2015	**33391**
Javier	Antonio	Leon	9/18/2015	**33392**
Jacob	Mathias	Paredes	9/18/2015	**33393**
Kimberly	Ann	Gambino	9/23/2015	**33394**
Jonathan	Rudolph	Noel	9/23/2015	**33395**
Shalom		Samuel	9/30/2015	**33396**
Sherry	Ching-Ching	Wang	9/30/2015	**33397**

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Ratification of Approved Continuing Education Providers

Exhibit 7

STATE OF CALIFORNIA
BOARD OF CHIROPRACTIC EXAMINERS

EDMUND G. BROWN JR., GOVERNOR

MEMORANDUM

Date: October 27, 2015

To: BOARD MEMBERS

From: Robert Puleo, Executive Officer

Subject: **Ratification for New Continuing Education Providers**

This is to request that the Board ratify the continuing education providers at the public meeting on October 27, 2015.

CONTINUING EDUCATION PROVIDERS	DATE APPROVED
1. Richard Robles, DC	10/27/15
2. Victor Kwok-Wai Shu	10/27/15
3. Movement Links	10/27/15
4. Marcus Strutz	10/27/15
5. Frequency Specific Seminars	10/27/15
6. Jim Naccarato, DC	10/27/15

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Ratification of Denied License Applications in Which the Applicants Did Not Request a Hearing

Exhibit 8

STATE OF CALIFORNIA

BOARD OF CHIROPRACTIC EXAMINERS | EDMUND G. BROWN JR., GOVERNOR

MEMORANDUM

Date: October 15, 2015

To: **Board Members**

From:
Robert Puleo
Executive Officer

Subject: **Ratification of Formerly Denied License Applications**

The Board of Chiropractic Examiners (Board) denies licensure to applicants who do not meet all statutory and regulatory requirements for a chiropractic license in California. An applicant has 60-days after the denial is issued to appeal the decision. If the applicant does not submit an appeal to the Board, the denial is upheld.

During July 1, 2015 and September 30, 2015, staff reviewed and confirmed that applicants met all statutory and regulatory requirements for licensure. There were no denials or appeals during this time period.

At this time, no ratification is necessary.

If you have any questions or concerns, please contact me at your earliest opportunity.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

BCE Licensing, Continuing Education and Public Relations Committee Meetings Update

Exhibit 9

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

NOTICE OF TELECONFERENCE
LICENSING, CONTINUING EDUCATION & PUBLIC RELATIONS COMMITTEE MEETING

August 26, 2015
12:30 p.m.

One or more Committee Members will participate in this meeting at the teleconference sites listed below. Each teleconference location is accessible to the public and the public will be given an opportunity to address the Licensing, Continuing Education and Public Relations Committee at each teleconference location. The public teleconference sites for this meeting are as follows:

Teleconference Meeting Locations:

Corey Lichtman, DC	Heather Dehn, DC	John Roza, Jr., DC
538 Stevens Ave.	901 P Street, Ste 142A	800 Douglas Blvd
Solana Beach, CA 92075	Sacramento, CA 95814	Roseville, CA 95678
(858) 481-1889	(916) 263-5355	(916) 786-2267

AGENDA

1. **Call to Order & Establishment of a Quorum**

2. **Approval of Minutes**
   July 15, 2015

3. **Review and Discussion of Possible Revisions to the Continuing Education Regulations for Approving Continuing Education Providers.**

4. **Update Regarding BCE Outreach**
   - A Consumer's Guide to Chiropractic
   - Creating a "How to File a Complaint" Pamphlet
   - Update on Fall/Winter 2015 Newsletter
   - Social Media: Facebook, Twitter

5. **Public Comment**
   Note: The Committee may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125, 11125.7(a).] Public comment is encouraged; however, if time constraints mandate, comments may be limited at the discretion of the Chair.

6. **Future Agenda Items**

7. **Adjournment**

LICENSING, CONTINUING EDUCATION
& PUBLIC RELATIONS COMMITTEE

Heather Dehn, D.C., Chair
John Roza Jr., D.C.
Corey Lichtman, D.C.

Meetings of the Board of Chiropractic Examiners' Committee are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. Public comments will be taken on agenda items at the time the specific item is raised. The Board's Committee 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. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at **www.chiro.ca.gov**.

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or e-mail marlene.valencia@chiro.ca.gov or send a written request to the Board of Chiropractic Examiners, 901 P Street, Suite 142A, Sacramento, CA 95814. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

NOTICE OF TELECONFERENCE
LICENSING, CONTINUING EDUCATION & PUBLIC RELATIONS COMMITTEE MEETING

October 19, 2015
12:30 p.m.

