STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY • GOVERNOR EDMUND G. BROWN JR.
STRUCTURAL PEST CONTROL BOARD – ADMINISTRATION UNIT
2005 EVERGREEN STREET, STE. 1500 SACRAMENTO, CA 95815
P 916-561-8700 | F 916-263-2469 | WWW.PESTBOARD.CA.GOV

BOARD MEETING

NOTICE and AGENDA

Wednesday, January 13, 2016
1:00 P.M.
Thursday, January 14, 2016
8:00 A.M.

Hilton San Diego Airport / Harbor Island
Skyline / Lindberg Room
1960 Harbor Island Drive
San Diego, CA 92101

Contact Person: Susan Saylor
(916) 561-8700

AGENDA

The public may provide comment on any issue before the Board
at the time the agenda item is discussed.

Wednesday – 1:00 P.M.

I. Roll Call / Establishment of Quorum

II. Flag Salute / Pledge of Allegiance

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

IV. Petition for Reinstatement
Henry P. Villaire / OPR 9198, Branch 2

V. Petition for Reinstatement
Douglas Lee Smith / OPR 9832, Branch 2

VI. Closed Session – Pursuant to subdivision (c) (3) of Section 11126 of the Government Code, the Board will meet in closed session to consider proposed disciplinary actions, stipulated settlements, and petitions for modification / termination of probation and reinstatement

Return to Open Session

VII. Adjournment

Thursday – 8:00 A.M.

VIII. Roll Call / Establishment of Quorum

IX. Flag Salute / Pledge of Allegiance

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

XI. Approval of Minutes from the October 7 & 8, 2015 Board Meeting

XII. Executive Officer's Report
- Licensing and Enforcement Survey Results and Statistics
- Examination Statistics
- Staffing Changes
- WDO Statistics
- Examination Development – Occupational Analyses
- Regulatory Update
- Legislative Update

XIII. Staff Update on Office of Inspector General's (OIG) Evaluation of Structural Fumigation Treatment Incidents Project

XIV. Update From Legal Counsel and Possible Board Position on Berkeley, California Ordinance Regarding Inspection and Certification Requirements of Exterior Elevated Elements as They Pertain to Board Licensees

XV. Presentation, Discussion and Possible Board Action on Act Review Committee Recommended Legislative and Regulatory Changes to Business and Professions Code Section 8616.9 and California Code of Regulations Sections 1990, and Addition of Business and Professions Code Sections 8504.2 and 8504.3

XVI. Presentation, Discussion and Possible Board Action on Staff Recommendation to Amend California Code of Regulations Section 1914

XVII. Update From Legal Counsel and Possible Board Position on *North Carolina State Board of Dental Examiners v. Federal Trade Commission* and California Attorney General, Kamala Harris's Legal Opinion on What Constitutes "Active State Supervision" of a California State Licensing Board

XVIII. Update on Proposed Federal Continuing Education Regulations

XIX. Board Calendar

XX. Future Agenda Items

XXI. Adjournment

The meeting may be cancelled or changed without notice. For verification, please check the Board's website at www.pestboard.ca.gov or call 916-561-8700. Action may be taken on any item on the agenda. Any item may be taken out of order to accommodate speakers and/or to maintain a quorum. Meetings of the Structural Pest Control Board are open to the public except when specifically noticed otherwise in accordance with the Open Meeting Act. The public may take appropriate opportunities to comment on any issue before the Board at the time the item is heard, but the President may, at his discretion, apportion available time among those who wish to speak. The public may comment on issues not on the agenda, but Board Members cannot discuss any issue that is not listed on the agenda. If you are presenting information to the Board, please provide 13 copies of your testimony for the Board Members and staff. Copying equipment is not available at the meeting location.

The meeting is accessible to the physically disabled. A person who needs a disability-related accommodation or modification in order to participate in the meeting may make a request by contacting the Structural Pest Control Board at (916) 561-8700 or email pestboard@dca.ca.gov or send a written request to the Structural Pest Control Board, 2005 Evergreen Street, Suite 1500, Sacramento, CA 95815. Providing your request at least five (5) business days before the meeting will help to ensure availability of the requested accommodation.

This agenda can be found on the Structural Pest Control Board's Website at: www.pestboard.ca.gov

MINUTES OF THE MEETING OF THE
STRUCTURAL PEST CONTROL BOARD

The meeting was held October 7 & 8, 2015 at the Department of Consumer Affairs, Hearing Room, 2005 Evergreen Street, Sacramento, California.

Board Members Present:

Dave Tamayo, President
Curtis Good, Vice President
Naresh Duggal
Mike Duran
Cliff Utley

Board Members Absent:

Ronna Brand
Marisa Quiroz

Board Staff Present:

Susan Saylor, Executive Officer
Robert Lucas, Assistant Executive Officer
David Skelton, Administrative Analyst

Departmental Staff Present:

Kurt Heppler, Legal Counsel
Frederic Chan-You, Legal Counsel

Wednesday, October 7, 2015

ROLL CALL / ESTABLISHMENT OF QUORUM

Mr. Tamayo called the meeting to order at 12:01 P.M. and Ms. Saylor called roll.

Board members Tamayo, Good, Duggal, Duran and Utley were present.

Board members Brand and Quiroz were absent.

A quorum of the Board was established.

FLAG SALUTE / PLEDGE OF ALLEGIANCE

Mr. Tamayo lead everyone in the flag salute and recitation of the pledge of allegiance.

**PETITION FOR MODIFICATION / TERMINATION OF PROBATION –
ANGEL GALLEGOS / OPR 10788, BRANCH 1**

Administrative Law Judge Marcie Larson sat with the Board to hear the Petition for Modification / Termination of Probation for Angel Gallegos, Operator License Number 10788. Mr. Gallegos was informed that he would be notified by mail of the Board's decision.

**PETITION FOR REINSTATEMENT –
RICHARD PATRICK LLOYD / FR 25266, BRANCH 3**

Administrative Law Judge Marcie Larson sat with the Board to hear the Petition for Reinstatement for Richard Patrick Lloyd, Field Representative License Number 25266. Mr. Lloyd was informed that he would be notified by mail of the Board's decision.

**PETITION FOR REINSTATEMENT –
DOUGLAS LEE SMITH / OPR 9832, BRANCH 2**

Douglas Lee Smith, Operator License Number 9832, withdrew his Petition for Reinstatement.

CLOSED SESSION

Pursuant to subdivision (c) (3) of section 11126 of the Government code, the Board met in closed session to consider proposed disciplinary actions, stipulated settlements, and petitions for modification / termination of probation and reinstatement.

Return to Open Session

ADJOURNMENT

The meeting adjourned for the day at 3:27 P.M.

Thursday, October 8, 2015

ROLL CALL / PLEDGE OF ALLEGIANCE

Mr. Tamayo called the meeting to order at 8:00 A.M. and Ms. Saylor called roll.

Board members Tamayo, Good, Duggal, Duran and Utley were present.

Board members Brand and Quiroz were absent.

A quorum of the Board was established.

Mr. Tamayo lead everyone in the flag salute and recitation of the pledge of allegiance.

APPROVAL OF THE MINUTES FROM THE JULY 22 AND 23, 2015 AND SEPTEMBER 4, 2015 BOARD MEETINGS

Mr. Utley moved and Mr. Duran seconded to approve the Minutes of the July 22 & 23, 2015 Board Meeting. Passed unanimously. (AYES: TAMAYO, GOOD, DUGGAL, DURAN, UTLEY. NOES: NONE. ABSTENTIONS: NONE.)

Mr. Utley moved and Mr. Good seconded to approve the Minutes of the September 4, 2015 Board Meeting. Passed unanimously. (AYES: TAMAYO, GOOD, DUGGAL, DURAN, UTLEY. NOES: NONE. ABSTENTIONS: NONE.)

EXECUTIVE OFFICER'S REPORT

Ms. Saylor updated the Board on licensing and enforcement survey results and statistics, examination statistics, wood destroying organism (WDO) statistics, examination development, and the status of legislative and regulatory changes including Senate Bills (SB) 328 and 799 and Assembly Bills (AB) 181 and 551.

Mr. Utley asked if there was a status update on the publication of a new Structural Pest Control Board (SPCB) Act Book.

Ms. Saylor stated that the publication of a new SPCB Act Book has been set for January, 2016 in order to capture the legislative and regulatory changes that will go into effect at that time.

DISCUSSION REGARDING THE 30 DAY WAITING PERIOD FOR APPLICANTS TO RETAKE LICENSING EXAMINATIONS – POSSIBLE BOARD ACTION ON REQUIREMENT

Numerous members of the industry expressed their concern with the Board's policy mandating a 30 day waiting period for Applicators who fail the exam citing the burden of employing

unlicensed individuals, the difficulty of the examination and the reduced risk of exams being compromised since Computer Based Testing was implemented.

Heidi Lincer-Hill, Office of Professional Examination Services (OPES), outlined the reasoning behind the 30-day waiting period citing the following: 1) that applicants should receive ample time to study, 2) examination security, and 3) consumer protection.

Mr. Tamayo inquired about research or studies showing the basis of the 30-day waiting period.

Ms. Lincer-Hill stated that no research or studies exist; instead, the waiting period is a result of long standing departmental practice. Ms. Lincer-Hill further stated that OPES is willing to support any action taken by the Board.

Mr. Heppler stated that if the Board were to reduce the 30-day waiting period for Applicators it would be in the form of a policy change and that additionally it would need to be determined if the 30-day waiting period was a contractual obligation.

> Mr. Good moved and Mr. Duran seconded to change the waiting period for Applicators to re-test from 30 to 15 days, effective November 2, 2015, and for staff to identify any contractual issues associated with the change. Passed unanimously. (AYES: TAMAYO, GOOD, DUGGAL, DURAN, UTLEY. NOES: NONE. ABSENTIONS: NONE.)

REVIEW AND DISCUSSION REGARDING THE EXAMINATION STUDY GUIDES AND REFERENCE MATERIALS – POSSIBLE BOARD ACTION

Ms. Saylor stated that staff has been working with OPES to reduce the number of reference books used for the exam development process.

Mr. Utley asked if the reference books are the same for all the licensing examinations.

Ms. Lincer-Hill stated that, overall, the reference books have been reduced from 18 to 10 without harming the validity of the exam. However, Applicator exam development is still in its early stages and additional time will be necessary to strengthen the examination bank of questions.

Mr. Duggal stated that the number of reference books used to create the examinations is still excessive.

Lisa Blecker, UC IPM, stated that the reference books currently used in exam creation are too advanced for applicants to effectively study. Ms. Blecker further stated that creating a single reference book that incorporates all the information applicants' needs would be beneficial.

Mr. Duggal asked legal counsel to look into the legality of public agencies other than the Board producing a reference book and / or study guide.

Mr. Chan-You stated that he would look into the legality of public agencies other than the Board producing a reference book and / or study guide.

Mr. Tamayo stated that using too many reference books in exam creation can lead to confusing or contradictory information.

Ms. Lincer-Hill stated that in the absence of an singular, adequate reference book, reducing the number of reference books used in exam creation makes it more difficult to produce an acceptable exam.

> Mr. Duggal moved and Mr. Duran seconded to direct staff, if practicable and psychometrically valid, to work with OPES on exploring the possibility of reducing the number of reference books used to create each exam to 2, one for pesticide safety & use and one for the laws and regulations specific to the license being sought. Passed unanimously. (AYES: TAMAYO, GOOD, DUGGAL, DURAN, UTLEY. NOES: NONE. ABSENTIONS: NONE.)

STATUS UPDATE OF REGULATORY LANGUAGE DEVELOPMENT REGARDING CONTINUING EDUCATION (CE) INTEGRATED PEST MANAGEMENT REVIEW COMMITTEE RECOMMENDED CHANGES TO CURRENT CE REGULATIONS

Ms. Saylor updated the Board on the development of regulatory language that would implement the recommendations of the CE IPM Review Committee highlighting the areas where staff is seeking clarification.

Mr. Heppler stated that this topic was placed on the agenda as an update and therefore the Board should refrain from taking any action on it.

Lee Whitmore, Beneficial Exterminating, stated that the Environmental Protection Agency (EPA) is in the process of establishing CE standards of 6 hours for rules & regulations and 6 hours for each technical branch of licensure.

