

FEBRUARY
10 & 11, 2016
BOARD MEETING

Department of Consumer Affairs
2005 Evergreen Street, Hearing Room
Sacramento, CA 95815



Physical Therapy Board of California

THE PHYSICAL THERAPY BOARD OF CALIFORNIA

2005 Evergreen St. Suite 1350, Sacramento, California 95815

Phone: (916) 561-8200 Fax: (916) 263-2560

www.ptbc.ca.gov

PHYSICAL THERAPY BOARD OF CALIFORNIA NOTICE OF PUBLIC MEETING

February 10, 2016 9:00 a.m.

February 11, 2016 9:00 a.m.

Department of Consumer Affairs
2005 Evergreen Street, Hearing Room
Sacramento, CA 95815

Action may be taken on any agenda item.
Agenda items may be taken out of order.

Unless otherwise indicated, all agenda items
will be held in **OPEN SESSION**. **THE PUBLIC
IS ENCOURAGED TO ATTEND**. Please refer
to the informational notes at the end of
the agenda.

BOARD MEMBERS

Katarina Eleby, *President*

Alicia K. Rabena-Amen, PT,MPT, *Vice President*

Debra Alviso, PT,DPT, *Member*

Jesus Dominguez, PT, Ph.D., *Member*

Daniel Drummer, PT, DPT, *Member*

James E. Turner, MPA, *Member*

Carol A. Wallisch, MA, MPH, *Member*

BOARD STAFF

Jason Kaiser, *Executive Officer*

Liz Constancio, *Manager*

Elsa Ybarra, *Manager*

Brooke Arneson, *Associate Analyst*



Physical Therapy Board of California



STATE OF CALIFORNIA

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DEPARTMENT OF CONSUMER AFFAIRS

Agenda

1. **Call to Order, [Roll Call](#) and Establishment of Quorum**
2. **Special Order of Business – February 10, 2016 9:00 a.m.**
 - (A) Hearing on Petition for Reduction in Penalty – Anthony Delzompo, PT
After submission of the matters, the Board will convene in CLOSED SESSION to deliberate pursuant to Government Code section 11126(c)(3).
3. **Closed Session**
 - (A) Pursuant to Government Code section 11126(c)(3)
Deliberation on Disciplinary Actions And Decisions to be Reached in
Administrative Procedure Act Proceedings
 - (B) Pursuant to Government Code section 11126(a)(1)
Evaluation of Executive Officer
 - (C) Adjourn Closed Session
4. **Reconvene Open Session**
5. **[Review and Approval of November 4 & 5, 2015 Meeting Minutes](#) – *Brooke Arneson***
6. **Consumer and Professional Associations and Intergovernmental Relations Reports**
 - (A) Federation of State Boards of Physical Therapy (FSBPT)
 - (B) Department of Consumer Affairs (DCA) – *Executive Office*
 - (C) California Physical Therapy Association (CPTA)
7. **President’s Report – *Katarina Eleby***
 - (A) [2016 Meeting Calendar](#)
8. **[Executive Officer’s Report](#) – *Jason Kaiser***
 - (A) Budget/Personnel
 - (B) BreEZe
 - (C) Legislation and Regulation
 - (D) Outreach
 - (E) Continuing Competency
 - (F) Application and Licensing
 - (G) Consumer Protection
9. **[Legislation Report](#) – *Brooke Arneson***
 - (A) [2015/16 Legislative Session Summary](#)
 - i. AB 12 (Cooley) State Government: Administrative Regulations: Review
 - ii. AB 19 (Chang) State Government: Regulations
 - iii. AB 351 (Jones-Sawyer) Public Contracts: Small Business Participation
 - iv. AB 507 (Olsen) DCA: BreEZe System: Annual Report
 - v. AB 611 (Dahle) Controlled Substances: Prescriptions: Reporting
 - vi. AB 750 (Low) Business and Professions: Licenses
 - vii. SB 52 (Walters) Regulatory Boards: Healing Arts

- (B) 2015/16 -Other Bills Potentially Impacting Physical Therapy Practice or Regulation or the Operation of the Physical Therapy Board

10. Rulemaking Report – Brooke Arneson

(A) 2015/16 Rulemaking Update

- i. License Renewal Exemptions: Retired Status
- ii. Requirements for Graduates from Non-Accredited Programs: Test of English as a Foreign Language (TOEFL)
- iii. Fee Increase

(B) Regulatory Language for Board Discussion and Possible Action Regarding Modified Text on English Proficiency Requirements; Proposed Language to Amend Section 1398.25 and Add Section 1398.26.3 to Article 2, Division 13.2, Title 16 of the California Code of Regulations

11. DCA Distributed Costs (Pro Rata) Presentation

Taylor Schick, DCA Budget Officer, Robert de los Reyes, DCA Budget Manager

12. U.S. Supreme Court Case of North Carolina Board of Dental Examiners v. FTC

Angelique Scott, DCA Legal Counsel

13. Administrative Services Report

(A) Budget – Carl Nelson

(B) Outreach – Jacki Maciel

14. Application & Licensing Services Report – Sarah Conley

15. Consumer Protection Services Report – Elsa Ybarra

16. Board Member Training – Jacki Maciel

(A) Form 700

17. Public Comment on Items Not on the Agenda

Please 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 to place the matter on the agenda of a future meeting. [Government Code sections 11125 and 11125.7(a)]

18. Agenda Items for Next Meeting – May 18 & 19, 2016

TBD, Southern California

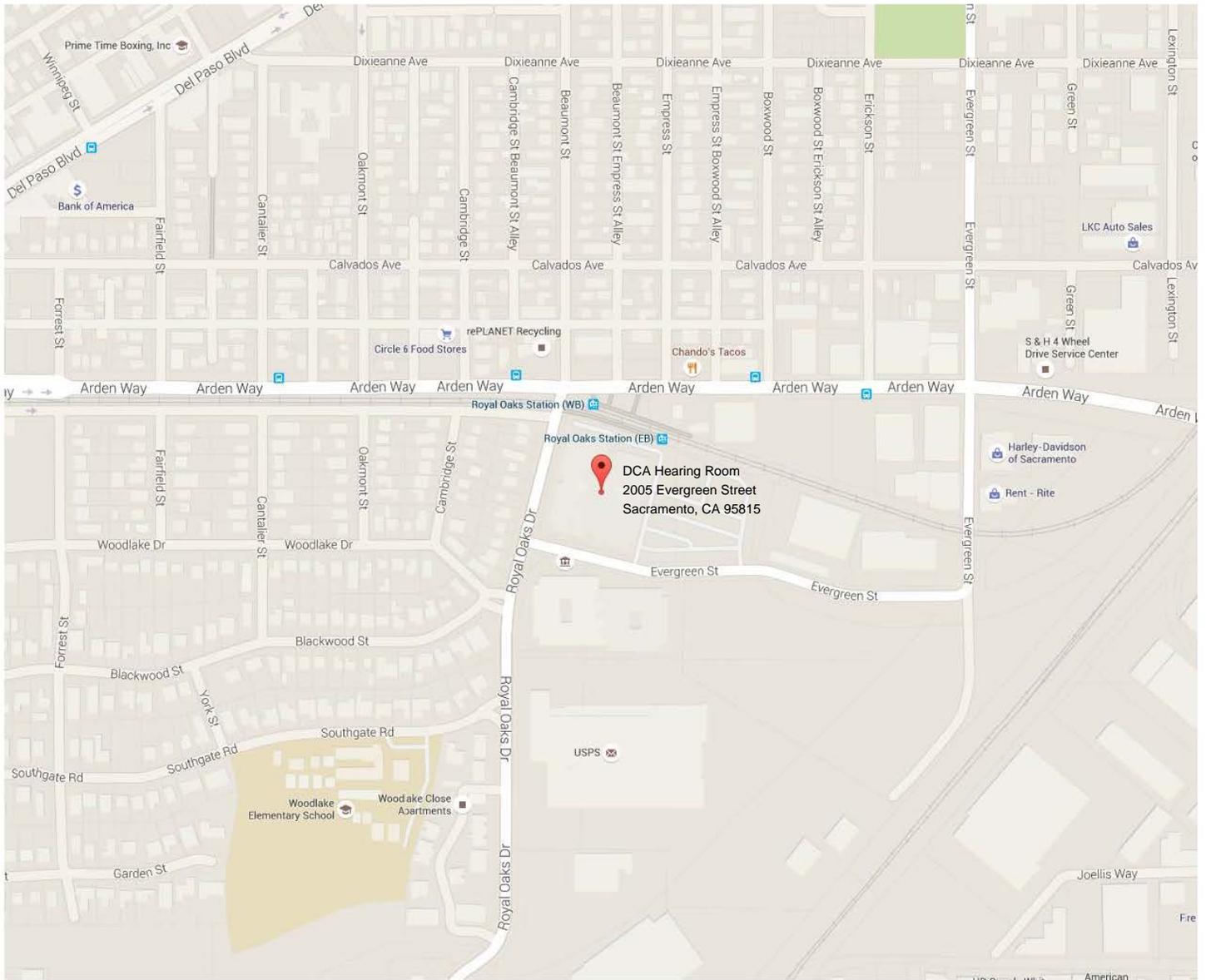
19. Adjournment

Informational Notes:

Times stated are approximate and subject to change. Agenda order is tentative and may be changed by the Board without prior notice. This meeting will conform to the Bagley-Keene Open Meeting Act. The Board provides the public the opportunity at the meetings to address each agenda item during the Board's discussion or consideration of the item. Total time allocated for public comment may be limited.

The Board plans to webcast this meeting on its website at www.ptbc.ca.gov. Webcast availability cannot, however, be guaranteed due to limited resources. The meeting will not be cancelled if webcast is not available. If you wish to participate or to have a guaranteed opportunity to observe, please plan to attend at a physical location. Adjournment, if it is the only item that occurs after a closed session, may not be webcast.

The meeting is accessible to the physically disabled. A person who needs disability-related accommodation or modification in order to participate in the meeting may make a request by contacting Brooke Arneson at (916) 561-8260, e-mail: brooke.arneson@dca.ca.gov, or send a written request to the Physical Therapy Board of California, 2005 Evergreen Street, Suite 1350, Sacramento, CA 95815. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodations. TDD Line: (916) 322-1700.



Roll Call

Department of Consumer Affairs, Sacramento, CA

February 10, 2016

	Present	Absent
Katarina Eleby, President		
Alicia Rabena Amen, PT, MPT, Vice-President		
Debra J. Alviso, PT, DPT		
Jesus Dominguez, PT, Ph.D.		
Daniel Drummer, PT, DPT		
James E. Turner, MPA		
Carol A. Wallisch, MA, MPH		

February 11, 2016

	Present	Absent
Katarina Eleby, President		
Alicia Rabena-Amen, PT, MPT, Vice-President		
Debra J. Alviso, PT, DPT		
Jesus Dominguez, PT, Ph.D.		
Daniel Drummer, PT, DPT		
James E. Turner, MPA		
Carol A. Wallisch, MA, MPH		



Physical Therapy Board of California

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY - GOVERNOR EDMUND G. BROWN JR.

Physical Therapy Board of California

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Physical Therapy Board of California

DRAFT Meeting Minutes

November 4, 2015 9:00 a.m.

November 5, 2015 9:00 a.m.

**Ohlone College
Newark Center for Health Sciences
and Technology
39399 Cherry Street, Room NC 1100
Newark, CA 94560**

Board Members

President

Debra Alviso, PT, DPT

Vice-President

Katarina Eleby

Members

Jesus Dominguez, PT, PhD

Daniel Drummer, PT, DPT

Alicia Rabena-Amen, PT, MPT

James Turner, MPA

Carol Wallisch, MA, MPH

Board Staff

Jason Kaiser, Executive Officer

Liz Constancio, Manager

Elsa Ybarra, Manager

Brooke Arneson, Associate

Analyst

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2 For the sake of clarity, agenda items discussed during the meeting follow their original order on
3 the agenda in these minutes; however, some agenda items may have been taken out of order
4 during the meeting.

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1. Call to Order, Roll Call and Establishment of Quorum

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The Physical Therapy Board of California (Board) meeting was called to order by Dr. Alviso at 9:02 a.m. on November 4, 2015. The Board recessed at 5:10 p.m. and reconvened at 9:00 a.m. on November 5, 2015. All members were present with the exception of Jesus Dominguez and Carol Wallisch and a quorum was established. Also present at the meeting were Angelique Scott, Legal Counsel; Liz Constancio; Brooke Arneson and Elsa Ybarra, Board staff. Jason Kaiser, Executive Officer was absent.

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2. Special Order of Business – August 19, 2015 9:00 a.m.

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(A) Hearing on Petition for Reinstatement of License – Aaron Tsuda

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(B) Hearing on Petition for Termination of Probation – Robert Gray, PT

19

20

After submission of the matter(s), the Board convened in closed session to deliberate per Government Code section 11126(c)(3).

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Once issued, disciplinary decisions can be found on the Board's website at www.ptbc.ca.gov.

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3. Closed Session

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**(A) Pursuant to Government Code section 11126(c)(3)
Deliberation on Disciplinary Actions**

Once issued, disciplinary decisions can be found on the Board’s website at www.ptbc.ca.gov.

**(B) Pursuant to Government Code section 11126(a)(1)
Appointment, Employment, Evaluation of Executive Officer**

**(C) Pursuant to Government Code section 11126(c)(1)
Prepare, approve, grade or administer examinations**

(D) Adjourn Closed Session

4. Reconvene Open Session

5. Review and Approval of August 19 & 20, 2015 Meeting Minutes

Ms. Arneson presented the August 2015 minutes for the Board’s consideration. The Board identified minor amendments to the minutes as follows:

- Page 8, line 129 – correct error “Ms.” Alviso to “Dr.” Alviso
- Page 9, line 157 – correct Director “Kadane” to “Kidane”
- Page 10, line 213 – correct “Vote: 7-0” to included “carried”

MOTION: To adopt the draft August 19 & 20, 2015 meeting minutes as amended.

M/S: Turner/Eleby

VOTE: 5-0 Motion carried

Discussion pursued regarding the depth of detail included in the minutes and the necessity. Dr. Alviso concluded she would have a discussion with the Executive Officer regarding this matter.

6. Consumer and Professional Associations and Intergovernmental Relations Reports

(A) Federation of State Boards of Physical Therapy (FSBPT)

No representatives were present.

(B) Department of Consumer Affairs (DCA)

72 No representatives were present.

73
74 **(C) California Physical Therapy Association (CPTA)**

75
76 Stacy DeFoe, Executive Director, discussed the Federation of State Boards of Physical
77 Therapy's (FSBPT) Physical Therapy Licensure Compact. She asked that the Board
78 place the Licensure Compact on the February agenda to further discuss the pros and
79 cons of participating in the compact. She stated that CPTA would be interested in
80 hearing from the Board on what the implications would be. She noted that CPTA has
81 not taken a formal position on the compact.

82
83 **7. President's Report - *Dr. Debra Alviso***

84
85 **(A) 2016 Meeting Calendar**

86
87 There were discussions regarding a change to the May meeting dates; however, Dr.
88 Alviso was concerned about graduation conflicts and deferred making the change until
89 Dr. Dominguez was consulted.

90
91 **8. Executive Officer's Report - *Jason Kaiser***

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93 Dr. Alviso referred members to the report included in the agenda materials and asked
94 Ms. Constancio and Ms. Ybarra to present in Mr. Kaiser's absence. Mr. Turner inquired
95 about staffing resources and there was discussion regarding BreEZe.

96
97 **9. Legislation Report - *Brooke Arneson***

98
99 **(A) 2015/16 Legislative Session Summary**

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101 Ms. Arneson referred the members to the legislative summary included in the agenda
102 materials and reviewed the status of the bills.

103
104 **(B) 2015/16 Other Bills Potentially Impacting Physical Therapy Practice or
105 Regulation or Operation of the Physical Therapy Board.**

106
107 Included in above report.

108
109 **10. Rulemaking Report - *Brooke Arneson***

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111 **(A) 2015 Rulemaking Update**

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113 Ms. Arneson referred the Board to the rulemaking tracking form included in the agenda
114 materials and advised on the status.

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(B) 2016 Rulemaking Calendar

Ms. Arneson discussed the calendar included in the agenda materials. The Board voted to adopt the 2015 Rulemaking Calendar as presented.

- MOTION:** Ms. Eleby
- M/S:** Mr. Turner
- VOTE:** 5-0 Motion Carried

(C) Draft Regulatory Language for Board Consideration and Possible Action for the Following Sections of Division 13.2 of Title 16 of the California Code of Regulations

**i. License Renewal Exemptions: Retired Status
Regulation number(s) to be determined**

After lengthy discussion regarding issues including; but not limited to, the definition of: retired, current and valid, subject of disciplinary action, expired and cancelled, the Board determined staff revisit the language and address concerns of the Board for further consideration at a future meeting.

11. Administrative Services Report – Liz Constancio

Ms. Constancio gave a detailed report on the Board’s budget status and outreach efforts as supported by the agenda materials.

12. Application & Licensing Services Report – Liz Constancio

Ms. Constancio presented the report included in the agenda materials.

13. Consumer Protection Services Report – Elsa Ybarra

Ms. Ybarra directed members to the reports included in the agenda materials.

14. Board Member Training – Liz Constancio

(A) Mandatory Training and Reporting Requirements

Ms. Constancio presented on training and reporting requirements and advised members the requirements are a statutory requirement.

15. Board Member Elections

(A) President – Ms. Eleby was elected 2016 President.

- MOTION:** Dr. Alviso
- M/S:** Mr. Turner

162 **VOTE:** 4-0 Motion Carried. 1 Abstention

163

164 **(B) Vice President** – Ms. Rabena-Amen was elected 2016 Vice President.

165

166 **MOTION:** Ms. Eleby

167 **M/S:** Dr. Alviso

168 **VOTE:** 4-0 Motion Carried

169

170 **(C) FSBPT Delegate** –Ms. Eleby was elected FSBPT Delegate.

171

172 **MOTION:** Dr. Alviso

173 **M/S:** Ms. Rabena-Amen

174 **VOTE:** 5-0 Motion Carried

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176 **(D) FSBPT Alternate Delegate** – Ms. Rabena-Amen was elected FSBPT Alternate
177 Delegate.

178

179 **MOTION:** Dr. Drummer

180 **M/S:** Dr. Alviso

181 **VOTE:** 5-0 Motion Carried

182

183 **(E) FSBPT Back-up Alternate Delegate** – Dr. Alviso and Ms. Eleby were elected
184 FSBPT Back-up Alternate Delegates.

185

186 **MOTION:** Dr. Drummer

187 **M/S:** Mr. Turner

188 **VOTE:** 5-0 Motion Carried

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190 **16. Public Comment on Items Not on the Agenda**

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192 There were no public comments on items not on the agenda.

193

194 **17. Agenda Items for Next Meeting – February 10 & 11, 2016**

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196 The topic of rulemaking defining retired status will be included on the agenda for the
197 February, 2016 meeting.

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199 **18. Adjournment**

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201 The Board concluded the meeting on Thursday, November 5, 2015 and adjourned at 2:35
202 p.m.

Physical Therapy Board of California

Adopted 2016 Meeting Calendar

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January

1 New Year's Day
 13 PTA NPTE
 18 Martin Luther King Jr. Day
 27 PT NPTE

April

6 PTA NPTE
 27 PT NPTE

July

4 Independence Day
 6 PTA NPTE
 19-20 PT NPTE

October

6 PTA NPTE
 27 PT NPTE
 31 Halloween

February

10-11 PTBC Meeting – Sacramento
 President's Day

May

8 Mother's Day
 18-19 PTBC Meeting- Southern California
 Memorial Day
 30

August

24-25 PTBC Meeting – Sacramento

November

4-6 FSBPT Meeting Columbus, OH
 9-10 PTBC Meeting – Bay Area
 11 Veteran's Day
 24 Thanksgiving
 25 Day After Thanksgiving

March

27 Easter
 31 César Chávez Day

June

8-11 APTA Conference Nashville, TN
 19 Father's Day

September

5 Labor Day

December

25 Christmas



Physical Therapy Board of California

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY - GOVERNOR EDMUND G. BROWN JR.

Physical Therapy Board of California

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Phone: (916) 561-8200 Fax: (916) 263-2560

Internet: www.ptbc.ca.gov



DATE: January 21, 2016

TO: Physical Therapy Board of California (Board)

SUBJECT: Executive Officer's Report

This report is to update you on the current status of the Board's operations.

BUDGET/PERSONNEL – The Administrative Services program has completed the recruitment process for Office Technician (OT) positions within the Administrative Services programs; we would like to welcome Ms. Ashley Haan. Ms. Haan will be responsible for the receptionist functions, including processing the incoming and outgoing mail; and, assisting PTBC staff with administrative functions, such as, composing correspondence, filing, copying, etc. within the Administrative Services Program (ADMIN). This position is permanent / part time (0.6 time base) Ms. Haan previously served the California Correctional Health Care Services as an Office Assistant, typing in processing records of inmates in response to subpoenas throughout California. In addition, she has in-depth knowledge in health information technology, including an Associate of Science Degree she earned in 2013. In addition, Ms. Haan has several years of professional experience with medical terminology and anatomy, which she gained during her previous employment in the private sector.

Update – January 22, 2016, the PTBC is currently recruiting for (1) Office Technician (OT) position within the Application & Licensing Services Program.

Please refer to Agenda Item 13(A) for a more detailed Budget report.

BreEZe – The BreEZe project went live on January 19, 2016. For all intents and purposes, the launch went well for the PTBC and DCA as a whole. All of our applications for licensure can now be submitted on-line. We are also able to process a majority of our licensing transactions on-line (e.g.; name change, address change, duplicate request, citation payments and cost recovery). We are currently working on a number of “tweaks” to the system to further its efficiency for both our stakeholders as well as PTBC Staff. Currently, due to the new implementation and resource availability, there is a set schedule of maintenance releases in which we can submit requests for change, to implement these “tweaks”. If a request is deemed to urgent to wait for the next maintenance release, and emergency release may be requested. To date, we have had to utilize the emergency release process on two separate occasions. Once the system has normalized, these requests will be handled by DCA's OIS (Office of Information Services) staff.

LEGISLATION AND REGULATION – Please refer to Agenda Items 9 and 10 for a more detailed report.

OUTREACH – Since our last report, Outreach has been focused on promoting BreEZe awareness. In conjunction with DCA, we have tweeted and posted about BreEZe access, functionality, and convenience, by providing FAQ's, informational link and tutorials on how to use the system. Our number of fans to our page has again increased significantly. At the time of this report, we are over 2,160 likes and counting! We need topics for our Facebook Page and Twitter Accounts! Board member participation is encouraged; please submit your ideas or topics for posting.

Please refer to Agenda Item 13(B) for a more detailed report.

CONTINUING COMPETENCY – No update at this time; the Continuing Competency program's resources continue to be on loan to the Application and Licensing Services programs. With the upcoming staffing additions, we plan to start addressing the audit backlog, but due to training and transition, there is currently no estimate as to when we will begin.