One or more Committee Members will participate in this meeting at the teleconference sites listed below. Each teleconference location is accessible to the public and the public will be given an opportunity to address the Licensing, Continuing Education and Public Relations Committee at each teleconference location. The public teleconference sites for this meeting are as follows:

Teleconference Meeting Locations:

Corey Lichtman, DC	Heather Dehn, DC	John Roza, Jr., DC
538 Stevens Ave.	4616 El Camino Ave, Ste B	800 Douglas Blvd
Solana Beach, CA 92075	Sacramento, CA 95821	Roseville, CA 95678
(858) 481-1889	(916) 263-5355	(916) 786-2267

AGENDA

1. **Call to Order & Establishment of a Quorum**

2. **Approval of Minutes**
   August 26, 2015

3. **Review and Discussion of Continuing Education Audit Statistics**

4. **Review and Discussion on Strategic Plan Action Items**
   - Goal 1 - Licensing
   - Goal 3 - Professional Qualifications and Continuing Education
   - Goal 5 - Public Relations and Outreach

5. **Review and Discussion of Possible Revisions to the Continuing Education Regulations for Approving Continuing Education Providers- Update Regarding CE Provider Qualification Focus Group**

6. **Review and Discussion Regarding Proposed Outreach Publications**
   - Licensee Guide

7. **Public Comment**
   Note: The Committee may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125, 11125.7(a).] Public comment is encouraged; however, if time constraints mandate, comments may be limited at the discretion of the Chair.

8. **Future Agenda Items**

9. **Adjournment**

LICENSING, CONTINUING EDUCATION
& PUBLIC RELATIONS COMMITTEE

Heather Dehn, D.C., Chair
John Roza Jr., D.C.
Corey Lichtman, D.C.

Meetings of the Board of Chiropractic Examiners' Committee are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. Public comments will be taken on agenda items at the time the specific item is raised. The Board's Committee 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. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at **www.chiro.ca.gov**.

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or e-mail marlene.valencia@chiro.ca.gov or send a written request to the Board of Chiropractic Examiners, 901 P Street, Suite 142A, Sacramento, CA 95814. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

BCE Government Affairs Committee Meeting Update

Exhibit 10

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

NOTICE OF PUBLIC MEETING

TELECONFERENCE - GOVERNMENT AFFAIRS & STRATEGIC PLANNING COMMITTEE

October 22, 2015, 10:00 a.m.

One or more Committee Members will participate in this meeting at the teleconference sites listed below. Each teleconference location is accessible to the public and the public will be given an opportunity to address the Government Affairs and Strategic Planning Committee at each teleconference location. The public teleconference sites for this meeting are as follows:

Teleconference Meeting Locations:

Julie Elginer, Dr. PH
Frank Ruffino, Public Member
Board of Chiropractic Examiners
901 P Street, Suite 142A
Sacramento, CA 95814
(916) 263-5355

Dionne McClain, D.C.
McClain Sports & Wellness Inc.
6360 Wilshire Blvd. #410
Los Angeles, CA 90048
(323) 653-1014

AGENDA

1. **CALL TO ORDER & ESTABLISHMENT OF A QUORUM**

2. **Approval of Minutes**
   July 16, 2015

3. **Legislative Update**
   - AB 85 – Wilk (Open Meetings)
   - AB 12 – Cooley (State Government: administrative regulations: review)
   - AB 333 – Melendez (Healing Arts: continuing education)
   - AB 410 – Obernolte (Documents Submitted to Legislative Committees)
   - SB 467 (Hill) – Professions and vocations
   - AB 179 (Bonilla) – Healing Arts

4. **Review and Discussion of BCE Strategic Plan Goals Assigned to the Government Affairs & Strategic Plan Committee**
   - Goal 4 – Organizational Effectiveness
   - Goal 7 - Government Affairs

5. **Overview of Strategic Planning Process and Approach for the 2016 Strategic Planning Year.**

6. **Annual Legislative/Agency Visits –** Discussion on who to visit and what to include in presentation.

7. **PUBLIC COMMENT FOR ITEMS NOT ON THE AGENDA**
   Note: The Committee may not discuss or take action on any matter raised during this public comment section that is not included on this agenda, except to decide whether to place the matter on the agenda of a future meeting. [Government Code Sections 11125, 11125.7(a).] Public comment is encouraged; however, if time constraints mandate, comments may be limited at the discretion of the Chair.

8. **FUTURE AGENDA ITEMS**

9. **ADJOURNMENT**

GOVERNMENT AFFAIRS COMMITTEE
Julie Elginer, Dr. PH, Chair
Dionne McClain, D.C.
Frank Ruffino, Public Member

The Board of Chiropractic Examiners' paramount responsibility is to protect the health, welfare, and safety of the public through licensure, education, and enforcement in chiropractic care.