Ms. Blecker stated that the public comment period for the EPA's proposed CE standards is currently open.

Mr. Tamayo stated that the Board's original direction regarding the implementation of the CE IPM Review Committee's recommendations was broad enough to give staff the ability to continue working and bring back a recommendation to a future meeting for approval.

Mr. Tamayo provided the public an opportunity to comment on items that are not on the agenda.

REVIEW, DISCUSSION AND POSSIBLE POSITION ON AB 1545

Ms. Saylor provided the Board with a recap of the interested parties meeting held on September 29, 2015 to discuss AB 1545, which proposes to move the Board from the authority of the Department of Consumer Affairs to the authority of a newly formed Housing Agency.

Ms. Saylor cited the discrepancy between the Board's primary mission of consumer protection and the proposed Housing Agency's primary mission to create more affordable housing.

Additionally, Ms. Saylor provided the Board with a handout from the interested parties meeting which contained an organizational chart showing the Board being placed under the authority of Contractor's State License Board.

Board Member Cliff Utley departed the meeting at 11:00 A.M. The Board still maintained a quorum as 4 members were present.

Mr. Good stated his opposition to AB 1545 citing the recent moves the Board has undergone and the incompatibility of the Board's consumer protection mandate with the proposed Housing Agency.

Mr. Duran stated his opposition to AB 1545 citing the recent moves the Board has undergone and the lack of a compelling reason for the Board to move.

Mr. Duggal stated his opposition to AB 1545 stating that the Board has more diverse interests than the creation of affordable housing and that consumer protection is the Board's primary focus.

Martyn Hopper, Pest Control Operators of California (PCOC), stated that thus far there has been no indication that the Governor would sign AB 1545 and that it was a good idea for the Board to get out in front of it and take a position as soon as possible.

> Mr. Good moved and Mr. Duran seconded for the Board to oppose its inclusion in AB 1545 and for the Executive Officer to write a letter to the author explaining the reasons why. The reasons identified by the Board to be included in the letter are the Board's consumer protection mandate being improperly aligned with the proposed mission of the Housing Agency, the Board's purview being larger than just housing, the inappropriateness of the Board being placed under the authority of the Contractor's State License Board, the absence of a benefit to the Board moving, and the cost associated with the Board moving. Passed unanimously. (AYES: TAMAYO, GOOD, DUGGAL, DURAN. NOES: NONE. ABSENTIONS: NONE.)

ANNOUNCEMENT STRUCTURAL PEST CONTROL BOARD SPECIALIST EXAMINATION

Ms. Saylor announced that the Board is opening up the Specialist examination in order to begin gathering a list of eligible candidates in the event of any current Board Specialists retiring.

PRESENTATION, DISCUSSION AND CONSIDERATION OF ACT REVIEW COMMITTEE RECOMMENDED LEGISLATIVE AND REGULATORY CHANGES TO BUSINESS AND PROFESSIONS CODE SECTION 8506.1 AND CALIFORNIA CODE OF REGULATIONS SECTIONS 1970.4, 1990, 1993.2, AND 1993.4 AND REPEAL OF CALIFORNIA CODE OF REGULATIONS SECTION 1993.3

Mr. Gordon presented the recommendations of the Act Review Committee to the Board.

The Board discussed the distinction between termite monitoring devices & bait stations and wood destroying pest monitoring devices & bait stations.

The Board and members of the public discussed the proposed changes to CCR Section 1990 and whether or not they obligated licensees to disclose non-wood related construction such as exterior concrete landings, steps, decking and related non-wood construction.

The Board asked the Act Review Committee to further revise CCR Section 1990 in a manner that would address the concerns about licensees' obligations and the extent to which they must disclose exterior structures, not limited to wood, as reportable conditions.

Mr. Duran moved and Mr. Good seconded to authorize the Executive Officer to seek an author to implement the recommended changes to B&P Code Section 8506.1. Passed unanimously. (AYES: TAMAYO, GOOD, DUGGAL, DURAN. NOES: NONE. ABSENTIONS: NONE.)

8506.1. A "registered company" is any sole proprietorship, partnership, corporation, or other organization or any combination thereof that is registered with the Structural Pest Control Board to engage in the practice of structural pest control.

A registered company may secure structural pest control work, submit bids, or otherwise contract for pest control work. A registered company may employ licensed field representatives and licensed operators to identify infestations or infections, make inspections, and represent the company in the securing of pest control work.

A registered company may hire or employ individuals who are not licensed under this chapter to perform work on contracts or service agreements as defined in this chapter covering Branches 1, 2, and 3 ~~wood-destroying organisms~~ only after an operator or field representative has fully completed the negotiation or signing of the contract covering a given job.

~~A registered company may hire and use individuals who are not licensed under this chapter on service contracts already established.~~ Nothing in this section shall be

interpreted to mean that an unlicensed individual may perform work specifically requiring licensure as defined in this chapter.

Mr. Good moved and Mr. Duran seconded for staff to begin the rulemaking process to implement the recommended changes to CCR Sections 1970.4, 1993.2, 1993.4, and 1993.3. Passed unanimously. (AYES: TAMAYO, GOOD, DUGGAL, DURAN. NOES: NONE. ABSENTIONS: NONE.)

§ 1970.4. Pesticide Disclosure Requirement.

(a) The primary contractor for fumigation shall have in his or her possession and shall provide to any subcontractor for fumigation a form (See Form 43M-48 (Rev. 5/07) at the end of this section) signed by the occupants or designated agent of a structure. The primary contractor for fumigation and the subcontractor for fumigation shall retain a copy of the occupants fumigation notice for a period of at least three years. In case of multiple-family dwellings, the owner, manager or designated agent of the building may obtain signatures and/or verify the notification of the occupants.

The form shall state the name of the pest to be controlled, the pesticide(s)/fumigant(s) proposed to be used, the active ingredient(s) and the health cautionary statement as required under section 8538 of the code. The form shall also state that a lethal gas (poison) will be used in the building on indicated dates and that it is unsafe to return to the building until a certification notice for reentry is posted by the licensed fumigator. The form shall also indicate that the occupant has received the prime contractor's information regarding the procedures for leaving the structure.

The properly signed form or a copy, written or electronic, thereof shall be in the possession of the licensed fumigator when the fumigant is released. Such form shall be attached to and become a permanent part of the fumigation log upon completion of the fumigation.

(b) Any death or serious injury relating to pesticide application or use, whether to a worker or member of the public, shall be reported to the nearest Structural Pest Control Board office immediately.

(c) Whenever a licensee employed by a branch 2 or branch 3 registered company applies a pesticide within, around or to any structure such person shall leave in a conspicuous location, or provide via electronic mail, if an electronic mailing address has been provided, a written, or electronic notice identifying the common, generic or chemical name of each pesticide applied and the registered company's name, address, and telephone number. In case of a multiple family structure, such notice may be given to the designated agent or the owner. Such pesticide identification notice may be a door hanger, invoice, billing statement or other similar written, or electronic document ~~which contains the registered company's name, address, and telephone number~~. Notices provided electronically must be transmitted no later than the conclusion of service.

(d) All pest control operators, field representatives, applicators and employees in all branches shall comply in every respect with the requirements of section 8538 of the code. Failure to comply with section 8538 of the code is a misdemeanor and shall constitute grounds for discipline.

(e) Where notification is required under section 8538 of the code, and the premises on which the work is to be performed is a multiple family dwelling consisting of more than 4 units, the owner/owner's agent shall receive notification and other notices shall be posted in heavily frequented, highly visible areas including, but not limited to, all mailboxes, manager's apartment, in all laundry rooms, and community rooms on all external pest control servicing. Complexes with fewer than 5 units will have each affected unit notified. Any pest control servicing done within a tenant's apartment requires that the tenant be notified according to section 8538 of the code.

(f) A registered company which applies any pesticide within, around or to any structure shall provide to any person, within 24 hours after request therefore, the common, generic or chemical name of each pesticide applied.

§ 1993.2. Termite Bait Station.

(a) For the purposes of this section ~~and section 1993.3,~~ "termite bait station" shall include:

(1) an "above-ground bait station," which shall mean any device containing pesticide bait used for the eradication of wood destroying pests that is attached to the structure, or

(2) an "in-ground bait station," which shall mean any device containing pesticide bait used for the eradication of termites that is placed in the ground. ~~material to attract and or monitor wood destroying pests, or containing a pesticide bait to eradicate wood destroying pests, that is placed in the ground.~~

~~(3) an "in-ground termite monitoring system" is a device placed in the ground to determine the presence or absence of subterranean termites through scheduled periodic inspections.~~

(b) Prior to installation of any termite baiting system, a full or limited inspection of the structure shall be made.

(c) Use of termite baiting systems shall be considered a control service agreement as defined by section 8516 of the code.

§ 1993.4 Termite Monitoring Devices

(a) "Termite monitoring devices" are defined as devices that contain no pesticides and do not provide any control measures. They solely provide an indication of the possible presence or absence of termites. Termite monitoring devices do not provide for positive identification, nor does a positive indication on such device eliminate the need for an inspection conducted by a Branch 3 Operator or Field Representative prior to any treatment or work being performed.

(b) Installation of termite monitoring device(s) must be performed by a registered Branch 3 company.

(c) Prior to installation of any termite monitoring device(s), the following disclosure language shall be provided to the property owner or the property owner's designated agent by either written or electronic means:

"Termite monitoring devices are intended to solely provide an indication of the possible presence or absence of termites in the areas where such devices are installed. Termite monitoring devices do not replace the requirement for a termite inspection to be performed by a licensed termite inspector prior to the commencement of any treatment

or work being performed. If the termite monitoring device indicates the possible presence of termites, you should consider having an inspection performed by (company name). You have the right to choose any registered company licensed to perform these services."

~~**§ 1993.3. In-Ground Termite Bait Stations.**~~

~~Use of in-ground termite monitoring and/or baiting systems shall be considered a control service agreement as defined by section 8516 of the code.~~

ANNUAL REVIEW AND POSSIBLE AMENDMENT OF BOARD POLICIES AND PROCEDURES

There were no recommendations for change to the Board's policies and procedures.

BOARD CALENDAR

The following 4 meetings were scheduled for January 13 & 14, 2016 in San Diego, April 6 & 7, 2016 in Sacramento, July 13 & 14, 2016 in Ontario, and October 12 & 13, 2016 in Sacramento.

FUTURE AGENDA ITEMS

Mr. Whitmore stated that a new ordinance in Berkeley, California requires Board licensees to perform work that is outside the scope of their licensure and that the topic should be placed on a future agenda for the Board to possibly take a position on it.

Mr. Heppler stated that legal counsel can research the ordinance and report back to the Board at a future meeting.

Mr. Duggal requested that the topic of reduction of reference materials be revisited at a future meeting and that legal counsel report back on the role public agencies other than the Board can play in the creation of exam study guides.

Mr. Chan-You suggested that the Board offer the public an opportunity to speak about possible legislative changes that would enable the Board to assist in the production of study guides.

ANNUAL ELECTION OF BOARD MEMBER PRESIDENT AND VICE PRESIDENT

Mr. Duran nominated Mr. Tamayo to be president of the Board. No other nominations for Board President were offered. Mr. Tamayo was unanimously elected as Board President. (AYES: TAMAYO, GOOD, DUGGAL, DURAN. NOES: NONE. ABSENTIONS: NONE.)

Mr. Duggal nominated Mr. Good to be Vice President of the Board. No other nominations for Board Vice President were offered. Mr. Good was unanimously elected

as Board Vice President. (AYES: TAMAYO, GOOD, DUGGAL, DURAN. NOES: NONE. ABSENTIONS: NONE.)

PUBLIC COMMENT FOR ITEMS NOT ON THE AGENDA

Mr. Katz requested that future meetings begin at 8:30 or 9:00 A.M. to accommodate those who are flying in to attend.

Mr. Tamayo stated that the Board would try to accommodate those who are flying in to attend but that sometimes early starts can't be avoided.

Billy Gaither, Van Hooser Enterprises, Inc., asked if the Board could update its website to include the dates of the upcoming examination development workshops.

ADJOURNMENT

The meeting was adjourned at 12:55 P.M.

