



- c) The opening, conduct, or closure of investigations;
  - d) Informal conferences; and
  - e) Discipline short of formal accusation.
- 4) Allows the director to review a proposed regulation and disapprove it based on the grounds that it is injurious to public health, safety, or welfare, but the board within a specified period can override the director's disapproval. (BPC §313.1)
  - 5) Requires a public entity to pay a judgment against an employee or former employee resulting from a claim or action for an injury arising out of an act or omission occurring within the scope of his or her employment with the public entity, under certain specified circumstances, and prohibits the payment of punitive or exemplary damages. (Government Code (GC) §825)

**This Bill:**

- 1) Requires the director of DCA, on his own initiative, or upon request by a board or the Legislature, to review any board action to determine if it is a market-sensitive action. (BPC §109(b))
- 2) Only allows review of an action that has taken place in the past 60 days. The review process also does not apply to any action taken by a board prior to January 1, 2017. (BPC §109(b)(2) and (3))
- 3) Defines the term "action" to mean nonministerial formal actions voted on by a board and nonministerial informal decisions made by staff as a result of explicit or implied delegated authority to act on behalf of the board. (BPC §109(b))
- 4) Defines "market-sensitive actions" as those actions that create barriers to market participation and restrict competition, including the following (BPC §109(b)):
  - a. Exam passage scores;
  - b. Advertising restrictions;
  - c. Price regulation;
  - d. Enlarging or restricting scope of practice qualifications for licensure; and
  - e. A pattern or program of disciplinary actions affecting multiple individuals that creates barriers to market participation.
- 5) Defines "clearly articulated and affirmatively expressed state policy" to mean Federal statute and regulations, California state law and regulations, department policies, and executive orders. (BPC §109(b))

- 6)** If the director finds an action is market-sensitive, then he or she has 90 days from receiving the request or initiating review to determine if the market-sensitive action furthers a clearly articulated and affirmatively expressed state policy. (BPC §109(b))
- 7)** Requires the director to notify the board of the review and whether the review resulted from a specific member of the legislature, a specific organization, or a member of the public. The Board must post the director's notification on its website. (BPC §109(b))
- 8)** Requires that while the director is reviewing the action, the board must cease implementation of that action until the review is finalized. (BPC §109(b))
- 9)** At completion of the review, requires the director to take one of the following actions: (BPC §109(b)):
  - a.** Approve the action if determined that it furthers a clearly articulated and affirmatively expressed state policy; or
  - b.** Disapprove the action if it does not further a clearly articulated and affirmatively expressed state policy. In this case, the director may recommend modifications, and the board may vote to accept and resubmit for review by the director.
- 10)** Requires the director to issue and post on DCA's web site a final written decision on the board action. The decision must contain an explanation of the reasons the action does or does not further a clearly articulated and affirmatively expressed state policy, and the rationale behind the decision. (BPC §109(c))
- 11)** States that the review conducted by the director as noted above does not apply to the following: (BPC §109(d))
  - a.** Review of a regulation promulgated by the board;
  - b.** A singular disciplinary action;
  - c.** Official positions on legislation;
  - d.** Legislative proposals;
  - e.** Any sanction or citation imposed by a board on a single licensee, unless it is part of a pattern or program of disciplinary actions affecting multiple individuals that create barriers to market participation.
- 12)** States that this review process shall not be construed to affect, impede, or delay any disciplinary actions of any board, except those that are under review as part of a potential pattern or program of disciplinary actions affecting multiple individuals that create barriers to market participation. (BPC §109(f))
- 13)** Allows the director to audit and review inquiries and complaints regarding licensees, dismissals of disciplinary cases, the opening, conduct, or closure of investigations,

informal conferences, and discipline short of formal accusation by any board within DCA. (BPC §116)