Committee Meetings of the Board of Chiropractic Examiners are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. Public comments will be taken on agenda items at the time the specific item is raised. The Committee 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. For verification of the meeting, call (916) 263-5355 or access the Board's Web Site at **www.chiro.ca.gov.**

The meeting facilities are accessible to individuals with physical disabilities. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Marlene Valencia at (916) 263-5355 ext. 5363 or e-mail marlene.valencia@dca.ca.gov or send a written request to the Board of Chiropractic Examiners, 901 P Street, Ste. 142A Sacramento, CA 95814. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Update on Pending Regulations

Exhibit 11

Prioritized the Rule making packages for the Proposed Regulations and Regulatory changes into the following groups:

	Group A	**STATUS**
1	Application for Licensure (CCR Section 321)	
2	Consumer Protection Enforcement Initiative	
3	Uniform Standards for Substance Abusing Licensees	
	Group B	
1	Revisions to BCE Disciplinary Guidelines	Approved Rule Making Process 7/30/15
2	Mandatory Cardiopulmonary Resuscitation (CPR) Certification for all licensees	Approved Rule Making Process 7/30/15
3	Comprehensive Revisions/Updates to CCR Article 4 (Sections 330 – 331.16) – Approved Schools & Qualifications of Applicants (Curriculum Requirements) Continuing Education Requirements (CE Provider and Course Approval)	
	Group C	
1	Chiropractic Records Retention/Disposition of Patient Records Upon Closure of Practice or Death/Incapacity of Licensee	Approved Rule Making Process 4/16/15
2	Continuing Education Requirements (CE Provider and Course Approval)	
3	Amend or Repeal CCR Section 354 - Successful Examination (Obsolete provision)	

Status options:

Proposed Regulatory Change

Approved Rule Making Process on_____

Initiate Rulemaking Process _____

Adopted by Board on_____

Pending DCA Approval

Pending OAL Approval

Approved /Denied by OAL

Effective Date_____

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Proposed 2016 Board Meeting Schedule

Exhibit 12

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

PROPOSED
Board of Chiropractic Examiners
Board Meeting Schedule
January – December 2016

January 2016 – Sacramento, California

April 2016 – Southern California

July 2016 – Northern, California

October 2016 – Southern California

PROPOSED

* Dates and locations are subject to change

T (916) 263-5355
F (916) 327-0039
TT/TDD (800) 735-2929
Consumer Complaint Hotline
(866) 543-1311

Board of Chiropractic Examiners
901 P Street, Suite 142A
Sacramento, California 95814
www.chiro.ca.gov

Board of Chiropractic Examiners
Proposed Board Meeting Schedule
January - December 2016

January						
S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

February						
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March						
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27	28	29	30	31		

April						
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May						
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29	30	31				

June						
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July						
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31						

August						
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September						
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October						
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November						
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27	28	29	30			

December						
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25	26	27	28	29	30	31

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

Overview of Occupational Analysis Process

Exhibit 13

STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

PROFESSIONAL EXAMINATION SERVICES

Chiropractor Occupational Analysis (OA): Step-by-Step Process

Major phases of the Chiropractor Occupational Analysis (OA) project will be as follows:

1. Literature Review

a. OPES staff will review current laws, rules, and regulations; reference books and documents; journal articles, examination specifications, and other relevant data in order to develop an understanding of the profession.

b. OPES staff will develop a preliminary list of tasks and knowledge for the practice based on findings from the literature review.

2. Interviews

a. OPES staff will conduct interviews with a sample of California-licensed Chiropractors. This can be done by telephone and onsite (at the licensee's practice location) to further refine the task and knowledge lists.

3. Task and Knowledge Statement Workshops

a. OPES staff will convene two focus groups with a sample of California-licensed Chiropractors to review task and knowledge statements created from the literature review and licensee interviews.

b. During each focus group, licensees will evaluate the statements for accuracy, currency, terminology, and completeness. Licensees will edit, delete, or add statements to the lists of tasks and knowledge as needed.

4. OA Questionnaire Distribution

a. OPES staff will develop an OA Questionnaire utilizing the finalized task and knowledge statements from the two task and knowledge statement focus group workshops.

b. The draft OA Questionnaire will be administered to a pilot group of California-licensed Chiropractors to ensure completeness and clarity prior to the final OA Questionnaire distribution.

c. The OA Questionnaire will be administered to a stratified random sample via an online questionnaire tool. A mailer invitation will be sent to provide link information.

d. In the OA Questionnaire, licensees will be asked to rate the task and knowledge statements on scales such as frequency, importance, and whether mastery is expected at entry level.

e. The survey response will be monitored to determine when a demographically representative sample of the population is achieved.

5. Analyze OA Questionnaire Data

a. OPES staff will analyze the data collected from the OA Questionnaire to summarize the frequency and importance ratings for the task and knowledge statements.

6. Review of Results from OA Workshops

a. OPES staff will convene two focus groups with a sample of California-licensed Chiropractors to review the OA Questionnaire data and finalize the description of practice.

