

Date of Hearing: April 3, 2018

ASSEMBLY COMMITTEE ON BUSINESS AND PROFESSIONS

Evan Low, Chair

AB 2483 (Voepel) – As Introduced February 14, 2018

SUBJECT: Department of Consumer Affairs: Office of Supervision of Occupational Boards.

SUMMARY: Establishes an Office of Supervision of Occupational Boards within the Department of Consumer Affairs (DCA), which would be responsible for exercising active supervision over each board under the DCA to ensure compliance with newly codified state policies related to increasing economic opportunity, promoting competition, and encouraging innovation.

EXISTING LAW:

- 1) Establishes the Department of Consumer Affairs (DCA) within the Business, Consumer Services, and Housing Agency. (Business and Professions Code (BPC) § 100)
- 2) Enumerates various regulatory boards, bureaus, committees, and commissions under the DCA's jurisdiction. (BPC § 101)
- 3) Provides that all boards, bureaus, and commissions in the DCA are established for the purpose of ensuring that those private businesses and professions deemed to engage in activities which have potential impact upon the public health, safety, and welfare are adequately regulated in order to protect the people of California. (BPC § 101.6)
- 4) Authorizes the Governor to remove at any time, any member of any board appointed by him or her for continued neglect of duties required by law, or for incompetence, or unprofessional or dishonorable conduct. (BPC § 106)
- 5) Places the DCA under the control of the Director of Consumer Affairs, who is appointed by the Governor and may investigate the work of boards under the DCA. (BPC §§ 150 et seq.)
- 6) Allows the Director of Consumer Affairs to 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. (BPC § 109)
- 7) Authorizes the Director of Consumer Affairs to 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. (BPC § 116)
- 8) Permits the Director of Consumer Affairs to require reports from any board or other agency within the DCA as he or she deems reasonably necessary on any phase of their operations. (BPC § 127)

9) Prohibits any board or other agency within the DCA from instituting or joining a legal action against any other agency within the state or federal government without the permission of the Director of Consumer Affairs. (BPC § 132)

10) Provides the Department of Consumer Affairs with the following powers and duties to:

- a) Recommend and propose the enactment of such legislation as necessary to protect and promote the interests of consumers.
- b) Represent the consumer's interests before federal and state legislative hearings and executive commissions.
- c) Assist, advise, and cooperate with federal, state, and local agencies and officials to protect and promote the interests of consumers.
- d) Study, investigate, research, and analyze matters affecting the interests of consumers.
- e) Hold public hearings, subpoena witnesses, take testimony, compel the production of books, papers, documents, and other evidence, and call upon other state agencies for information.
- f) Propose and assist in the creation and development of consumer education programs.
- g) Promote ethical standards of conduct for business and consumers and undertake activities to encourage public responsibility in the production, promotion, sale and lease of consumer goods and services.
- h) Advise the Governor and Legislature on all matters affecting the interests of consumers.
- i) Exercise and perform such other functions, powers and duties as may be deemed appropriate to protect and promote the interests of consumers as directed by the Governor or the Legislature.
- j) Maintain contact and liaison with consumer groups in California and nationally.

(BPC § 310)

11) Requires that the Director of Consumer Affairs be formally notified of and be provided a full opportunity to review all notices of proposed, modified, and final rulemaking actions, and provides the director with the authority to disapprove a proposed rule or regulation within 30 days on the ground that it is injurious to the public health, safety, or welfare. (BPC § 313.1)

12) States that 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 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. (BPC § 825)

THIS BILL:

- 1) Codifies the following policies of the state:
 - a) Occupational licensing laws should be construed and applied to increase economic opportunity, promote competition, and encourage innovation.
 - b) Regulators should displace competition through occupational licensing only where less restrictive regulation will not suffice to protect consumers from present, significant, and substantiated harms that threaten public health, safety, or welfare.
 - c) An occupational licensing restriction should be enforced against an individual only to the extent the individual sells goods and services that are included explicitly in the statute or regulation that defines the occupation's scope of practice.
- 2) Defines "covered board" as any entity listed in BPC § 101.
- 3) Establishes an Office of Supervision of Occupational Boards within the DCA with responsibility for exercising active supervision over each covered board to ensure compliance with the state's newly codified policies.
- 4) Requires the Office of Supervision of Occupational Boards to independently do the following as part of its active supervision over covered boards:
 - a) Play a substantial role in the development of a covered board's rules and policies to ensure they benefit consumers and do not serve the private interests of providers of goods and services regulated by the covered board.
 - b) Disapprove the use of any rule or policy of a covered board and terminate any enforcement action that is not consistent with the state's newly codified policies.
 - c) Exercise control over each covered board by reviewing and affirmatively approving only rules, policies, and enforcement actions that are consistent with the state's newly codified policies.
 - d) Analyze existing and proposed rules and policies and conduct investigations to gain additional information to promote compliance with the state's newly codified policies, including, but not limited to, less restrictive regulatory approaches.
- 5) Mandates that the Office of Supervision of Occupational Boards shall be staffed by not fewer than one attorney who does not provide general counsel to any covered board.
- 6) Requires the Office of Supervision of Occupational Boards to review and approve or reject any rule, policy, enforcement action, or other occupational licensure action proposed by each covered board before the board may adopt or implement the action.
- 7) Permits any person to file a complaint to the Office of Supervision of Occupational Boards about a rule, policy, enforcement action, or other occupational licensure action of a covered board that the person believes is not consistent with the state's newly codified policies.

- 8) Requires the Office of Supervision of Occupational Boards to, within 90 days, investigate each complaint, identify remedies, and instruct the covered board to take action as the office determines to be appropriate, and respond in writing to the complainant.
- 9) Provides for an appeals process through the superior court for decisions made by the Office of Supervision of Occupational Boards.

FISCAL EFFECT: Unknown; this bill is keyed fiscal by the Legislative Counsel.

COMMENTS:

Purpose. This bill is sponsored by the author. According to the author:

AB 2483 works to ensure that occupational laws are properly utilized and are applied to increase economic opportunity, promote competition, and encourage innovation in our Golden State. The establishment of the Office of Supervision of Occupational Boards would have 90 days to receive complaints to investigate individuals and respond in a written form to promote fairness and efficiency.

Background.

Overview of Licensure in California. California has provided for the licensure of regulated professionals since the early days of statehood. In 1876, the Legislature enacted the original Medical Practice Act, which was revised two years later to delegate licensing authority to the first three regulatory boards: the Medical Board, Eclectic Board, and Homeopathic Board. By the end of the 1920s, seven additional boards had been established to regulate pharmacists, dentists, optometrists, veterinarians, barbers, accountants, and embalmers. These boards were placed under the oversight of a Department of Vocational and Professional Standards, which would become the Department of Consumer Affairs in 1965. Today, the DCA oversees 38 boards, bureaus, and other regulatory bodies.

As a department within an agency of the state government, the DCA is led by a director appointed by the Governor. While the regulatory boards under the DCA's oversight are considered semi-autonomous, the Director of Consumer Affairs does wield considerable influence over board policymaking. For example, the director has the power to review and disapprove formal rulemaking, may conduct audits and reviews of board activities, and approves budget change proposals prior to their submission to the Department of Finance. The powers of the director are then further subject to the authority of the Secretary of the Business, Consumer Services, and Housing Agency and, ultimately, the Governor.

The practice act for each profession licensed by a regulatory board under the DCA typically includes sunset provisions providing for regular review by the Legislature. At staggered intervals averaging four years, the Senate and Assembly Business and Professions Committees prepare a comprehensive background paper for each entity, hold public hearings, recalculate the balance of consumer protection and regulatory burden, and make recommendations to enact any necessary reforms. In rare instances, entities are abolished, reduced, or consolidated when inefficiencies are identified or when public benefit is deemed insufficient to justify regulation. For example, in 2017 the Legislature allowed the State Board of Guide Dogs for the Blind to sunset, replacing its licensing program with less intrusive title protections.