APPLICATIONS & LICENSING –Please refer to Agenda Item 12 for a more detailed report.

CONSUMER PROTECTION – Please refer to Agenda Item 13 for a more detailed report.



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Briefing Paper

Date: January 6, 2016
Prepared for: PTBC Members
Prepared by: Brooke Arneson
Subject: Legislation Report

Purpose:

To provide an update on pending legislation.

Attachments:

1. [2016 Legislative Calendar](#)
2. [Definition of the Board's Legislative Positions](#)
3. [2016 Legislative Summary](#)

Background and Update:

The 2016 Legislative calendar is included in the meeting materials for your reference, along with a copy of the Board's Legislative positions taken from the PTBC's Board member Administrative Manual.

As noted on the calendar, the Legislature reconvened on January 4th. September 30th is the last day for the Governor to sign or veto bills passed by the Legislature before September 1st and in the Governor's possession on or after September 1st. All statutes will take effect January 1st 2017. Staff continues to monitor Legislation for progress.

In addition, a 2016 Legislative summary is included which notes all bills from the current Legislative session that could potentially impact Physical Therapy practice, regulation or the operation of the Physical Therapy Board.

Action Requested:

No action is needed. This Legislative report is for informational purposes only.

2016 TENTATIVE LEGISLATIVE CALENDAR

COMPILED BY THE OFFICE OF THE SECRETARY OF THE SENATE
10/7/2015

DEADLINES

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MAY						
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- Jan. 1** Statutes take effect (Art. IV, Sec. 8(c)).
- Jan. 4** Legislature **reconvenes** (J.R. 51(a)(4)).
- Jan. 10** Budget must be submitted by Governor (Art. IV, Sec. 12 (a)).
- Jan. 15** Last day for **policy committees** to hear and report to Fiscal Committees fiscal bills introduced in their house in the odd-numbered year. (J.R. 61(b)(1)).
- Jan. 18** Martin Luther King, Jr. Day observed.
- Jan. 22** Last day for any committee to hear and report to the **Floor** bills introduced in their house in 2015 (J.R. 61(b)(2)). Last day to submit **bill requests** to the Office of Legislative Counsel.
- Jan. 31** Last day for each house to **pass bills introduced in that house in the** odd-numbered year (J.R. 61(b)(3)), (Art. IV, Sec. 10(c)).

- Feb. 15** Presidents' day observed.
- Feb. 19** Last day for bills to be **introduced** (J.R. 61(b)(4), (J.R. 54(a)).

- Mar. 17** **Spring Recess** begins upon adjournment (J.R. 51(b)(1)).
- Mar. 28** Legislature reconvenes from **Spring Recess** (J.R. 51(b)(1)).

- Apr. 1** Cesar Chavez Day Observed.
- Apr. 22** Last day for **policy committees** to hear and report to Fiscal Committees **fiscal bills** introduced in their house (J.R. 61(b)(5)).

- May 6** Last day for **policy committees** to hear and report to the Floor **nonfiscal** bills introduced in their house (J.R. 61(b)(6)).
- May 13** Last day for **policy committees** to meet prior to June 6 (J.R. 61(b)(7)).
- May 27** Last day for **fiscal committees** to hear and report to the Floor bills introduced in their house (J.R. 61 (b)(8)). Last day for **fiscal committees** to meet prior to June 6 (J.R. 61 (b)(9)).
- May 30** Memorial Day observed.
- May 31 - June 3** **Floor Session only.** No committee may meet for any purpose (J.R. 61(b)(10)).

*Holiday schedule subject to Senate Rules committee approval

2016 TENTATIVE LEGISLATIVE CALENDAR

COMPILED BY THE OFFICE OF THE SECRETARY OF THE SENATE
10/7/2015

JUNE						
S	M	T	W	TH	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		

- June 3** Last day for each house to pass bills introduced in that house (J.R. 61(b)(11)).
- June 6** Committee meetings may resume (J.R. 61(b)(12)).
- June 15** Budget Bill must be passed by **midnight** (Art. IV, Sec. 12(c)(3)).
- June 30** Last day for a legislative measure to qualify for the Nov. 8 General election ballot (Elections Code Sec. 9040).

JULY						
S	M	T	W	TH	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						

- July 1** Last day for **policy committees** to meet and report bills (J.R. 61(b)(13)). **Summer Recess** begins upon adjournment provided the Budget Bill has been passed (J.R. 51(b)(2)).
- July 4** Independence Day observed.

AUGUST						
S	M	T	W	TH	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			

- Aug. 1** Legislature reconvenes from **Summer Recess** (J.R. 51(b)(2)).
- Aug. 12** Last day for **fiscal committees** to meet and report bills (J.R. 61(b)(14)).
- Aug. 15 - 31 Floor Session only.** No committees may meet for any purpose (J.R. 61(b)(15)).
- Aug. 19** Last day to **amend** on the Floor (J.R. 61(b)(16)).
- Aug. 31** Last day for **each house to pass bills**, except bills that take effect immediately or bills in Extraordinary Session (Art. IV, Sec. 10(c)), (J.R. 61(b)(17)).
Final Recess begins upon adjournment (J.R. 51(b)(3)).

IMPORTANT DATES OCCURRING DURING FINAL RECESS

2016

- Sept. 30 Last day for Governor to sign or veto bills passed by the Legislature before Sept. 1 and in the Governor's possession on or after Sept. 1 (Art. IV, Sec.10(b)(2)).
- Nov. 8 General Election.
- Nov. 30 Adjournment *Sine Die* at midnight (Art. IV, Sec. 3(a)).
- Dec. 5 12 Noon convening of the 2017-18 Regular Session (Art. IV, Sec. 3(a)).

2017

- Jan. 1 Statutes take effect (Art. IV, Sec. 8(c)).

*Holiday schedule subject to Senate Rules committee approval

Legislation - Definition of the Positions Taken by the Physical Therapy Board Regarding Proposed Legislation

(Board Policy)

The Board will adopt the following positions regarding pending or proposed legislation.

Oppose: The Board will actively oppose proposed legislation and demonstrate opposition through letters, testimony and other action necessary to communicate the oppose position taken by the Board.

Oppose, unless amended: The Board will take an opposed position and actively lobby the legislature to amend the proposed legislation.

Neutral: The Board neither supports nor opposes the addition/amendment/repeal of the statutory provision(s) set forth by the bill.

Watch: The watch position adopted by the Board will indicate interest regarding the proposed legislation. The Board staff and members will closely monitor the progress of the proposed legislation and amendments.

Support, if amended: The Board will take a supportive position and actively lobby the legislature to amend the proposed legislation.

Support: The Board will actively support proposed legislation and demonstrate support through letter, testimony and any other action necessary to communicate the support position taken by the Board.

PTBC 2016 Legislation Summary

Bill	Author	Summary	Board's Position	Status
AB 12 (Amended 8/19/15)	Cooley	State Government: Administrative Regulations Review This bill would, require every state office, agency, department, division, board, bureau, and commission to review and revise regulations to eliminate inconsistent, overlapping, duplicative, and outdated provisions. Revisions must be adopted by January 1, 2018, unless a non-substantive Section 100 change is appropriate, and report to the Governor and Legislature on compliance with these provisions.	Watch	8/27/2015 In Senate Committee on Appropriations: Held under submission. Held Under Submission is an action taken by a committee when a bill is heard in committee and there is an indication that the author and the committee members want to work on or discuss the bill further, but there is no motion for the bill to progress out of the committee. This does not preclude the bill from being set for another hearing.
AB 19 (Amended 5/6/15)	Chang	Governor's Office of Business and Economic Development: Small Business: Regulations Would require the Governor's Office of Business and Economic Development, in consultation with the Office of Small Business Advocate, to establish a process for the ongoing review of existing regulations. The bill would require the review to be primarily focused on regulations affecting small businesses adopted prior to January 1, 2016, to determine whether the regulations could be less administratively burdensome or costly to affected sectors.	Watch	1/31/2016 Died -Assembly Committee on Appropriations.
AB 351 (Introduced 2/17/15)	Jones-Sawyer	Public Contracts: Small Business Participation Would require all state agencies to establish and achieve an annual goal of 25% small business participation in state procurements and contracts, and to report to the Director, statistics regarding small business participation. Any agency not meeting this goal would be required to submit a corrective action plan to the Department of General Services within 45 days of the end of each fiscal year.	No Position	1/31/2016 Died -Assembly Committee on Appropriations.

PTBC 2016 Legislation Summary

Bill	Author	Summary	Board's Position	Status
AB 507 (Amended 7/9/15)	Olsen	Department of Consumer Affairs: BreZE System: Annual Report This bill would require the Department of Consumer Affairs to submit a report to the Legislature and Department of Finance, on or before March 1, 2016, and annually thereafter when available, detailing the implementation status of the Department's enterprise-wide licensing system known as BreZE. This report would contain the Departments plan for implementing BreEZE for the remaining 19 programs on legacy licensing systems, the total remaining cost of BreEZe implementation, and a description of any increased efficiency achieved by implementing BreEZe.	No Position	8/17/2015 In Senate Committee on Business, Professions & Economic Development. Set, first hearing. Hearing cancelled at the request of the author.
AB 611 (Amended 4/15/15)	Dahle	Controlled Substances: Prescriptions: Reporting Current law requires the Department of Justice (DOJ), upon approval of an application, to provide the approved health care practitioner or pharmacist the history of controlled substances dispensed to an individual under their care. This bill would also authorize an individual designated to investigate a holder of a professional license to apply to DOJ to obtain approval to access information contained in the Controlled Substance Utilization Review (CURES) Prescription Drug Monitoring Program (PDMP) regarding the controlled substance history of an applicant or a licensee for the purpose of investigating the alleged substance abuse of a licensee.	Watch	1/31/2016 Died –Assembly Committee on Business & Professions

PTBC 2016 Legislation Summary

Bill	Author	Summary	Board's Position	Status
<p>AB 750 (Amended 4/16/15)</p>	<p>Low</p>	<p>Business and Professions: Retired Category: Licenses Would authorize any of the boards, bureaus, commissions, or programs within the DCA to establish by regulations a system for a retired category of license for persons who are not actively engaged in the practice of their profession or vocation, and would prohibit the holder of a retired license from engaging in any activity for which a license is required, unless regulation specifies the criteria for a retired licensee to practice his or her profession.</p>	<p>Watch</p>	<p>1/31/2016 Died –Assembly Committee on Appropriations</p>
<p>SB 52 (Introduced 12/19/14)</p>	<p>Walters</p>	<p>Regulatory Boards: Healing Arts Current law creates various regulatory boards within the DCA. Current law authorizes health-related boards to adopt regulations requiring a licensee to display his or her license or registration in the locality in which they are treating patients and to make specified disclosures to patients. This bill would make technical changes to that provision.</p>	<p>Watch</p>	<p>2/1/2016 Died –Senate Rules Committee</p>



Physical Therapy Board of California

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY - GOVERNOR EDMUND G. BROWN JR.

Physical Therapy Board of California

2005 Evergreen St. Suite 1350, Sacramento, California 95815

Phone: (916) 561-8200 Fax: (916) 263-2560

Internet: www.ptbc.ca.gov



Briefing Paper

Date: January 5, 2016
Prepared for: PTBC Members
Prepared by: Brooke Arneson
Subject: Rulemaking Report

Purpose:

To update the Board on the status of proposed rulemaking in progress.

Background:

At the November 2015 meeting, the Board adopted the 2016 Rulemaking Calendar as required by Government Code (GC) § 11017.6. The rulemaking calendar prepared pursuant to this section sets forth the Board's rulemaking plan for the year and is published by the Office of Administrative Law (OAL) in the California Regulatory Notice Register (Notice Register); the Notice Register is available on OAL's website: http://www.oal.ca.gov/Notice_Register.htm

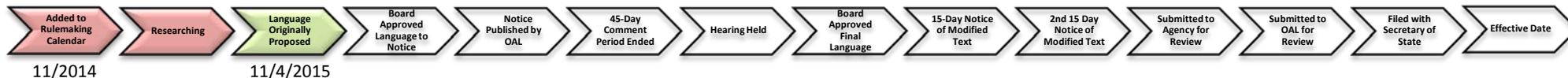
From the 2016 Rulemaking Calendar, staff developed a rulemaking tracking form on which all rulemaking progress is noted and reported to the Board at its quarterly meetings. Also included in this tracking form is rulemaking from the 2015 Rulemaking Calendar that is still in process or has recently commenced to provide an update to the Board.

Action Requested:

No action is requested on presentation of the rulemaking report; however, staff is requesting action which will be addressed during the presentation of agenda item 10(B).

2015/2016 Rulemaking Tracking Form

License Renewal Exemptions: Retired Status



OAL No.:

Notes: Please see Agenda Item 10(B).

Requirements for Graduates from Non-Accredited Programs: Test of English as a Foreign Language (TOEFL)



OAL No.: Notice File No. Z-2015-0317-07

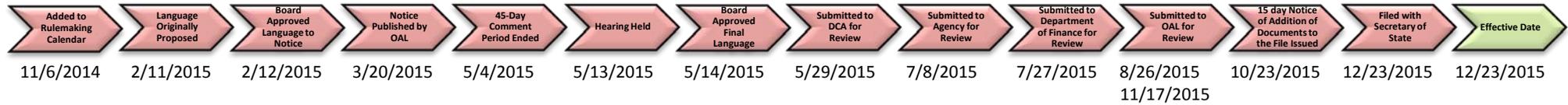
Notes: Business and Profession Code (BPC) § 2653 was amended by Chapter 338, Statutes of 2013 (SB 198, Lieu), which added a provision requiring applicants who graduated from non-accredited physical therapist programs to demonstrate English proficiency by achieving a score specified by the Board on the TOEFL. Currently the passing score on the TOEFL is being reported by each credential evaluation service when an applicant’s education is evaluated. This regulation will provide for specific exemptions to the TOEFL requirement and set a Board established passing score.

The Language was modified per Agency’s recommendations and the 15 day Notice of Modified Text commenced on December 10th. Board staff updated the rulemaking file and it was returned to the Department for additional review. Once the Department’s review is completed, the file will be resubmitted to Agency for approval.

Green: Current Status Red: Completed Grey: Not Applicable

Agenda Item 10(A) – Rulemaking Update

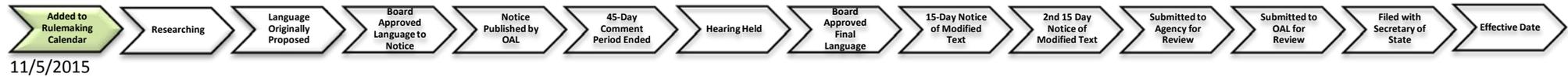
Fee Increase



OAL No.: Notice File No. Z-2015-0310-07 **Resubmittal OAL No.:** Notice File No. Z-2015-1117-02SR

Notes: Business and Profession Code (BPC) § 2688 authorizes the Board to increase its fees to a statutory maximum through regulation. This regulation will provide for an increase in application, initial license and biennial renewal fees. The proposed increase in fees will enable the Board to effectively sustain operations necessary for protecting consumers through its licensing and enforcement functions and avoid insolvency in fiscal year 2017/18. The regulatory package was submitted to the Office of Administrative Law (OAL) on August 26, 2015; however it was withdrawn on October 1, 2015 for an addendum to the workload analysis. The 15 day Notice of Addition of Documents and Information to the Rulemaking File commenced on November 9th. Board staff resubmitted the withdrawn file to OAL on November 17th and it was approved and filed with the Secretary of State on December 23, 2015 with an immediate effective date.

Satisfactory Documentary Evidence of Equivalent Degree for Licensure as a Physical Therapist or Physical Therapist Assistant/Coursework Tool



OAL No.:

Notes: Placed on the 2016 Rulemaking Calendar that was adopted at the Board meeting on November 5, 2015.

Green: Current Status Red: Completed Grey: Not Applicable

Examination Passing Standard/Setting Examination Score



11/5/2015

OAL No.:

Notes:

Placed on the 2016 Rulemaking Calendar that was adopted at the Board meeting on November 5, 2015.

License Renewal Exemptions: Disability



11/5/2015

OAL No.:

Notes:

Placed on the 2016 Rulemaking Calendar that was adopted at the Board meeting on November 5, 2015.

Green: Current Status Red: Completed Grey: Not Applicable

Application and Licensing Regulations, Continuing Competency



11/5/2015

OAL No.:

Notes:

Placed on the 2016 Rulemaking Calendar that was adopted at the Board meeting on November 5, 2015.

Unprofessional Conduct



11/5/2015

OAL No.:

Notes:

Placed on the 2016 Rulemaking Calendar that was adopted at the Board meeting on November 5, 2015.

Green: Current Status Red: Completed Grey: Not Applicable

Processing Times

- The “Added to Rulemaking Calendar” date is the date the Board adopts the Rulemaking Calendar.
- A rulemaking file must be completed within one year of the publication date of the Notice of Proposed Action. The OAL issues the Notice File Number upon filing the Notice of Proposed Action.
- The DCA is allowed thirty calendar days to review the rulemaking file prior to submission to the Dept. of Finance (DOF).
- The DOF is allowed thirty days to review the rulemaking file prior to submission to the OAL.
- The OAL is allowed thirty working days to review the file and determine whether to approve or disapprove it. The OAL issues the Regulatory Action Number upon submission of the rulemaking file for final review.
- Pursuant to Government Code section 11343.4, as amended by Section 2 of Chapter 295 of the Statutes of 2012 (SB 1099, Wright), regulation effective dates are as follows:

<u>Date Filed with the Secretary of State</u>	<u>Effective Date</u>
September 1 st – November 30 th	January 1 st
December 1 st – February 29 th	April 1 st
March 1 st – May 31 st	July 1 st
June 1 st – August 31 st	October 1st

Agenda Item 10(A) – Rulemaking Update



Physical Therapy Board of California

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Briefing Paper

Date: January 5, 2016

Prepared for: PTBC Members

Prepared by: Brooke Arneson

Subject: Retired Status Requirements

Purpose: To propose language establishing procedures for a licensee with a current, valid and unrestricted license to apply for retired status.

- Attachments:**
1. [Proposed Regulatory Language](#)
 2. ["Request for Retired Status" form](#)
 3. ["Request to Restore Active License Status" form](#)

Background: SB 198 added Business and Professions Code (BPC) § 2648.7 to the Physical Therapy Practice Act (Act) when it was chaptered into law. The amendment to the Act exempts a licensee from the payment of the renewal fee and from meeting the requirements set forth in Section 2649 (Continuing Competency) if the licensee applies to the board for license status. A licensee in retired status pursuant to this section shall not engage in the practice of, or assist in the provision of, physical therapy unless the licensee applies for renewal and meets all of the renewal requirements set forth in Section 2644.

Analysis:

Article 4. Renewal of Licenses includes BPC Sections 2644 through 2649. This briefing paper will refer to the following specific sections:

BPC § 2644 requires:

- (a) *Every license shall expire at 12 a.m. on the last day of the birth month of the licensee during the second year of a two-year term, if not renewed.*
- (b) *To renew an unexpired license, the licensee shall, on or before the date on which it would otherwise expire, apply for renewal on a form prescribed by the board, pay the prescribed renewal fee, and submit proof of the completion of continuing competency required by the board pursuant to Section 2649. The licensee shall disclose on his or her license renewal application any misdemeanor or other criminal offense for which he or she has been found guilty or to which he or she has plead guilty or no contest.*

BPC § 2647

A person who fails to renew his or her license within five years after its expiration may not renew it, and it shall not be reissued, reinstated, or restored thereafter. However, the person may apply for a new license if he or she satisfies the requirements set forth in Article 3 (commencing with Section 2635).

BPC § 2648.7

A licensee is exempt from the payment of the renewal fee and from meeting the requirements set forth in Section 2649 if he or she has applied to the board for retired license status. A holder of a license in retired status pursuant to this section shall not engage in the practice of, or assist in the provision of, physical therapy unless the licensee applies for renewal and meets all of the requirements as set forth in Section 2644.

To further define, clarify and implement the Board's administration of the statute, staff proposes the following:

- A licensee applying for retired status shall have a current, valid and unrestricted license in order to enter into retired status. This prevents a licensee from entering into retired status to avoid payment of delinquent fees.
- The proposed language considers a license expired once it enters into retired status since it is no longer a license to practice.
- Denies a request for retired status to a licensee whose license is suspended, placed on probation, revoked, or is otherwise subject to disciplinary action, i.e. an Accusation has been filed. This prevents a licensee from entering into retired status and tolling probation.
- Since BPC § 2648.7 requires a licensee to apply to the Board for retired status and conversely BPC § 2644 requires a licensee to apply to the Board for renewal, the Board must develop a form for entering into and out of retired status.
- Clarifies the licensee is still under the jurisdiction of the Board while in retired status and therefore is required to comply with the Physical Therapy Practice Act and regulations governing the protection of consumers of physical therapy, i.e. maintain a current address, reporting requirements, etc.
- Requires the licensee in retired status to either reactive the license within five years from the date of expiration or go delinquent and the license will be cancelled in retired status. This is consistent with all licensees pursuant to BPC § 2647 thereby eliminating the Board's responsibility to ensure the licensee's compliance with the laws and regulations governing the protection of the consumers of physical therapy.

Action Requested:

Adopt the proposed language as written or modify the proposed language and direct staff to proceed with the rulemaking process. Amendments to the proposed language suggested by the Board at the November 2015 meeting are reflected in red text and strikeout for further discussion.

The Physical Therapy Board of California proposes to add section 1399.56 to Article 10, Division 13.2, Title 16 of the California Code of Regulations, to read as follows:

(a) A physical therapist or physical therapist assistant ~~who holds a~~ license that is current and valid, and whose license is not suspended, revoked, or otherwise restricted by the board or subject to discipline, may request retired status. A license shall be considered expired upon approval of the request.

(b) The board shall deny a request for retired license status if the license is suspended, placed on probation, revoked, ~~or is otherwise subject to disciplinary action under this chapter.~~

(c) The request shall be on a form prescribed by the board titled "Request for Retired License Status (RS-112015)."

(d) The licensee shall disclose under penalty of perjury whether the licensee has any misdemeanor or other criminal offense for which he or she has been found guilty or to which he or she has pleaded guilty or no contest.

(e) A licensee in retired status shall not engage in any activity for which ~~an active~~ **current and valid** license is required.

(f) A licensee in retired status shall comply with the Physical Therapy Practice Act and Board's regulations.

(g) In order to restore a license from retired status to active status, the licensee shall:

(1) Complete a form prescribed by the board titled "Request to Restore License to Active Status (AS-112015)".

(2) Pay the ~~biennial~~ renewal fee. ~~in effect at the time the request to restore the license to active status is received.~~

(3) Satisfy continuing competency requirements pursuant to section 2649 of the Code.