7. Prepare and Submit Validation Report

a. OPES staff will prepare a report of all OA processes and results and submit the report to the Board of Chiropractic Examiners in both bound and electronic format.

EXPERT CONSULTANTS

Purpose

In licensure examination development work, expert consultants are referred to as subject matter experts (SMEs). Their participation is essential to the development of licensure exams, and ensures that the exams accurately assess whether candidates possess the minimally acceptable knowledge, skills, and abilities necessary to perform tasks on the job safely and competently.

Process

The selection of expert consultants/SMEs by boards, bureaus, and committees of the Department of Consumer Affairs (DCA) critically affects the quality and defensibility of their licensure exams, and is based on the following minimum criteria:

- Reflect the profession in specialty, practice setting, geographic location, ethnicity, and gender.
- Represent the current pool of practitioners.
- Possess current skills and a valid license in good standing.
- Articulate specialized technical knowledge related to a profession.

In addition, several of the six to ten expert consultants/SMEs in each workshop should be licensed five years or less to ensure an entry-level perspective is represented.

Due to potential conflict of interest, undue influence, and/or security considerations, board members, committee members, and instructors shall not serve as expert consultants/SMEs for, nor participate in, any aspect of licensure exam development or administration, pursuant to DCA Policy OPES 11-01.

Workshops

OPES exam development workshops bring together the professional knowledge and experience of expert consultants/SMEs, and the expertise of OPES exam development specialists. Separate workshops are conducted for:

Occupational analysis: Identifying critical job tasks and required knowledge.
Item linking: Linking old exam items (questions) to an updated exam outline.
Item writing: Creating new items.
Item review: Revising new or poorly functioning items.
Exam construction: Selecting items to construct a new exam version.
Setting a passing score: Determining the passing score of an exam.

OPES exam development specialists begin each workshop by training expert consultants/SMEs in the required concepts, standards, and techniques. The exam development specialist serves as a facilitator, guide, and coach. Workshops are typically conducted on two consecutive eight-hour days at the OPES offices in Sacramento.

(Continued on back)

EXPERT CONSULTANTS (CONTINUED)

Security

OPES has implemented a variety of controls to ensure the integrity, security and appropriate level of confidentiality of licensure exam programs. These controls vary according to the sensitivity of the information, and will include restricting and/or prohibiting certain items, such as electronic devices, when conducting exam-related workshops.

Expert consultants/SMEs are required to provide valid identification, allow for personal belongings to be secured during workshops, and sign one or more agreements accepting responsibility for maintaining strict confidentiality of licensing exam material and information to which they have access.

Any person who fails to comply with OPES' security requirements will not be allowed to participate in licensure exam workshops. In addition, any person who subverts or attempts to subvert any licensing exam will face serious consequences which may include loss of licensure and/or criminal charges.

Authority

California Business and Professions Code section 123

STATE OF CALIFORNIA

DEPARTMENT OF CONSUMER AFFAIRS

STATE AND CONSUMER SERVICES AGENCY • GOVERNOR EDMUND G. BROWN JR.

DEPARTMENTAL POLICY

TITLE	LICENSURE EXAMINATION VALIDATION POLICY		
POLICY OWNER	OFFICE OF PROFESSIONAL EXAMINATION SERVICES		
POLICY NUMBER	OPES 12-01	SUPERCEDES	NEW
ISSUE DATE	OCTOBER 1, 2012	EFFECTIVE	IMMEDIATELY
DISTRIBUTE TO	ALL EMPLOYEES		
ORIGINAL APPROVED BY	Denise D. Brown Director		
NUMBER OF PAGES	9	ATTACHMENTS	NONE

POLICY

It is the policy of the Department of Consumer Affairs (DCA) that occupational analyses and examination development studies are fundamental components of licensure programs. Licensure examinations with substantial validity evidence are essential in preventing unqualified individuals from obtaining a professional license. To that end, licensure examinations must be:

- Developed following an examination outline that is based on a current occupational analysis.
- Regularly evaluated.
- Updated when tasks performed or prerequisite knowledge in a profession or on a job change, or to prevent overexposure of test questions.
- Reported annually to the Legislature.

APPLICABILITY

This policy applies to all employees, governmental officials, contractors, consultants, and temporary staff of DCA; and any of its divisions, bureaus, boards, and other constituent agencies. Within this policy, the generic acronym "DCA" applies to all of these entities. For purposes of this policy, "board" shall refer to all boards, bureaus, or committees.

PURPOSE

The purpose of this policy is to meet the mandate of Business and Professions (B&P) Code section 139 (a) and (b) directing DCA to develop a policy regarding examination development and validation, and occupational analyses; and B&P Code section 139 (c) and (d) directing DCA to evaluate and report annually to the Legislature the methods used by each regulatory entity for ensuring that their licensing examinations are subject to periodic evaluations.