- 14) Includes exam questions in the board records and data that the director may obtain and investigate. (BPC §153)
- 15) Requires the director to review all proposed regulations, final rulemaking records, and relevant facts to determine whether a proposed regulation furthers a clearly articulated and affirmatively expressed state policy. (BPC §313.1(c))
- 16) Sets the director's review period at 60 days. (BPC §313.1(e))
- 17) Requires that if the director disapproves a regulation because it does not further a clearly articulated or affirmatively expressed state policy, that the disapproval shall be in writing. (BPC §313.1(e))
- 18) Prohibits a board from overriding the director's disapproval of a regulation that was disapproved because it does not further a clearly articulated and affirmatively expressed state policy. (BPC §313(f))
- 19) Requires a public entity to pay for a judgment or settlement for treble damage antitrust awards against a member of a regulatory board for an act or omission occurring within the scope of his or her official capacity as a board member. Also states that treble damages awarded pursuant to the federal Clayton Act for a violation of the federal Sherman Act (both related to antitrust) are not considered punitive or exemplary damages. (GC §825(g) and (h))

**Comment:**

- 1) **Intent.** This bill is a response to a recent Supreme Court ruling, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.

With this ruling, the Supreme Court provided that when the majority of members of a regulatory board are active market participants, then “board members are entitled to state-action antitrust immunity only if they act pursuant to a clearly articulated and affirmatively expressed state policy and their decisions are actively supervised by the state<sup>1</sup>.”

The Supreme Court stated that “active supervision” 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.” They also noted that “the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.” The FTC has subsequently released guidance materials on active supervision.

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<sup>1</sup> Memo from DCA Director Awet Kidane, “*North Carolina Board of Dental Examiners v. Federal Trade Commission: Policy Concepts*,” March 25, 2016.

DCA has begun work with the Legislature to ensure that its boards are in compliance with the Supreme Court ruling. The Department has identified certain policy concepts that it believes will ensure active state supervision of its boards.

**Attachment B** contains the DCA policy concepts memo.

- 2) DCA Director Authority.** Currently, DCA’s director can investigate board matters when there have been allegations of misconduct or when there is probable cause of criminal conduct. He or she may audit and review certain specified actions of the Medical Board and the allied health professional boards. The director is also authorized to disprove a regulation on the grounds that it is injurious to public health, safety, or welfare.

This bill would give new powers to the director as follows:

- Authority to a review board action to determine if it is a market-sensitive action, and if so, if it furthers a clearly articulated and affirmatively expressed state policy;
- Authority to audit and review certain specified actions of any board within the department; and
- Authority to review all proposed regulations to determine whether they further a clearly articulated and affirmatively expressed state policy.

- 3) Previous Legislation and Board Position.** At its May 13, 2016 meeting, the Board considered a similar bill, SB 1195 (*Hill, Professions and Vocations: Board Actions: Competitive Impact*).

The Board took a “support if amended” position on SB 1195, asking that the bill be amended to revise its definition of “competitive impact.”

SB 1195 died in the Senate in June. DCA has indicated that the draft language provided today will be amended into SB 1194 (Hill).

The language for consideration today no longer contains any definition or reference to “competitive impact.”

- 4) Support and Opposition.**

Support

- None at this time.

Opposition

- None at this time.

- 5) History.**

None at this time.

**6) Attachments.**

**Attachment A:** Proposed Amendments (*Provided by DCA, August 11, 2016*)

**Attachment B:** DCA Policy Concepts Memo from DCA Director Awet Kidane, "*North Carolina Board of Dental Examiners v. Federal Trade Commission: Policy Concepts*," March 25, 2016.

## Proposed Amendments to Current Law to comply with the North Carolina Decision

Section 109 of the Business and Professions Code is amended to read:

### **109.**

~~(a) The decisions of any of the boards comprising the department with respect to setting standards, conducting examinations, passing candidates, and revoking licenses, are not passing candidates and revoking or otherwise imposing discipline on licenses shall not be subject to review by the director, but director and are final within the limits provided by this code which that are applicable to the particular board, except as provided in this section. board.~~

~~(b)~~ (a) The director may initiate an investigation of any allegations of misconduct in the preparation, administration, or scoring of an examination which is administered by a board, or in the review of qualifications which are a part of the licensing process of any board. A request for investigation shall be made by the director to the Division of Investigation through the chief of the division or to any law enforcement agency in the jurisdiction where the alleged misconduct occurred.

~~(c)~~ (1) The director may intervene in any matter of any board where an investigation by the Division of Investigation discloses probable cause to believe that the conduct or activity of a board, or its members or employees, constitutes a violation of criminal law.