(h) A person who fails to ~~renew-restore~~ his or her retired license within five years ~~may shall~~ -not ~~renew-restore~~ it, and it shall ~~become expired and~~ not be reissued, reinstated, or restored thereafter. ~~However, t~~The person may apply for a new license if he or she satisfies the requirements set forth in Article 3.

(i) ~~A licensee may be granted retired status on no more than two separate occasions.~~

(j) Failure to comply with this section is unprofessional conduct and grounds for citation or discipline.

Note: Authority cited: Sections 2615, Business and Professions Code. Reference: Sections 118, 125.9, 2647, 2648.7, 2660 and 2688, Business and Professions Code.

Request for Retired License Status

Failure to provide any requested data may prevent or significantly delay the processing of your request. Submit completed forms by mail, fax or email. You can verify your Retired status on the PTBC website under "Verify a License".

Licenses in Retired status are prohibited from engaging in the practice of, or assisting in the provision of, physical therapy services. Such licenses are exempt from the renewal fee and continuing competency requirements.

SECTION A: Personal Information			
License Type:	<input type="checkbox"/> PT	<input type="checkbox"/> PTA	License Number
First Name	Middle Name	Last Name	
Work Phone - -	Daytime Phone - -	Email Address	

SECTION B: Mandatory Conviction and License Disciplined Disclosure Question
<p>Since you last renewed your license, have you had any license disciplined by a government agency or other disciplinary body? Have you been convicted of or pled guilty or nolo contendere to any felony, misdemeanor, infraction or other criminal offense under the laws of any state, the United States, or a foreign country, including any conviction which has been dismissed under Section 1203.4 of the Penal Code? If you are awaiting judgment and sentencing following entry of a plea or jury verdict, you must still disclose the conviction.</p> <p style="text-align: center;"> <input type="checkbox"/> *Yes <input type="checkbox"/> No </p> <p><small>*If you answered yes to this question please provide details. If you have had a license disciplined, provide certified copies of the disciplinary order and any documentation of rehabilitation to the PTBC. If you have been convicted, please provide CERTIFIED TRUE COPIES of the court and arrest records for each criminal offense to the PTBC. Mail all documents within 30 days to: PTBC 2005 Evergreen Street, Suite 1350, Sacramento, CA 95815</small></p>

SECTION C: Declaration
<p>By signing below, I am requesting Retired Status. I understand that I am prohibited from engaging in the practice of, or assisting in the provision of physical therapy. I declare under penalty of perjury under the laws of the State of California that the information given above is true and correct; and, I am the person who was issued a license by the Physical Therapy Board of California.</p> <p>Signature: _____ Date: _____</p>

Request to Restore Active License Status

Failure to provide any requested data may prevent or significantly delay the processing of your request. Submit completed forms by mail, fax or email. You can verify your license status on the PTBC website under "Verify a License".

SECTION A: Personal Information			
License Type:	<input type="checkbox"/> PT	<input type="checkbox"/> PTA	License Number
First Name	Middle Name	Last Name	
Work Phone - -	Daytime Phone - -	Email Address	

SECTION B: Continuing Competency
To obtain Active Status, the law requires that you complete continuing education equivalent to that required for a single renewal period of an active license. The continuing competency activity must have been completed within the last two years prior to applying to restore the license to active status. Continuing Competency completed more than two years before the request cannot be considered.
<input type="checkbox"/> I have completed continuing education required as described above.

SECTION C: Mandatory Conviction and License Disciplined Disclosure Question
Since you last renewed your license, have you had any license disciplined by a government agency or other disciplinary body? Have you been convicted of or pled guilty or nolo contendere to any felony, misdemeanor, infraction or other criminal offense under the laws of any state, the United States, or a foreign country, including any conviction which has been dismissed under Section 1203.4 of the Penal Code? If you are awaiting judgment and sentencing following entry of a plea or jury verdict, you must still disclose the conviction.
<input type="checkbox"/> *Yes <input type="checkbox"/> No
<small>*If you answered yes to this question please provide details. If you have had a license disciplined, provide certified copies of the disciplinary order and any documentation of rehabilitation to the PTBC. If you have been convicted, please provide CERTIFIED TRUE COPIES of the court and arrest records for each criminal offense to the PTBC. Mail all documents within 30 days to: PTBC 2005 Evergreen Street, Suite 1350, Sacramento, CA 95815</small>

SECTION D: Declaration
By signing below, I am requesting to restore my license to Active Status. I declare under penalty of perjury under the laws of the State of California that the information given above is true, correct and that I am the person who was issued a license by the Physical Therapy Board of California.
Signature: _____ Date: _____

MEMORANDUM

DATE: January 21, 2016

ATTENTION: Board Members, Physical Therapy Board of California

SUBJECT: Presentation and Discussion Regarding February 2015 US Supreme Court Decision: North Carolina State Board of Dental Examiners v. FTC, related opinion from the office of the Attorney General, FTC staff Guidance and Legislative Hearings

FROM: Angelique Scott, Attorney, Legal Affairs Division, DCA

BACKGROUND:

On February 25, 2015, the U.S. Supreme Court rendered a decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission. (**Attachment 1**) While this is an antitrust case about the scope of the “state-action” doctrine, the U.S. Supreme Court decision has caused licensing boards to evaluate their structure and how they make policy decisions effecting market participants.

The historical facts in that case relate to the North Carolina State Board of Dental Examiners (dental board), which is composed six licensed dentists, one licensed dental hygienist and one public member, is a state agency established under North Carolina law delegated to regulate dentists. The dental board sent cease-and-desist letters to non-dentists performing teeth whitening services and sent letters to facilities allowing the non-dentists to perform the service on their premises, claiming they were engaged in the unauthorized practice of dentistry, even though teeth whitening services was not specifically delineated within their scope of practice. The non-dentists stopped offering these services in North Carolina.

The six licensed members were elected to the dental board by other dentists (market participants) and not by the state’s legislature or Governor. Moreover, there was no state mechanism for the removal of board members from office.

The Federal Trade Commission (FTC) determined that the dental board’s actions violated the federal antitrust law by preventing non-dentists from providing teeth whitening services and sued the dental board. The dental board argued that it's actions did not violate the law, because it is a state agency and therefore immune from antitrust law.

U.S. SUPREME COURT

The U.S. Supreme Court heard the matter and held that a state board in which a “controlling number” of decision makers are active market participants in the occupation the board regulates, must satisfy “active supervision” requirements to get antitrust state-action immunity.

- The Court identified a few constant requirements of “active supervision”:
 - 1) the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it;
 - 2) the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy;
 - 3) the mere potential for state supervision is not an adequate substitute for a decision by the state; and,
 - 4) the state supervisor may not itself be an “active market participant”.
- The Court concluded that states can ensure immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision.

ATTORNEY GENERAL’S OPINION

On September 10, 2015, the Attorney General (AG) issued an opinion as to what constitutes “active state supervision” of state licensing boards, and how to guard against antitrust liability for board members. (**Attachment 2**)

- The AG’s opinion stated:

“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.

- The AG’s opinion instructs that “There is no bright-line test for determining what constitutes active supervision of a professional licensing board: the standard is “flexible and context-dependent....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.”
- In the context of regulating profession, market sensitive decisions (that is the kinds of decisions that are most likely to be open to antitrust scrutiny) are 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.
- The AG’s opinion also identified some broad areas of operation where board members can act with reasonable confidence of preserving their state action immunity:
 - 1) Promulgation regulations, because of the:
 - public notice,
 - written justification,
 - DCA Director’s review, and
 - review by the Office of Administrative Law pursuant to the Administrative Procedure Act.
 - 2) Disciplinary decisions, because of
 - due process procedures in place;

- participation of state actors, such as board executive directors, investigators, prosecutors, and administrative law judges; and
 - the availability of judicial (administrative mandamus) review.
- 3) Carrying out the actions required by a detailed anticompetitive statutory scheme, because arguably
- detailed legislation leaves nothing for the state to supervise, and
 - legislation itself satisfies the supervision requirement.
- 4) Pro-Competitive actions, rather than anti-competitive actions, such as the adoption of safety standards that are based on objective expert judgments, or 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, because such actions have been
- found by the courts to be pro-competitive, rather than anti-competitive.
 - held to be pro-competitive because they are pro-consumer.

FTC GUIDANCE

In October 2015, staff at FTC, issued its Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants in response to the various state officials across the nation requesting FTC's advice regarding antitrust compliance for state licensing boards responsible for regulating occupations. (**Attachment 3**)

- The FTC's Guidance reiterates the Supreme Court's finding that a state board in which a "controlling number" of decision makers are active market participants in the occupation the board regulates must satisfy the active supervision requirement, in order to invoke state action antitrust immunity".
- The FTC Guidance goes on to define an "active market participant" as any person who is licensed by the board or provides any service that is subject to the regulatory authority of the board.
- The FTC Guidance provides that a "controlling number" is not necessarily a majority, of actual decisionmakers. "A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market...must be actively supervised to be eligible for the state action defense." It also indicates that the

controlling number of active market participants implicates the need for active state supervision, not simply a majority of board members.

- According to the FTC Guidance, the relevant factors in determining whether the active supervision requirement has been satisfied are:
 - 1) The supervisor has obtained the information necessary for a proper evaluation of the action recommended by the regulatory board.
 - 2) 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.
 - 3) The supervisor has issued a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision.

RECOMMENDATION TO BOARD MEMBERS

As a result, boards are being encouraged to:

- A) promote their primary mission of consumer protection in making decisions
- B) articulate the public policy reasons for their decisions;
- C) conduct an analysis of the procompetitive and anticompetitive aspects of that decision, and
- D) articulate in their records (minutes), how the actions taken, will further the state's affirmatively stated policies.

135 S.Ct. 1101
Supreme Court of the United States

[NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS](#), Petitioner

v.

FEDERAL TRADE COMMISSION.

No. 13–534.

|
Argued Oct. 14, 2014.

|
Decided Feb. 25, 2015.

Synopsis

Background: North Carolina State Board of Dental Examiners petitioned for review of an order of the Federal Trade Commission ([FTC](#)), [2011 WL 11798463](#), which prohibited board from directing non-dentists to stop providing teeth whitening services or products, discouraging or barring the provision of those goods and services, or communicating to certain third parties that non-dentist teeth whitening goods or services violated state's Dental Practice Act. The United States Court of Appeals for the Fourth Circuit, [Shedd](#), Circuit Judge, [717 F.3d 359](#), denied petition. Board's petition for writ of certiorari was granted.

[Holding:] The Supreme Court, Justice [Kennedy](#), held that board was nonsovereign entity controlled by active market participants that did not receive active supervision by state, and thus board's anticompetitive actions were not entitled to *Parker* state-action immunity from federal antitrust law.

Affirmed.

Justice [Alito](#), filed dissenting opinion in which Justices [Scalia](#) and [Thomas](#) joined.

1104 Syllabus

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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

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

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method

of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board's motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 1109 – 1117.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 1109 – 1110.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if “ ‘the challenged restraint ... [is] clearly articulated and *1105 affirmatively expressed as state policy,’ and ... ‘the policy ... [is] actively supervised by the State.’ ” *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. —, —, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 1110 – 1116.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374, 111 S.Ct. 1344, 113 L.Ed.2d 382. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal*'s two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 1110 – 1112.

(2) There are instances in which an actor can be excused from *Midcal*'s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie v. Eau Claire*, 471 U.S. 34, 35, 105 S.Ct. 1713, 85 L.Ed.2d 24. That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni*'s holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U.S., at 374, 111 S.Ct. 1344, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633, 112 S.Ct. 2169, 119 L.Ed.2d 410, and *Phoebe Putney*, *supra*, at —, 133 S.Ct. 1003. The clear lesson of precedent is that *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 1112 – 1114.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal*'s second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal*'s supervision *1106 requirement was created to address. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 44 L.Ed.2d 572. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U.S., at 46, n. 10, 105 S.Ct. 1713, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. 445 U.S., at 105–106, 100 S.Ct. 937. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra*, at 39, 105 S.Ct. 1713. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus, the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity. Pp. 1113 – 1115.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick v. Burget*, 486 U.S. 94, 105–106, 108 S.Ct. 1658, 100 L.Ed.2d 83, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 1114 – 1116.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 1116.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's *1107 anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U.S., at 100–101, 108 S.Ct. 1658. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id.*, at 102–103, 108 S.Ct. 1658; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra*, at 638, 112 S.Ct. 2169. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 1116 – 1117.

717 F.3d 359, affirmed.

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

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Opinion

Justice KENNEDY delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

I

A

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

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See §§ 90–29 to 90–41. To perform that function it has broad authority over licensees. See § 90–41. The Board's authority with respect to unlicensed persons, however, is more restricted: like “any resident citizen,” the Board may file suit to “perpetually enjoin any person from ... unlawfully practicing dentistry.” § 90–40.1.

*1108 The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. § 90–22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a “consumer” and is appointed by the Governor. *Ibid.* All members serve 3–year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, § 138A–22(a), and the Board must comply with the State's Administrative Procedure Act, § 150B–1 *et seq.*, Public Records Act, § 132–1 *et seq.*, and open-meetings law, § 143–318.9 *et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not

inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§ 90–48, 143B–30.1, 150B–21.9(a).

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

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

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

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

C

In 2010, the Federal Trade Commission (FTC) filed an administrative complaint charging the Board with violating § 5 of ***1109** the Federal Trade Commission Act, 38 Stat. 719, as amended, [15 U.S.C. § 45](#). The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a “public/private hybrid” that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the Board could not make that showing.

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

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

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. [717 F.3d 359, 370 \(2013\)](#). This Court granted certiorari. [571 U.S. —, 134 S.Ct. 1491, 188 L.Ed.2d 375 \(2014\)](#).

II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” [United States v. Topco Associates, Inc.](#), 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, [15 U.S.C. § 1 et seq.](#), serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See [FTC v. Ticor Title Ins. Co.](#), 504 U.S. 621, 632, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While “the States regulate their economies in many ways not inconsistent with the antitrust laws,” *id.*, at 635–636, 112 S.Ct. 2169, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. See [Exxon Corp. v. Governor of Maryland](#), 437 U.S. 117, 133, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); see also Easterbrook, *1110 Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in [Parker v. Brown](#) interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See [317 U.S.](#), at 350–351, 63 S.Ct. 307. That ruling recognized Congress' purpose to respect the federal balance and to “embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.” [Community Communications Co. v. Boulder](#), 455 U.S. 40, 53, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). Since 1943, the Court has reaffirmed the importance of [Parker](#)'s central holding. See, e.g., [Ticor](#), *supra*, at 632–637, 112 S.Ct. 2169; [Hoover v. Ronwin](#), 466 U.S. 558, 568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984); [Lafayette v. Louisiana Power & Light Co.](#), 435 U.S. 389, 394–400, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

III

[1] In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with [Parker](#) immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys [Parker](#) immunity only if it satisfies two requirements: “first that ‘the challenged restraint ... be one clearly articulated and affirmatively expressed as state policy,’ and second that ‘the policy ... be actively supervised by the State.’” [FTC v. Phoebe Putney Health System, Inc.](#), 568 U.S. —, —, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (2013) (quoting [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.](#), 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

[2] Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. “[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, ‘state action immunity is disfavored, much as are repeals by implication.’” *Phoebe Putney, supra*, at —, 133 S.Ct., at 1010 (quoting *Ticor, supra*, at 636, 112 S.Ct. 2169).

[3] [4] An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991). State legislation and “decision[s] of a state supreme court, acting legislatively rather than judicially,” will satisfy this standard, and “*ipso facto* are exempt from the operation of the antitrust laws” because they are an undoubted exercise of state sovereign authority. *Hoover, supra*, at 567–568, 104 S.Ct. 1989.

[5] [6] But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor. See *Parker, supra*, at 351, 63 S.Ct. 307 *1111 (“[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful”). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover, supra*, at 567–568, 104 S.Ct. 1989. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members”). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor*, 504 U.S., at 636, 112 S.Ct. 2169.

[7] Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal, supra*, at 106, 100 S.Ct. 937 (“The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement”). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988); *Hoover, supra*, at 584, 104 S.Ct. 1989 (Stevens, J., dissenting) (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of ... our antitrust jurisprudence”); see also Elhauge, *The Scope of Antitrust Process*, 104 Harv. L.Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 500 (1986).

[8] [9] *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. See *Goldfarb, supra*, at 790, 95 S.Ct. 2004; see also 1A P. Areeda & H. Hovencamp, *Antitrust Law* ¶ 226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor, supra*, at 634–635, 112 S.Ct. 2169. Rather, it is “whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws.” *Patrick v. Burget*, 486 U.S. 94, 100, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233, a case arising from California's delegation of price-fixing authority *1112 to wine merchants. Under *Midcal*, “[a] state law or regulatory scheme cannot be the basis for antitrust immunity

unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.” *Ticor, supra*, at 631, 112 S.Ct. 2169 (citing *Midcal, supra*, at 105, 100 S.Ct. 937).

[10] [11] *Midcal*'s clear articulation requirement is satisfied “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.” *Phoebe Putney*, 568 U.S., at —, 133 S.Ct., at 1013. The active supervision requirement demands, *inter alia*, “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” *Patrick, supra*, 486 U.S., at 101, 108 S.Ct. 1658.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor, supra*, at 636–637, 112 S.Ct. 2169. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Midcal's supervision rule “stems from the recognition that ‘[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.’ ” *Patrick, supra*, at 100, 108 S.Ct. 1658. Concern about the private incentives of active market participants animates *Midcal*'s supervision mandate, which demands “realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.” *Patrick, supra*, at 101, 108 S.Ct. 1658.

B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from *Midcal*'s active supervision requirement. In *Hallie v. Eau Claire*, 471 U.S. 34, 45, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), the Court held municipalities are subject exclusively to *Midcal*'s “ ‘clear articulation’ ” requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that “[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals.” 471 U.S., at 47, 105 S.Ct. 1713. *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id.*, at 45, n. 9, 105 S.Ct. 1713. Critically, the municipality in *Hallie* exercised a wide range of governmental *1113 powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U.S., at 45, 105 S.Ct. 1713.

Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U.S., at 367–368, 111 S.Ct. 1344. The Court disagreed, holding there is no “conspiracy exception” to *Parker*. *Omni, supra*, at 374, 111 S.Ct. 1344.

Omni, like the cases before it, recognized the importance of drawing a line “relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest.” 499 U.S., at 378, 111 S.Ct. 1344. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for “corruption” as vague and unworkable, since “virtually all regulation benefits some segments of the society and harms others” and may in that sense be seen as “ ‘corrupt.’ ” 499 U.S., at 377, 111 S.Ct. 1344. *Omni* also rejected subjective tests for corruption that would force a “deconstruction of the governmental process and probing of the official ‘intent’ that we have consistently sought to avoid.” *Ibid*. Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

[12] *Omni*'s holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor* the Court affirmed that *Midcal*'s limits on delegation must ensure that “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.” 504 U.S., at 633, 112 S.Ct. 2169. And in *Phoebe Putney* the Court observed that *Midcal*'s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has “an incentive to pursue [its] own self-interest under the guise of implementing state policies.” 568 U.S., at —, 133 S.Ct., at 1011 (quoting *Hallie*, *supra*, at 46–47, 105 S.Ct. 1713). The lesson is clear: *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

[13] The Board argues entities designated by the States as agencies are exempt from *Midcal*'s second requirement. *1114 That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See *Areeda & Hovencamp* ¶ 227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick*, 486 U.S., at 100–101, 108 S.Ct. 1658.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had “joined in what is essentially a private anticompetitive activity” for “the benefit of its members.” 421 U.S., at 791, 792, 95 S.Ct. 2004. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U.S., at 791, 95 S.Ct. 2004; see also *Hoover*, 466 U.S., at 569, 104 S.Ct. 1989 (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361–362, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (granting the Arizona Bar state-action immunity partly because its “rules are subject to pointed re-examination by the policymaker”).

While *Hallie* stated “it is likely that active state supervision would also not be required” for agencies, 471 U.S., at 46, n. 10, 105 S.Ct. 1713, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, “[t]here is no doubt that the members of such associations often have

economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.” *Allied Tube*, 486 U.S., at 500, 108 S.Ct. 1931. For that reason, those associations must satisfy *Midcal*’s active supervision standard. See *Midcal*, 445 U.S., at 105–106, 100 S.Ct. 937.

[14] The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39, 105 S.Ct. 1713 (rejecting “purely formalistic” analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See *Areeda & Hovencamp* ¶ 227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*’s active supervision requirement in order to invoke state-action antitrust immunity.

*1115 D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), and may conclude there are substantial benefits to staffing their agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

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

Today’s holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky v. Delia*, 566 U.S. —, —, 132 S.Ct. 1657, 1666, 182 L.Ed.2d 662 (2012) (warning in the context of civil rights suits that the “the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts”). But this case, which does not present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb*, 421 U.S., at 792, n. 22, 95 S.Ct. 2004; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

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

“[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and *1116 actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own.” *Patrick*, 486 U.S. at 105–106, 108 S.Ct. 1658 (footnote omitted).

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

E

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

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes “the practice of dentistry” and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni*, 499 U.S., at 371–372, 111 S.Ct. 1344, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

IV

[15] The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide “realistic assurance” that a nonsovereign actor's anticompetitive conduct “promotes state policy, rather than merely the party's individual interests.” *Patrick*, *supra*, at 100–101, 108 S.Ct. 1658; see also *Ticor*, 504 U.S., at 639–640, 112 S.Ct. 2169.

[16] The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick*, 486 U.S., at 102–103, 108 S.Ct. 1658; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the “mere potential for state supervision is not an adequate substitute for a decision by the State,” *Ticor*, *supra*, at 638, 112 S.Ct. 2169. Further, *1117 the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

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

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

It is so ordered.

Justice [ALITO](#), with whom Justice [SCALIA](#) and Justice [THOMAS](#) join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352, 63 S.Ct. 307. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff them in this way.¹ Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.² But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

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

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

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker*, and the answer to that question is clear. Under *Parker*, the Sherman Act (and the [*1118 Federal Trade Commission Act](#), see *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992)) do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority

to regulate “their purely internal affairs.” *Leisy v. Hardin*, 135 U.S. 100, 122, 10 S.Ct. 681, 34 L.Ed. 128 (1890). In exercising their police power in this area, the States had long enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade.³

³ See Handler, *The Current Attack on the Parker v. Brown State Action Doctrine*, 76 Colum. L.Rev. 1, 4–6 (1976) (collecting cases). The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power “to the utmost extent.” *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, e.g., *Kidd v. Pearson*, 128 U.S. 1, 17–18, 9 S.Ct. 6, 32 L.Ed. 346 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it “exerts a substantial economic effect on interstate commerce.” *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743, n. 2, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) (“[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power”). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in *Parker*.