On September 30, 1999, the Office of Professional Examination Services (OPES) completed and distributed to its clients an internal publication "Examination Validation Policy" in compliance with B&P Code section 139 (a) and (b). In 2000, DCA policy "Licensing Examinations – Reporting Requirements" (OER-00-01) was established to meet the mandate of B&P Code section 139 (c) and (d). It has since been abolished. This new policy addresses the provisions of all four subsections of B&P Code section 139: (a), (b), (c), and (d).

AUTHORITY

- Business and Professions Code section 139 (a), (b), (c), and (d)
- Business and Professions Code section 101.6
- Government Code section 12944 (a) of the Fair Employment and Housing Act
- *Uniform Guidelines on Employee Selection Procedures (1978)*, adopted by the Equal Employment Opportunity Commission, Civil Service Commission (EEOC), Department of Labor, and Department of Justice
- Civil Rights Act of 1964, as amended

DEFINITIONS

Content domain is the "set of behaviors, knowledge, skills, abilities, attitudes or other characteristics to be measured by a test, represented in a detailed specification, and often organized into categories by which items are classified."[1]

Content-related evidence of validity is the evidence that shows the extent to which the content domains of a test are based upon tasks performed in practice and the knowledge, skills, and abilities required to perform those tasks.

Criterion-referenced passing score is the score on a licensure examination that establishes minimum competence. This score is an absolute standard and is not dependent upon the performance of the candidates who sit for the examination.

Entry level indicates minimum acceptable competence for licensure into a profession in the State of California.

Examination development specialists are individuals who are trained, experienced, and skilled in licensure-related occupational analysis; licensure-related examination planning, development, validation, administration, scoring, and analysis; and the professional and technical standards, laws, and regulations related to these tasks.

Examination outline is a detailed description for an examination that specifies the number or proportion of items required to assess each content domain.

Minimum acceptable competence is the level of knowledge, skill, and ability required of licensees that, when performed at this level, would not cause harm to the public health, safety, or welfare.

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[1] American Educational Research Association, American Psychological Association, and National Council on Measurement in Education, *Standards for Educational and Psychological Testing,* Washington, DC, 1999, p. 174

Occupational analysis is a method for identifying the tasks performed in a profession and the knowledge, skills, and abilities required to perform those tasks. For occupational licensing, the term occupational analysis is preferred over job analysis or practice analysis because the scope of analysis is across a profession, not an individual job.

Reliable measurement/reliability is "the degree to which test scores for a group of test takers are consistent over repeated applications of a measurement procedure and hence are inferred to be dependable, and repeatable for an individual test taker; the degree to which scores are free of errors of measurement for a given group."[2]

Review ("Audit") of a national licensure examination is an analysis of a nationally developed and administered licensure examination for a profession. The goals of the review are (a) the identification of any critical aspects of the profession as it is performed in California that is not tested in the national examination, but should be tested to ensure safe and competent practice in California and (b) an assessment of whether professional testing standards are being met.

Subject matter experts (SMEs) are practitioners currently possessing an active license in good standing, who are active in their practice, and are representative of the diversity of the professional population in terms of years licensed, practice specialty, ethnicity, gender, and geographic area of practice. When contracting for their services, DCA refers to SMEs as Expert Consultants.

Validation is "the process by which evidence of validity is gathered, analyzed, and summarized."[3]

Validity is the "degree to which accumulated evidence and theory support specific interpretations of test scores entailed by proposed uses of a test."[4] Validity is not a property inherent in a test; it is the degree to which the decisions based on that test are accurate. For licensing examinations, validity is interpreted as correctly differentiating between persons who are qualified to safely practice a profession from those who are not.

PROVISIONS

A. VALIDATION TOPICS

B&P Code section 139 (b) requires OPES to address eight specific topics, plus any other topics necessary to ensure that licensing examinations conducted on behalf of DCA are validated according to accepted technical and professional standards.

1. AN APPROPRIATE SCHEDULE FOR EXAMINATION VALIDATION AND OCCUPATIONAL ANALYSIS AND CIRCUMSTANCES UNDER WHICH MORE FREQUENT REVIEWS ARE APPROPRIATE

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[2] American Educational Research Association, op.cit., p. 180

[3] Society for Industrial Organizational Psychology, *Principles for the Validation and Use of Personnel Selection Procedures,* Bowling Green, OH, 2003, p. 72

[4] American Educational Research Association, op.cit., p. 184

Occupational Analysis Schedule

Generally, an occupational analysis and examination outline should be updated every five years to be considered current; however, many factors are taken into consideration when determining the need for a shorter interval. For instance, an occupational analysis and examination outline must be updated whenever there are significant changes in a profession's job tasks and/or demands, scope of practice, equipment, technology, required knowledge, skills and abilities, or laws and regulations governing the profession. The board is responsible for promptly notifying the examination development specialist of any significant changes to the profession. This is true both for California-specific and national licensure examination-related occupational analyses.