_____ _____

Dave Tamayo, President Date

STRUCTURAL PEST CONTROL BOARD STATISTICS FOR NOVEMBER 2015 Page 1 of 2	FISCAL YEAR 2015/2016		FISCAL YEAR 2014/2015	
EXAMINATION	Monthly	Year To Date	Monthly	Year To Date
Field Representatives Scheduled	395	2,116	410	1,941
Field Representatives Examined	224	1,670	228	1,267
Field Representatives Passed	76	613	55	239
Field Representatives Failed	148	1,057	173	1,028
Operators Scheduled	30	155	44	206
Operators Examined	17	134	29	173
Operators Passed	12	86	16	63
Operators Failed	5	48	13	110
Applicators Scheduled	250	1,574		
Applicators Examined	226	1,291	40	1,169
Applicators Passed	101	548	20	536
Applicators Failed	125	743	20	633
Field Representatives Passing Rate	34%	37%	24%	19%
Operator Passing Rate	71%	64%	55%	36%
Applicators Passing Rate	45%	42%	50%	46%
LICENSING				
Field Representative Licenses Issued	67	487	42	221
Operator Licenses Issued	9	58	9	45
Company Registrations Issued	14	90	16	89
Branch Office Registrations Issued	1	9	5	8
Change of Registered Company Officers	3	13	5	9
Change Of Qualifying Manager	6	48	7	37
Applicator Licenses Issued	87	546	43	608
Duplicate Licenses Issued	55	339	111	416
Upgrade Present License	21	82	12	55
Change of Status Processed	25	157	12	126
Address Change	54	639	174	660
Address Change (Principal Office)	19	117	30	107
Address Change (Branch Office)	3	15	2	3
Transfer of Employment Processed	108	689	87	610
Change of Name	0	8	1	6
Change of Registered Company Name	2	6	0	3
License Histories Prepared	11	75	35	83
Down Grade Present License	36	251	32	235
LICENSES/REGISTRATIONS IN EFFECT				
Field Representative		10,367		10,197
Operator		4,003		3,986
Company Registration		2,952		2,987
Branch Office		439		437
Licensed Applicator		6,515		6,365
LICENSES/REGISTRATIONS ON PROBATION				
Companies		17		21
Licensees		89		95

STRUCTURAL PEST CONTROL BOARD STATISTICS FOR NOVEMBER 2015 Page 2 of 2	FISCAL YEAR 2015/2016		FISCAL YEAR 2014/2015	
	Monthly	Year To Date	Monthly	Year To Date
LICENSES RENEWED				
Operator	0	174	4	154
Field Representative	0	409	0	905
Applicator	0	72	58	280
LICENSES/ REGISTRATIONS CANCELLED				
Operator	0	121	2	204
Field Representative	4	53	7	816
Company Registration	6	99	8	66
Branch Office	1	15	0	17
Applicator	0	17	0	8
LICENSES DENIED				
Licenses	0	9	2	4
INVESTIGATIVE FINES PROCESSED				
Fines Processed	$0	$0	$0	$104
Penalty Assessment	$0	$0	$0	$0
Pesticide Fines	$12,905	$72,040	$10,525	$51,040
STAMPS SOLD				
Pesticide	6,140	30,610	5,830	28,830
WDO				
Filing	0	0	0	0
SEARCHES MADE				
Public	79	408	56	351
Complaints	31	182	30	158
BOND & INSURANCE				
Bonds Processed	9	85	40	679
Insurance Processed	220	1170	205	1175
Restoration Bonds Processed	0	3	0	2
Suspension Orders	22	156	10	280
Cancellations Processed	17	124	27	538
Change of Bond/Insurance	14	177	90	855
CONTINUING EDUCATION EXAMS				
Field Representative Examined	0	0	0	0
Field Representative Passed	0	0	0	0
Field Representative Failed	0	0	0	0
Operator Examined	0	0	0	0
Operator Passed	0	0	0	0
Operator Failed	0	0	0	0
Applicator Examined	0	0	0	0
Applicator Passed	0	0	0	0
Applicator Failed	0	0	0	0

LICENSING UNIT SURVEY RESULTS

January 13 & 14, 2016 – SPCB Meeting
September 16, 2015 – December 16, 2015

Response cards are sent to licensees, registered companies, and applicants receiving the following services: Licensure, Renewal of License, Upgrade/Downgrade License, Change of Qualifying Manager, Bond/Insurance, Company Registration, Transfer of Employment, Change of Address, and Examination. 160 survey cards were mailed during this reporting period. 13 responses were received.

	Question	Yes	No	N/A
1	Was staff courteous?	100%	0%	0%
2	Did staff understand your question?	100%	0%	0%
3	Did staff clearly answer your question?	93%	7%	0%
4	Did staff promptly return your telephone call?	77%	16%	7%
5	Did staff efficiently and promptly handle your transaction?	86%	7%	7%
6	How long did it take to complete its action on your file?* (Average)	37 days		

*There were 9 responses to question 6, ranging from 1 day to 120 days.

Company Registration: 65 days average (3 responses)

Operator License: N/A (0 responses)

Field Representative License: 30 days average (1 response)

Applicator License: N/A (0 responses)

Transfer of Employment: 82 days average (1 response)

Change of Address: N/A (0 responses)

Bond/Insurance: N/A (0 responses)

Change of Qualifying Manager: N/A (0 responses)

Examination: 8 days average (4 responses)

Comments:

- Great job. Thank you.

- Staff was great. Took forever for board to process sent in paperwork.
- I would like someone to know that Frank Munoz is a vital asset to your team. So many times a company blurs an employee with daily operations and forgets to tell them how important they are to the vitality of operations. Please shake his hand for me.
- Good service. Quick as could be expected. Thanks a lot.
- I work with a lot of states and this by far was the worst experience ever. No returned calls, no communication, and never got anything but voicemail.
- She was very helpful.
- Very nice staff.
- It was good. A little confusing and takes way too long to get test a date and especially if you pass you still have to wait a long time to get your license.
- Promptly returned call when she was back in the office.
- Very friendly, pleasant staff!

EXAMINATION STATISTICS AS OF 12/15/2015

Examination	Stat Dates	Release Date	# of Examinees	Passing Rate	Repeat Examinees	1st Time Passers
RA	1/1/15 - 2/28/15	Jan-15	162	39%	4	
RA	3/1/15 - 12/15/2015	Mar-15	2605	47%	880	47%
FR1	3/1/15 - 12/15/2015	May-13	82	41%	29	45%
FR2	1/1/15 - 2/28/15	Jun-14	464	24%	208	
FR2	3/1/15 - 12/15/2015	Mar-15	2548	39%	1181	41%
FR3	1/1/15 - 2/28/15	Jun-14	245	22%	129	
FR3	3/1/15 - 12/15/2015	Mar-15	895	43%	424	41%
OPR1	3/1/15 - 12/15/2015	May-13	20	40%	14	67%
OPR2	3/17/14 - 12/31/14	May-13	81	36%	75	
OPR2	3/1/15 - 12/15/2015	Jan-15	183	57%	74	70%
OPR3	03/17/14 - 12/31/14	May-13	101	49%	27	
OPR3	3/1/15 - 12/15/2015	Jan-15	93	72%	29	78%

CURRENT VERSION OF EXAM
PREVIOUS VERSION OF EXAM

WDO ACTIVITIES FILED

	2011/12	2012/13	2013/14	2014/15	2015/16	MO. AVG
July	116,972	110,432	123,958	122,803	121,639	**118,541**
August	124,622	110,534	116,087	112,400	112,511	**115,911**
September	117,013	103,223	129,161	116,100	115,977	**116,374**
October	120,171	120,645	117,714	123,250	123,409	**120,445**
November	110,723	102,655	103,787	94,750	100,779	**102,979**
December	91,644	88,935	101,132	95,373		**94,271**
January	84,492	94,775	92,959	88,247		**90,118**
February	95,226	98,208	88,870	97,884		**95,047**
March	108,429	114,785	109,979	124,448		**114,410**
April	118,528	121,802	122,692	131,292		**123,579**
May	111,594	115,207	114,956	116,578		**114,584**
June	113,080	116,313	117,773	124,648		**117,954**
FY Total	***1,312,494***	***1,297,514***	***1,339,068***	***1,347,773***		**1,324,212**
AVG PER MO.	109,375	108,126	111,589	112,314		

STRUCTURAL PEST CONTROL BOARD

REGULATORY ACTION STATUS

SECTION	SUBJECT	STATUS
1911	Addresses – Permits licensees to request a mailing address other than the address of record.	March 13, 1996 – Approved by the Office of Administrative Law.
	Addresses – Requires applicators to report change of address.	August 12, 1996 – Approved by the Office of Administrative Law.
	Transfer of Employment – Allow employers to disassociate employees	**January 15, 2015 – Proposed text approved by Board Members** **Contradicts B&P Code Section 8567 – Being referred to Act Review Committee**
1912	Branch Office Registration – Section 100 Change. To change the phrase "A registered company who opens a branch shall ..." to "A registered company which opens a branch office shall..."	Section 100 Change – Approved by the Office of Administrative Law on May 17, 2004.
1914	Name Style – Delete Board's responsibility to disapprove confusingly similar name styles.	December 16, 1998 – Public Hearing. Disapproved by the Board. April 4, 2003 - Public Hearing - Board voted to adopt. February 14, 2004 Rulemaking File expired due to Executive Order. Noticed for Public Hearing: April 8, 2005. Adopted by the Board. March 21, 2006 Approved by the Office of Administrative Law.

1918	Supervision – Clarifies that a field representative or an operator can supervise. Supervision – Permits qualifying managers to supervise multiple locations.	August 12, 1996 – Approved by the Office of Administrative Law. December 16, 1998 – Public Hearing. Referred to Rules and Regulations Committee. August 6, 1999 – Modified language mailed. January 11, 2001 Public Hearing. Adopted by the Board. Rulemaking file not completed by deadline of December 1, 2001
1918	Re-states supervision of multiple locations, clarifies liability / responsibility of qualifying manager[s] & supervisor(s).	April 4, 2003 Public Hearing, referred to Rules and Regs Committee. Committee meeting held September 17, 2003. Placed on agenda for October 17, 2003 Bd. Mtg. Modified Text mailed Nov. 19, 2003. Comments due Dec. 3, 2003. No comments rec'd. February 14, 2004 Rulemaking File expired due to Executive Order. Noticed for Public Hearing: April 8, 2005. Adopted by the Board. March 21, 2006 - Approved by the Office of Administrative Law.
1919	Research Panel – Deletes reference to public board member on panel.	March 13, 1996 – Approved by the Office of Administrative Law.
1920	Cite & Fine – Authorizes board staff to issue citations and fines.	August 13, 1998 – Approved by the Office of Administrative Law.
	Cite & Fine – Amends to clarify no appeal after modification of decision.	October 15, 1999 – Public Hearing - Board voted to adopt.
1920 (e)(1)(2)(3)	Cite & Fine – Specifies that a second informal conference for a modified citation will not be allowed.	January 11, 2001 - Public Hearing - Board voted to adopt. December 1, 2001 Rulemaking File not completed by deadline. April 4, 2003 - Public Hearing - Board voted to adopt. February 14, 2004 Rulemaking File expired due to Executive Order. Noticed for Public Hearing: April 8, 2005. Adopted by the Board. March 21, 2006 - Approved by the Office of Administrative Law.

1920(b)	Citation - Assessment of Fines – SB 362 increased max fine amt to $5000. Repealed specific criteria required in assessing fines in excess of $2,500.	Section 100 Change pending Administrative decision to go forward. Filed with Sec. of State: 12-18-03. Board approved DCA's four sets of circumstance for max. fine on October 8, 2004. Noticed for Public Hearing July 15, 2005. December 30, 2005 – Approved by the Office of Administrative Law. Agency subsequently agreed that the specific criteria from 2004 for fines in excess of $2,500 should no longer apply. Board approved on April 22, 2010. December 22, 2010 Notice, ISOR, Language, Std 399 submitted to Linda Otani for review/approval by DPR and Agency. April 12, 2011 DPR returned package with approval signatures. May 10, 2012 – Public Hearing – Board voted to adopt. March 22, 2013 rulemaking file filed with Office of Administrative Law May 8, 2013 – Disapproved by OAL Economic Impact Statement not included June 25, 2013 – 15 day notice to add Economic Impact Statement July 17, 2015 – Resubmitted to OAL August 8, 2013 – Approved by OAL Became Effective October 1, 2013
1922	Civil Penalty Actions by Commissioners – Specifies penalty ranges. Penalty ranges serious, minor and moderate upped to mirror new law.	May 14, 1998 – Approved by the Office of Administrative Law. Noticed for Public Hearing: October 7, 2005. Adopted by the Board. August 25, 2006 – Approved by the Office of Administrative Law.
1922.3	Course requirements by County Agricultural Commissioners - Will place into regulation specific guidelines for licensee / County Ag Commissioners re: civil penalty actions.	Noticed for the April 23, 2004 Board Meeting. Approved by the Office of Administrative Law - July 6, 2005.