In *Parker*, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to establish marketing plans for certain agricultural commodities within the State. 317 U.S., at 346–347, 63 S.Ct. 307. Raisins were among the regulated commodities, and so the Commission *1119 established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id.*, at 347–348, 63 S.Ct. 307. The *Parker* Court assumed that this program would have violated “the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons,” and the Court also assumed that Congress could have prohibited a State from creating a program like California's if it had chosen to do so. *Id.*, at 350, 63 S.Ct. 307. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id.*, at 351, 63 S.Ct. 307.

The Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that “[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.” 317 U.S., at 351, 63 S.Ct. 307. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical and dental boards, often staffed by doctors or dentists,⁴ and had given those boards the authority to confer and revoke licenses.⁵ This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent v. West Virginia*, 129 U.S. 114, 128, 9 S.Ct. 231, 32 L.Ed. 623 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate

from the state board of health attesting to their qualifications. And in *Hawker v. New York*, 170 U.S. 189, 192, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Court reiterated that a law specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

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

5 In *Hawker v. New York*, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.*, at 191–193, n. 1, 18 S.Ct. 573. See also *Douglas v. Noble*, 261 U.S. 165, 166, 43 S.Ct. 303, 67 L.Ed. 590 (1923) (“In 1893 the legislature of Washington provided that only licensed persons should practice dentistry” and “vested the authority to license in a board of examiners, consisting of five practicing dentists”).

II

As noted above, the only question in this case is whether the North Carolina Board *1120 of Dental Examiners is really a state agency, and the answer to that question is clearly yes.

- The North Carolina Legislature determined that the practice of dentistry “affect[s] the public health, safety and welfare” of North Carolina’s citizens and that therefore the profession should be “subject to regulation and control in the public interest” in order to ensure “that only qualified persons be permitted to practice dentistry in the State.” *N.C. Gen.Stat. Ann. § 90–22(a)* (2013).
- To further that end, the legislature created the North Carolina State Board of Dental Examiners “as the agency of the State for the regulation of the practice of dentistry in th[e] State.” *§ 90–22(b)*.
- The legislature specified the membership of the Board. *§ 90–22(c)*. It defined the “practice of dentistry,” *§ 90–29(b)*, and it set out standards for licensing practitioners, *§ 90–30*. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. *§ 90–41(a)*.
- The legislature empowered the Board to “maintain an action in the name of the State of North Carolina to perpetually enjoin any person from ... unlawfully practicing dentistry.” *§ 90–40.1(a)*. It authorized the Board to conduct investigations and to hire legal counsel, and the legislature made any “notice or statement of charges against any licensee” a public record under state law. *§§ 90–41(d)–(g)*.
- The legislature empowered the Board “to enact rules and regulations governing the practice of dentistry within the State,” consistent with relevant statutes. *§ 90–48*. It has required that any such rules be included in the Board’s annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature’s Joint Regulatory Reform Committee. *§ 93B–2*. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid.*

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

The Board is not a private or “nonsovereign” entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not “ ‘give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.’ ” *Ante*, at 1111 (quoting *Parker*, 317 U.S., at 351, 63 S.Ct. 307). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co. v. United States*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904), to show what it had in mind. In that case, the Court held that a State’s act of chartering a corporation did not shield the corporation’s monopolizing activities from federal antitrust law. *Id.*, at 344–345, 63 S.Ct. 307. Nothing similar

is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are “controlled by active *1121 market participants,” *ante*, at 1114, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker*, 317 U.S., at 346, 63 S.Ct. 307. If the Commission then agreed that a marketing plan was warranted, the Commission would “select a program committee *from among nominees chosen by the qualified producers.*” *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id.*, at 347, 63 S.Ct. 307. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a “sovereign” when it “adopt[ed] and enforc[ed] the prorate program.” *Id.*, at 352, 63 S.Ct. 307. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the *Parker* doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both “ ‘clearly articulated’ ” and “ ‘actively supervised by the State itself.’ ” 445 U.S., at 105, 100 S.Ct. 937. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

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

Our decision in *Hallie v. Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), which involved Sherman Act claims against a municipality, not a State agency, is similarly inapplicable. In *Hallie*, the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities “are not themselves sovereign.” 471 U.S., at 38, 105 S.Ct. 1713. But recognizing that a municipality is “an arm of the State,” *id.*, at 45, 105 S.Ct. 1713, the Court held that a municipality *1122 should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), 471 U.S., at 46, 105 S.Ct. 1713. That municipalities are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.

Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193, 126 S.Ct. 1689, 164 L.Ed.2d 367 (2006), and California's sovereignty provided the foundation for the decision

in *Parker, supra*, at 352, 63 S.Ct. 307. Municipalities are not sovereign. *Jinks v. Richland County*, 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003). And for this reason, federal law often treats municipalities differently from States. Compare *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (“[N]either a State nor its officials acting in their official capacities are ‘persons’ under [42 U.S.C.] § 1983”), with *Monell v. City Dept. of Social Servs., New York*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (municipalities liable under § 1983 where “execution of a government’s policy or custom ... inflicts the injury”).

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

The Court’s analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *Id.*, at 374, 111 S.Ct. 1344. The Sherman Act, we said, is not an anticorruption or good-government statute. 499 U.S., at 398, 111 S.Ct. 1344. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U.S., at 374–379, 111 S.Ct. 1344. But that is essentially what the Court has done here.

IV

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

As a result of today’s decision, States may find it necessary to change the composition *1123 of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because “active market participants” constitute “a controlling number of [the] decisionmakers,” *ante*, at 1114, but this test raises many questions.

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

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

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

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

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.⁶ So why ask only whether the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision.

⁶ See, e.g., R. Noll, *Reforming Regulation* 40–43, 46 (1971); J. Wilson, *The Politics of Regulation* 357–394 (1980). Indeed, it has even been charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, “The Nader Report” on the Federal Trade Commission vii–xiv (1969); Posner, *Federal Trade Commission*, *Chi. L.Rev.* 47, 82–84 (1969).

V

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

All Citations

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OPINION	:	No. 15-402
	:	
of	:	September 10, 2015
	:	
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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.

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 1890⁴ 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

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

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 boards¹⁵ 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

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

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.

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

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

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_16h1.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

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 complaints⁴⁹ and to initiate audits and reviews of disciplinary cases and complaints about licensees.⁵⁰

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

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,

⁵⁷ See 1A Areeda & Hovenkamp, *Antitrust Law*, *supra*, 225, at pp. 135-137; e.g. *AI 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

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

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. Friedenber*g (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-

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.

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

* 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 not 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

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 not 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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July 15, 2015

Honorable Jerry Hill
Room 5035, State Capitol

ANTITRUST LIABILITY: STATE-ACTION IMMUNITY - #1509722

Dear Senator Hill:

The Sherman Act¹ prohibits anticompetitive conduct including monopolies and agreements in restraint of trade, but states are immune from Sherman Act liability in certain circumstances. In *North Carolina State Bd. of Dental Examiners v. F.T.C.* (2015) 574 U.S. ___ [135 S.Ct. 1101, 1110] (hereafter *North Carolina*), the United States Supreme Court held that the State of North Carolina's dental board, which was controlled by active market participants, was not immune from liability under the Sherman Act with respect to its anticompetitive actions because the board was not actively supervised by the state. You have asked us to describe the effect of this holding on the legal standard used by courts to determine when a state agency or board will be granted immunity from liability under the Sherman Act.

1. The Sherman Act

The Sherman Act prohibits agreements in restraint of trade and monopolies, as provided in sections 1 and 2 of the act. Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade or commerce, or, in other words, the anticompetitive conduct of a combination of firms. Section 2 of the Sherman Act prohibits monopolies, attempts to monopolize, and combinations or conspiracies to monopolize, or, in other words, the anticompetitive conduct of either a single firm or a combination of firms. Not every combination in restraint of trade is unlawful under the Sherman Act. (*People v. Santa Clara Val. Bowling Proprietors' Ass'n* (1965) 238 Cal.App.2d 225, 233.) Rather, the act proscribes only those restraints that are unreasonable. (*Ibid.*)

¹ 15 U.S.C. §§ 1-7; hereafter the Sherman Act. All further section references are to title 15 of the United States Code.

2. History of state-action immunity prior to the ruling in *North Carolina*

In order to determine the impact of the *North Carolina* decision on the legal standards for state-action immunity, we must first examine United States Supreme Court jurisprudence applying state-action immunity leading up to *North Carolina*.

In *Parker v. Brown* (1943) 317 U.S. 341, 350-351 (hereafter *Parker*), the Supreme Court first addressed the issue of whether the Sherman Act applies to states and concluded that “nothing in the language of the Sherman Act or in its history ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.” *Parker* involved a suit that challenged a California statute as violating the Sherman Act. The statute in that case established a program for the marketing of agricultural commodities produced in the state by restricting competition among growers and maintaining prices. (*Id.* at p. 346.) The program restricted the trade of raisins by authorizing the establishment of a commission with the authority to approve a petition of raisin producers for the establishment of a prorate marketing plan for raisins. (*Ibid.*) If the commission approved the program and 65 percent of specified raisin producers approved the program, then the program was instituted. (*Id.* at pp. 346-347.) In concluding that the Sherman Act did not prohibit the California program, the court held that state actions are immune from liability under the Sherman Act. (*Id.* at p. 352.) The court reasoned that the California program constituted state action because of the following:

“It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, *it is the state, acting through the Commission, which adopts the program* and which enforces it with penal sanctions, *in the execution of a governmental policy*. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application.” (*Ibid.*; emphasis added.)

Although the court held that the California program was entitled to state-action immunity, the court limited the application of state-action immunity by cautioning that “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.” (*Id.* at p. 351.)

Thus, the holding in *Parker* established that a state entity is immune from Sherman Act liability where it is executing a governmental policy. Following *Parker*, the United States Supreme Court decided a series of cases that developed the application of state-action immunity by examining the nature and extent of state involvement necessary for an action to be considered state action.

In *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 775 (hereafter *Goldfarb*), the United States Supreme Court determined that a minimum fee schedule for lawyers published

by a county bar association and enforced by the Virginia State Bar violated the Sherman Act. In reaching this conclusion, the court ruled that the anticompetitive activity of establishing a minimum fee schedule was not state action because “it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities.” (*Id.* at p. 790.) Furthermore, the court stated as follows:

“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. [Citation.] The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act. [Citation.]” (*Id.* at pp. 791-792; fns. omitted.)

Thus, the holding in *Goldfarb* clarified that actions by a purported state agency are, nevertheless, subject to the prohibitions of the Sherman Act where those actions in essence constitute private anticompetitive activity.

However, in *Bates v. State Bar of Arizona* (1977) 433 U.S. 350, 362-363 (hereafter *Bates*), the United States Supreme Court held that the Arizona Supreme Court’s imposition and enforcement of a disciplinary rule that restricted advertising did not violate the Sherman Act because the action qualified as exempt state action under *Parker, supra*. The court reached this conclusion after finding that the “disciplinary rules reflect a clear articulation of the State’s policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policymaker the Arizona Supreme Court in enforcement proceedings.” (*Bates, supra*, at p. 362.) The court deemed “it significant that the state policy is so clearly and affirmatively expressed and that the State’s supervision is so active.” (*Ibid.*) Thus, *Bates* clarified that it is relevant to a grant of state-action immunity whether the anticompetitive actions represent a clear articulation of the state’s policy and are subject to a pointed re-examination by the state Supreme Court.

In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.* (1980) 445 U.S. 97, 99 (hereafter *Midcal*), the United States Supreme Court examined a California statute that required all wine producers, wholesalers, and rectifiers to file fair trade contracts or price schedules with the state, and prohibited wine merchants from selling wine to a retailer at a price other than a price set in such an effective price schedule or fair trade contract. Under the statute, California had no direct control over, and did not review the reasonableness of, the prices set by wine dealers. (*Id.* at p. 100.) In determining whether the state’s involvement in the above program was sufficient to establish antitrust immunity under *Parker, supra*, the court examined its preceding decisions and held that two standards must be met for state-action immunity to apply: “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.” (*Midcal, supra*, at p. 105, citing *City of Lafayette, La. v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, 410 (hereafter *City of Lafayette*)). Ultimately, the court in *Midcal* found that the California program failed to meet the second requirement for state-action immunity because the state “neither establishes prices nor reviews the

reasonableness of the price schedule; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. [Fn. omitted.]" (*Midcal, supra*, at pp. 105-106.) In sum, the court in *Midcal* expressly imposed two requirements for state-action immunity to apply: (1) a clearly articulated and affirmatively expressed state policy, and (2) active supervision of that policy by the state.

Subsequently, in *Hoover v. Ronwin* (1984) 466 U.S. 558 (hereafter *Hoover*), the United States Supreme Court examined whether state-action immunity applied to a committee appointed by the Arizona Supreme Court to administer the state bar examination. The court reiterated *Midcal's* two-part test and stated that when "the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.'" (*Hoover, supra*, at p. 569.) However, the court articulated that when the conduct is that of a "nonsovereign state representative," it must be pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation," and the degree of state supervision is also "relevant to the inquiry." (*Ibid.*) Applying these standards, the court held that the actions of the committee were entitled to state-action immunity because the Arizona Supreme Court "retained strict supervisory powers and ultimate full authority over [the committee's] actions." (*Id.* at p. 572.) In the court's view, the Arizona Supreme Court retained sufficient supervision and authority over the committee by specifying the subjects to be tested on the bar exam and the general qualifications required for bar applicants, approving the committee's grading formula, and, most significantly, making the final decision to grant or deny admission to the bar and providing individualized review of bar examinations when requested. (*Id.* at pp. 572-573.) In sum, *Hoover* confirmed that a "nonsovereign state representative" is entitled to state-action immunity when its actions meet *Midcal's* clear articulation requirement and emphasized that the degree of state supervision is also "relevant to the inquiry."

The court in *Town of Hallie v. City of Eau Claire* (1985) 471 U.S. 34, 44-46 (hereafter *Town of Hallie*) addressed the application of the state immunity doctrine with respect to municipalities. Distinguishing municipal actors from state actors, the court applied only the first *Midcal* requirement. Thus, the court held that municipalities are immune from Sherman Act liability when acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, but need not show active state supervision to maintain their state-action exemption. (*Town of Hallie, supra*, at pp. 40 & 46.) In deciding to apply only the first *Midcal* requirement, the court distinguished municipalities from both the state and private parties, explaining that municipalities "are not beyond the reach of antitrust laws by virtue of their status because they are not themselves sovereign." (*Town of Hallie, supra*, at p. 38.) In making this distinction, the court emphasized that municipalities differ from private parties because there is a real danger that private parties will act to further their own interests over the interests of the state. The court reasoned that with municipalities there is "little or no danger" of this occurring. (*Id.* at p. 47.) In sum, the ruling in *Town of Hallie* stands for the proposition that, to be entitled to state-action immunity, municipalities need only meet the first *Midcal* requirement of acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition.

The United States Supreme Court examined whether state-action immunity applied to protect private physicians with respect to their anticompetitive conduct on a hospital's peer-review committee that the hospital was under a statutory obligation to establish and review in *Patrick v. Burget* (1988) 486 U.S. 94, 102 (hereafter *Patrick*). The court determined that both *Midcal* requirements must be satisfied for the anticompetitive actions of private parties to be deemed state action and shielded from antitrust laws. (*Patrick, supra*, at p. 100.) After finding that the actions of the peer review committees did not meet the active supervision prong, the court declined to consider the clear articulation requirement and held that state-action immunity did not apply. (*Ibid.*) In discussing active supervision, the court stated that the requirement “stems from the recognition that ‘[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.’ [Citation.]” (*Ibid.*) Therefore, the court determined that there was a danger that the private physicians on a hospital peer review committee were furthering their own private interests because the state did not have the ability to review the committee's decisions regarding hospital privileges to determine whether those decisions comported with state regulatory policy and correct abuses. (*Id.* at pp. 101-102.) In other words, according to the court in *Patrick*, both *Midcal* requirements apply to the anticompetitive actions of private parties because of the real danger that private parties will act to further their own interests.

In *City of Columbia v. Omni Outdoor Advertising, Inc.* (1991) 499 U.S. 365, 368-369 (hereafter *City of Columbia*), a private billboard company argued that the city's billboard ordinances were the result of an anticompetitive conspiracy between city officials and a private local billboard company, whereby the city colluded with the local billboard company to pass local ordinances intended to restrict competition from out-of-town companies. The United States Supreme Court rejected the argument that a conspiracy exception exists for *Parker's* state-action exemption “where politicians or political entities are involved as conspirators’ with private actors in the restraint of trade.” (*City of Columbia, supra*, at p. 374.) In reaching this conclusion, the court cautioned that “[t]his does not mean, of course, that the States may exempt *private* action from the scope of the Sherman Act; we in no way qualify the well-established principal that ‘a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring their action is unlawful.’” (*Id.* at p. 379, citing *Parker, supra*, 317 U.S. at p. 351; emphasis in original.) Additionally, the court stated that “with the possible market participant exception, *any* action that qualifies as state action is ‘*ipso facto* ... exempt from the operation of the antitrust laws.’” (*Id.* at p. 379, citing *Hoover, supra*, 466 U.S. at p. 568; emphasis in original.) Therefore, in *City of Columbia* the Supreme Court left open a “possible” exception from state-action immunity in instances where the state is acting as a market participant.

Next, the United States Supreme Court in *F.T.C. v. Ticor Title Ins. Co.* (1992) 504 U.S. 621, 632 (hereafter *Ticor*) considered whether the mere existence of a state regulatory program for setting insurance rates, if staffed, funded, and empowered by law, satisfied the active supervision requirement in *Midcal*. The court concluded that the regulatory program did not meet the active supervision requirement because “The mere potential for state supervision is not an adequate substitute for a decision by the State.” (*Ticor, supra*, at p. 638.)

The court explained that “[w]here prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme.” (*Ibid.*)² Accordingly, the holding in *Ticor* emphasized that the mere potential for state supervision by itself is not adequate for a finding of active state supervision.

Recently, in *F.T.C. v. Phoebe Putney Health System, Inc.* (2013) 568 U.S. ___ [133 S.Ct. 1003] (hereafter *Phoebe Putney*), the United States Supreme Court addressed the question of whether a “substate governmental entity” (*id.* at p. 1010) in the form of a hospital authority created by the state legislature to “exercise public and essential governmental functions” (*id.* at p. 1007) is entitled to state-action immunity for permitting acquisitions that substantially lessened competition.³ The court granted certiorari to answer two questions: (1) whether the hospital authorities acted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition; and (2) if so, whether state-action immunity was nonetheless inapplicable as a result of the hospital authority’s “minimal participation” and “limited supervision” of the hospitals’ acquisitions and operations. (*Id.* at p. 1009.) The court answered the first question in the negative finding that “[g]rants of general corporate power that allow substate governmental entities to participate in a competitive marketplace” do not clearly articulate or affirmatively express a state policy to displace competition. (*Id.* at p. 1012.) Because the court concluded that the hospital authorities did not act pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, the court did not reach the second question. (*Id.* at p. 1009.) Accordingly, the United States Supreme Court left open the question of whether *Midcal*’s active supervision requirement applies to “substate governmental entities.” Additionally, in a footnote, the court declined to answer an amicus curiae question of whether a “market participant” exception to state-action immunity applied because the argument was not raised in the lower courts. (*Phoebe Putney, supra*, at p. 1010, fn. 4.) However, the court recognized that *City of Columbia, supra*, left open the possibility of a market participant exception. (*Phoebe Putney, supra*, at p. 1010.) Therefore, the court in *Phoebe Putney* left open the question of whether a “substate governmental agency” is required to be actively supervised by the state to be entitled to state-action immunity, and recognized that there is a possible market participant exception to state-action immunity.

² In *Ticor*, the potential for state supervision was not enough because the rates became effective unless they were rejected by the state within a set time. Furthermore, the facts of that case revealed that, at most, the rate filings were checked for mathematical accuracy and some were unchecked altogether. (*Ibid.*)

³ The hospital authorities had the power, among other things, to acquire and operate hospitals and other public health facilities. (*Id.* at p. 1008.)

2.1 Summary of pre-North Carolina case law

The United States Supreme Court jurisprudence leading up to *North Carolina*, *supra*, 135 S.Ct. 1101, set forth varying requirements for state-action immunity that largely depend upon the character of the entity engaging in the anticompetitive conduct. Under the pre-*North Carolina* jurisprudence, the application of state-action immunity depends upon whether the entity engaging in the anticompetitive activity is the state, a municipality, a private party, or an agency delegated authority by the state. A state acting in its sovereign capacity is automatically exempt from the operation of antitrust laws. (See *Parker*, *supra*, 317 U.S. at p. 352; *Hoover*, *supra*, 466 U.S. at pp. 567-568.)⁴ A municipality is entitled to state-action immunity if it engages in anticompetitive activities pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. (*Town of Hallie*, *supra*, 471 U.S. at p. 44.) A private party is entitled to state-action immunity only if its anticompetitive conduct meets both the clear articulation and active supervision prongs of the *Midcal* test. (*Patrick*, *supra*, 486 U.S. at p. 100.) Lastly, the pre-*North Carolina* jurisprudence established that an entity that has been delegated state powers, and thus constitutes a state agency for limited purposes, is not automatically entitled to state-action immunity with regard to its anticompetitive activities. (*Goldfarb*, *supra*, 421 U.S. at pp. 791-792.) However, that jurisprudence provided less defined standards for determining when such an entity is entitled to state-action immunity.

For instance, in *Hoover*, the United States Supreme Court stated that when the activity is that of a “nonsovereign state representative,” such as a committee appointed by a state supreme court, the activity must be conducted pursuant to a clearly articulated state policy to displace competition and the degree of the state’s supervision of the activity is also “relevant to the inquiry.” (*Hoover*, *supra*, 466 U.S. at p. 569.) Whereas, in *Phoebe Putney*, the court left open the question of whether *Midcal*’s active supervision requirement applies to “substate governmental entities,” such as hospital authorities cloaked by the state legislature with governmental authority. (*Phoebe Putney*, *supra*, 133 S.Ct. at pp. 1009-1010.) Additionally, in *City of Columbia*, the court noted the possibility that a state acting as a market participant rather than a regulator may not be ipso facto exempt under the state-action doctrine, and *Phoebe Putney* also recognized the potential application of the market participant exception to state-action immunity. (*Id.* at p. 1010, fn. 4; *City of Columbia*, *supra*, 499 U.S. at p. 379.) However, prior to *North Carolina*, no United States Supreme Court case had actually applied a market participant exception to deny state-action immunity to a state agency that engages in anticompetitive conduct.⁵

⁴ “[W]hen a state legislature adopts legislation, its actions constitute those of the State, [citation] and ipso facto are exempt from the operation of the antitrust laws.” (*Hoover*, *supra*, at pp. 567-568.)

⁵ In its discussion of states acting as market participants in *City of Columbia*, the United States Supreme Court referenced *Union Pacific Railroad Co. v. United States* (1941) 313 U.S. 450, (continued...)