Examination Validation Schedule

New forms of a licensure examination assist in the legal defensibility of the examination, prevent overexposure of test items, and keep the examination current. The decision to create an examination, or new forms of an examination, is made by the board responsible for the license in consultation with the examination development specialist. The creation of new examination forms depends on the needs of the testing program and the number of people taking the examination.

2. MINIMUM REQUIREMENTS FOR PSYCHOMETRICALLY SOUND EXAMINATION VALIDATION, EXAMINATION DEVELOPMENT, AND OCCUPATIONAL ANALYSES, INCLUDING STANDARDS FOR SUFFICIENT NUMBER OF TEST ITEMS

Boards have the ultimate responsibility to ensure that a licensure examination meets technical, professional, and legal standards and protects the health, safety, and welfare of the public by assessing a candidate's ability to practice at or above the level of minimum acceptable competence.

The inferences made from the resulting scores on a licensing examination are validated on a continuous basis. Gathering evidence in support of an examination and the resulting scores is an on-going process. Each examination is created from an examination outline that is based upon the results of a current occupational analysis that identifies the job-related critical tasks, and related knowledge, skills, and abilities (KSAs) necessary for safe and competent practice. Examinations are designed to assess those KSAs. To ensure that examinations are job-related, SMEs must participate in all phases of examination development.

All aspects of test development and test use, including occupational analysis, examination development, and validation, should adhere to accepted technical and professional standards to ensure that all items on the examination are psychometrically sound, job-related, and legally defensible. These standards include those found in *Standards for Educational and Psychological Testing,* referred to in this policy as the *Standards;* and the *Principles for Validation and Use of Personnel Selection Procedures,* referred to in this policy as the *Principles.*

The *Standards* and *Principles* are used as the basis of all aspects of the policies contained in this document. The EEOC *Uniform Guidelines on Employee Selection Procedures* (1978) provide direction on the legal defensibility of selection-related examinations.

Other professional literature that defines and describes testing standards and influences professionals is produced by the following organizations:

- *American Educational Research Association (AERA)*
- *American Psychological Association (APA)*
- *Council on Licensure, Enforcement, and Regulation (CLEAR)*
- *Educational Testing Service* (ETS)
- *Equal Employment Opportunity Commission (EEOC)*
- *Institute for Credentialing Excellence (ICE)*
- *National Council of Measurement in Education (NCME)*
- *Society for Industrial and Organizational Psychology (SIOP)*

Minimum Requirements for Psychometrically Sound Occupational Analysis

The minimum requirements for a psychometrically sound occupational analysis are as follows:

- Adhere to a content validation strategy or other psychometrically sound examination development method as referenced in a recognized professional source.
- Develop an examination outline from the occupational analysis.
- Gather data from a sample of current licensees in the State of California that represents the geographic, professional, and other relevant categories of the profession.

Minimum Requirements for Psychometrically Sound Examination Development and Validation

The minimum requirements for psychometrically sound examination development and validation are as follows:

- Adhere to the *Standards* and *Principles*.
- Document the process following recommendations in the *Standards* and *Principles*.
- Conduct with a trained examination development specialist in consultation with SMEs.
- Use an examination outline and psychometrically sound item-writing guidelines.
- Follow established security procedures.

Standards for Sufficient Number of Test Items

The number of items in an examination should be sufficient to ensure content coverage and provide reliable measurement. Both empirical data and the judgment and evaluation by SMEs should be used to establish the number of items within an examination. The empirical data should include results from an occupational analysis, item analysis, and test analysis.

The item bank for a licensure examination should contain a sufficient number of items such that: 1) at least one new form of the examination could be generated if a security breach occurred; and 2) items are not exposed too frequently to repeating examinees.

3. SETTING PASSING STANDARDS

Passing score standards for licensure examinations must:

- Follow a process that adheres to accepted technical and professional standards.

- Adhere to a criterion-referenced passing score methodology that uses minimum competence at an entry-level to the profession.

An arbitrary fixed passing score or percentage, such as 70 percent, does not represent minimally acceptable competence. Arbitrary passing scores are not legally defensible.

If a board has an appeals process for candidates who are not successful in their examination, once a criterion-referenced passing score has been determined for a multiple-choice examination, the board shall not change a candidate's score without consultation with the examination development specialist.