(2) The term “intervene,” as used in paragraph ~~(c)~~ (1) of this section may include, but is not limited to, an application for a restraining order or injunctive relief as specified in Section 123.5, or a referral or request for criminal prosecution. For purposes of this section, the director shall be deemed to have standing under Section 123.5 and shall seek representation of the Attorney General, or other appropriate counsel in the event of a conflict in pursuing that action.

*(b) (1) For the purposes of this subdivision, the following terms have the following meanings:*

*(A) The term “action” as used in this subdivision includes nonministerial formal actions as voted on by a board and nonministerial informal decisions made by staff as a result of explicit or implied delegated authority to act on behalf of the board.*

*(B) Notwithstanding any other law, the term “board” as used in this section means a board, committee, or commission within the Department of Consumer Affairs.*

*(C) The term “Market-sensitive actions” as used in this section, means those actions that create barriers to market participation and restrict competition including, but not limited to, examination passage scores, advertising restrictions, price regulation, enlarging or restricting scope of practice qualifications for licensure, and a pattern or program of disciplinary actions affecting multiple individuals that create barriers to market participation.*

*(D) The term “clearly articulated and affirmatively expressed state policy” as used in this section includes Federal statute and regulations, California state law and regulations, department policies, and executive orders.*

*(2)(A)(i) Within 60 days of an action taking place, the director may initiate, upon his or her own initiative, and shall, upon request by the board taking the action or the Legislature, review any action by a board to determine if it is a market-sensitive action.*

(ii) If the action is found to be a market-sensitive action, the director has 90 days from receiving a request for a review or initiating a review pursuant to this section in which to make a determination of whether that market-sensitive action furthers a clearly articulated and affirmatively expressed state policy.

(iii) If the director initiates a review of an action he or she shall notify the board of the review and whether the review resulted from contact made by a specific member of the legislature, a specific organization, or a member of the public. The board shall post on its website the notification received from the director.

(iv) The director's decision to review an action under this subdivision shall serve to cease implementation of the action until the review is finalized and the action is found to further a clearly articulated and affirmatively expressed state policy.

(v) Any further review by the director under this subdivision shall include a substantive review of the board action based upon all the relevant facts in the record provided by the board and may include any other information identified by the director.

(C) At the completion of the review, the director shall take one of the following actions:

(i) Approve the action upon determination that it furthers a clearly articulated and affirmatively expressed state policy

(ii) Disapprove the action if it does not further a clearly articulated and affirmatively expressed state policy. Upon disapproval the director may recommend modifications to the board action which the board may vote to accept and resubmit for review by the director. If the board rejects the recommended modifications the board action shall not take effect.

(3) This subdivision shall not be construed to apply to any action taken by a board prior to January 1, 2017.

~~(d)~~ (c) The director shall issue, and post on the department's Internet Web site, his or her final written decision on the board action with an explanation of the reasons that action does or does not further a clearly articulated and affirmatively expressed state policy and the rationale behind the director's decision.

~~(e)~~ (d) The review set forth in subdivision (c) shall not apply to the review of any regulation promulgated by a board, singular disciplinary action, official positions on legislation, legislative proposals, or any other sanction or citation imposed by a board upon a single licensee unless it is part of a pattern or program of disciplinary actions affecting multiple individuals that create barriers to market participation.

~~(f)~~ (e) The director shall report to the Chairs of the Senate Committee on Business, Professions, and Economic Development and the Assembly Committee on Business and Professions annually, commencing March 1, 2017, regarding his or her approvals, disapprovals, recommendations for modifications pursuant to this section. That report shall be submitted in compliance with Section 9795 of the Government Code.

(f) This section shall not be construed to affect, impede, or delay any disciplinary actions of any board except those that are under review as part of a potential a pattern or program of disciplinary actions affecting multiple individuals that create barriers to market participation.

Section 116 of the Business and Professions Code is amended to read:

**116.**

(a) The director may audit and review, upon his or her own initiative, or upon the request of a consumer or licensee, inquiries and complaints regarding licensees, dismissals of disciplinary cases, the opening, conduct, or closure of investigations, informal conferences, and discipline short of formal accusation by the Medical Board of California, the allied health professional boards, and the California Board of Podiatric Medicine. The director may make recommendations for changes to the disciplinary system to the appropriate board, the Legislature, or both. any board within the department.