Thus, the classification of an entity will guide a court in determining which, if any, of *Midcal's* clear articulation and active supervision requirements must be satisfied to entitle the entity to state-action immunity. In this regard, the pre-*North Carolina* jurisprudence provides guidance concerning what is required to satisfy *Midcal's* clear articulation and active supervision requirements.

Regarding clear articulation, the United States Supreme Court has stated that, although compulsion is often the best evidence, “a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be ‘clearly articulated’ within the meaning of *Midcal*.” (*Southern Motor Carriers Rate Conference, Inc. v. United States* (1985) 471 U.S. 48, 61-62; emphasis in original; hereafter *Southern Motor*.) It is not necessary for the state to explicitly require the anticompetitive activity because it can be presumed that anticompetitive effects logically result from broad authority to regulate. (*Town of Hallie, supra*, 471 U.S. at p. 42.) As long as the state statutes are not neutral⁶ and “[contemplate] the kind of action complained of,” this is sufficient to satisfy the clear articulation requirement of the state-action test. (*Id.* at p. 44.) Therefore, the clear articulation requirement is satisfied “if suppression of competition is the ‘foreseeable result’ of what the statute authorizes.” (*City of Columbia, supra*, 499 U.S. at p. 373.)⁷

(...continued)

where the court held Kansas City liable for certain anticompetitive activity that it engaged in in its capacity as an owner and operator of a wholesale produce market. (*City of Columbia, supra*, at p. 375.) However, other than this brief discussion in *City of Columbia*, there has been no further elaboration by the United States Supreme Court concerning the application of the market participant exception.

Prior to *North Carolina*, several federal circuit courts of appeal were split regarding the recognition of a market participant exception. Some federal circuit courts of appeal recognized a market participant exception (see *A.D. Bedell Wholesale Co. v. Philip Morris Inc.* (3rd Cir. 2001) 263 F.3d 239, 265, fn. 55; *VIBO Corp. v. Conway* (6th Cir. 2012) 669 F.3d 675, 687; and *Washington State Electrical Contractors Ass’n. v. Forrest* (9th Cir. 1991) 930 F.2d 736, 737), and some did not (see *SSC Corp. v. Town of Smithtown* (2nd Cir. 1995) 66 F.3d 502, 517; *Limeco v. Division of Lime of Mississippi Dept. of Agriculture & Commerce* (5th Cir. 1985) 778 F.2d 1086, 1087; and *Paragould Cablevision v. City of Paragould* (8th Cir. 1991) 930 F.2d 1310, 1312-1313).

⁶ The United States Supreme Court has held that a neutral home rule amendment to a state constitution that provides a municipal government with general authority to govern local affairs does not constitute “clear articulation.” (*Community Communications Co. v. Boulder* (1982) 455 U.S. 40, 51-52.)

⁷ For example, in *City of Columbia*, the suppression of competition was a foreseeable result of a state statute that authorized municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries. (*Id.* at pp. 370 & 373.) However, in *Phoebe Putney*, the suppression of competition was not a foreseeable result of a neutral grant of general corporate powers to a substate governmental entity. (*Phoebe Putney, supra*, 133 S. Ct. at pp. 1011-1012.)

(continued...)

Regarding active supervision, this requirement stems from the recognition that “Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the government interests of the State.” (*Town of Hallie, supra*, 471 U.S. at p. 47.) As such, “The active supervision prong of the *Midcal* test 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.” (*Patrick, supra*, 486 U.S. at p. 101.) Further, potential state supervision does not constitute active state supervision. (*Ticor, supra*, 504 U.S. at p. 638.)

In sum, the first prong of the *Midcal* test for state-action immunity is met if suppression of competition is the foreseeable result of a state statute. And the second prong of the *Midcal* test for state-action immunity is met if state officials have and exercise power to review anticompetitive decisions and disapprove those that fail to accord with state policy. In other words, the state supervision must be active rather than a mere potential for supervision. However, the *North Carolina* decision described below further elucidated when and how the *Midcal* test would apply with regard to an entity to which the state has delegated regulatory authority.

3. The *North Carolina* decision

The United States Supreme Court in *North Carolina* specifically addressed the issue of whether a state dental board controlled by active market participants that engaged in anticompetitive conduct was entitled to state-action immunity from liability under the Sherman Act. In that case, the entity claiming state-action immunity was the North Carolina State Board of Dental Examiners (SBDE), which was established as “the agency of the State for the regulation of the practice of dentistry” whose “principal duty is to create, administer, and enforce a licensing system for dentists.” (*North Carolina, supra*, 135 S.Ct. at p. 1107.) The SBDE’s duties included the authority to file suit to enjoin the unlawful practice of dentistry and the SBDE was authorized to promulgate rules and regulations governing the practice of dentistry in the state, provided those mandates were not inconsistent with state law and were approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. (*Id.* at p. 1108.) The SBDE was comprised of eight members, six of whom were required to be licensed dentists engaged in the active practice of dentistry and to be elected by other licensed dentists in North Carolina through an election conducted by the SBDE. (*Ibid.*)⁸ There was no mechanism for the removal of an elected member of the SBDE by a public official, and the SBDE members were required to swear an oath of office and to comply with the state’s Administrative Procedure Act and open meeting laws. (*Ibid.*)

(...continued)

⁸The other two SBDE members were a licensed and practicing dental hygienist elected by other licensed hygienists and a “consumer” appointed by the Governor. (*Ibid.*)

The anticompetitive activity at issue in *North Carolina* was the SBDE's issuance of cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers that directed the recipients to cease "all activity constituting the practice of dentistry." (*North Carolina, supra*, 135 S.Ct. at p. 1108.)⁹ At the time, neither North Carolina's statutory definition of the practice of dentistry nor the SBDE's official rules and regulations defined the practice of dentistry as specifically including, or not including, teeth whitening. (*Id.* at p. 1116.)

The court in *North Carolina* held that the SBDE was a nonsovereign actor controlled by active market participants, and as such "enjoys *Parker* immunity only if it satisfies two requirements: 'first that the "challenged restraint ... be one clearly articulated and affirmatively expressed as state policy," and second that the "policy ... be actively supervised by the State.'" [Citations.]" (*North Carolina, supra*, 135 S.Ct. at p. 1110.) The court and the parties assumed that the clear articulation requirement was satisfied, but the court concluded that "the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners." (*Ibid.*)

The court explained that automatic state-action immunity does not apply when the state "delegates control over a market to a *non-sovereign actor*," which is "one whose conduct does not automatically qualify as that of the sovereign State itself," and "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." (*North Carolina, supra*, 135 S.Ct. at pp. 1110-1111; emphasis added.) According to the court, a limitation on state-action immunity is "most essential when the State seeks to delegate its regulatory power to active market participants." (*Id.* at p. 1111.) Therefore, the court determined that state-action immunity "requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own." (*Ibid.*)

In deciding to apply both *Midcal* requirements, the court acknowledged that *Town of Hallie, supra*, exempted municipalities from the active supervision requirement. (*North Carolina, supra*, 135 S.Ct. at p. 1112.) The court distinguished *Town of Hallie* by explaining that active market participants "ordinarily have none of the features justifying the narrow exception" for municipalities, which are electorally accountable and exercise "a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field." (*North Carolina, supra*, at pp. 1112-1113.) Having made this distinction, the court concluded that "a state board on which a *controlling number of decisionmakers* are active market participants in the occupation the

⁹ At the time the SBDE issued the cease-and-desist letters, several of its dentist members "earned substantial fees" for performing teeth whitening services. (*Ibid.*)

board regulates must satisfy *Midcal's* active supervision requirement in order to invoke state-action antitrust immunity." (*Id.* at p. 1114; emphasis added.)¹⁰

In applying the active supervision requirement, the court found no evidence of any decision by the state to initiate or concur with the SBDE's actions against nondentists.¹¹ Instead, the court found that the SBDE relied upon cease-and-desist letters "rather than any powers at its disposal that would invoke oversight by a *politically accountable official*." (*Ibid.*; emphasis added.) The court then went on to describe general standards for active supervision, but cautioned that any inquiry regarding active supervision is "flexible and context-dependent." (*Ibid.*) In this regard, the court described the standards for active supervision as follows:

"Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.' [Citations.] [¶] 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 [citation]; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy [citation]; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State' [citation]. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case." (*Id.* at pp. 1116-1117.)

In summary, the court found that active supervision is a fact-specific inquiry that requires, at a minimum, review of an anticompetitive decision by a state supervisor who is not an active market participant and who has the power to veto or modify the anticompetitive decision, which requires an actual decision by the state, rather than the mere potential for a decision.

The dissent in *North Carolina* pointed out several ambiguities in the court's opinion and noted that "it is not clear what sort of changes are needed to satisfy the test that the Court now adopts." (*North Carolina, supra*, 135 S.Ct. at p. 1123 (dis. opn. of Alito, J.)) For

¹⁰ Because the case did not present a claim for money damages, the court left open the question of whether under some circumstances state agency officials, including board members, may enjoy immunity from damages liability. However, the court provided that "the States may provide for the defense and indemnification of agency members in the event of litigation." (*Id.* at p. 1115.)

¹¹ Because the SBDE did not contend that its anticompetitive conduct was actively supervised by the state, there was no evidence to review and the court did not review any specific supervisory systems. (*North Carolina, supra*, 135 S.Ct. at p. 1116.)

example, the dissent questioned at what point active market participants constitute a “controlling number of [the] decisionmakers” of a state agency to invoke the active supervision requirement. (*Ibid.*) The dissent posited whether a controlling number is a majority, or if something less than a majority would suffice, such as where active market participants constitute a powerful voting bloc. (*Ibid.*) The dissent also questioned who constitutes an active market participant by postulating the following:

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

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

Ultimately, the dissent conceded that “The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.” (*Ibid.*)

4. Legal standards for grant of state-action immunity

Based on the foregoing, it is our opinion that a court would apply the following legal standards to a claim for state-action immunity from the Sherman Act in light of the United States Supreme Court’s decision in *North Carolina*.

4.1 State acting as sovereign

Actions of the state acting as sovereign, such as legislation or decisions of the state supreme court acting legislatively, *ipso facto* are exempt from the Sherman Act. (*North Carolina, supra*, 135 S.Ct. at p. 1110.)

4.2 Municipalities

Municipalities are entitled to state-action immunity if their anticompetitive conduct is pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. (*City of Lafayette, supra*, 435 U.S. at pp. 410 & 413; *Town of Hallie, supra*, 471 U.S. at p. 44.)

4.3 Private parties

Private parties delegated authority by the state are entitled to state-action immunity only if their anticompetitive conduct is pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and the policy is actively supervised by the State. (*Patrick, supra*, 486 U.S. at p. 100.)

4.4 State agencies not controlled by active market participants

Although *North Carolina* did not specifically address state agencies not controlled by active market participants, the court did state that “State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.” (*North Carolina, supra*, 135 S.Ct. at p. 1111.) As such, the anticompetitive actions of a state agency are not automatically entitled to state-action immunity, unless they result from procedures that suffice to make it the state’s own action. (*Ibid.*) Whether those procedures include both of *Midcal’s* clear articulation and active supervision requirements was not specifically addressed by the court in *North Carolina*; however, the court reiterated that only the first requirement applies to municipalities because they are electorally accountable and there is minimal risk of municipal officers pursuing private, nonpublic aims. (*North Carolina, supra*, 135 S.Ct. at pp. 1112-1113.) Therefore, it is our opinion that, like municipalities, state agencies not controlled by active market participants are entitled to state-action immunity if their anticompetitive actions satisfy only *Midcal’s* clear articulation requirement, as long as their actions pose minimal risk of furthering private interests over those of the state.

4.5 State agencies controlled by active market participants

A state agency or board on which “a controlling number of decisionmakers are active market participants” in the occupation that the state agency regulates is entitled to state-action immunity if it acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and is actively supervised by the state. (*North Carolina, supra*, 135 S.Ct. at p. 1114.) It is not clear what “a controlling number of decisionmakers” entails, but in our view, the more likely it is that the members will be able to control decisions of the agency or board, the more likely it is that a court will find them to constitute a “controlling number.” For instance, a majority of the voting members would almost certainly be considered a controlling number, but a court could consider an influential voting bloc to also constitute a controlling number. (*Id.* at p. 1123.) Likewise, it is unclear what it means to be an “active market participant.” (*Ibid.*) At the very least we think an active market participant would include a person currently licensed and practicing in the field being regulated by the state agency or board because of the greater likelihood that such a person will be influenced by private, rather than public, interests. Ultimately, we think a court would make such a determination on a contextual basis using a spectrum analysis. For example, at one end of the spectrum would be a person with no connection to the industry being regulated, and at the other end of the spectrum would be a person currently practicing in the precise industry being regulated. In our view, the closer a person’s ties are to the industry being regulated, the greater the likelihood that the person will act pursuant to private rather than public interests, and the more likely a court would be to consider them an active market participant.

4.6 Clear articulation

A state policy to displace competition is clearly articulated when 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. [Citation.]” (*North Carolina, supra*, 135 S.Ct. at p. 1112.) Although “compulsion is often the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition,” it is not required. (*Southern Motor, supra*, 471 U.S. at p. 62.) As long as the state statute providing authorization is not neutral and “contemplate[s] the kind of action complained of,” in our view, a court would find it sufficient to satisfy the clear articulation requirement of the state-action test. (*Town of Hallie, supra*, 471 U.S. at pp. 43-44.)

4.7 Active state supervision

Any inquiry regarding active state supervision is “flexible and context-dependent” and should focus on whether the state’s “review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’ [Citations.]” (*North Carolina, supra*, 135 S.Ct. at p. 1116.) As such, we think a court would analyze the presence of active supervision on a spectrum such that the more the state supervision assures the promotion of state over private interests, the more likely a court would be to find sufficient active supervision for purposes of state-action immunity. However, it is our opinion that a court would require, at a minimum, that the three criteria specified in *North Carolina* be satisfied for a finding of active supervision: (1) the anticompetitive decision is reviewed by a state supervisor;¹² (2) the state supervisor has the actual power, rather than the mere potential, to veto or modify an anticompetitive decision; and (3) the state supervisor is not an active market participant. (*Id.* at pp. 1116-1117.)

5. Conclusion

Ultimately, the United States Supreme Court has a “settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies.” (*Cantor v. Detroit Edison Co.* (1976) 428 U.S. 579, 603; hereafter *Cantor*.)¹³ Therefore, we cannot affirmatively provide every instance in which a

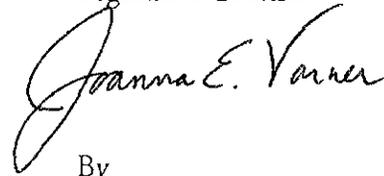
¹² In finding no evidence of active supervision, the court noted that SBDE’s anticompetitive actions did not invoke oversight by a “politically accountable official.” (*Ibid.*) Therefore, one could argue that the state supervisor should be politically accountable; however, the minimum requirements articulated by the court for active supervision do not specify this requirement. Accordingly, although perhaps not required, supervision by a politically accountable official may influence a court to view the state’s supervision on the side of the spectrum that favors a grant of state-action immunity.

¹³ In *Cantor*, the court rejected the application of “a simple rule than can easily be applied in any case in which a state regulatory agency approves a proposal and orders a regulated company to comply with it.” (*Ibid.*)

court would grant state-action immunity. However, it is our opinion that, in light of the decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (2015) 574 U.S. __ [135 S.Ct. 1101], a court would use the legal standards described above to decide whether to grant state-action immunity from Sherman Act liability.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

A handwritten signature in cursive script that reads "Joanna E. Varner". The signature is written in black ink and is positioned to the left of the typed name and title.

By
Joanna E. Varner
Deputy Legislative Counsel

JEV:sjk



Physical Therapy Board of California

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY - GOVERNOR EDMUND G. BROWN JR.

Physical Therapy Board of California

2005 Evergreen St. Suite 1350, Sacramento, California 95815

Phone: (916) 561-8200 Fax: (916) 263-2560

Internet: www.ptbc.ca.gov



Briefing Paper

Date: 01/19/2015

Prepared for: PTBC Members

Prepared by: Carl Nelson

Subject: Budget Report

Purpose:

To provide an update on the PTBC's budget activities for Oct – Dec (Q2), CY 2015/16.

Attachments: [Budget Expenditure Report 13 \(A-1\)](#)
[Expenditure Measures Report 13 \(A-2\)](#)
[Revenue Measures Report 13 \(A-3\)](#)
[Expenditure Definition Key 13 \(A-4\)](#)
[Revenue Definition Key 13 \(A-5\)](#)

Background:

This current fiscal year (CY 15/16), the PTBC has a total budget authority of \$4,227,000.

On December 23, 2015, the PTBC received approval of its Fee Increase Regulation effective upon filing with the Secretary of State. Staff has requested new fee codes reflecting the new fees, and has submitted a request with the BreEZe team to add the new codes to the BreEZe system. Staff is expecting to begin collecting revenue based on the new fees within the next few months, no later than July 1, 2016 Therefore, the PTBC is monitoring expenditures closely and making adjustments necessary to spend within our budget allotments.

Additionally, the PTBC has received notice that its BCP request has been approved for the upcoming BY 2016/17. These BCPs will bring three additional positions to the Applications Services program and provide \$200,000 to the Attorney General (AG) budget and \$50,000 to our Office of Administrative Hearings (OAH) budget authority. This additional funding will assist the PTBC in accommodating the increasing costs.

Further, as requested by board staff, a definition key for both revenues and expenditures will continue to be included in this report, until directed otherwise.

Analysis:

In reviewing this CY 2015/16, second quarter revenues and expenditures, the staff identified the following:



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Expenditures

➤ Personnel Services

The Personnel Services budget allotment is \$1,760,283 and expenditures are \$831,329 or 47% of the budget. The PTBC has exceeded its budget allotment in temp help. Over expenditures are common in the temp help line item, as the PTBC has no budget authority in this budget line-item and temporary help is relied upon as a resource to alleviate excessive backlogs within its application and licensing programs. In addition, historically, the PTBC over spends its board member per diem budget line-item, as the line-item does not have sufficient funds allocated to meet the volume of workload; therefore, it was necessary to redirect funds from the Operating Expense & Equipment (OE&E) budget to support these costs. In comparison to FY14/15 (Q2), the PTBC personnel services expenditures increased this year by \$30,562 or 3.8%.

➤ Operating Expense & Equipment

The Operating Expense & Equipment (OE&E) budget allotment is \$2,565,717 and expenditures are \$1,178,173 or 46% of the OE&E budget. In comparison to the second quarter of FY14/15 OE&E expenses have decreased by 3%.

Based on expenditures and projected operational costs, the PTBC projects to spend \$4,125,000 this current year (year-end).

Revenues

The PTBC received a second quarter revenue collection of \$1,138,445 bringing a total of \$2,230,252, including reimbursements (as of 12/31/15).

In comparison to FY14/15, the PTBC is exceeding its revenue collections especially in license renewals which increased from \$1,692,707 in FY 2014/15 to \$1,832,632 in current year. The PTBC projects \$3,804,000 in revenues year-end.

Action Requested:

No action required.

Physical Therapy Board of California
CY 2015/16 Budget Expenditure Report

Budget Line-Items	FY 2014/15		CY 2015-16			
	Expended (As of 12/31/14)	Expenditures (Year-end)	Authorized Budget	Expended (As of 12/31/15)	% Budget	Balance
PERSONNEL SERVICES						
Personnel Services Totals	800,767	1,643,016	1,760,283	831,329	47%	928,954
Civil Services Permanent	436,114	881,329	1,055,000	453,201	43%	601,799
Statutory Exempt	40,464	82,484	77,000	41,706	54%	35,294
Temp help	37,705	101,311	0	48,802	-	(48,802)
Board Members	14,700	31,400	19,283	10,700	55%	8,583
Overtime	0	413	0	0	-	0
Staff Benefits	271,784	546,079	609,000	276,920	45%	332,080
*TOTAL PERS SVS	800,767	1,643,016	1,760,283	831,329	47%	928,954
OPERATING EXPENSES & EQUIPMENT						
General Services Totals	240,826	278,882	401,572	246,149	61%	155,423
Fingerprints	13,439	33,267	99,000	14,059	14%	84,941
General Expense	9,660	21,763	17,402	7,435	43%	9,967
Minor Equipment	3,091	9,931	12,223	1,952	16%	10,271
Major Equipment	0	0	5,777	0	0%	5,777
Printing	6,029	7,861	10,000	7,740	77%	2,260
Communications	3,287	11,402	10,000	4,165	42%	5,835
Postage	15,066	31,695	28,322	14,342	51%	13,980
Travel in State	5,995	17,947	18,500	5,872	32%	12,628
Training	430	430	1,000	0	0%	1,000
Facilities Operations	111,045	113,171	118,000	120,584	102%	(2,584)
C&P Services Interdepartmental	0	0	348	0	0%	348
C&P Services External	72,784	31,415	81,000	70,000	86%	11,000
Departmental Services Totals	355,584	765,900	957,095	471,625	49%	485,470
OIS Pro Rata	170,394	389,025	550,000	272,000	49%	278,000
Indirect Distributed Cost	90,432	188,201	238,000	116,000	49%	122,000
Interagency Services	0	0	500	0	0%	500
DOI Pro Rata	2,822	5,358	5,000	2,500	50%	2,500
Public Affairs Pro Rata	2,752	5,224	7,000	3,000	43%	4,000
CCED Pro Rata	3,020	6,002	8,000	4,000	50%	4,000
Consolidated Data Center	470	1,355	3,395	1,501	44%	1,894
Data Processing	918	1,184	1,200	606	51%	594
Central Admin Services Pro Rata	84,776	169,551	144,000	72,018	50%	71,982
Exams Totals	3,000	6,483	5,050	8,273	0%	(3,223)
Exam Administrative External	0	0	0	0	-	0
Exam Contracts	3,000	6,483	5,050	8,273	-	(3,223)
Exam Subject Matter Experts	0	0	0	0	-	0
Enforcement Totals	615,303	1,411,903	1,202,000	588,253	49%	613,747
Attorney General	254,478	632,454	428,000	245,255	57%	182,745
Office of Admin Hearings	39,256	109,382	60,000	22,020	37%	37,980
Evidence/Witness	41,737	104,422	100,000	22,199	22%	77,801
Court Reporters	2,438	5,589	0	779	-	(779)
DOI Investigation	277,394	560,056	614,000	298,000	49%	316,000
*TOTALS OE & E	1,214,713	2,463,168	2,565,717	1,314,300	51%	1,251,417
*TOTALS, PERS SVS AND OE&E	2,015,480	4,106,184	4,326,000	2,145,629	50%	2,180,371
Scheduled Reimbursements	(19,901)	(40,595)	(97,000)	(20,604)	***Note	
Unsheduled Reimbursements	(57,540)	(58,405)	(2,000)	(78,396)		
**TOTALS	1,938,039	4,007,184	4,227,000	2,046,629	48%	2,180,371

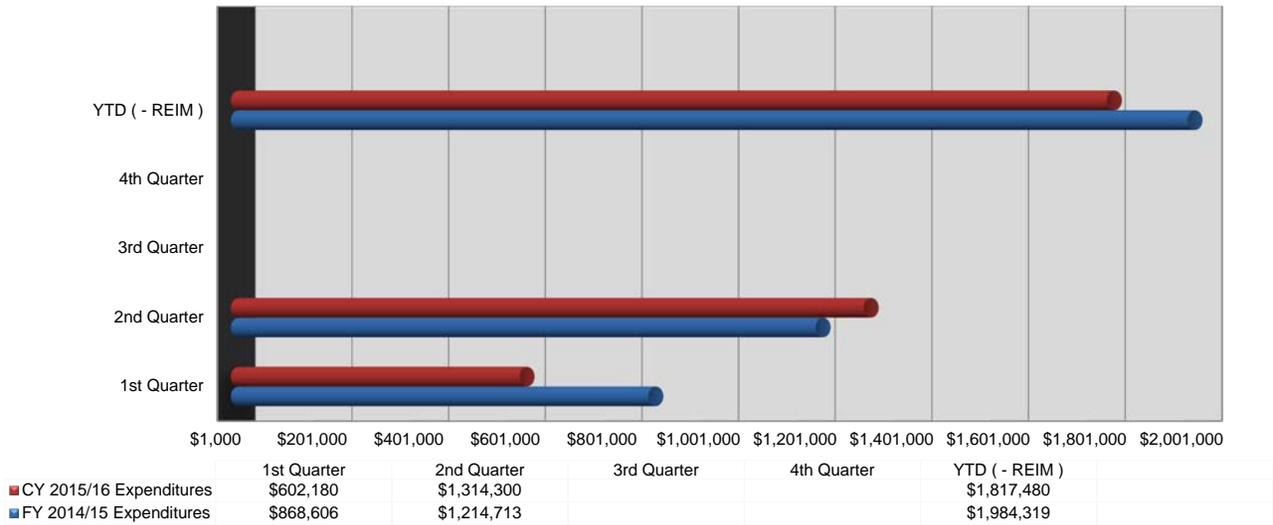
* Reflects totals for budget categories. ** Reflects totals authorized budget and expenditures (includes reimbursements).