1923	Consumer Complaint Disclosure. DCA created new document: Public Information System – Disclosure.	July 18, 2003 - Public Hearing - Board approved to adopt after proposed language modified with a 15-day public comment period. Rulemaking file placed on hold due to Executive Order. Withdrawn by DCA Legal Dept. Noticed for Public Hearing: October 7, 2005. Board voted to not proceed. (Language needs re-drafting – (a)4(d)(A) and (B)(ii) – now conforms to healing arts situation, and, if [A] is satisfied – so is [B])
1934	Board Approved Operator's License Course – Specifies time period in which courses must be completed.	August 13, 1998 – Approved by the Office of Administrative Law.
1936	**Operator and Field Representative License Applications Revisions to include military / veteran status, revised criminal history question, etc.**	March 27, 2014 – Staff directed by Board to begin rulemaking process to revise forms June 4, 2015 - Noticed for Public Hearing **July 23, 2015 - Public Hearing – Adopted by Board** **August 20, 2015 – To DCA for Review**
1936.1	**Company Registration Form Revisions to include military / veteran status, revised criminal history question, etc.**	March 27, 2014 – Staff directed by Board to begin rulemaking process to revise forms June 4, 2015 - Noticed for Public Hearing **July 23, 2015 - Public Hearing – Adopted by Board** **August 20, 2015 – To DCA for Review**
1936.2	Applicator – Established by regulation the form for the applicator's license.	August 12, 1996 – Approved by the Office of Administrative Law.
1936.2	**Applicator License Application Form Revisions to include military / veteran status, revised criminal history question, etc.**	March 27, 2014 – Staff directed by Board to begin rulemaking process to revise forms June 4, 2015 - Noticed for Public Hearing **July 23, 2015 - Public Hearing – Adopted by Board** **August 20, 2015 – To DCA for Review**

1937	Qualification of Applicant – Specifies minimum number of hours of training and experience. IPM training and experience – Requires that branch 2 and/or 3 applicants complete training and experience in structural Integrated Pest Management as part of their pre-licensing requirements	August 13, 1998 – Approved by the Office of Administrative Law. January 2008 – Noticed for Public Hearing to amend the current regulation. April 18, 2008 - Public Hearing - Board approved to adopt. June 26, 2008 - Rulemaking file submitted to DCA for Director review. November 18, 2008 – Clarification of the effective date needed for section 1950 of the rulemaking file. January 6, 2009 – Rulemaking file submitted to DCA for Director review. March 20, 2009 - Approved by the Office of Administrative Law.
1937.11	Disciplinary Guidelines – Incorporates by reference the Manual of Disciplinary Guidelines and Model Disciplinary Orders. Clean up language to change reference of UC Berkeley correspondence course to a CE course approved by board.	April 14, 1997 – Approved by the Office of Administrative Law. Board approved on October 28, 2010. December 22, 2010 Notice, ISOR, Language, Std 399 submitted to Linda Otani for review/approval by DPR and Agency. April 12, 2011 DPR returned package with approval signatures. May 10, 2012 – Public Hearing - Board voted to adopt. March 22, 2013 rulemaking file filed with Office of Administrative Law May 8, 2013 – Disapproved by OAL Economic Impact Statement not included June 25, 2013 – 15 day notice to add Economic Impact Statement July 17, 2015 – Resubmitted to OAL August 8, 2013 – Approved by OAL Became Effective October 1, 2013

1937.11	**Revisions regarding when suspension time must be served, length of probation, tolling of probation, etc.**	**March 26, 2015 - Board ask for additional time to review and ensure that maximum penalties are sufficient.** **July 23, 2015 – Approved by Board Members**
1937.17	Customer Notification of Licensure – Adopts regulation requiring practitioner notification to customer of licensure.	October 15, 1999 – Public Hearing - Referred to committee. January 18, 2002 - Public Hearing adopted by the board with modified text. December 16, 2002 - Approved by the Office of Administrative Law.
1940 1941 1942	Applicator – Amends these actions to make distinction between field representatives, operators and applicators.	August 12, 1996 – Approved by the Office of Administrative Law.

1948	Applicator Renewal Fee – Establishes the fee for applicator license renewal. Applicator – Establish and specify fee for applicator's license and license renewal.	June 26, 1998 – Public Hearing. Pending approval by Department of Finance. January 20, 2000 – Public Hearing - Board voted to adopt. March 13, 2002 disapproved by OAL. April 12, 2002 Public Hearing: Board voted to take no action. May 5, 2002: Rulemaking file submitted to the Director. July 7, 2002 file disapproved, DCA opposed approval due to Board's current fund condition. April 4, 2003 - Public Hearing - Board voted to adopt. February 14, 2004 Rulemaking File expired due to Executive Order. Noticed for Public Hearing: April 8, 2005. Adopted by the Board. April 2005 - DCA opposed proposal. Withdrawn from rulemaking file on April 28, 2005 for separate submission. Noticed for Public Hearing: October 7, 2005. Adopted by the Board. August 25, 2006 – Approved by the Office of Administrative Law.
1948	Applicator license/renewal fee lowered to $10, Operator license/renewal fee lowered to $120.	
	Field Representative – Increase field representative examination fee.	October 15, 1999 – Public Hearing - Adopted by the Board. January 20, 2000 Board decided to drop this section.
1950	Continuing Education - Deletes outdated renewal requirements.	August 12, 1996 - Approved by the Office of Administrative Law.

1950	Applicator Continuing Education – Establish and specify number and type of continuing education hours required for renewal of applicator's license. At April 2005 Hearing CE hours were changed to 12 hrs total, 8 covering pesticide application/use and 4 covering SPC Act & its rules & regulations or structural pest related agencies' rules & regulations.	June 26, 1998 - Public Hearing. Pending approval by Department of Finance. January 20, 2000 - Public Hearing Board voted to adopt. March 13, 2001 disapproved by the OAL. April 12, 2002 - Public Hearing. Board voted to adopt. Disapproved by the Director July 7, 2002. April 4, 2003 - Public Hearing - Board voted to proceed after 15-Day Notice. Notice mailed June 11, 2003, final comments due June 30, 2003. February 14, 2004 Rulemaking File expired due to Executive Order. Noticed for Public Hearing: April 8, 2005. Board voted to proceed after a 15-Day Notice. Notice mailed: May 27, 2005. March 21, 2006 - Approved by the Office of Administrative Law.
1950	Continuing Education - Deletes language regarding Wood Roof Cleaning & Treatment Continuing Education - Hours.	Change without Regulatory Effect - Approved by the Office of Administrative Law effective March 26, 2002.
	Continuing Education - To establish four hours in ethics for license renewal of Operators and Field Representatives.	Noticed for April 23, 2004 Bd. Mtg. Matter considered and rejected at July 23, 2004 Special Mtg. Withdrawn July 2004 with Notice of Decision Not to Proceed.
	Continuing Education - Requires that branch 2 and/or 3 licensees gain continuing education hours in structural Integrated Pest Management as part of their license renewal requirements.	Noticed for the April 18, 2008 Board Meeting. April 18, 2008 - Public Hearing - Board approved to adopt after proposed language modified with a 15-day public comment period. June 26, 2008 - Rulemaking file submitted to DCA for Director review. November 18, 2008 – Clarification of the effective date needed for section 1950 of the rulemaking file. January 6, 2009 – Rulemaking file submitted to DCA for Director review. March 20, 2009 - Approved by the Office of Administrative Law.

1950.1	Armed Services Exemption – Grants a one-year extension for a licensee to complete his/her continuing education requirements if his/her license expired while serving for the United States armed services.	Noticed for the January 23, 2009 Board Meeting. January 23, 2009 - Public hearing, Board voted to send out 15-day notice of modified text. February 9, 2009 – Notice of modified text sent out. June 10, 2009 - Rulemaking file submitted to DCA for Director review. August 5, 2009 – Received approved rulemaking file from DCA. August 5, 2009 – Final rulemaking file submitted to OAL. September 16, 2009 – Approved by the Office of Administrative Law
1950.5(c),(d)(g),(h),[g]	Continuing Education - Requires that course providers administer a second examination.	March 13, 1996 - Approved by the Office of Administrative Law.
1950.5(c),(d)(g),(h),[g]	Continuing Education Requirements, Hour Value System, removal of language regarding wood roof cleaning and treatment.	March 26, 2002 - Approved by the Office of Administrative Law
1950.5	Hour Value System - Require all C.E. providers to administer written tests after licensees complete approved courses in technical or rules and regulations; equivalent activities will no longer be granted C.E.; Board mtg. attendance will drop to 4 hrs total C.E. credit - 1 hr General Ed and 1 hr Rules & Regs per meeting.	Noticed for the April 23, 2004 Board Meeting. Approved by the Office of Administrative Law - July 6, 2005.

1950.5	Hour Value System - Establish an hour value for board approved Integrated Pest Management courses.	Noticed for the April 18, 2008 Board Meeting. April 18, 2008 - Public Hearing - Board approved to adopt. June 26, 2008 - Rulemaking file submitted to DCA for Director review. November 18, 2008 – Clarification of the effective date needed for section 1950 of the rulemaking file. January 6, 2009 – Rulemaking file submitted to DCA for Director review. March 20, 2009 - Approved by the Office of Administrative Law.
1951	Continuing Education - Makes distinction between field representative, operators and applicators.	August 12, 1996 - Approved by the Office of Administrative Law.
	Continuing Education – Licensing examination to replace continuing education examination.	October 15, 1999 – Public Hearing - referred to committee. April 6, 2000 – Committee recommendations to the Board.
	Examination in Lieu of C.E. - To change references of operator/field representative to "licensee" and clarify that a passing score is 70% or higher.	Noticed for the April 23, 2004 Board Meeting. Approved by the Office of Administrative Law - July 6, 2005.
1953(a)	Providers of Continuing Education - C.E. providers that providers do not charge an attendee fee to be exempt from the $25 course approval fee. Thus eliminating financial burden to the provider. Adopt a revised form 43M-18.	January 11, 2001 - Public Hearing - Board voted to adopt. February 2001-DCA opposed proposal. July 18, 2003 - Public Hearing Board voted to adopt new form. March 17, 2004 Rulemaking file on hold due to Executive Order. Approved by Office Of Administrative Law on August 12, 2004.

1953(f)(3)	Approval of Activities - Revised Form.	July 18, 2003 Public Hearing - Board voted to adopt the revised form. Approved by Office Administrative Law, Section 100 Change effective on May 2, 2003.
1953(f)(3)	Section 100 Change – Typo. The dates for the form numbers were duplicated. Delete (New 5/87) and replace it with (Rev. 11/99) Revise the form - Return it back to 43M-38 (5/87). Current form (Rev.11/99) is obsolete. Correction of reversal of form numbers 43M-38 and 43M-39 in language and 43M-39 given Rev.10/03 date.	Section 100 Change to OAL on May 13, 2004. Withdrawn June 17, 2004. Change requires language be re-noticed. Board needs to notice for public hearing. Approved by the Office of Administrative Law - July 6, 2005
1953(3) (A)(C)(D)(E) (4)(g)	Approval of Activities - Clean up language in item (3)(A), define "syllabus" in item (3)(C), revision of form No 43M-39, and language regarding the cost of postage in item (3)(D), delete the words "or products" and language regarding the approval for meetings of in-house staff or employee training being approved in item (4)(g).	Noticed for April 23, 2004 Board Meeting. Approved by the Office of Administrative Law - July 6, 2005.
1953(f)(3)(D)	Approval of Activities - Remove the requirement that continuing education course providers provide course evaluation forms to students.	Noticed for the April 18, 2008 Board Meeting. April 18, 2008 - Public Hearing - Board approved to adopt. June 26, 2008 - Rulemaking file submitted to DCA for Director review. November 18, 2008 – Clarification of the effective date needed for section 1950 of the rulemaking file. January 6, 2009 – Rulemaking file submitted to DCA for Director review. March 20, 2009 - Approved by the Office of Administrative Law.