4. STANDARDS FOR REVIEW OF STATE AND NATIONAL EXAMINATIONS

All licensure examinations appropriated for use in California professions regulated by DCA should be validated according to accepted technical and professional standards, as described elsewhere in these provisions. At a minimum, the following factors must be considered in a review of state and national examination programs:

- Right to access information from all studies and reports from test vendors (local or national)
- Right of state agency to review recent examination
- Description of methodology used to establish content-related validity
- Occupational analysis report and frequency of updates
- Method to ensure standards are set for entry-level practice
- Examination outline and method to link to the occupational analysis
- Information about the sample of practitioners surveyed
- Item development process (experts used, editing methods, etc.)
- Sufficient size of item banks
- Pass-point setting methodology
- Examination security methods; examination administration processes
- Examination reliability
- Pass/fail ratio
- Statistical performance of examinations

California practice must be appropriately represented in an occupational analysis conducted on a national level in order for the results to be valid for examination development in California, and if national examinations are used, the suitability of examination content for California practice must be determined by a review of the occupational analyses, including the demographics of the practitioners upon which it is based.

5. APPROPRIATE FUNDING SOURCES FOR EXAMINATION VALIDATIONS AND OCCUPATIONAL ANALYSES

Budget line items should be designated exclusively for examination development and occupational analyses projects. To assure validity, maintain consistency, preserve security, and ensure the integrity of the examination program, the budget line items need to be continuous appropriations.

Boards should budget for costs associated with examination and occupational analysis development; contracting with a computer-based testing vendor for electronic examination administration; and projecting for expenses associated with travel and per diem for SMEs who participate in examination development and occupational analysis workshops. Boards that administer examinations by paper and pencil should also consider the expense of examination proctors, including their travel and per diem expenses; examination site rental; additional security resources; and printing costs for the preparation guides and examination booklets.

Boards must have the budgetary flexibility to adapt to unexpected or additional program needs. For example, the potential for catastrophic incidents such as a security breach and the cost to replace the compromised examination should be considered in determining overall examination-related costs.

Boards contract via intra-agency contracts (IACs) with OPES for examination-related services. Currently, boards request OPES' services and submit a Budget Change Proposal (BCP) to obtain expenditure authority if they do not already have a budget line item for these expenditures. Boards are then charged, and OPES is reimbursed through the IACs for occupational analyses, national examination reviews, and ongoing examination development, evaluation, construction, and publication services. Consulting and psychometric expertise and test scoring and item analysis (TSIA) services, among others, continue to be funded by distributed administrative costs (pro rata).

6. CONDITIONS UNDER WHICH BOARDS SHOULD USE INTERNAL AND EXTERNAL ENTITIES TO CONDUCT THESE REVIEWS

A board may choose to use external and/or internal resources for licensure examination development and/or review of state and national licensure examinations, and must determine the most logical application of those resources.

OPES is the internal resource for examination review and California-specific examination development services for DCA. OPES also conducts reviews of national examination programs to ensure compliance with California requirements.

If OPES is unable to provide the requested service, external development and review may occur. External examination development or review of a national licensure examination occurs when the board contracts with a qualified private testing firm.

7. STANDARDS FOR DETERMINING APPROPRIATE COSTS OF REVIEWS OF DIFFERENT TYPES OF EXAMINATIONS, MEASURED IN TERMS OF HOURS REQUIRED

The *Standards* provide "a basis for evaluating the quality of testing practices."[5] These criteria can be used to identify tasks that must be performed in the development and validation of a licensure examination. Costs are applied to the performance of each task, based on its difficulty, available technology, and the complexity of the profession.

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[5] American Educational Research Association, op.cit, p. 1.

OPES has a defined fee schedule that is based on the number of hours to complete each phase of the project. An occupational analysis and an examination development project will require different tasks to be performed; therefore, the number of hours varies from one phase to another. The time and tasks required depends on the profession, type of exam, number of forms, frequency of administration, technology resources, and other factors.

8. CONDITIONS UNDER WHICH IT IS APPROPRIATE TO FUND PERMANENT AND LIMITED-TERM POSITIONS WITHIN A BOARD TO MANAGE THESE REVIEWS

Because examinations are critical to the mandate for consumer protection, it is necessary that if a board provides an examination, it should maintain examination support staff. The number of support staff needed is determined by each board's examination requirements and secured through the budget process.

Factors that may affect change in the number of staff support needed include, but are not limited to the following:

- An increase in the number of times an examination is offered.
- A change of method by which an examination is administered, for example:
  - from paper to computer-based testing administration
  - from oral panel to written examination format
  - from written-only to the addition of a practical examination
- A change of examination administration, for example:
  - from a national to a California-based examination, or vice-versa
  - a change in examination administration vendors
- A unique circumstance such as a breach of examination security.
- A change in legislative mandates.

B. YEARLY REPORTING REQUIREMENTS

B&P Code section 139 (c) specifies that every regulatory board shall submit to DCA on or before December 1 of each year its method for ensuring that every licensing examination is subject to periodic evaluation. These evaluations must include four components:

1. A description of the occupational analysis serving as the basis for the examination.
2. Sufficient item analysis data to permit a psychometric evaluation of the items.
3. An assessment of the appropriateness of prerequisites for admittance to the examination.
4. An estimate of the costs and personnel required to perform these functions.