(b) The director shall report to the Chairpersons Chairs of the Senate Committee on Business and Professions ~~Business, Professions, and Economic Development~~ Committee and the Assembly Committee on Health, Business and Professions ~~Committee~~ annually, commencing March 1, 1995, 2017, regarding his or her findings from any audit, review, or monitoring and evaluation conducted pursuant to this section. This report shall be submitted in compliance with Section 9795 of the Government Code.

Section 153 of the Business and Professions Code is amended to read:

**153.**

The director may investigate the work of the several boards in his or her department and may obtain a copy of all records and full and complete data in all official matters in possession of the boards, their members, officers, or ~~employees, other than examination questions prior to submission to applicants at scheduled examinations.~~ employees.

Section 307 of the Business and Professions Code is amended to read:

**307.**

The director may contract for the services of experts and consultants where necessary to carry out ~~the provisions of this chapter~~ and may provide compensation and reimbursement of expenses for ~~such~~ those experts and consultants in accordance with state law.

Section 313.1 of the Business and Professions Code is amended to read:

**313.1.**

(a) For the purposes of this section, "clearly articulated and affirmatively expressed state policy" means Federal statute and regulations, California state law and regulations, department policies, and executive orders.

~~(a)~~ (b) Notwithstanding any other ~~provision of~~ law to the contrary, no rule or ~~regulation, except those relating to examinations and qualifications for licensure, and~~ regulation and no fee change proposed or promulgated by any board of the boards, commissions, or committees within the department, shall take effect pending compliance with this section.

~~(b)~~ (c) The director shall be formally notified of and shall be provided a full opportunity to review, in accordance with the requirements of Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, ~~the requirements in subdivision (c) of Section 109,~~ and this section, all of the following:

(1) All notices of proposed action, any modifications and supplements thereto, and the text of proposed regulations.

(2) Any notices of sufficiently related changes to regulations previously noticed to the public, and the text of proposed regulations showing modifications to the text.

(3) Final rulemaking records.

(4) All relevant facts in the rulemaking record, which may include data, public comments, or other documentary evidence pertaining to the proposed regulation to determine whether it furthers a clearly articulated and affirmatively expressed state policy.

~~(e)~~ (d) The submission of all notices and final rulemaking records to the director and the ~~completion of the director's review,~~ director's approval as authorized by this section, shall be a precondition to the filing of any rule or regulation with the Office of Administrative Law. The Office of Administrative Law shall have no jurisdiction to review a rule or regulation subject to this section until after the ~~completion of the director's review and only then if the director has not disapproved it~~ approval. The filing of any document with the Office of Administrative Law shall be accompanied by a certification that the board, ~~commission, or committee~~ has complied with the requirements of this section.

~~(d)~~ (e) Following the receipt of any final rulemaking record subject to subdivision (a), the director shall have the authority for a period of ~~30~~ 60 days to ~~disapprove~~ approve or ~~approve or disapprove or require modification~~ approve or disapprove a proposed rule or regulation on the ground that it is injurious to the public health, safety, or ~~welfare~~ welfare, or does not further a clearly articulated and affirmatively expressed state policy state law. If the director does not approve the rule or regulation within the 60-day period, the rule or regulation shall not be submitted to the Office of Administrative Law and the rule or regulation shall have no effect

(1) If the regulation does not further a clearly articulated and affirmatively expressed state policy, it shall be disapproved. If the director disapproves the regulation because it does not further a clearly articulated or affirmatively expressed state policy, he or she may recommend modifications. The disapproval shall be in writing and express the rationale for the disapproval.

~~(e)~~ (f) Final rulemaking records shall be filed with the director within the one-year notice period specified in Section 11346.4 of the Government Code. If necessary for compliance with this section, the one-year notice period may be extended, as specified by this subdivision.

(1) In the event that the one-year notice period lapses during the director's 60-day ~~30-day~~ review period, or within 60 days following the notice of the director's disapproval, it may be extended for a maximum of 90 days.

(2) If the director approves the final rulemaking record or ~~declines to take action on it within 30 days,~~ record or declines to take action on it within 60 days, the board, ~~commission, or committee~~ shall have five days from the receipt of the record from the director within which to file it with the Office of Administrative Law.