1960 **(New, Proposed)**	**Fingerprint Requirement – requires all licensees who have not previously been fingerprinted to do so upon license renewal**	March 26, 2015 - Text Approved by Board Members June 4, 2015 - Noticed for Public Hearing **July 23, 2015 - Public Hearing – Adopted by Board** **August 20, 2015 – To DCA for Review** **December 1, 2015 – Approved by DCA, to Agency for Review**
1970	Standards - Construction elements allowing passage of fumigants.	October 12, 2000 - Public Hearing - Board voted to adopt with modifications. November 23, 2001 - Approved by the Office of Administrative Law.
1970	Fumigation Log - Delete the reporting requirements of the name and address of the guard, and delete the date and hour the police department was notified of fumigation. Rev. form 43M-47. Add additional fumigant calculators on the Fumigation Log	January 11, 2001 - Public Hearing - Board voted to adopt. Rulemaking file not complete by deadline of December 1, 2001. April 4, 2003 - Public Hearing. Due to errors in language, re-noticed for July 18, 2003 - Public Hearing. Board voted to adopt new language and revise log form number 43M-47. Approved by Office of Administrative Law on August 12, 2004. Noticed for Public Hearing July 20, 2007. July 20, 2007 - Public Hearing. Board voted to adopt. September 26, 2007 language under DCA legal review by the Director. March 17, 2008 – Approved by the Director, filed with the Office of Administrative Law. April 29, 2008 – Approved by the Office of Administrative Law.

1970	Standards and Record Requirements - Fumigating contractors will be required to provide a complete fumigation log to its prime contractors and retain the log for 3 years.	July 18, 2003 - Board voted to place on October 17, 2003 board meeting agenda. October 17, 2003 Board voted not to adopt. Noticed for Public Hearing July 20, 2007. July 20, 2007 - Public Hearing. Board voted to adopt. September 26, 2007 language under DCA legal review by the Director. March 17, 2008 – Approved by the Director, filed with the Office of Administrative Law. April 29, 2008 – Approved by the Office of Administrative Law.
1970.3	Securing Against Entry - Includes clamshell locks and pins in general description of secondary locks.	March 13, 1996 - Approved by the Office of Administrative Law.
1970.4	Pesticide Disclosure Requirement - Requires primary contractor to retain OFN for three years.	July 28, 1995 - Board voted to adopt. Technical error - Necessary to re-notice all amendments.
	Pesticide Disclosure Requirement - Includes the required Occupants Fumigation Notice into regulation.	May 12, 1995 - Public Hearing. Referred to the Laws and Regulations Committee for further review. December 8, 1995 - Board adopted revision to the OFN. Technical error- Necessary to re-notice all amendments.
1970.4	Pesticide Disclosure Requirement - Requires primary contractor to retain Occupants Fumigation Notice (OFN) for three years. Includes the required OFN into regulation.	April 28, 1998 – Approved by the Office of Administrative Law.
	Pet Notification - Amends OFN to include notification regarding neighboring pets.	January 20, 2000 - Board voted to adopt. June 23, 2000 Board voted not to proceed. January 2005 Board voted to proceed. Noticed for Public Hearing July 15, 2005. December 30, 2005 – Approved by the Office of Administrative Law.
	Disclosure Requirement - Deletes language regarding Wood Roof Cleaning & Treatment Pesticide.	March 26, 2002 change without regulatory effect approved by the Office of Administrative Law.

1970.4	Disclosure Requirement – Include presence of conduit language on the OFN	Noticed for Public Hearing July 20, 2007. July 20, 2007 - Public Hearing. Board voted to adopt. September 26, 2007 language under DCA legal review by the Director. March 17, 2008 – Approved by the Director, filed with the Office of Administrative Law. April 29, 2008 – Approved by the Office of Administrative Law.
1970.4	**Allows for signed Occupants Fumigation Notice to be in electronic format**	January 15, 2015 - Text Approved by Board Members June 4, 2015 - Noticed for Public Hearing **July 23, 2015 - Public Hearing** **August 20, 2015 – To DCA for Review**
1970.5	Aeration - Clarifies that a field representative or operator must be present during aeration. Amendment regarding when licensee is required to be present to correlate with DPR's CAP regulation. – DEAD 05/10/12	August 12, 1996 – Approved by the Office of Administrative Law. December 22, 2010 Notice, ISOR, Language, Std 399 submitted to Linda Otani for review/approval by DPR. March 11, 2011 DPR request this regulation be repealed. April 28, 2011 Board voted to repeal regulation. May 10, 2012 – Public Hearing – Board voted to non-adopt proposed repeal of regulation.
1970.6	Fumigation - Construction elements allowing passage of fumigants.	December 16, 1998 - Public Hearing - Action postponed until further input. June 18, 1999 - Board voted to adopt with modifications. November 23, 2001 - Approved by the Office of Administrative Law.
1971	Gas Masks – Removed the subsection concerning gas masks. B&P Code section 8505.15 was repealed January 1, 2008	Noticed for Public Hearing July 24, 2009 July 24, 2009 – Board members voted to carryover to next board meeting. October 22, 2009 – Board members voted not to proceed with amending the regulation.

1973	Re-entry Requirements - Requires use of proper testing equipment and changes printing on re-entry notice from red to black.	March 13, 1996 - Approved by the Office of Administrative Law.
1973	Notice of Re-entry – Replace a product trade name with the active ingredient.	Noticed for Public Hearing July 20, 2007. July 20, 2007 - Public Hearing. Board voted to adopt. September 26, 2007 language under DCA legal review by the Director. March 17, 2008 – Approved by the Director, filed with the Office of Administrative Law. April 29, 2008 – Approved by the Office of Administrative Law.
1974	Fumigation Warning Signs - Specifies size and placement of signs. Fumigation warning signs to include the name of the fumigant used and its active ingredient.	March 13, 1996 - Approved by the Office of Administrative Law. Noticed for Public Hearing January 21, 2010 Public hearing held January 21,2010 – Board voted to adopt . May 18, 2010, Rulemaking File submitted to DPR for approval. September 23, 2010 DPR returned package with approval signatures. September 30, 2010 Rulemaking File submitted to OAL. November 8, 2010 approved by OAL
1983(i)	Handling, Use and Storage of Pesticides - Clarification of bait station (rodenticide and avicide) reference.	December 16, 1998 - Public Hearing December 30, 1998 - Notice of Modification mailed. January 11, 2001 - Public Hearing - Board voted to adopt. Rulemaking File not complete by deadline date of December 1, 2001. April 4, 2003 - Public Hearing - Board voted to adopt. February 14, 2004 Rulemaking File expired due to Executive Order. Noticed for Public Hearing: April 8, 2005. Adopted by the Board. March 21, 2006 - Approved by the Office of Administrative Law.

1983(j)	Language regarding the removal of termite bait stations when a contract for service is terminated.	July 18, 2003 - Public hearing Board voted to adopt with proposed amendments. Approved by the Office of Administrative Law on August 12, 2004
1984	Proposed regulation to define structural Integrated Pest Management	October 2007 – Noticed for Public Hearing to adopt new section. March 10, 2008 – Final rulemaking file submitted to the Department. June 6, 2008 – Approved by the Director, filed with the Office of Administrative Law. July 9, 2008 - Approved by the Office of Administrative Law. Noticed for the January 23, 2009 Board Meeting. January 23, 2009 - Public hearing, Board voted to adopt with proposed amendments. June 10, 2009 - Rulemaking file submitted to DCA for Director review. August 5, 2009 – Received approved rulemaking file from DCA. August 5, 2009 – Final rulemaking file submitted to OAL. September 16, 2009 – Approved by the Office of Administrative Law
1990	Report Requirements - Defines separated reports and structural members, and addresses reporting requirements for carpenter ants/bees.	March 13, 1996 - Approved by the Office of Administrative Law.
1990(g)	Report Requirements – Inspection of wooden decks.	April 28, 1998 - Approved by the Office of Administrative Law.
1990.1	Report Requirements - Repeal language under Section 8516.1(b) and (c)(1)(8).	March 26, 2002 change without regulatory effect - Approved by the Office of Administrative Law.
1991	Report Requirements - Eliminates requirement to cover accessible pellets and frass, and requires replacement of wood members no longer serving purpose to support or adorn the structure.	March 13, 1996 - Approved by the Office of Administrative Law.

1991(A)(B) (C)	Report Requirements - Specifies the restoration, refastening, removal or replacement of wooden decks, wooden stairs or wooden landings.	April 28, 1998 - Approved by the Office of Administrative Law.
1991(a)(5) 1991(a)(5)	Report Requirements – Allows for reinforcement of fungus infected wood and permits surface fungus to be chemically treated or left as is once the moisture is eliminated.	April 3, 1996 – Approved by the Office of Administrative Law.
1991(a)(8)c)	Report Requirements – Requires registered companies to report that local treatment and/or corrective work will not eradicate other undetected infestations which may be located in other areas of the structure.	October 6, 1995 – Public Hearing - Board voted to non-adopt. Referred to committee to consider the matter of an all-encompassing disclosure statement on all inspection reports addressing inaccessible areas and potential infection and infestations.
	Report Requirements - Local treatment notification.	October 15, 1999 Public Hearing - Board voted to adopt. January 11, 2001 - Referred back to committee for comments. October 19, 2001 Public Hearing - Board voted to non-adopt, referred language back to committee. August 31, 2002 publication date expired. October 11, 2002 - Re-noticed -Public Hearing. Board voted to adopt. January 8, 2003 language under DCA legal review by the Director. February 21, 2003 filed with the Office of Administrative Law. Rulemaking file withdrawn from OAL March 27, 2003 pending a 15-Day Notice. File resubmitted to OAL. July 26, 2003 - Approved by the Office of Administrative Law.

1991(a)(9)	Report Requirement - Corrective Measures for extermination of a subterranean termite infestation and termite tubes. Exception for above ground termite bait stations.	January 11, 2001 Board voted to amend 1991(a)(9). October 19, 2001 Board passed unanimously to modify language with a 15-Day Notice. Notice mailed January 28, 2002, 1 year past the publication date. Bd. needs to re-notice. Noticed for Public Hearing July 15, 2005. December 30, 2005 – Approved by the Office of Administrative Law.
1991(13)(A) (B)(C)	Report Requirements - Delete specific recommendations regarding wooden decks, wooden stairs and landings. Language already exists in 1991(a)(5).	October 19, 2001 Board voted to repeal the language. August 31, 2002 publication date expired. April 4, 2003 - Public Hearing. Board voted to go forward after 15-Day Notice. Notice mailed June 11, 2003, final comments due June 30, 2003. February 14, 2004 rulemaking file expired due to Executive Order. Noticed for Public Hearing: April 8, 2005. Adopted by the Board. March 21, 2006 - Approved by the Office of Administrative Law.
1991(b)(10)	Report Requirements – Non-substantive correction to heading.	March 28, 2000 – Filed with the Office of Administrative Law. May 15, 2000 - Approved by the Office of Administrative Law.
1993(a)(b) (c)(d)(e)	Inspection - Specifies that reports shall comply With 8516 and defines different types of inspection reports. Also clarifies difference between duties performed by a field representative, operator and applicator.	March 13, 1996 - Approved by the Office of Administrative Law.
	Inspection Reports - Clarifies that the requirement applies to licensed field representative and licensed operators, not license applicators.	August 12,1996 - Approved by the Office of Administrative Law.