***PTBC has collected 109,343.18; however, cannot exceed using 99k of reimbursements for CY expenditures (See Revenue Report for details).

Agenda Item 13 (A-1) Budget Expenditure Report

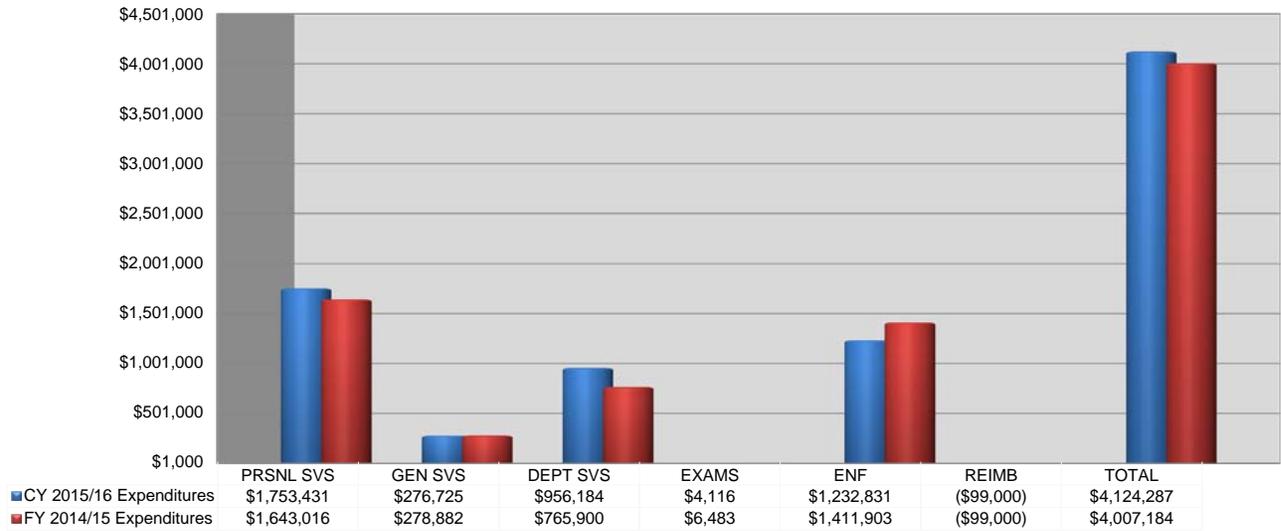
**Physical Therapy Board of California
CY 2015/16 Expenditure Measures Report
4th Quarter (As of 12/31/15)**

Expenditure Measures (Quarterly)



Notes:
CY 2015/16 Budget Authority \$4,227,000

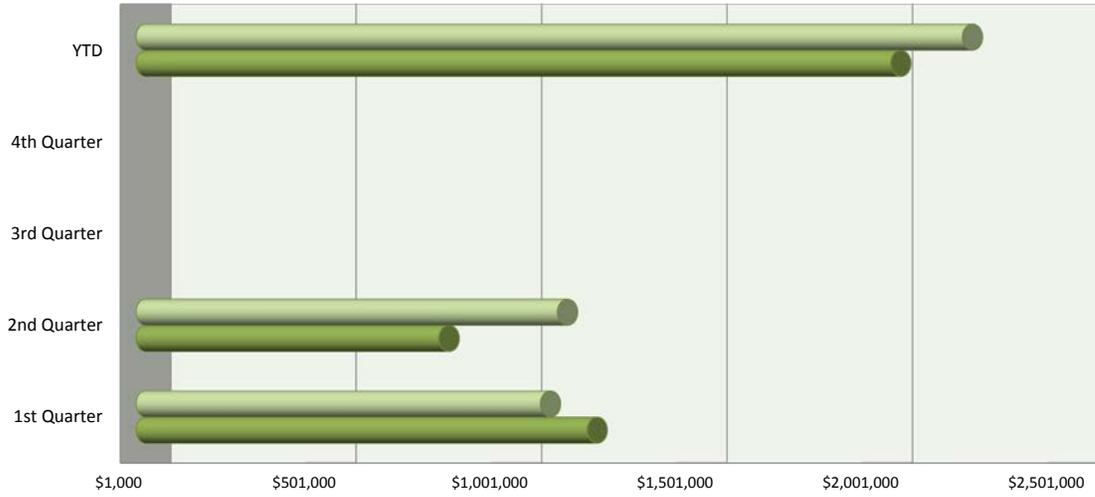
Expenditure Measures (Year-end)



Notes:
CY 2015/16 Projected Expenditures (FM06)
FY 2014/15 Actual Expenditures (FM13)

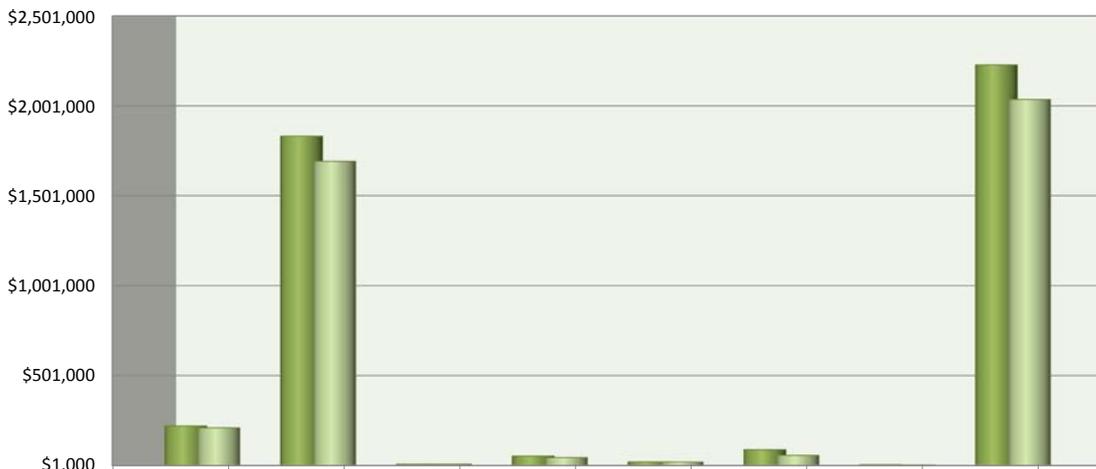
**Physical Therapy Board of California
CY 2015/16 Revenue Measures Report
2nd Quarter (As of 12/31/15)**

Revenue Measures (Quarterly)



	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	YTD
FY 2015/16 Revenues	\$1,091,807	\$1,137,928			\$2,229,735
CY 2014/15 Revenues	\$1,217,989	\$818,505			\$2,036,494

Revenue Measures (Year-end)



	APPS & LIC	LIC RNWL	LIC DELQ	OTHR REG	SCH REIMB	UNSCH REIMB	MISC	YTD
CY 2015/16 Revenues	\$220,797	\$1,832,632	\$8,400	\$53,353	\$20,604	\$88,739	\$5,210	\$2,229,735
FY 2014/15 Revenues	\$210,337	\$1,692,707	\$8,250	\$44,447	\$19,901	\$57,540	\$3,312	\$2,036,494

**Physical Therapy Board of California
Expenditure (budget line-Items) - Definition Key**

Budget Line Items	Definitions
Personnel Services	
Civil Services Permanent	Salary and wages of civil service - permanent employees (i.e. authorized).
Statutory Exempt	Employees appointed/elected to state (i.e. Executive Officer).
Temp help	Blanket positions (i.e. Student Assistant, Permanent Intermittent, etc.).
Board Commission	Exempt/Statutory - Per Diem (i.e. Board Members per diem)
Overtime	Ordered work time in excess of regular scheduled workweek.
Staff Benefits	Benefits for both authorized and temporary positions (i.e. health, dental, vision, retirement, etc).
General Services	
Fingerprints	Fingerprint Reports (i.e. criminal and background checks completed by DOJ for new employees, applicants and licensees).
General Expense	Office supplies, freight/drayage (FedEx shipping), transcription services, admin overhead (DGS service fees; purchase orders, contracts, etc.), library purchase/subscription, mail equipment maintenance).
Minor Equipment/Major Equipment	Minor Equipment (Replacement/Additional) less than \$5,000 per unit (i.e. printer, copier, office furniture, etc.). Major Equipment (Replacement/Additional) over \$5,000 per unit (i.e. Copiers).
Printing	Printing costs (i.e. Newsletter's, booklets, etc.).
Communication	Communications costs (i.e. cell phones, office land lines and fax line, etc.).
Postage	Stamps, registered and certified mail charges, postage meter, postage charges by DCA mail room and license renewal notices processed by EDD,
Travel in State	Per Diem, commercial air, private car (mileage, tolls, parking), rental car (rental, gas, parking, etc.), CalAters (transaction fees).
Training	Tuition and registration fees for training classes and conferences (i.e. DCA - SOLID, State Training Center, Other Vendors).
Facilities Ops	Rent - Building and Grounds (Non-State Owned), includes, self storage and overtime utility charges.
C&P Services Internal	Consultant/Professional (Inter-departmental) services provided by other state agencies or interagency agreement with DCA.
C&P Services External	Consultant/Professional Services - Interdepartmental for credit card processing (i.e. credit card transactions for online license renewals and American Express).
Departmental Services	
Office of Information Services	Pro-rata: Cost based on assessment to support the DCA, Office of Information Systems (OIS).
Indirect Distributed Cost	Pro-rata: Cost based on assessment to support the DCA, Office of Administrative Services (OAS).
Division of Investigation Pro Rata (DOI)	Pro-rata: Cost based on assessment to support Division of Investigations (DOI) services. (Investigating PTBC enforcement cases, administering new employment background checks, etc.).
Public Affairs Pro Rata	Pro-rata: Cost based on assessment to support Office of Public Affairs. (media inquiries, creating and executing marketing plans, and developing consumer education and media campaigns, i.e. graphic art designs for publications, business cards, website, etc.).

Physical Therapy Board of California
Revenue Line-Item - Definition Key

SCHEDULED REIMBURSEMENTS	
Fingerprint Cards	Reimbursements received for the assessment of fingerprint processing fees
External/Private Grant	Reimbursements received for OIS Public Sales
UNSCHEDULED REIMBURSEMENTS	
Investigative Cost Recovery	Unscheduled reimbursements for cost recovery directly recovered by the Board
Probation monitoring Cost Recovery	Unscheduled reimbursements for cost recovery for probation monitoring costs.
OTHER REGULATORY	
Citation/Fine FTB Collection	Fines collected by the State of California Franchise Tax Board
Admin Citation Fines-Variou	Fines collected for administrative citations
Endorsement Fee	Fees collected to provide an endorsement of a license to another State Board
Duplicate License/Certification Fee	Fees collected for production of a duplicate license or wall certificate
OTHER REGULATORY LICENSES AND PERMITS	
Foreign Application Fee PTA	Application for licensure fee for foreign educated Physical Therapist Assistants
Foreign application Fee PT	Application for licensure fee for foreign educated Physical Therapists
Application Fee & Initial License-PTA	Application and Initial License Fee for U.S educated Physical Therapist Assistants
Application Fee PT	Application fee for U..S educated Physical Therapists
Initial License -PT	Initial License fee for U.S. educated Physical Therapists
Over/Short Fees	Fees paid over or short of established application fee amounts
Suspended Revenue	PTBC cashier suspends revenue temporarily while trying to identify correct revenue type.
Prior Year Revenue Adjustment	Correction of prior year revenue reported
RENEWAL FEES	
Renewal - ENMG	Payment for renewal of ENMG Certification
Renewal - KEMG	Payment for renewal of KEMG Certification
Biennial Renewal - PTA	Renewal fee for PTA licenses
Biennial Renewal - PT	Renewal fee for PT licenses
SALES OF DOCUMENTS	
Sale of Public Documents	Sale of PTBC licensing Files for a fee.
INCOME FROM SURPLUS MONEY INVESTMENTS	
Interest Earned	Quarterly apportionment by SCO of earned interest from investment
REVENUE CANCELLED WARRANTS	
Cancelled warrants	Cancelled warrant (check) paid to a party that went uncashed for one year

Physical Therapy Board of California
Revenue Line-Item - Definition Key

MISCELLANEOUS INCOME	
MISCELLANEOUS INCOME	Revenue designated as miscellaneous by PTBC cashiering
DISHONORED CHECK FEE	
Dishonored Check Fee	Revenue from charge for a dishonored check



Physical Therapy Board of California

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY - GOVERNOR EDMUND G. BROWN JR.

Physical Therapy Board of California

2005 Evergreen St. Suite 1350, Sacramento, California 95815

Phone: (916) 561-8200 Fax: (916) 263-2560

Internet: www.ptbc.ca.gov



Briefing Paper

Date: January 5, 2016
Prepared for: PTBC Members
Prepared by: Jacki Maciel
Subject: Outreach Report

Purpose:

To provide PTBC's Outreach activities and statistics for Oct – Dec (Q 2), current year 2015/16.

Attachments: [Outreach Statistics Report 13 \(B-1\)](#)

Background:

Social media continues to shift in how people read and share news, information and content. Over the past year, the PTBC has been able to track social media following as well as control the potential volume of feedback and communication.

Analysis:

In reviewing the statistics, the PTBC staff identified the following:

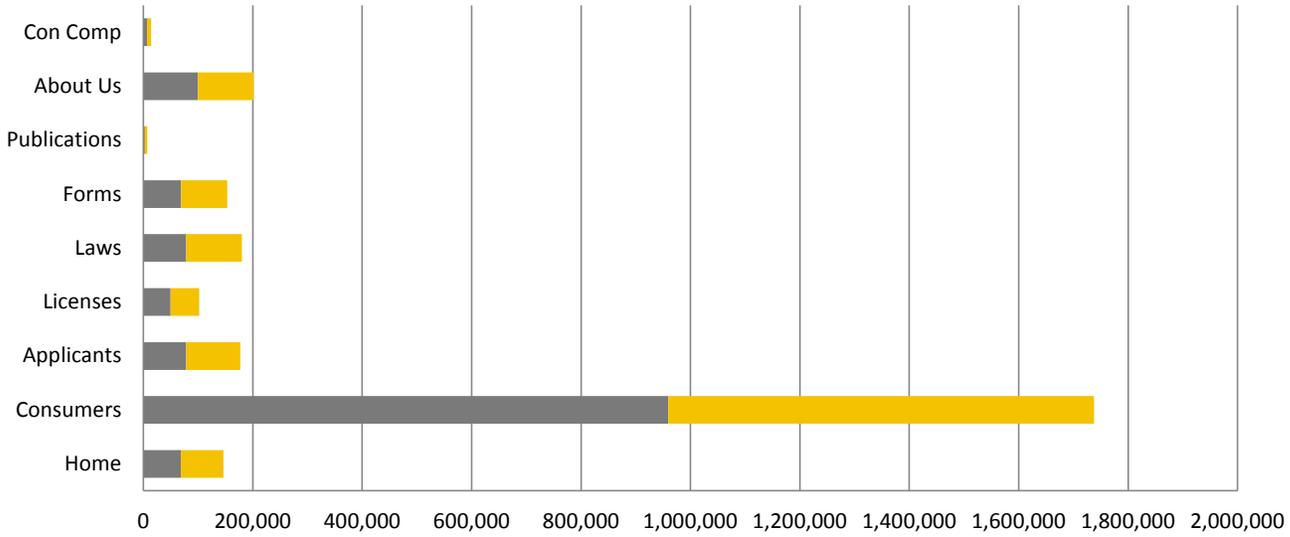
Website – The Consumers tab reflected a 20.8% increase from last fiscal year. The remaining tabs as illustrated reflect an overall decline. As with many web sites, social media continues to prove consumers are most likely to search for information via Facebook, Twitter and other various social networking sites as well as Google.

Facebook – Once again, the PTBC Facebook remains number 1 within the healing arts board's on social media. Our total likes have increased 17.9% from last fiscal year and visits reflect our most significant increase of 126%. An increase in visits are extremely rewarding as they are a direct indication our content and information is being well received and shared.

Action:

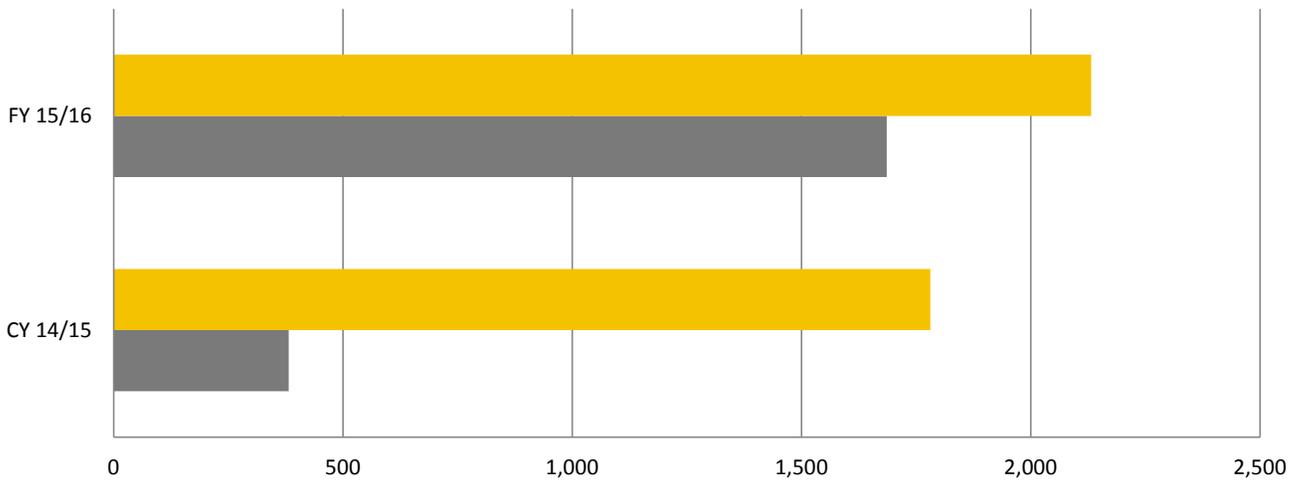
None.

Web-hits (2nd Quarter)



	Home	Consumers	Applicants	Licenses	Laws	Forms	Publications	About Us	Con Comp
■ CY 15/16	68,121	959,488	78,393	49,711	78,194	69,062	2,749	99,927	6,797
■ FY 14/15	78,365	778,008	98,794	52,082	102,089	83,946	4,381	101,826	7,139

Facebook (2nd Quarter)



	CY 14/15	FY 15/16
■ Likes	1,781	2,132
■ Visits	382	1,686



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Briefing Paper

Date: 1/22/16

Prepared for: PTBC Members

Prepared by: Sarah Conley

Subject: Application and Licensing Services Report

Purpose:

To provide an update on the most recent activities of the Application and Licensing Services programs.

Attachments: [Application and Licensing Statistics Report \(14 - A\)](#)

Background:

At the last meeting, staff reported on conducting business process assessments as a part of preparation for the implementation of BreEZe, that communication was suffering due BreEZe obligations, and auditing license records with renewal deficiencies or discrepancies to facilitate resolutions.

Program Updates:

As of January 19th, BreEZe is operational! This may be one of a number of instances Breeze is addressed throughout this meeting's various reports; however, this is the opportunity to specifically discuss applications and licensing. Years of hard work, to say the least, have come to fruition giving staff a new tool that will benefit them as well as applicants and licensees. What does this mean? How have things changes? In short, Breeze provides convenience and efficiency. The most prominent Breeze functionality for applicants and licensees is the ability for applications to be submitted online. Applications include renewal applications, initial licensure applications, address change requests, name change requests, requests for license verification, duplicate license request, applications to retire a license and applications to activate and inactive license. Therefore, regardless of the type of application, the applicant may complete the online form and submit it with payment – all electronically.

The new Breeze system and what it can do is exciting; however, it is new. Like with anything new, there is a transition period in which users must acclimate, and staff is doing just that, but they are doing it quickly and effectively. They were extremely prepared for this transition, and it shows. As

mentioned at the last meeting, Breeze allowed staff to reassess its business processes, and the Application and Licensing programs have been at the forefront of that reassessment. As a result, both programs' business processes have been revised, so staff is not only adjusting to BreEZe, but also utilizing new business processes *and* providing greater phone accessibility. Therefore, there may be some initial backlog as the staff (and the system) transition to smooth operation.

In addition to the implementation of BreEZe, resource availability has added to the programs' capacity. With system development and pre-implementation testing complete, staff may resume full attention on their specific rolls within the programs. Although testing will continue as system enhancements are made, it is anticipated that the testing will be more focused and not require as much of staff's time. Also, with the addition of another applications analyst, Ms. Krystyn Lee (please refer to agenda item #8(a)), the Application Services program has gained much needed assistance to address its workload.