B&P Code section 139 (d) states that the evaluation specified in section 139 (c) may be conducted either by the Board, Bureau, Committee, OPES, or a qualified private testing firm. OPES compiles this information annually into a report for the appropriate fiscal, policy, and review committees of the Legislature. This report is consolidated into DCA's Annual Report.

VIOLATIONS

Validation ensures that licensing examinations are psychometrically sound, job-related, and legally defensible. Failure to follow the provisions of this policy may result in licensing persons who do not meet the minimum level of competency required for independent and safe practice,

exposing California consumers and DCA's regulatory entities to considerable risk of harm by unqualified licensees.

REVISIONS

Determination of the need for revisions to this policy is the responsibility of OPES at (916) 575-7240. Specific questions regarding the status or maintenance of this policy should be directed to the Division of Legislative and Policy Review at (916) 574-7800.

RELATED DOCUMENTS

Departmental Policy Memorandum "Examination Security": DPM-OPES 10-01
Departmental Policy "Participation in Examination Workshops": OPES 11-01

BOARD of CHIROPRACTIC EXAMINERS
STATE OF CALIFORNIA

State of California
Edmund G. Brown Jr., Governor

North Carolina State Board of Dental Examiners V. Federal Trade Commissions

Exhibit 15

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
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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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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FOR IMMEDIATE RELEASE
October 16, 2015

The Federation of Associations of Regulatory Boards Responds to FTC Staff Guidance on Active Supervision

Northbrook, IL - On October 14, 2015, the Staff of the Bureau of Competition of the Federal Trade Commission (FTC) issued its **Guidance on Active Supervision of State Regulatory Boards Controlled by Active Market Participants**. The views of the Staff do not constitute regulations and they are not legally binding on the FTC. This Guidance document is subject to continued interpretation and modification; however, this Guidance document will likely be afforded weight in interpreting the requirements imposed by the recent United States Supreme Court case of ***North Carolina State Board of Dental Examiners v. FTC***, 135 S. Ct. 1101 (2015).

The Guidance document reiterates the ruling of the Supreme Court, provides an overview of the state action defense and, of substance, sets forth guidance on the state oversight requirement imposed upon state boards seeking to assert a state action defense in response to claims under the antitrust laws. As a precursor to any analysis, the actions of the state board must first involve activities that initiate an application of the antitrust laws. Further, the Guidance document notes the need for a clearly articulated state policy, the first prong of an analysis of the state actor defense to antitrust allegations.

In particular, the Guidance document addresses and attempts to provide clarity as to the second prong of the state actor defense, that being the active state oversight requirement. Pursuant to the Supreme Court decision, active state oversight is required when a controlling number of decision makers on a state board are active market participants. The Guidance document concludes that active market participants are an encompassing group. All licensees serving on boards, whether currently practicing and/or participating in a sub-specialty, are deemed to be active market participants. Thus, the Guidance document does not distinguish between professionals that may or may not "compete" in the market.

The method of selection is irrelevant as to whether or not such board member is an active market participant. Gubernatorial appointment will not relieve the active oversight requirement where a board is "controlled" by active market participants. Finally, a controlling number on the state board need not be a majority of decision makers. The number of active market participants constituting a controlling number will be determined on a case by case basis and mere numbers will not be determinative.

Addressing what constitutes "active supervision", the Guidance document emphasizes the need for accountability on the part of the state. After noting the four elements to the test set forth by the Court, the Guidance document addresses presence or absence of various factors to consider when determining what constitutes active supervision. It is clear that the expected "supervisor" (person or agency) must have substantive authority to review the basis for the board decision and an obligation to issue a written decision to approve/modify/disapprove such decision. The supervisor cannot be an active market participant. The Guidance document provides examples of both acceptable and non-acceptable active supervision.

The Guidance document addresses the necessity of active supervision in individual disciplinary cases. It suggests examples of oversight include an administrator, state attorney general, or other state official who reviews the evidence, supplements as appropriate, undertakes a de novo review, and issues a

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written decision that approves/modifies/disapproves the intended action. As referenced above, the proposed action of the board must first be determined to initiate an application of the antitrust laws and a single disciplinary action likely has a de minimis effect on competition.

FARB has already modified its Uniform Model Practice Act to begin to address the statutory perspective of active oversight. Further, recent and upcoming FARB conferences continue to focus on this important topic. FARB would like to emphasize that the state actor doctrine is a defense to antitrust allegations. State boards are encouraged to continue to educate their members on the important role they play as public protectors. As it becomes available, FARB will disseminate additional information to our membership.

About FARB

FARB is a not for profit, 501(c)(3) organization incorporated in 1974 to promote public protection and provide a forum for information exchange for associations of regulatory boards and their stakeholders with interests in professional regulation. The mission of FARB is to promote excellence in regulation for public protection by providing expertise and innovation from a multi-professional perspective.

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