1993	Deletes language regarding the filing of stamps.	April 4, 2003 - Public Hearing - Board voted to adopt. February 14, 2004 rulemaking file expired due to Executive Order. Noticed for Public Hearing: April 8, 2005. Adopted by the Board. March 21, 2006 -Approved by the Office of Administrative Law.
1993, 1998	Report Requirements – To eliminate reference to filing inspection reports and notices of work completed and require companies to file the address of properties inspected.	January 20, 2000 - Public Hearing Board voted to adopt. March 13, 2001 Rulemaking File disapproved by the Office of Administrative Law. April 4, 2003 - Public Hearing. Sec.1996 proceed with a 15-Day Notice, Sec. 1996.3 re-notice for July 18, 2003 meeting, Sec.1993 & 1998 Board voted to adopt. February 14, 2004 Rulemaking File expired due to Executive Order. Noticed for Public Hearing: April 8, 2005. Adopted by the Board. March 21, 2006 - Approved by the Office of Administrative Law.
1993.1	Reinspection Language – To adopt section 1993.1 to require Wood Destroying Pest and Organism Inspection Reports to contain statement that work performed by others must be reinspected within ten days of request at a charge no greater than the original inspection fee.	May 22, 1998 – Rulemaking file disapproved by Office of Administrative Law. December 16, 1998 – Public Hearing. December 30, 1998 - Notice of Modifications mailed. January 11, 2001 - Public Hearing. Board voted to adopt. December 1, 2001 rulemaking file not completed by deadline. April 4, 2003 re-noticed for Public Hearing. Approved by the Office of Administrative Law - July 6, 2005.

1993.2	Bait Stations.	October 19, 2001 Board passed to adopt new language. Publication date expired. October 11, 2002 language re-noticed for Board meeting. December 23, 2002 rulemaking file under review. January 8, 2003 under DCA legal review by the Director. February 21, 2003 filed with the Office of Administrative Law. March 27, 2003 rulemaking file withdrawn from OAL pending a 15-Day Notice. July 26, 2003 - Approved by the Office of Administrative Law.
1993.2	**Bait Stations.**	**October 8, 2015 Board voted to adopt the Act Review Committee's revisions and instructed staff to begin the rulemaking process**
1993.3	Bait Stations.	October 12, 2001 Board passed to adopt new language. Publication date expired. Language re-noticed for October 11, 2002 Board meeting. Rulemaking package under review 12-23-02. January 8, 2003 – Under DCA legal review by the Director. February 21, 2003 filed with the Office of Administrative Law. March 27, 2003 rulemaking file withdrawn from OAL pending a 15-Day Notice. July 26, 2003 - Approved by the Office of Administrative Law.
1993.3	**Bait Stations.**	**October 8, 2015 Board voted to adopt the Act Review Committee's recommendation to repeal this section and instructed staff to begin the rulemaking process**
1993.4	**Termite Monitoring Devices.**	**October 8, 2015 Board voted to adopt the Act Review Committee's recommended addition of this section and instructed staff to begin the rulemaking process**

1996	Pre-Treatment - Specifies Pre-Treatment Inspection Report/Notice of Intent form.	August 30, 1996 - Public Hearing. Amendment was not adopted. Board referred to Pre-Treatment Committee.
	Inspection Report – Includes a first page of the Inspection Report for scanning purposes.	August 13, 1998 – Approved by the Office of Administrative Law.
1996 1996.2	Requirements for Reporting All Inspections Under Section 8516(b). Revised Inspection Report Form and Standard Notice of work Completed and Not Completed.	January 18, 2002 Public Hearing - Board voted to adopt. Form Rev. date completed 1-15-03. April 4, 2003 Board again voted to adopt regulatory lang. Noticed for Public Hearing July 15, 2005. December 30, 2005 – Approved by the Office of Administrative Law. December 16, 2002 - Approved by the Office of Administrative Law.
1996.1	Inspection and Completion Tags - The completion tag shall include the method(s) of treatment. Completion tag to include the trade name of any pesticide used and active ingredient.	July 18, 2003 Public Hearing - Board members voted to adopt. Rulemaking file placed on hold due to Executive Order. Approved by Office of Administrative Law August 12, 2004 Noticed for Public Hearing January 21, 2010 Public hearing held January 21,2010 – Board voted to adopt. May 18, 2010, Rulemaking File submitted to DPR for approval. September 23, 2010 DPR returned package with approval signatures. September 30, 2010 Rulemaking File submitted to OAL. November 8, 2010 approved by OAL.
1996.2	Completion Notice – Includes a first page of the Completion Notice for scanning purposes.	August 13, 1998 – Approved by the Office of Administrative Law.
	Revised Completion Notice Form.	January 18, 2002 Public Hearing - Adopted by the Board. December 16, 2002 - Approved by the Office of Administrative Law.

1996.3	Requirements for Reporting property addresses. Adopt new language that will provide guidelines of what is required when filing the WDO form with the Board. Increase filing fee to $2.00 on form Increase filing fee to $2.50 on form	March 17, 2003 Rulemaking file on hold due to Executive Order. July 18, 2003 Public Hearing - Board voted to adopt after a 15-Day Notice of modified language. Approved by Office of Administrative Law July 13, 2004 Noticed for Public Hearing July 24, 2009 July 24, 2009 – Board voted to adopt. Sept. 3, 2009 – Rulemaking file submitted to DCA for review. January 21, 2010, Board considered 15-day comments to increase fee to $2.50. Board voted to adopt at $2.50 per activity. May 20, 2010 Office of Administrative Law approves Rulemaking File to increase fee to $2.50 effective July 1, 2010.
1997	Filing Fee – Inspection Reports and Completion Notices. Filing Fee – Inspection Reports and Completion Notices – Fee increase.	October 15, 1996 – Approved by the Office of Administrative Law. December 16, 1998 – Public Hearing Adopted by Board. Rulemaking file not submitted based on recommendations from DCA that fee increase not necessary to fund condition.

1997	Filing Fee – WDO Activity Filing Fee.	December 16, 1999 – Non-substantive change without regulatory effect filed with the Office of Administrative Law. January 28, 2000 - Approved by the Office of Administrative Law.
	Filing Fee – Increase WDO Activity Filing Fee to $2.00.	Noticed for Public Hearing July 24, 2009 July 24, 2009 Board voted to adopt. Sept. 3, 2009 – Rulemaking file submitted to DCA for review.
	15-Day Modified Text to increase fee to $2.50 per activity effective July 1, 2010	Dec. 28, 2009 – Board passed unanimously to modify language with a 15-Day Notice. Notice mailed on December 29, 2009, final comments due January 13, 2010 January 21, 2010, Board considered 15-day comments to increase fee to $2.50. Board voted to adopt at $2.50 per activity. May 20, 2010 Office of Administrative Law approves Rulemaking File to increase fee to $2.50 effective July 1, 2010.
1999.5	Advertising Guidelines.	June 18, 1999 – Public Hearing August 27, 1999 – Modified language mailed November 22, 2001 approved by the Office of Administrative Law. September 24, 2002 non-substantive change without regulatory effect approved by the Office of Administrative Law.
	Include an introductory statement to clarify the purpose of the regulation. Clarify that certain subsections pertain only to Branch 3 companies.	October 2007 – Noticed for Public Hearing to amend the current regulation. January 2008 – Board moved to request further analysis by Legal Counsel and staff. June 26, 2008 - Rulemaking file submitted to DCA for Director review.

1999.5 (cont)		September 11, 2008 - Rulemaking file submitted to OAL for approval. October 24, 2008 - Rulemaking file disapproved by OAL. February 19, 2009 – Task Force meeting held to discuss OAL's disapproval March 2009 – Extension granted by OAL. June 2, 2009 – Resubmittal submitted to DCA for Director review. June 8, 2009 – Resubmittal submitted to OAL for approval. July 17, 2009 – Approved by OAL

ORDINANCE NO. 7,431–N.S.

URGENCY ORDINANCE ADDING A NEW SECTION 19.40.035 TO THE BERKELEY MUNICIPAL CODE CHAPTER 19.40 (BERKELEY HOUSING CODE) TO REQUIRE INSPECTION AND CERTIFICATION OF WEATHER-EXPOSED ELEVATED ELEMENTS EVERY THREE YEARS

BE IT ORDAINED by the Council of the City of Berkeley as follows:

Section 1. Findings.

The City Council finds that:

A. There is a need for additional modifications to impose more stringent requirements locally than are mandated in the adopted 2013 California Building Code.
B. The marine weather environment in Berkeley, characterized by high humidity and low overall prevailing temperatures, results in a high overall moisture content in building construction materials and slow drying of building materials and assemblies once wet or humidified.

C. Dry rot and other moisture related damage resulting from the effect of the City's climate and topography on exterior building construction features and materials pose risks to life and property.

D. Currently, there is no law that balconies and other exterior projections exposed to weather be periodically inspected to determine if they have been structurally compromised and are in need of repairs.

E. Since the City is experiencing a high volume of permit submittals for new buildings, which include balconies and similar exterior appurtenances, and there are a large number of balconies and similar appurtenances on existing buildings, it is imperative that the code amendments be adopted and become effective as soon as possible for the increased preservation of public health and safety.

Section 2. That Section 19.40.035 of the Berkeley Municipal Code is added to read as follows:

19.40.035 Section 601.4 of the Berkeley Housing Code

601.4 Structural Maintenance. All exterior elevated wood and metal decks, balconies, landings, stairway systems, guardrails, handrails, or any parts thereof in weather-exposed areas of Group R-1 and R-2 Occupancies, as defined in the most recent edition of the California Building Code, shall be inspected within six months of adoption of this section, and every three years thereafter, by a licensed general contractor, structural pest control licensee, licensed architect, or licensed engineer, verifying that

the elements are in general safe condition, adequate working order, and free from hazardous dry rot, fungus, deterioration, decay, or improper alteration. Property owners shall provide proof of compliance with this section by submitting an affidavit form provided by the City. The affidavit shall be signed by the responsible inspecting party and submitted to the Housing Code Enforcement Office. For the purpose of this section, elevated "weather-exposed areas" mean those areas which are not interior building areas and are located more than 30 inches above adjacent grade.

Section 3. Vote Required, Immediately Effective
Based on the findings and evidence in Section 1 of this Urgency Ordinance, the Council determines that this Ordinance is necessary for the immediate preservation of the public health, peace and safety in accordance with Article XIV Section 93 of the Charter of the City of Berkeley and must therefore go into effect immediately. This ordinance shall go into effect immediately upon a seven-ninths vote of the City Council, in satisfaction of the Charter of the City of Berkeley and Government Code section 65858.

At a regular meeting of the Council of the City of Berkeley held on July 14, 2015, this Urgency Ordinance was adopted by the following vote:

Ayes: Anderson, Arreguin, Capitelli, Droste, Maio, Moore, Wengraf, Worthington, and Bates.

Noes: None.

Absent: None.

Tom Bates, Mayor

ATTEST: Rose Thomsen
Rose Thomsen, Deputy City Clerk

In effect: Immediately

8504.2 Control means a pest population management system that utilizes all suitable techniques to reduce and maintain pest populations at levels below those causing economic or material injury or to so manipulate the populations that they are prevented from causing such injury.

8504.3 Eradication means the total elimination of a pest from a designated area. For purposes of this subdivision eliminate and exterminate shall have the same meaning.

8616.9. If an employee is found during an inspection or investigation not wearing personal protective equipment required by label or regulation, the commissioner shall have the ~~option to use discretion in citing an employer only if evidence of all of the following is provided:~~ discretion to issue a compliance and/or enforcement action to the employee, employer, or both. In order for the commissioner to issue a compliance and/or enforcement action to the employee only, the employer must provide evidence of all of the following:
(a) The employer has a written training program, has provided training to the employee, and has maintained a record of training as required by label or regulation.
(b) The employer provided personal protective equipment required by label or regulation, the equipment was available at the site when the employee was handling the pesticide or pesticides, and the equipment was properly maintained and in good working order.
(c) The employer is in compliance with regulations relating to the workplace and supervision of employees.
(d) The employer has documented implement~~ed~~ation and adheres to a written company policy of disciplinary action for employees who violate company policy or state or local laws or regulations.
(e) The employer has not been issued a compliance or enforcement action for violations relating to personal protective equipment for the previous two (2) years ~~history of repeated violations of this section~~.

§ 1990. Report Requirements Under Section 8516(b) 1-9, Inclusive.