Analysis:

In comparison to last fiscal year, second quarter, the PTBC's workload and productivity has increased in all application and licensing program functions. The increases, in part, are a result of the natural growth in the profession.

	Change from FY 2014/15 Q2
Applications received	8%
Licenses issued	13%
Renewal applications received	45%
Renewal licenses issued	9%
Active licenses	4%
Inactive licenses	11%
Delinquent licenses	1%

Action Requested:

None.

**Application and Licensing Statistics Report
CY 2015/16 - 2nd Quarter (10/1/2015-12/31/2015)**

Physical Therapy Board of California - APPLICATION STATISTICS

Applications Received

Type	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	CY 2015/16
	Jul	Aug	Sep	TOTAL		Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL					
PT	419	239			658	105	168	182	455	97	131	33	261								716	
FPT	59	43			102	17	29	17	63	10	19	21	50								113	
FPTA	39	12			51	5	6	4	15	3	7	6	16								31	
PTA	94	162			256	19	57	18	94	86	53	28	167								261	
E-PTA	5	1			6	1	1	1	3	0	0	0	0								3	
EK	0	0			0	0	0	0	0	0	0	0	0								0	
EN	0	0			0	0	1	0	1	0	0	0	0								1	
Total	616	457			1,073	147	262	222	631	196	210	88	494								1,125	

Licenses Issued

Type	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	CY 2015/16
	Jul	Aug	Sep	TOTAL		Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL					
PT	329	357			686	100	294	129	523	75	195	166	436								959	
PTA	103	132			235	33	78	50	161	56	31	29	116								277	
EK	0	0			0	0	0	0	0	0	0	0	0								0	
EN	0	0			0	0	0	0	0	0	1	0	1								1	
Total	432	489			921	133	372	179	684	131	227	195	553								1,237	

*License issuance data will not agree with applications received data because they do not occur in the same quarter.

Renewal Applications Received

Type	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	CY 2015/16
	Jul	Aug	Sep	TOTAL		Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL					
PT	4,147	2,655			6,802	920	1,644	958	3,522	2,039	890	920	3,849								7,371	
PTA	1,000	638			1,638	251	380	216	847	461	233	239	933								1,780	
EK	3	5			8	2	2	1	5	3	0	1	4								9	
EN	2	0			2	2	2	1	5	0	0	1	1								6	
Total	5,152	3,298			8,450	1,175	2,028	1,176	4,379	2,503	1,123	1,161	4,787								9,166	

Renewal Licenses Issued

Type	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	CY 2015/16
	Jul	Aug	Sep	TOTAL		Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL					
PT	2,752	2,671			5,423	974	1,022	951	2,947	1,069	906	903	2,878								5,825	
PTA	706	642			1,348	264	243	229	736	256	235	234	725								1,461	
EK	3	5			8	2	1	0	3	1	1	0	2								5	
EN	3	0			3	1	3	0	4	0	0	3	3								7	
Total	3,464	3,318			6,782	1,241	1,269	1,180	3,690	1,326	1,142	1,140	3,608								7,298	

**Application and Licensing Statistics Report
CY 2015/16 - 2nd Quarter (10/1/2015-12/31/2015)**

Physical Therapy Board of California - LICENSE STATUS STATISTICS

Active Licenses

Type	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	CY 2015/16
	Jul	Aug	Sep	TOTAL		Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL					
PT	22,159	22,374			22,374	22,639	22,944	22,956	22,956	22,957	23,189	23,216	23,216								22,956	
PTA	5,407	5,504			5,504	5,679	5,787	5,790	5,790	5,825	5,848	5,857	5,857								5,790	
EK	30	30			30	31	31	31	31	32	31	30	30								31	
EN	24	23			23	22	22	22	22	22	23	21	21								22	
Total	27,620	27,931			27,931	28,371	28,784	28,799	28,799	28,836	29,091	29,124	29,124								28,799	

Inactive Licenses

Type	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	*CY 2015/16
	Jul	Aug	Sep	TOTAL		Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL					
PT	1,454	1,489			1,489	1,604	1,613	1,614	1,614	1,621	1,637	1,651	1,651								1,651	
PTA	392	399			399	429	426	427	427	431	437	437	437								437	
Total	1,846	1,888			1,888	2,033	2,039	2,041	2,041	2,052	2,074	2,088	2,088								2,088	

*Licensees in inactive status are eligible for active status upon request and meeting CC requirements.

* Data reflects the number of licensees in Inactive status as of the end of Q2.

Delinquent Licenses

Type	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	*CY 2015/16
	Jul	Aug	Sep	TOTAL		Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL					
PT	3,667	3,704			3,704	3,763	3,750	3,791	3,791	3,783	3,721	3,739	3,739								3,739	
PTA	1,060	1,047			1,047	1,048	1,037	1,043	1,043	1,048	1,030	1,038	1,038								1,038	
EK	2	2			2	1	1	1	1	1	0	1	1								1	
EN	5	6			6	6	6	6	6	6	5	7	7								7	
Total	4,734	4,759			4,759	4,818	4,794	4,841	4,841	4,838	4,756	4,785	4,785								4,785	

Licensees in delinquent status are eligible to renew their license at any time.

* Data reflects the number of licensees in Delinquent status as of the end of Q2.

Renewal Licenses - Fee Exemption/Waiver

Type	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	*CY 2015/16
	Jul	Aug	Sep	TOTAL		Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL					
Military (E)	1	1			1	0	0	0	0	0	0	0	0								0	
Disability (W)	0	0			0	0	0	0	0	0	0	2	2								2	
Volunteer Service (W)	0	0			0	0	0	0	0	0	0	0	0								0	
Retired Status (E)	42	53			53	76	82	90	90	92	104	105	105								105	
Total	43	54			54	76	82	90	90	92	104	107	107								107	

Licensee obtain status by request and is subject to meeting requirements.

* Data reflects the number of licensees in these status categories as of the end of Q2

**Application and Licensing Statistics Report
CY 2015/16 - 2nd Quarter (10/1/2015-12/31/2015)**

Federation of State Boards Physical Therapy - EXAMINATION STATISTICS

National Physical Therapist (PT) / Physical Therapist Assistant (PTA) Examination - CALIFORNIA STATISTICS

Accredited PT Program Pass/Fail

	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q2			Q3			Q4			CY 2015/16			
						Jul	Aug*	Sep*	TOTAL	Oct	Nov*	Dec*	TOTAL	Jan	Feb*	Mar*	TOTAL		Apr	May*	Jun*
Pass	217	176			393	271			271	268			268								539
Fail	29	50			79	29			29	61			61								90
Total	246	226			472	300			300	329			329								629
Pass Rate	88%	78%			83%	90%			90%	81%			81%								86%

Foreign Educated PT Pass/Fail

	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q2			Q3			Q4			CY 2015/16			
						Jul	Aug*	Sep*	TOTAL	Oct	Nov*	Dec*	TOTAL	Jan	Feb*	Mar*	TOTAL		Apr	May*	Jun*
Pass	11	3			14	7			7	9			9								16
Fail	42	47			89	39			39	49			49								88
Total	53	50			103	46			46	58			58								104
Pass Rate	21%	6%			14%	15%			15%	16%			16%								15%

Accredited PTA Program Pass/Fail

	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q2			Q3			Q4			CY 2015/16			
						Jul	Aug*	Sep*	TOTAL	Oct	Nov*	Dec*	TOTAL	Jan	Feb*	Mar*	TOTAL		Apr	May*	Jun*
Pass	99	68			167	116			116	83			83								199
Fail	50	37			87	53			53	30			30								83
Total	149	105			254	169			169	113			113								282
Pass Rate	66%	65%			66%	69%			69%	73%			73%								71%

Foreign Educated PTA Pass/Fail

	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q2			Q3			Q4			CY 2015/16			
						Jul	Aug*	Sep*	TOTAL	Oct	Nov*	Dec*	TOTAL	Jan	Feb*	Mar*	TOTAL		Apr	May*	Jun*
Pass	19	6			25	4			4	13			13								17
Fail	10	15			25	9			9	15			15								24
Total	29	21			50	13			13	28			28								41
Pass Rate	66%	29%			50%	31%			31%	46%			46%								41%

*No examination administered

**Application and Licensing Statistics Report
CY 2015/16 - 2nd Quarter (10/1/2015-12/31/2015)**

Federation of State Boards Physical Therapy - EXAMINATION STATISTICS

California Law Examination (CLE)

Accredited Pass/Fail

	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	CY 2015/16
						Jul	Aug	Sep	TOTAL	Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL	
Pass	500	418			918	273	214	161	648	170	184	148	502									1,150
Fail	243	194			437	128	81	62	271	95	76	62	233									504
Total	743	612			1,355	401	295	223	919	265	260	210	735									1,654
Pass Rate	67%	68%			68%	68%	73%	72%	71%	64%	71%	70%	68%									70%

Foreign Educated Pass/Fail

	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	CY 2015/16
						Jul	Aug	Sep	TOTAL	Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL	
Pass	58	60			118	16	21	14	51	18	12	10	40									91
Fail	64	44			108	10	14	10	34	16	10	10	36									70
Total	122	104			226	26	35	24	85	34	22	20	76									161
Pass Rate	48%	58%			52%	62%	60%	58%	60%	53%	55%	50%	53%									57%

**Application and Licensing Statistics Report
CY 2015/16 - 2nd Quarter (10/1/2015-12/31/2015)**

Federation of State Boards Physical Therapy - EXAMINATION STATISTICS

National Physical Therapist (PT) and Physical Therapist Assistant (PTA) Examination - NATIONAL STATISTICS

Accredited PT Program Pass/Fail

PT	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q2			Q3			Q4			CY 2015/16
	Jul	Aug*	Sep*	TOTAL		Oct	Nov*	Dec*	TOTAL	Jan	Feb*	Mar*	TOTAL	Apr	8-May	Jun*	TOTAL	
Pass	4,575	1,376			5,951	4,613			4,613	1,416			1,416					4,613
Fail	562	505			1,067	635			635	641			641					635
Total	5,137	1,881			7,018	5,248			5,248	2,057			2,057					5,248
Pass Rate	89%	73%			85%	88%			88%	69%			69%					88%

Foreign Educated PT Pass/Fail

PT	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q2			Q3			Q4			CY 2015/16
	Jul	Aug*	Sep*	TOTAL		Oct	Nov*	Dec*	TOTAL	Jan	Feb*	Mar*	TOTAL	Apr	May*	Jun*	TOTAL	
Pass	239	183			422	324			324	316			316					324
Fail	779	923			1,702	888			888	1,111			1,111					888
Total	1,018	1,106			2,124	1,212			1,212	1,437			1,437					1,212
Pass Rate	23%	17%			20%	27%			27%	22%			22%					27%

Accredited PTA Program Pass/Fail

PTA	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q2			Q3			Q4			CY 2015/16
	Jul	Aug*	Sep*	TOTAL		Oct	Nov*	Dec*	TOTAL	Jan	Feb*	Mar*	TOTAL	Apr	May*	Jun*	TOTAL	
Pass	3,181	1,349			4,530	3,167			3,167	1,523			1,523					3,167
Fail	654	569			1,223	755			755	687			687					755
Total	3,835	1,918			5,753	3,922			3,922	2,210			2,210					3,922
Pass Rate	83%	70%			79%	81%			81%	69%			69%					81%

Foreign Educated PTA Pass/Fail

PTA	Q1	Q2	Q3	Q4	FY 2014/15	Q1			Q2			Q3			Q4			CY 2015/16
	Jul	Aug*	Sep*	TOTAL		Oct	Nov*	Dec*	TOTAL	Jan	Feb*	Mar*	TOTAL	Apr	May*	Jun*	TOTAL	
Pass	84	65			149	67			67	104			104					67
Fail	77	110			187	86			86	113			113					86
Total	161	175			336	153			153	217			217					153
Pass Rate	52%	37%			44%	44%			44%	48%			48%					44%

*No examination administered

**Application and Licensing Statistics Report
CY 2015/16 - 2nd Quarter (10/1/2015-12/31/2015)**

Federation of State Boards Physical Therapy - EXAMINATION STATISTICS

Jurisprudence (Law) Examination - NATIONAL STATISTICS

Accredited Program Pass/Fail

	Q1	Q2	Q3	Q4	FY	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	CY
PT & PTA					2014/15	Jul	Aug	Sep	TOTAL	Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL	2015/16
Pass	1,838	1,328			3,166	966	665	460	2,091	635	487	356	1,478									2,091
Fail	476	385			861	261	164	131	556	239	162	114	515									556
Total	2,314	1,713			4,027	1,227	829	591	2,647	874	649	470	1,993									2,647
Pass Rate	79%	78%			79%	79%	80%	78%	79%	73%	75%	76%	74%									79%

Foreign Educated Pass/Fail

	Q1	Q2	Q3	Q4	FY	Q1			Q1	Q2			Q2	Q3			Q3	Q4			Q4	CY
PT & PTA					2014/15	Jul	Aug	Sep	TOTAL	Oct	Nov	Dec	TOTAL	Jan	Feb	Mar	TOTAL	Apr	May	Jun	TOTAL	2015/16
Pass	130	134			264	29	51	37	117	47	44	35	126									117
Fail	82	70			152	17	24	10	51	28	24	17	69									51
Total	212	204			416	46	75	47	168	75	68	52	195									168
Pass Rate	61%	66%			63%	63%	68%	79%	66%	63%	65%	67%	65%									66%



Physical Therapy Board of California

Physical Therapy Board of California

2005 Evergreen St. Suite 1350, Sacramento, California 95815

Phone: (916) 561-8200 FAX : (916)263-2560

Internet: www.ptbc.ca.gov



Agenda Item 15

Briefing Paper

Date: February 2, 2016

Prepared for: PTBC Members

Prepared by: Elsa Ybarra

SUBJECT: Consumer Protection Services Program (CPS)

Purpose: Consumer Protection Services

Attachments: [CPS Q2 - Performance Measures Report 15 \(A-1\)](#)
[CPS Data FY 2015-2016 15 \(A-2\)](#)
[Q2 - Disciplinary Summary 15 \(A-3\)](#)

CPS Program Updates:

- BreEZe is now in production as of January 19, 2016. Although we are still in the transition period of learning the system and our processes, staff are adapting extremely well. The teamwork amongst staff has made this an easy transition.
- The Expert Consultant Training in November 2015 at Loma Linda was a success with 32 participants. Positive feedback was received from the participants. The next training is scheduled for February 9th in Sacramento with 25 participants expected.

Performance Measures Report: (Q2 Report October – December 2015)

- PM1/Volume or Number of cases opened (complaints and convictions)

In the 2nd quarter, 131 cases were initiated. Of those, 57% were conviction related cases.

- PM2/Intake Average number of days from complaint intake to case assignment

This target continues to be met.

- PM3/ Intake & Investigation: Complaint receipt to closure of investigation. No discipline taken.

A total of 169 cases were closed without disciplinary action. Although, the target of 90 days was not met; 86% of the cases were closed within the 90 day target.

- PM4/Formal Discipline. Average number of days from complaint receipt to final disposition.

In this quarter, there were a total of 17 cases resulting in disciplinary action. Of those 17 cases, 10 had a life cycle of 2-3 years to final disposition. We continue to have aged cases; however, these cases are monitored closely to ensure they are moving through the process.

- PM7/Probation Intake. Number of days from probation monitor assignment to first contact by probation monitor.

The 10 day target of first contact with new probationers continues to be met.

- PM8/ Probation Violation Response

No probation violations reported for Q2.

Consumer Protection Services Report provides detailed data of the complaint and disciplinary process from the time the complaint and/or case is opened to the final outcome of the matter. These statistics provide an overall look at the enforcement process.

Action Requested:

No Action Required

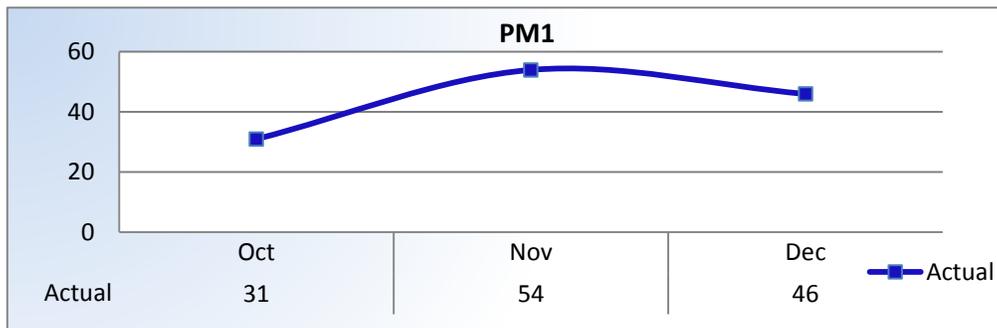
Performance Measures

Q2 Report (October - December 2015)

To ensure stakeholders can review the Board's progress toward meeting its enforcement goals and targets, we have developed a transparent system of performance measurement. These measures will be posted publicly on a quarterly basis.

PM1 | Volume

Number of complaints and convictions received.

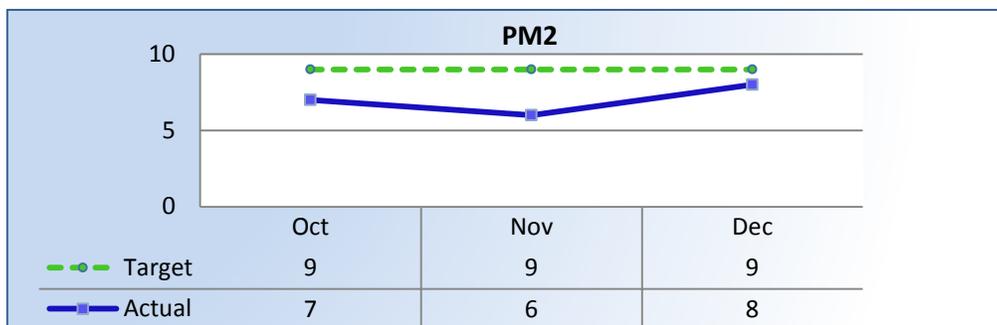


Total Received: 131 Monthly Average: 44

Complaints: 56 | Convictions: 75

PM2 | Intake

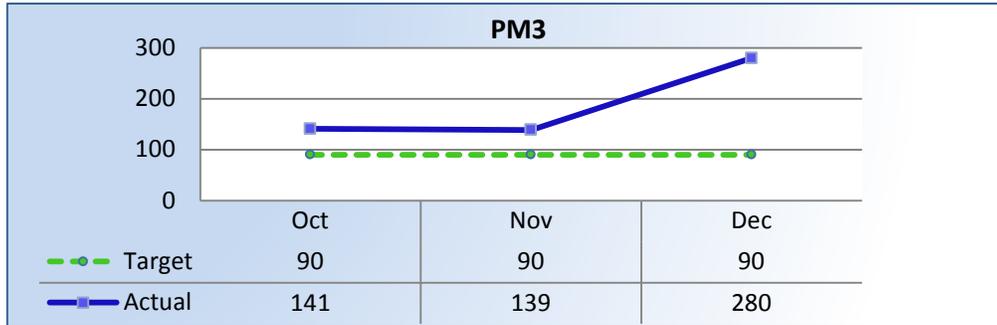
Average cycle time from complaint receipt, to the date the complaint was assigned to an investigator.



Target Average: 9 Days | Actual Average: 7 Days

PM3 | Intake & Investigation

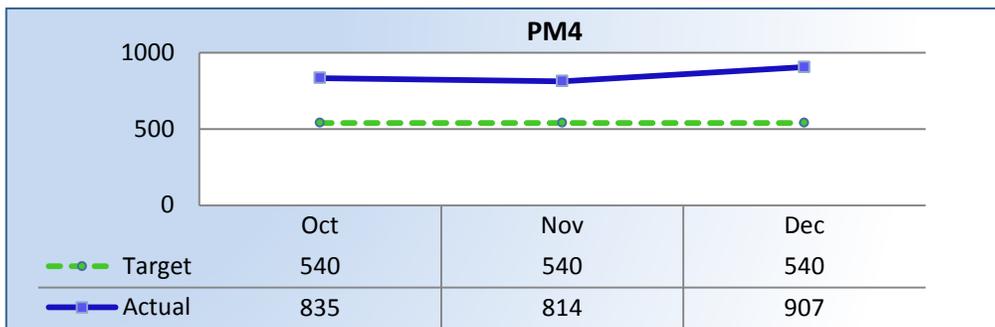
Average number of days to complete the entire enforcement process for cases not transmitted to the AG. (Includes intake and investigation)



Target Average: 90 Days | Actual Average: 193 Days

PM4 | Formal Discipline

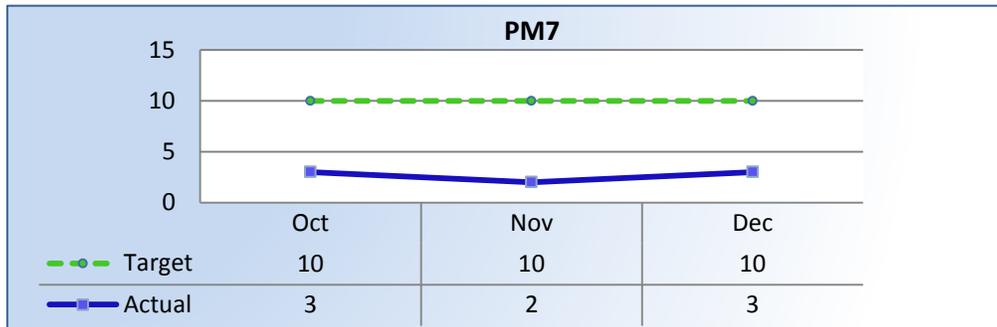
Average number of days to complete the entire enforcement process for cases transmitted to the AG for formal discipline. (Includes intake, investigation, and transmittal outcome)



Target Average: 540 Days | Actual Average: 870 Days

PM7 | Probation Intake

Average number of days from monitor assignment, to the date the monitor makes first contact with the probationer.



Target Average: 10 Days | Actual Average: 2 Days

PM8 | Probation Violation Response

Average number of days from the date a violation of probation is reported, to the date the assigned monitor initiates appropriate action.

The Board did not have any new probation violations this quarter.

Target Average: 7 Days | Actual Average: N/A

CONSUMER PROTECTION SERVICES DATA FY 2015/2016

	1st Quarter			2nd Quarter			3rd Quarter			4th Quarter			
Complaint Intake	<i>Complaints Received by the Board. Measured from date received to assignment for investigation or closure without action.</i>												
Complaints	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Received	67	64	65	19	19	18							252
Closed without Assignment for Investigation	2	2	0	0	0	0							4
Assigned for Investigation - <i>Note: Number of assigned cases may include cases from previous month; therefore totals will not add up.</i>	65	57	69	22	19	18							250
Average Days to Close or Assigned for Investigation	4	4	3	8	8	13							7
Pending	3	8	4	4	7	3							

Convictions/Arrest Reports	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Received	15	21	27	12	35	28							138
Closed / Assigned for Investigation	12	16	35	12	27	36							138
Average Days to Close	3	2	2	4	5	5							3.5
Pending	3	8	0	0	4	0							

Total Intake	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Received	82	85	92	31	54	46							390
Closed w/o Inv. Assignment	2	2	0	0	0	1							5
Assigned for Investigation	77	73	104	34	46	54							388
Avg. Days to Close or Assign	3	4	3	7	6	8							5
Pending	6	16	4	4	12	3							

Investigation *Complaints investigated by the program whether by desk investigation or by field investigation.*
Measured by date the complaint is received to the date the complaint is closed or referred for enforcement action.
If a complaint is never referred for Field Investigation, it will be counted as 'Closed' under Desk Investigation.
If a complaint is referred for Field Investigation, it will be counted as 'Closed' under Non-Sworn or Sworn.