(3) (A) If the director disapproves a rule or regulation, it shall have no force or effect unless within 60 days of the notice of disapproval, (A) the disapproval is overridden by a unanimous vote of the members of the board, commission, or committee, and (B) the board, commission, or committee files the final rulemaking record with the Office of Administrative Law in compliance with this section and the procedures required by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) Any regulation disapproved because it does not further a clearly articulated and affirmatively expressed state policy shall not be subject to the provisions of this subdivision.

~~(f)~~ (g) ~~Nothing in this~~ This section shall not be construed to prohibit the director from affirmatively approving a proposed rule, regulation, or fee change at any time within the 60-day period after it has been submitted to him or her, in which event it shall become effective upon compliance with this section and

the procedures required by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Section 825 of the Government Code is amended to read:

**825.**

(a) Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, 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.

If the public entity conducts the defense of an employee or former employee against any claim or action with his or her reasonable good-faith cooperation, 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. However, where the public entity conducted the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise, or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the public entity is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for punitive or exemplary damages.

(b) Notwithstanding subdivision (a) or any other provision of law, a public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of the state government, finds all of the following:

(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.

(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

(3) Payment of the claim or judgment would be in the best interests of the public entity.

As used in this subdivision with respect to an entity of state government, "a decision of the governing body" means the approval of the Legislature for payment of that part of a judgment that is for punitive damages or exemplary damages, upon recommendation of the appointing power of the employee or former employee, based upon the finding by the Legislature and the appointing authority of the existence of the three conditions for payment of a punitive or exemplary damages claim. The provisions of subdivision (a) of Section 965.6 shall apply to the payment of any claim pursuant to this subdivision. The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

(c) Except as provided in subdivision (d), if the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if those provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

(d) The subject of payment of punitive damages pursuant to this section or any other provision of law shall not be a subject of meet and confer under the provisions of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, or pursuant to any other law or authority.

(e) Nothing in this section shall affect the provisions of Section 818 prohibiting the award of punitive damages against a public entity. This section shall not be construed as a waiver of a public entity's immunity from liability for punitive damages under Section 1981, 1983, or 1985 of Title 42 of the United States Code.

(f) (1) Except as provided in paragraph (2), a public entity shall not pay a judgment, compromise, or settlement arising from a claim or action against an elected official, if the claim or action is based on conduct by the elected official by way of tortiously intervening or attempting to intervene in, or by way of tortiously influencing or attempting to influence the outcome of, any judicial action or proceeding for the benefit of a particular party by contacting the trial judge or any commissioner, court-appointed arbitrator, court-appointed mediator, or court-appointed special referee assigned to the matter, or the court clerk, bailiff, or marshal after an action has been filed, unless he or she was counsel of record acting lawfully within the scope of his or her employment on behalf of that party. Notwithstanding Section 825.6, if a public entity conducted the defense of an elected official against such a claim or action and the elected official is found liable by the trier of fact, the court shall order the elected official to pay to the public entity the cost of that defense.

(2) If an elected official is held liable for monetary damages in the action, the plaintiff shall first seek recovery of the judgment against the assets of the elected official. If the elected official's assets are insufficient to satisfy the total judgment, as determined by the court, the public entity may pay the deficiency if the public entity is authorized by law to pay that judgment.

(3) To the extent the public entity pays any portion of the judgment or is entitled to reimbursement of defense costs pursuant to paragraph (1), the public entity shall pursue all available creditor's remedies against the elected official, including garnishment, until that party has fully reimbursed the public entity.

(4) This subdivision shall not apply to any criminal or civil enforcement action brought in the name of the people of the State of California by an elected district attorney, city attorney, or attorney general.

*(g) Notwithstanding subdivision (a), a public entity shall pay for a judgment or settlement for treble damage antitrust awards against a member of a regulatory board for an act or omission occurring within the scope of his or her ~~employment~~ official or individual capacity as a member of a regulatory board.*

*(h) Treble damages awarded pursuant to the federal Clayton Act (Sections 12 to 27 of Title 15 of, and Sections 52 to 53 of Title 29 of, the United States Code) for a violation of the federal Sherman Act (Sections 1 to 6, 6a, and 7 of Title 15 of the United States Code) are not punitive or exemplary damages under the Government Claims Act (Division 3.6 (commencing with Section 810) of Title 1 of the Government Code) for purposes of this section.*

Section 11346.5 of the Government Code is amended to read:

**11346.5.**

(a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest drafted in plain English in a format similar to the Legislative Counsel's digest on legislative bills. The informative digest shall include the following:

(A) A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.