(a) All reports shall be completed as prescribed by the board. Copies ~~filed with~~ provided to the board shall be clear and legible. All reports must supply the information required by Section 8516 of the Code and the information regarding the pesticide or pesticides used as set forth in Section 8538 of the Code, and shall contain or describe the following:

(1) Structural pest control license number of the ~~person~~ Branch 3 licensee(s) ~~making~~ who performed the inspection.

(2) Signature of the Branch 3 licensee(s) who ~~made~~ performed the inspection.

(3) Infestations, infections or evidence thereof.

(4) Wood members found to be damaged by wood destroying pests or organisms.

(b) Conditions usually deemed likely to lead to infestation or infection include, but are not limited to:

(1) Faulty Grade Level. A faulty grade level exists when the top of any foundation is even with or below the adjacent ~~earth~~ surface. The existing ~~earth~~ surface level shall be considered grade.

(2) Inaccessible subareas or portions thereof and areas where there is less than 12 inches clear space between the bottom of the floor joists and the unimproved ground area.

(3) Excessive Cellulose Debris. This is defined as any cellulose debris of a size that can be raked or larger. Stumps and wood imbedded in footings in earth contact shall be reported.

(4) Earth-wood contacts.

(5) Commonly controllable moisture conditions which would foster the growth of a fungus infection materially damaging to woodwork.

(c) When an infestation of carpenter ants or carpenter bees is found in a structure, control measures may be applied by a registered ~~companies holding a~~ Branch 2 or Branch 3 company ~~registration certificate~~. If a Branch 3 licensee discovers an infestation or evidence of carpenter ant or carpenter bee infestation while performing an inspection pursuant to section 8516 of the code, he or she shall report his or her findings and make recommendations for controlling the infestation.

(d) Even though the licensee may consider the following areas inaccessible for purposes of inspection, the licensee must state specifically which of these areas or any other areas were not inspected and why the inspection of these areas is not practical: furnished interiors; inaccessible attics or portions thereof; the interior of hollow walls; spaces between a floor or porch deck and the ceiling or soffit below; stall showers over finished ceilings; such structural segments as porte cocheres, enclosed bay windows, buttresses, and similar areas to which there is no access without defacing or tearing out lumber, masonry or finished work; built-in cabinet work; floors beneath coverings, areas where storage conditions or locks make inspection impracticable.

(e) Information regarding all accessible areas of the structure including but not limited to the substructure, foundation walls and footings, porches, decks, patios and steps, stairways, air vents, abutments, stucco walls, columns, attached structures or other parts of a structure normally subject to attack by wood-destroying pests or organisms.

(f) The following language shall appear just prior to the first finding/recommendation on each separated report:

“This is a separated report which is defined as Section I/Section II conditions evident on the date of the inspection. Section I contains items where there is visible evidence of active infestation, infection or conditions that have resulted in or from infestation of infection. Section II items are conditions deemed likely to lead to infestation or infection but where no visible evidence of such was found. Further inspection items are defined as recommendations to inspect area(s) which during the original inspection did not allow the inspector access to complete the inspection and cannot be defined as Section I or Section II.”

~~(g) Information must be reported regarding any wooden deck, wooden stairs or wooden landing in exterior exposure attached to or touching the structure being inspected. Portions of such structure that are not available for visual inspection must be designated as inaccessible.~~

STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

BUSINESS, CONSUMER SERVICES AND HOUSING AGENCY • GOVERNOR EDMUND G. BROWN JR.
STRUCTURAL PEST CONTROL BOARD – ADMINISTRATION UNIT
2005 Evergreen Street, Ste. 1500
P 916-561-8700 | F 916-263-2469 | www.pestboard.ca.gov

MEMORANDUM

DATE	December 7, 2015
TO	Board Members
FROM	Susan Saylor, Executive Officer Structural Pest Control Board
SUBJECT	**AGENDA ITEM XVI – PROPOSED AMENDMENTS TO CALIFORNIA CODE OF REGULATIONS (CCR) SECTION 1914**

Currently, CCR Section 1914 authorizes the Board to deny a name style for a company registration that would be issued in the same name as a company whose registration has been suspended or revoked. Additionally, it makes the use of a telephone number or a name style whose company registration has been suspended or revoked without written approval by the Board grounds for discipline.

Included in your Board packages are proposed amendments to CCR Section 1914 that would add surrendered licenses to this language.

§ 1914. Name Style - Company Registration.

No company registration certificate shall be issued in a fictitious name which the board determines is likely to be confused with that of a governmental agency or trade association. No company registration shall be issued in the same name of a firm whose company registration has been suspended, surrendered or revoked unless a period of at least one year has elapsed from the effective date of the suspension, surrender or revocation.

It shall be grounds for disciplinary action for a registered company to use the telephone number and/or name style of a firm whose company registration has been suspended, surrendered or revoked, without the prior written approval of the board.

Syllabus

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

SUPREME COURT OF THE UNITED STATES

Syllabus

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

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

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

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

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

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

all respects.

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

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

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

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

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

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

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

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

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

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

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

Syllabus

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

717 F. 3d 359, affirmed.

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

SUPREME COURT OF THE UNITED STATES

No. 13–534

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

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

[February 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

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

I

A

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

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

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

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

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

B

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

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

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

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

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

C

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

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

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

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

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

II

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

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

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

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

III

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

A

Although state-action immunity exists to avoid conflicts

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

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

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

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

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

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

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

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

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

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

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

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

B

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

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

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

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

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

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

C

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

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

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

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

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

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

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

D

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

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

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

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

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

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

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

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

E

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

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

IV

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

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

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

* * *

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

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

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–534

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

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

[February 25, 2015]

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

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

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

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

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

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

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

I

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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

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

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

safety.

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

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

III

The Court goes astray because it forgets the origin of the

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

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

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

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

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

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

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

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

III

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

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

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

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

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

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

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

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

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

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

IV

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

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

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

I. Introduction

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

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

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

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

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

[2] *Id.* at 1095.

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

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

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

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

Our answers to these questions come with the following caveats.

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

- Federal antitrust law does 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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OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

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

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

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

CONCLUSIONS

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

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

ANALYSIS

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

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

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

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

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

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

A. The *North Carolina Dental* Decision

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

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

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

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

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

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

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

[4] 15 U.S.C. §§ 1, 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] *Ibid*.

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

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

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

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

D. Legal Standards for Active State Supervision

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

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

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

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

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

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

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

[22] *Ibid.*

[23] *Ibid.*

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

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

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

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

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

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

[25] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

III. Potential Measures for Preserving State Action Immunity

A. Changes to the Composition of Boards

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Some Mechanisms for Increasing State Supervision

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

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[38] *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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[43] Bus. & Prof. Code, § 301.

[44] Bus. & Prof. Code, §§ 10, 305.

[45] See Bus. & Prof. Code, § 310.

[46] Bus. & Prof. Code, § 153.

[47] Bus. & Prof. Code, § 109.

[48] Bus. & Prof. Code, § 127.

[49] Bus. & Prof. Code, § 325.

[50] Bus. & Prof. Code, § 116.

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

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

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[51] Bus. & Prof. Code, § 313.1.

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

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

[54] Bus. & Prof. Code, § 116.

[55] Bus. & Prof. Code, § 313.1.

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

C. Legislation Granting Immunity

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

IV. Indemnification of Board Members

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

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

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

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

[59] Gov. Code, §§ 810-996.6.

[60] See Gov. Code § 810.2.

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

A. Duty to Defend

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

B. Duty to Indemnify

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

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

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

[62] Gov. Code, § 995.

[63] Gov. Code, § 995.2, subd. (a).

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

[65] Gov. Code, § 825, subd. (a).

[66] Gov. Code, § 815.2.

[67] Gov. Code, § 818.

[68] 15 U.S.C. § 15(a).

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

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

C. Possible Improvements to Indemnification Scheme

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

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

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

[70] 15 U.S.C. § 15(a).

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

[72] Civ. Code, §§ 818, 3294.

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

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

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

V. Conclusions

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

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

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

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

[75] Bus. & Prof. Code, § 453.

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

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STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

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MEMORANDUM

DATE	December 7, 2015
TO	Board Members
FROM	Susan Saylor, Executive Officer Structural Pest Control Board
SUBJECT	**AGENDA ITEM XVIII – PROPOSED FEDERAL CONTINUING EDUCATION REGULATIONS**

At the October 2015 Meeting, it was brought to the Board's attention that there are Federal Regulations currently being considered that would, among other things, mandate minimum Continuing Education requirements for our licensees.

I have included in your Board packages a chart comparing the proposed changes to existing Federal requirements and asked Darren Van Steenwyk, Chairman of the CE IPM Review Committee, to provide the Board with an update.

U.S. Environmental Protection Agency
Proposed Revisions: EPA Certification of Pesticide Applicator Rule (40 CFR 171)

Item	Proposed Revision	Existing Rule
Private Applicator Competency		
Enhance Private Applicator Competency Standards Unit VI.A.	Private applicators must demonstrate competency in the general core competency standards similar to those for commercial applicators (i.e., **label and labeling comprehension; safety; environment; pests; pesticides; equipment; application techniques; laws and regulations; responsibilities for supervisors of noncertified applicators; stewardship) along with general knowledge of agricultural pest control.**	Private applicators must be certified as competent on 5 general topics: recognizing pests, reading and understanding labeling, applying pesticides in accordance with the labeling, recognizing environmental conditions and avoiding contamination, recognizing poisoning symptoms and procedures to follow in the case of a pesticide accident.
Strengthen Private Applicator Competency Gauge Unit VI.B.	Private applicators must either **attend a training program covering the mandatory competency standards** (Unit VI.A.) **or pass a written exam**.	Private applicator certification can be done by written or oral exam, or other method approved as part of the State certification plan.
Eliminate Non-Reader Certification for Private Applicators Unit VI.C.	No "non-reader" option for persons who cannot read to obtain certification to use specific RUPs.	States can offer an alternative, product-specific certification process for persons who cannot read.
Categories for Private and Commercial Applicators		
Establish Application Method-Specific Categories for Private and Commercial Applicator Certification Unit VII.	Establish categories for private and commercial applicators performing**: aerial application, soil fumigation, and non-soil fumigation.**	No additional certification required to use certain application methods that may present higher risks if not conducted properly.

Item	Proposed Revision	Existing Rule
Establish Predator Control Categories for Private and Commercial Applicator Certification Unit VIII.	Add categories for private and commercial applicators: **sodium fluoroacetate in livestock protection collars and sodium cyanide delivered through M-44 devices**.	No predator control categories established in rule. Registration decisions and labeling for sodium fluoroacetate (Compound 1080) used in livestock protection collars and sodium cyanide delivered through M-44 devices include specific competency standards and require applicators to be competent.
Exam and Training Security Requirements		
Security and Effectiveness of Exam and Training Administration Unit IX.	Require candidates to **present identification** for initial and recertification exams and training sessions. Codify policy requiring **all exams to be closed book and proctored**.	No requirement to present identification at exam or training sessions. Competency for commercial applicators must be determined on the basis of written examination. EPA policy requires that all certification exams be closed book and proctored.
Strengthen Standards for Noncertified Applicators Working Under the Direct Supervision of Certified Applicators		
Enhance Competence of Noncertified Applicators Unit X.A.	Noncertified applicators must receive **annual training on safe pesticide application and protecting themselves and others from pesticide exposure** (similar to WPS handler training). Exemption from training requirement for those with valid WPS handler training and those who have passed the commercial core exam.	Noncertified applicators must be competent to use RUPs. No specific training requirements. For specific applications, the certified applicator must provide verifiable instructions including detailed guidance for applying the pesticide.
Establish Qualifications for Training Providers Unit X.B.	Noncertified applicator training can only be provided by one of the following: **a currently certified applicator, a State-designated trainer of certified applicators, or a person who has completed a train-the-trainer course under the WPS**.	The certified applicator provides required instructions. No qualifications required other than certification.