Desk Investigation	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Initial Assignment for Desk Investigation	77	73	104	33	46	54							387
Closed	105	97	66	68	29	47							412
Average Days to Close	73	110	79	95	118	87							93.667
Pending	201	173	209	179	189	189							

Field Investigation (Sworn)	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Assignment for Sworn Field Investigation	1	4	3	3	0	7							18
Closed	14	6	5	7	0	16							48
Average Days to Close	737	468	548	812	0	843							568
Pending	102	100	98	95	0	91							

All Investigations	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
First Assignments	77	73	104	34	46	54							388
Closed	119	103	71	75	31	63							462
Average Days to Close	151	131	112	165	157	279							165.83
Pending	303	273	307	274	289	280							

All Investigations Aging	Jan-00	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Up to 90 Days	81	77	49	45	19	25							296
91 to 180 Days	17	10	11	15	4	19							76
181 Days to 1 Year	6	5	3	8	4	7							33
1 to 2 Years	8	6	6	1	2	3							26
2 to 3 Years	3	2	0	3	2	1							11
Over 3 Years	4	3	1	3	0	8							19

Disciplinary Actions This section DOES NOT include subsequent discipline on a license. Data from complaint records combined/consolidated into a single case will not appear in this section.

	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
AG Cases Initiated	3	0	2	1	2	2							10
AG Cases Pending	60	55	53	50	48	40							
SOIs Filed	0	0	1	0	0	0							1
Accusations Filed	4	3	0	3	1	1							12

ACC Decisions/Stips	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Prop/Default Decisions	0	1	0	2	0	0							3
Stipulations	6	2	4	2	2	10							26

SOI Disciplinary Orders	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
SOI Final Orders (Dec/Stips)	2	0	0	0	1	0							3
Average Days to Complete	829	0	0	0	416	0							207.5

ACC Disciplinary Orders	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
ACC Final Orders (Dec/Stips)	6	3	4	4	2	10							29
Average Days to Complete	839	655	886	835	755	907							812.83

Total Disciplinary Orders	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Total Final Orders (Dec/Stips)	8	3	4	4	3	10							
Total Average Days to Complete	836	655	866	835	642	907							790.17

Total Orders Aging/Final Decision	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Up to 90 Days	0	0	0	0	0	0							0
91 to 180 Days	0	0	0	0	0	0							0
181 Days to 1 Year	0	1	0	1	0	0							2
1 to 2 Years	4	1	2	1	2	3							13
2 to 3 Years	3	0	1	0	1	5							10
Over 3 Years	1	1	1	2	0	2							7

Citations	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Final Citations	11	10	11	8	5	8							53
Average Days to Complete*	492	328	178	259	399	162							303

Other Legal Actions	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
Interim Suspension & PC 23 Ordered	1	0	0	1	0	0							2

Probation												
	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun
Entered Probationer	6	1	1	2	3	6						
Completed Probation	0	1	4	4	3	0						
Entered Maximus	1	4	0	2	3	2						
Completed Maximus	0	0	0	0	0	0						
Non-Compliant w/Probation	2	4	1	0	0	0						
Total Probationers	92	92	92	91	88	94						
Total Maximus Participants	11	15	15	16	19	21						

Performance Measures													
	Jul	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	FY Total
PM1 Volume - Number of Complaints Received within the specified time period.	67	64	65	19	19	18							252
PM1 Volume - Conviction/Arrest Reports Received	15	21	27	12	35	28							138
PM2 Cycle Time - Intake Average number of complaint intake during the specified time period.	3	4	3	7	6	8							3
PM3 Cycle Time-No Discipline (Target 90 Days) Average number of days to complete complaint intake and investigation steps of the enforcement process for Closed Complaints not resulting in Formal Discipline.	154	131	95	141	139	280							132
PM 4 Cycle Time-Discipline (Target 540 Days) Average number of days to complete the enforcement process (Complaint intake, Investigation, and Formal Discipline steps) for cases closed with Formal Discipline.	836	530	886	835	814	907							758

1 The following is a list of disciplinary actions taken by the Physical Therapy Board of California for the months of
2 October, November, & December 2015. The Decisions become operative on the Effective Date, with the exception
3 of situations where the licensee has obtained a court ordered stay. Stay orders do not occur in stipulated decisions,
4 which are negotiated settlements waiving court appeals.
5

6 Copies of Accusations, Decisions, or Citations may be obtained by visiting our website at www.ptbc.ca.gov. In
7 addition to obtaining this information from our website, you may also request it by telephone, fax, or mail. Please
8 address your request to:
9

10 Physical Therapy Board of California
11 2005 Evergreen Street, Suite 1350
12 Sacramento, CA 95815
13 (916) 561-8200/ FAX (916) 263-2560
14

15 Physical Therapy Board of California Disciplinary Summary

16
17
18
19 **October 2015**

20
21 **AMIRIAN, JOSEPH (PT 32333)**

22 Accusation Filed 11/25/09. Violation of B & P: 490 Conviction of Crime Substantially Related to the Practice,
23 2660(d) Conviction of a Crime Substantially Related to the Practice, 2660(h) Gross Negligence, 2660(k) Aiding and
24 Abetting the Unlawful Practice of Physical Therapy, 2661 Conviction of a Crime. Stipulated Settlement and
25 Disciplinary Order Effective 08/25/10, 1 Yr. Suspension, 5 Yrs. Probation. Order Restricting Practice of Physical
26 Therapy Effective 09/24/12; may not consult, examine, treat, touch and/or otherwise practice physical therapy on
27 any and all patients during pendency of criminal action until its final conclusion. Accusation and Petition to Revoke
28 Probation Filed 10/14/14. Stipulated Revocation of License and Order Effective 10/23/15, License Revoked
29

30 **GIBSON, ALICIA (PT 19878)**

31 Accusation Filed 05/23/14. Violation of B & P Codes: 490 Conviction of a Crime, 493 Conviction of Crime
32 w/Conclusive Evidence, 2239 Self-Use of Drugs or Alcohol, 2660(d) Convict of Criminal Offense, 2660(h)
33 Violating the Code, 2661 Conviction of a Crime. Violation of CCR: 1399.24 Unprofessional Conduct. Decision
34 After Rejection Effective 10/16/15, Revocation Stayed, 3 Yrs. Prob., or one year after successful completion of the
35 Board's rehabilitation and monitoring program, whichever is longer.
36

37 **STILWELL, LISA (PT 13322)**

38 Accusation Filed 04/10/15. Violation of B & P Codes: 2630 Unlawful Physical Therapist, 2660 Unprofessional
39 Conduct, 2660(a) Violating the Code, 2660(f) Posses/Convict of Controlled Substance. Violation of CCR:
40 1399.20(a) Violate Prov of PT Act, 1399.24 Unprofessional Conduct. Default Decision and Order Effective
41 10/14/15, License Revoked.
42

43 **THOMAS, LINDA (PT 11136)**

44 Accusation Filed 01/13/15. Violation of B & P Codes: 2239 Self-Use of Drugs or Alcohol, 2660 Unprofessional
45 Conduct, 2660(a) Violating the Code, 2660(e) Conviction of Crime Offenses, 2661 Conviction of a Crime. Violation
46 of CCR: 1399.20 Criminal Substantial Relation. Stipulated Settlement and Disciplinary Order Effective 10/12/15,
47 Revocation Stayed, 5 Yrs. Prob. or for the time necessary to satisfactorily complete the Board's rehabilitation
48 program, plus one (1) year, whichever is longer.
49
50
51

1 **November 2015**

2
3 **CASCO, FRANCESCA (AT 8376)**

4 Accusation Filed 03/16/15. Violation of B & P Codes: 490 Conviction of a Crime, 493 Conviction of a Crime, 2660
5 Unprofessional Conduct, 2660(b) Procuring Licensure by Fraud, 2660(d) Conviction of Criminal Offense, 2660(h)
6 Violating the Code, 2660(k) Commit Fraud, Dishonest Act, 2676 Continuing Competency Deficiencies. Violation of
7 CCR: 1399.24 Unprofessional Conduct, 1399.91 Continuing Comp Required, 1399.93 Cont Comp Required &
8 Limitations. Stipulated Settlement and Disciplinary Order Effective 11/16/15, Revocation, Stayed, 3 Yrs. Prob.
9

10 **KOHLI, MANINDER (PT 29722)**

11 Accusation Filed 08/20/14. Violation of B & P Codes: 810 Violation of Insurance Requirement, 2052 Unlicensed
12 Practice of Medicine, 2234 Repeated Negligent Acts, 2260(g) Gross Negligence, 2264 Aiding and Abetting
13 Unlicensed Activity, 2630 Aiding & Abetting the Unlicensed Practice of Physical Therapy, 2660(h) Violating the
14 Code, 2660(i) Aiding and Abetting, 2660(j) Aiding and Abetting, 2660(k) Commit Fraud, Dishonest Act. Violation
15 of CCR: 1398.44 Gross Negligence in Supervision of Physical Therapist Assistants and Aides, 1399 Supervision of
16 Physical Therapy Aides, 1399.20 Gross Negligence in Supervision of PTA's and Aides, 1399.85 Gross Negligence.
17 Stipulated Surrender of License and Order Effective 11/30/15, License Surrendered.
18

19 **MAGA, MICHAEL (PT 25552)**

20 Accusation Filed 09/26/14. Violation of B & P Codes: 2239 Self-Use of Drugs or Alcohol, 2660(a) Violating the
21 Code, 2660(e) Conviction of Crime Offenses. Violation of CCR: 1399.20 Criminal Substantial Relation, 1399.24
22 Unprofessional Conduct. Stipulated Settlement and Disciplinary Order Effective 11/02/15, Revocation, Stayed, 5
23 Yrs. Prob., or for such period as is necessary to complete the Board's Substance Abuse Rehabilitation Program plus
24 one (1) year thereafter, whichever is longer.
25

26 **December 2015**

27
28 **AMIRIAN, MAYRA (PT 17661)**

29 Accusation Filed 10/02/14. Violation of B & P Codes: 2234 Gross Negligence, 2264 Aiding & Abetting Unlicensed
30 Activity, 2620.7 Patient Record Docum & Retention, 2630 Unlawful Physical Therapist, 2660(g) Gross Negligence,
31 2660(h) Violating the Code, 2660(i) Aiding & Abetting, 2660(j) Aiding & Abetting Unlicensed Activity. Violation
32 of CCR: 1398.13 Patient Record Documentation, 1399 Supervision of Physical Therapy Aides. Stipulated
33 Settlement and Disciplinary Order Effective 12/07/15, Revocation Stayed, 3 Yrs. Prob.
34

35 **EMERY-JONES, JOLLENE DELL (PT 9511)**

36 Accusation Filed 03/30/15. Violation of B & P Codes: 490 Conviction of a Crime, 493 Conviction of a Crime, 2239
37 Self-Use of Drugs or Alcohol, 2660 Unprofessional Conduct, 2660(a) Violating the Code, 2660(e) Conviction of
38 Criminal Offenses, 2661 Conviction of a Crime. Violation of CCR: 1399.24 Unprofessional Conduct. Stipulated
39 Settlement and Disciplinary Order Effective 12/10/15, Revocation Stayed, 4 Yrs. Prob., or completion of the
40 Substance Abuse Rehabilitation Program plus one (1) year [whichever term of probation is longer].
41

42 **HALPIN, RACHEL (PT 36240)**

43 Accusation Filed 01/20/15. Violation of B & P Codes: 2660(g) Gross Negligence, 2660(h) Violating the Code
44 Stipulated Settlement and Disciplinary Order Effective 12/30/15, Public Repeval
45

46 **HSIA, WING PUI (PT 37058)**

47 Accusation Filed 07/08/15. Violation of Business & Professions Codes: 136 Change of Address Notification, 2261
48 False Statements on Documents, 2262 Alteration of Medical Records, 2620.7 Patient Record Documentation &
49 Retention, 2660(g) Gross Negligence, 2660(h) Violating the Code, 2660(k) Commit Fraud, Dishonest Act. Violation
50 of CCR: 1398.6 Filing of Addresses, 1398.13 Patient Record Documentation, 1399.20 Violate Provisions of Med
51 Practice Act. Stipulated Settlement and Disciplinary Order Effective 12/30/15, Revocation Stayed, 5 Yrs. Prob.
52
53
54

1 **HUANG, WEI (PT 25437)**

2 Accusation Filed 05/07/15. Violation of B & P Codes: 680 Disclosure of Name & License, 2234 Unprofessional
3 Conduct, 2620 Not Authorize PT to Diagnose, 2630 Unlawful Physical Therapist, 2660(g) Gross Negligence,
4 2660(h) Violating the Code, 2660(i) Aiding & Abetting, 2660(j) Aiding & Abetting Unlicensed Activity, 2691
5 Unprofessional Conduct. Violation of CCR: 1398.11 Name Tag Identic Requirement, 1398.13 Patient Record
6 Documentation, 1399 Supervision of Physical Therapy Aides. Stipulated Settlement and Disciplinary Order
7 Effective 12/14/15, Revocation Stayed, 3 Yrs. Prob.
8

9 **LANG, STACY (AT 926)**

10 Ruling and Order on Petition for Interim Suspension Order Issued 07/30/15. Accusation Filed 08/14/15. Violation of
11 B & P Codes: 822 Mental or Physical Illness, 2234(b) Gross Negligence, 2234(c) Repeated Negligent Acts, 2660(g)
12 Gross Negligence, 2660(h) Violating the Code (PT), 2660(i) Aiding/Abetting, 2660(j) Aiding/Abetting Unlicensed
13 Activity, 2660(m) Verbal Abuse or Sexual Harassment. Violation of CCR: 1398.44 Supervision of PTA, 1399
14 Supervision of Physical Therapy Aides. Stipulated Surrender of License and Order Effective 12/21/15, License
15 Surrendered.
16

17 **MARCIANO, ANTHONY (PT 17563)**

18 Accusation Filed 01/09/15. First Amended Accusation Filed 10/12/15. Violation of B & P Codes: 2234(c) Repeated
19 Negligent Acts, 2620.7 Pt. Recor Docum & Retention, 2660(h) Violating the Code. Violation of CCR: 1398.13
20 Patient Record Documentation. Stipulated Settlement and Disciplinary Order Effective 12/18/15, Public Reproval.
21

22 **SULLIVAN, CARLA (AT 5791)**

23 Accusation Filed 08/29/14. Violation of B & P Codes: 490 Conviction of a Crime, 2239 Self-Use of Drugs or
24 Alcohol, 2660(a) Violating the Code, 2660(e) Conviction of Crime Offenses, 2660(w) Habitual Intemperance.
25 Stipulated Settlement and Disciplinary Order Effective 12/09/15, Revocation Stayed, 5 Yrs. Prob., or completion of
26 the Program plus one (1) year, whichever is longer.
27

28 **THOMAS, WANDA (AT 8673)**

29 Accusation Filed 05/29/15. Violation of B & P Codes: 490 Conviction of a Crime, 2234 Unprofessional Conduct,
30 2660(a) Violating the Code, 2660(e) Conviction of Criminal Offense, 2660(j) Commit Fraud, Dishonest Act, 2661
31 Conviction of a Crime. Violation of CCR: 1399.20 Criminal Substantial Relation, 1399.24 Unprofessional Conduct.
32 Stipulated Settlement and Disciplinary Order Effective 12/09/15, Revocation Stayed, 3 Yrs. Prob.
33

34 **WEYGANDT, ERIC WRIGHT (PT 28712)**

35 Accusation Filed 07/14/15. Violation of B & P Codes: 726 Sexual Misconduct with Patient, 2660.1 Presumption of
36 non-consent, 2660(g) Gross Negligence, 2660(i) Aiding and Abetting, 2660(m) Sexual Harassment. Stipulated
37 Revocation of License and Order Effective 12/21/15, License Revoked.
38

39 **Initial Probationary Licenses (IPL) Issued**

40
41
42

43 **October 2015**

44
45 **(NONE FOR THIS MONTH)**
46

47 **November 2015**

48
49 **NATALI, ANN MARIE (APPLICANT)**

50 Application Denied 01/07/15. Violation of B & P Code: 480 Grounds for Denial of License. Statement of Issues
51 Filed 03/16/15. Initial Probationary License Issued 11/20/15, 3 Yrs. Prob., or completion of the substance abuse
52 rehabilitation program plus one (1) year, whichever is longer.
53

1 **December 2015**

2
3 (NONE FOR THIS MONTH)

4
5 **Licenses Denied**

6
7
8
9 **October, November, and December 2015**

10
11 (NONE FOR THESE MONTHS)

12
13 **Glossary of Terms**

- 14
- 15 B & P Code – Business and Professions Code
- 16 H & S Code – Health and Safety Code
- 17 R & R – Rules and Regulations
- 18 CCR – California Code of Regulations

19
20 Accusations: Charges and allegations, which still must undergo rigorous tests of proof at later administrative
21 hearings.

22
23 Petition to Revoke Probation: A Petition to Revoke Probation is filed when a licensee is charged with violation of a
24 prior disciplinary decision.

25
26 Probationary License: Where good cause exists to deny a license, the licensing agency has the option to issue a
27 conditional license subject to probationary terms and conditions.

28
29 Statement of Issues Filed: When an applicant for licensure is informed the license will be denied for cause, the
30 applicant has a right to demand a formal hearing, usually before an Administrative Law Judge. The process is
31 initiated by the filing of a Statement of Issues, which is similar to an accusation.

32
33 Surrender of License: License surrenders are accepted in lieu of further proceedings.

34
35 Statement of Issues Decision: These are decisions rendered after the filing of a Statement of Issues.

36
37 Stipulated Decision: Negotiated settlements waiving court appeals.



Physical Therapy Board of California

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY - GOVERNOR EDMUND G. BROWN JR.

Physical Therapy Board of California

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Briefing Paper

Date: January 5, 2016

Prepared for: PTBC Members

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Subject: Board Member Training

Purpose:

To provide information regarding the Conflict of Interest (Form 700), electronic filing (Netfile) process and procedures.

Attachments: [Conflict of Interest \(COI\) – Form 700 Procedures \(16A-1\)](#)

Background:

The Conflict of Interest (COI) Regulations (Title 16, Division 38, and Chapter 2) indicates that board members, committee members and specific Department of Consumer Affairs' (DCA) positions are required to file a Form 700 annually.

Recently, in an effort to simplify and expedite the filing procedure, the DCA notified all boards/bureaus they will use a paperless filing system to file the Form 700. Designated filers will use NetFile's paperless system to electronically file their Form 700. As DCA will no longer accept paper filings, designated filers must file their Form 700 electronically.

Analysis:

The new system, NetFile is a web-based, unlimited –user, data entry and report generation system for the financial and campaign management of California and Federal political committees.

The NetFile online filing is available 24/7 from any computer with internet access; and, the system will save you time, ensure required data is complete and eliminate the need for filing technical amendments. Moreover, all your data is saved for future filings. You will not need to print, sign or mail your Form 700. Once online filing is completed, no further action is required.

Action Required:

All PTBC board members and staff have been entered into the NetFile system by the COI Filing Officer. If you haven't already filed your Form 700 for 2015, please do so at your earliest opportunity.

**PHYSICAL THERAPY BOARD
CONFLICT OF INTEREST – FORM 700 ELECTRONIC FILING PROCEDURES**

Pursuant to the Conflict of Interest (COI) Regulations, Board Members are designated positions as being required to file a Statement of Economic Interests (Form 700) upon assuming office, annually and upon leaving office.

You are required to file even if you do not have any reportable interests.

When to File?	Filing dates will differ depending on status of appointment.				
Assuming Office Filing	When: 30 days from date of being appointed/sworn in. Period: 12 months prior to date of being appointed/sworn in.				
Annual Filing	When: No later than April 1. Period: January 1 through December 31 prior to annual filing date.				
Leaving Office Filing	When: No later than 30 days after leaving office or position. Period: January 1 through date leaving office or position. If within 30 days, you are reappointed with the same agency, you do not have to file for leaving office or position.				
Where to File?	Effective January 2016, the DCA requires all designated filers to file online.				
How to File?	Access the NetFile Filing Portal user log-in page provided by email on 1/27/2016. Under Form 700 (SEI) Filers Section; Click the New User? Request a Password. You will receive a unique password via email. You must use this email to receive notification. You may change email later. Its encouraged to keep your password in a safe location. Its encouraged to use business (not home) contact information, as the Form 700 is a public document.				
Reference Contacts	<table border="0"> <tr> <td>PTBC, COI/Training Coordinator Jacki Maciel P: (916) 561-8279 E: jacki.maciel@dca.ca.gov</td> <td>DCA, COI Filing Officer Jill Johnson P: (916) 574-8312 E: jill.johnson@dca.ca.gov</td> </tr> <tr> <td>COI Filing Inquiries Fair Political Practices Commission P: 1-866-ASK-FPPC (275-3772) Mon-Thu 9:00 a.m.-11:30 a.m.</td> <td>NetFile Application/Program Inquiries NetFile Email Support E: filerhelp@netfile.com</td> </tr> </table>	PTBC, COI/Training Coordinator Jacki Maciel P: (916) 561-8279 E: jacki.maciel@dca.ca.gov	DCA, COI Filing Officer Jill Johnson P: (916) 574-8312 E: jill.johnson@dca.ca.gov	COI Filing Inquiries Fair Political Practices Commission P: 1-866-ASK-FPPC (275-3772) Mon-Thu 9:00 a.m.-11:30 a.m.	NetFile Application/Program Inquiries NetFile Email Support E: filerhelp@netfile.com
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**PHYSICAL THERAPY BOARD
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Additional Requirements	As part of complying with COI requirements, you are required to complete ethics training every two years.		
When to Complete?	Assuming Office: Within 6 months from being appointed/sworn in. Biannually: Every 2 years after completing training after appointed/sworn in.		
Where to Complete?	Ethics Training Course available at the Attorney General Office website http://oag.ca.gov/ethics/course		
How to Complete?	Access the website link; Following instructions to complete training. Upon completing training, print your certificate, sign; and, submit a copy of your signed certificate of completion to PTBC, COI/Training Coordinator. PTBC COI/Training Coordinator will keep one copy in your employee file and forward a copy to the DCA, COI Filing Officer.		
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