(B) If the proposed action differs substantially from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes.

(C) A policy statement overview explaining the broad objectives of the regulation and the specific benefits anticipated by the proposed adoption, amendment, or repeal of a regulation, including, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.

(D) An evaluation of whether the proposed regulation is inconsistent or incompatible with existing state regulations.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state. For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

(7) If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, makes an initial determination that the action may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

(A) Identification of the types of businesses that would be affected.

(B) A description of the projected reporting, recordkeeping, and other compliance requirements that would result from the proposed action.

(C) The following statement: “The (name of agency) has made an initial determination that the (adoption/amendment/ repeal) of this regulation may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

(ii) Consolidation or simplification of compliance and reporting requirements for businesses.

(iii) The use of performance standards rather than prescriptive standards.

(iv) Exemption or partial exemption from the regulatory requirements for businesses.”

(8) If a state agency, in adopting, amending, or repealing any administrative regulation, makes an initial determination that the action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this declaration, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support its initial determination.

An agency’s initial determination and declaration that a proposed adoption, amendment, or repeal of a regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

(9) A description of all cost impacts, known to the agency at the time the notice of proposed action is submitted to the office, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

If no cost impacts are known to the agency, it shall state the following:

“The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.”

(10) A statement of the results of the economic impact assessment required by subdivision (b) of Section 11346.3 or the standardized regulatory impact analysis if required by subdivision (c) of Section 11346.3, a summary of any comments submitted to the agency pursuant to subdivision (f) of Section 11346.3 and the agency’s response to those comments.

(11) The finding prescribed by subdivision (d) of Section 11346.3, if required.

(12) (A) A statement that the action would have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative regulation, makes an initial determination that the action would have that effect.

(B) The agency officer designated in paragraph ~~(14)~~ (15) shall make available to the public, upon request, the agency’s evaluation, if any, of the effect of the proposed regulatory action on housing costs.

(C) The statement described in subparagraph (A) shall also include the estimated costs of compliance and potential benefits of a building standard, if any, that were included in the initial statement of reasons.

(D) For purposes of model codes adopted pursuant to Section 18928 of the Health and Safety Code, the agency shall comply with the requirements of this paragraph only if an interested party has made a request to the agency to examine a specific section for purposes of estimating the costs of compliance and potential benefits for that section, as described in Section 11346.2.

~~(13) If the regulatory action is submitted by a board within the Department of Consumer Affairs, a statement that the Director of Consumer Affairs has reviewed the proposed regulation and determined that the proposed regulation furthers state law.~~

~~(13)~~ (14) A statement that the adopting agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. For a major regulation, as defined by Section 11342.548, proposed on or after November 1, 2013, the statement shall be based, in part, upon the standardized regulatory impact analysis of the proposed regulation, as required by Section 11346.3, as well as upon the benefits of the proposed regulation identified pursuant to subparagraph (C) of paragraph (3).

~~(14)~~ (15) The name and telephone number of the agency representative and designated backup contact person to whom inquiries concerning the proposed administrative action may be directed.

~~(15)~~ (16) The date by which comments submitted in writing must be received to present statements, arguments, or contentions in writing relating to the proposed action in order for them to be considered by the state agency before it adopts, amends, or repeals a regulation.

~~(16)~~ (17) Reference to the fact that the agency proposing the action has prepared a statement of the reasons for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed action, pursuant to subdivision (b).

~~(17)~~ (18) A statement that if a public hearing is not scheduled, any interested person or his or her duly authorized representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Section 11346.8.

~~(18)~~ (19) A statement indicating that the full text of a regulation changed pursuant to Section 11346.8 will be available for at least 15 days prior to the date on which the agency adopts, amends, or repeals the resulting regulation.

~~(19)~~ (20) A statement explaining how to obtain a copy of the final statement of reasons once it has been prepared pursuant to subdivision (a) of Section 11346.9.

~~(20)~~ (21) If the agency maintains an Internet Web site or other similar forum for the electronic publication or distribution of written material, a statement explaining how materials published or distributed through that forum can be accessed.