Item	Proposed Revision	Existing Rule
Establish Qualifications for Certified Applicators Supervising Noncertified Applicators Unit X.C.	Supervising applicators must: • Be certified in the category in which they supervise applications. • **Ensure noncertified applicators under their supervision have satisfied the training requirement**. • For specific applications**, provide a copy of all applicable labeling to the noncertified applicator** and provide specific instructions related to the application. • Ensure **means for immediate communication** between the supervisor and supervisee are immediately available.	Supervising applicators must demonstrate practical knowledge of supervisory requirements. For specific applications, supervising applicator must provide detailed guidance for applying the pesticide properly and provisions for contacting the certified applicator.
Expand Commercial Applicator Recordkeeping to Include Noncertified Applicator Training Unit XI.	Require **commercial applicators to maintain records of noncertified applicators' training** that include: the trained noncertified applicator's printed name and signature, the date of the training, the name of the person who provided the training, and the supervising commercial applicator's name.	No commercial applicator recordkeeping required related to providing verifiable instructions to noncertified applicators.
Minimum Age for Certified and Noncertified Applicators		
Establish a Minimum Age for Certified Applicators Unit XII.	Persons must be at least **18 years old** to be certified as a commercial or private applicator.	No minimum age requirement.
Establish a Minimum Age for Noncertified Applicators Unit XIII.	Persons must be at least **18 years old** to qualify as a noncertified applicator using RUPs under the direct supervision of a commercial or private applicator.	No minimum age requirement.
National Certification Period and Standards for Recertification		

Item	Proposed Revision	Existing Rule
National Certification Period **Unit XIV.A.**	Require all applicators to renew their certification (recertify) at least **every 3 years**.	States must ensure that applicators maintain a continuing level of competency and ability to apply pesticides safety and properly.
Recertification Requirements **Unit XIV.B.**	**One continuing education unit (CEU) is 50 minutes of active training time.** To renew their certification, **commercial applicators** must earn **6 CEUs covering core content and 6 CEUs per category of certification**, or they must pass written exams for core and each category of certification. To renew their certification, **private applicators** must earn **6 CEUs covering the general private applicator certification requirements and 3 CEUs per category of certification**, or they must pass written exams for general private applicator certification and each category of certification. Applicators must earn at least half of the required CEUs in the 18 months preceding the expiration of their certification.	States must ensure that applicators maintain a continuing level of competency and ability to apply pesticides safety and properly.
Revise State Certification Plan Requirements		
State Plan Modification to Implement Proposed Changes **Unit XV.3.i.**	Certification plans must meet or exceed new standards and requirements. States, tribes, and territories may either **adopt the proposed standards for noncertified applicator training or prohibit the use of RUPs by noncertified applicators working under the direct supervision of certified applicators**.	Certification plans must meet or exceed existing standards and requirements.

Item	Proposed Revision	Existing Rule
Program Reporting and Accountability Unit XV.3.ii.	**Reporting must include:** • For private and commercial applicators - new, recertified, and total number of applicators holding certifications, **by category and subcategory** (if applicable). • Any changes to the certification plan not previously evaluated by EPA. • Any planned changes to the certification plan. • **Number, description and narrative discussion of enforcement actions taken for incidents involving RUPs**.	Reporting must include: • Total number of applicators, private and commercial, by category, currently certified; and number of applicators, private and commercial, by category, certified during the last reporting period. • Any changes in commercial applicator subcategories. • A summary of enforcement activities related to use of restricted use pesticides during the last reporting period. • Any significant proposed changes in required standards of competency. • Proposed changes in plans and procedures for enforcement activities related to use of restricted use pesticides for the next reporting period. • Any other proposed changes from the State plan that would significantly affect the State certification program.
Civil and Criminal Penalty Authority Unit XV.3.iii.	States must have authority to assess civil **and** criminal penalties for commercial and private applicators.	States must have authority to assess civil and/or criminal penalties for commercial and private applicators.

Item	Proposed Revision	Existing Rule
Commercial Applicator Recordkeeping Unit XV.3.iv.	States must require commercial applicators to maintain **records about RUP use including:** • **Name and address of person for whom RUP applied** • **Location of application** • **Size of area treated** • **Site to which RUP was applied** • **Time and date of application** • **Product name and EPA registration number of RUP applied** • **Total amount of RUP applied per application and location** • **Name and certification number of certified applicator and name(s) of any noncertified applicator that made the application under the direct supervision of the certified applicator.** States must require commercial applicators to maintain **records related to the qualifications of noncertified applicators working under their direct supervision**.	State plans must include requirements for certified commercial applicators maintain for at least 2 years routine operational records containing information on kinds, amounts, uses, dates, and places of application of RUPs.
RUP Dealer Recordkeeping Unit XV.3.v.	**RUP dealer recordkeeping must include**: • Name and address of each person to whom the RUP was distributed or sold. • The applicator's certification number, issuing authority, certification expiration date, and categories of certification. • The product name and EPA registration number of the RUP(s) distributed or sold in the transaction, and the State special local need registration number on the label of the RUP if applicable. • The quantity of the pesticide(s) distributed or sold in the transaction. • The date of the transaction.	No federal requirement for RUP dealers to maintain records.

Item	Proposed Revision	Existing Rule
Certified Applicator Credentials **Unit XV.3.vi.**	**Certified applicator credentials must include**: • The full name of the certified applicator. • The certification, license, or credential number of the certified applicator. • The type of certification (private or commercial). • The category(ies), including any application method-specific category(ies) and subcategories of certification, in which the applicator is certified, as applicable. • The expiration date of the certification. • A Statement that the certification is based on a certification issued by another State, Tribe or Federal agency, if applicable, and the identity of that State, Tribe or Federal agency.	No federal requirements for what information must be included on documents used to verify an applicator's certification.
Reciprocal Applicator Certification **Unit XV.3.vii.**	Certification plans must specify **whether, and if so under what circumstances, the state would issue reciprocal certifications**. Reciprocal certifications subject to specific conditions.	No requirements for states to provide specific information on requirements and procedures for issuing reciprocal certification.
State Plan Maintenance, Modification, and Withdrawal **Unit XV.3.viii.**	**Codify policy that substantial modifications** include: • Deletion of a mechanism for certification and/or recertification. • Establishment of a new private applicator subcategory, commercial applicator category, or commercial applicator subcategory. • Any other changes that the Agency has notified the State, Tribal or Federal agency that the Agency considers to be are substantial modifications.	States may not make substantial modifications to their certification plan without EPA approval. The regulation does not outline what constitutes a substantial modification. EPA policy states that substantial modifications include: • Deletion of a mechanism for certification and/or recertification. • Establishment of a new private applicator subcategory, commercial applicator category, or commercial applicator subcategory. • Any other changes that the Agency has notified the State, Tribal or Federal agency that the Agency considers to be are substantial modifications.

Item	Proposed Revision	Existing Rule
Federal Agency Certification Plans		
Establish Provisions for Review and Approval of Federal Agency Plans Unit XVI.A.	Delete Government Agency Plan option from the regulation. **Codify existing policy** to allow Federal agencies to develop their own plans for certifying applicators. **Federal agency certification plans must meet or exceed the standards in the proposed regulation**.	Option to develop a single, federal government-wide Government Agency Plan to certify federal employees applying RUPs. *Government Agency Plan never developed.* EPA policy allows Federal agencies to develop their own plans for certifying applicators, as long as the plan meets or exceeds the applicable standards in the regulation for State plans, and complies with requirements of the policy.

Item	Proposed Revision	Existing Rule
Certification in Indian Country		
Clarify Options for Establishing a Certification Program in Indian Country Unit XVII.	**Three options for applicator certification programs in Indian Country:** • Tribes may **enter into an agreement with EPA** to recognize certifications issued under other EPA-approved certification plans (State, Tribal, or Federal); no concurrence from or agreement with State is needed • Tribes may **develop and implement a Tribal certification plan** (requires Tribes to develop and submit a Tribal certification plan that meets or exceeds the proposed standards) • EPA may **administer a Federal certification plan for applicators in Indian country** that meets or exceeds the proposed standards. EPA may include multiple tribes and geographic areas under a single plan.	Three options for applicator certification programs in Indian Country: • Tribes may **utilize State certification** to certify applicators (requires concurrence by the State(s) and an appropriate State-Tribal cooperative agreement) • Tribes may **develop and implement a Tribal certification plan** (requires Tribes to develop and submit an appropriate Tribal certification plan to EPA for approval) • EPA may **administer a Federal certification plan for applicators in Indian country**
EPA-Administered Plans		
Revise Provisions for EPA-Administered Plans Unit XVIII.	EPA-administered federal certification plans must meet the proposed standards for State certification plans, including RUP applicator certification, recertification, and noncertified applicator qualifications, as well as plan reporting and maintenance requirements.	The current rule establishes requirements for EPA-administered certification in States or areas of Indian country without EPA-approved certification plans in place, including specific standards for certification and recertification of pesticide applicators.
Definitions – Unit XIX.A.– (R)evised or (N)ew		
Application (N)	The dispersal of a pesticide on, in, at, or around a target site.	
Application method (N)	The application using a particular type of equipment, mechanism, or device used in the application of a pesticide, including, but not limited to, ground boom, air-blast sprayer, wand, and backpack sprayer, as well as methods such as aerial, chemigation, and fumigation.	
Compatibility (R)	The extent to which a pesticide can be combined with other chemicals without causing undesirable results.	
Dealership (R)	Any establishment owned or operated by a restricted use pesticide retail dealer where restricted use pesticides are distributed or sold.	
Fumigant (N)	Any pesticide product that is a vapor or gas, or forms a vapor or gas upon application, and whose pesticidal action is achieved through the gaseous or vapor state.	
Fumigation (N)	Application of a fumigant.	

Item	Proposed Revision	Existing Rule
Indian country (N)	(1) All land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. (2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State. (3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.	
Indian Tribe (N)	Any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community included in the list of Tribes published by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act.	
Non-target organism (R)	Any plant, animal or other organism other than the target pests which a pesticide is intended to affect.	
Noncertified applicator (N)	Any person who is not certified in accordance with 40 CFR 171 to use or supervise the use of restricted use pesticides in the pertinent jurisdiction, but who is using restricted use pesticides under the direct supervision of a person certified as a commercial or private applicator certified in accordance with this part.	
Personal protective equipment (N)	Devices and apparel that are worn to protect the body from contact with pesticides or pesticide residues, including, but not limited to, coveralls, chemical-resistant suits, chemical-resistant gloves, chemical-resistant footwear, respirators, chemical-resistant aprons, chemical-resistant headgear, and protective eyewear.	
Principal place of business (R)	The principal location, either residence or office, where a person conducts a business of applying restricted use pesticides. A person who applies restricted use pesticides in more than one State or area of Indian country may designate a location within a State or area of Indian country as its principal place of business for that State or area of Indian country.	
Toxicity (R)	The property of a pesticide that refers to the degree to which the pesticide and its related derivative compounds are able to cause an adverse physiological effect on an organism as a result of exposure.	
Use (N)	(1) Pre-application activities, including, but not limited to: (i) Arranging for the application of the pesticide. (ii) Mixing and loading the pesticide. (iii) Making necessary preparations for the application of the pesticide, including responsibilities related to providing training, a copy of a label and use-specific instructions to noncertified applicators, and complying with any applicable requirements under part 170 of this chapter. (2) Applying the pesticide, including supervising the use of a pesticide by a noncertified applicator. (3) Post-application activities, including, but not limited to, transporting or storing pesticide containers that have been opened, cleaning equipment, and disposing of excess pesticides, spray mix, equipment wash waters, pesticide containers, and other materials contaminated with or containing pesticides.	
Use-specific instructions (N)	The information and requirements specific to a particular pesticide product or work site that are necessary in order for an applicator to use the pesticide in accordance with applicable requirements and without causing unreasonable adverse effects.	

April 2016

Sun	Mon	Tue	Wed	Thu	Fri	Sat
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July 2016

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					1	2
3	4	5	6	7	8	9
10	11	12	13 SPCB Meeting (Ontario)	14 SPCB Meeting (Ontario)	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31	Notes:					

October 2016						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1
2	3	4	5	6	7	8
9	10	11	12 SPCB Meeting (Sacramento)	13 SPCB Meeting (Sacramento)	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31	Notes:				

January 2017						
Sun	Mon	Tue	Wed	Thu	Fri	Sat
1 80	2 81	3 82	4 83	5 84	6 85	7 86
8 87	9 88	10 89	11 90	12 91	13 92	14 93
15 94	16 95	17 96	18 97	19 98	20 99	21 100
22 101	23 102	24 103	25 104	26 105	27 106	28 107
29 108	30 109	31 110	Notes:			