~~(21)~~ (22) If the proposed regulation is subject to Section 11346.6, a statement that the agency shall provide, upon request, a description of the proposed changes included in the proposed action, in the manner provided by Section 11346.6, to accommodate a person with a visual or other disability for which effective communication is required under state or federal law and that providing the description of proposed changes may require extending the period of public comment for the proposed action.

(b) The agency representative designated in paragraph ~~(14)~~ (15) of subdivision (a) shall make available to the public upon request the express terms of the proposed action. The representative shall also make

available to the public upon request the location of public records, including reports, documentation, and other materials, related to the proposed action. If the representative receives an inquiry regarding the proposed action that the representative cannot answer, the representative shall refer the inquiry to another person in the agency for a prompt response.

(c) This section shall not be construed in any manner that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary or cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, if there has been substantial compliance with those requirements.



## MEMORANDUM

<b>DATE</b>	March 25, 2016
<b>TO</b>	Executive Officers Department of Consumer Affairs
<b>FROM</b>	Awet Kidane, Director Department of Consumer Affairs 
<b>SUBJECT</b>	<b><i>North Carolina Board of Dental Examiners v. Federal Trade Commission: Policy Concepts</i></b>

This memorandum is intended to serve as a follow up to the meeting held on March 7, 2016, in which we discussed the potential policy concepts that the Department of Consumer Affairs (Department) was considering in response to the *North Carolina Board of Dental Examiners v. Federal Trade Commission (North Carolina)* decision.

As you are aware, the *North Carolina* case established that when a controlling number of decision makers are active market participants, board members are entitled to state-action antitrust immunity only if they act pursuant to a clearly articulated and affirmatively expressed state policy and their decisions are actively supervised by the state. After careful analysis and consideration, the Department believes the three policy concepts, discussed in our meeting and set out below, will provide further active state supervision to boards as required by the *North Carolina* case and will provide important clarity regarding the payment of damages by the state.

First, the Department believes that removing the active license requirement for executive officer positions will assist with protecting the boards from antitrust liability. This change allows for a nonmarket participant to serve in that critical role thereby minimizing the impact an active market participant executive officer may have on the board's operations.

Second, the existing regulatory review process should be strengthened. Under current law, the Director reviews board regulations and has the authority to disapprove them if they are "injurious to the public health, safety or welfare." Current law does not specifically authorize the Director to disapprove regulations for anticompetitive impacts that do not further a clearly articulated state policy. In order to ensure appropriate state supervision, the Department believes that the Director should have the specific authority to disapprove regulations for anticompetitive impacts without the possibility of a veto override.

And third, the indemnification for board members in antitrust cases needs to be addressed. Specifically, the Attorney General's opinion on the *North Carolina* case indicated that provisions providing indemnity to state actors should be clarified to ensure that treble damages resulting from antitrust violations are not considered punitive and may be paid by the state. This would leave no question that the state will pay treble damages awarded for violations of antitrust law in the same way it pays damages for board members in other types of lawsuits.

The concepts that I discussed with you in our meeting were also shared with the legislative committees during the Department's Joint Legislative Sunset Review hearing on March 9, 2016. The Department is committed to assisting the boards in this area and is continuing to work with the Legislature and Administration to address this important issue.

If you have questions or concerns regarding any of the information provided in this memo, please contact Melinda McClain at (916) 574-7800 or [Melinda.McClain@dca.ca.gov](mailto:Melinda.McClain@dca.ca.gov), or your assigned legal counsel.

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**To:** Board Members

**Date:** August 1, 2016

**From:** Kim Madsen  
Executive Officer

**Telephone:** (916) 574-7841

**Subject:** 2017 Meeting Dates – Amended Memo

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### Policy and Advocacy Committee

February 3, 2017 – Sacramento, CA  
April 21, 2017 – Sacramento, CA  
June 23, 2017 – Sacramento, CA  
September 15, 2017 – Sacramento, CA

### Board Meetings\*

March 1-3, 2017  
May 10-12, 2017  
August 23-25, 2017  
November 1-3, 2017

\* Locations will be determined at a later date. Depending on the number of petitioners and disciplinary matters to be discussed, the first day of the Board may be canceled.

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