Criticisms of the DCA. In recent years, a number of published reports have called for reforms to California's licensure scheme, criticizing the state's regulation of occupations and professions as needlessly burdensome and complex. These reports typically follow a libertarian philosophy in favor of smaller government, arguing that regulation should only exist in situations where clear consumer harm is likely absent government intervention. Barriers to entry such as licensing fees, education requirements, examinations, criminal history disqualifications, and other prerequisites are all then presumed undesirable unless proven necessary for the public interest.

The Little Hoover Commission's *Jobs for Californians: Strategies to Ease Occupational Licensing Barriers* refers to the boards and bureaus under the DCA as a "nearly impenetrable thicket of bureaucracy for Californians" and advocates for the state to "review its licensing requirements and determine whether those requirements are overly broad or burdensome to labor market entry or labor mobility." The Institute for Justice's *License to Work: A National Study of Burdens from Occupational Licensing*, now in its second edition, ranks California as the "most burdensome state" when accounting for both the number of lower-income occupations licensed and the average burden of licensing requirements. Other reports published by both public and private research institutions are less aggressively critical in tone, but offer similar assessments as to the possibility that California may arguably overregulate in its licensure of professions and occupations.

Antitrust Implications and NC Dental. More substantiated concerns about the validity of California's licensing structure arose in the wake of a decision by the Supreme Court of the *United States in North Carolina State Board of Dental Examiners v. Federal Trade Commission (NC Dental)*. The fact of the case involved actions taken by North Carolina's dental board to stop shopping mall kiosks and other retail settings from offering teeth whitening services, which the board alleged constituted the unlicensed practice of dentistry. The Federal Trade Commission (FTC), noting in court filings that the majority of the state's dental board was comprised of active dentists with a financial incentive to reduce competition in a lucrative market, brought antitrust charges against the board.

While the Sherman Antitrust Act broadly prohibits anticompetitive misconduct, case precedent set in *Parker v. Brown* immunizes those acting on behalf of the state against charges brought under the act. Under *Parker's* state action doctrine, individuals who are not eligible for sovereign immunity but serve as agents of subordinate state agencies enjoy antitrust immunity if their actions furthered a clearly articulated and affirmatively expressed state policy. Other private individuals acting on behalf of the state also retain immunity if their conduct is subject to active supervision by the state.

Prior to *NC Dental*, the common presumption that licensing board members constituted subordinate agency actors who needed only to further a state policy for their actions to be immunized from antitrust charges. However, in the Court's decision, it was ruled that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates" must meet the requirement for active state supervision to receive *Parker* immunity. In effect, *NC Dental* dramatically rewrote expectations of antitrust immunity for state licensing board members across the country and called into question whether certain regulatory schemes were not merely overly burdensome, but vulnerable to litigation alleging deliberate anticompetitive behavior.

Concerned that boards under the DCA may be at risk of antitrust litigation similar to the charges filed in *NC Dental*, Senator Jerry Hill requested an official opinion from Attorney General Kamala D. Harris regarding “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.” In response, Opinion No. 15-402 concluded that “active state supervision” requires that a state official must “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 opinion further states that “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.”

Guided by the Attorney General’s opinion, the Legislature engaged in a robust discussion of whether California already met the requirements for active state supervision of professional licensing boards. Noting that the *NC Dental* decision applied specifically to the facts contained in that case, California lawmakers considered the substantial bureaucracy employed in its licensure scheme, including the significant oversight provided by the DCA and the Director of Consumer Affairs. Further, the professional members of North Carolina’s dental board were appointed not by the Governor and Legislature (as is the case in California), but were directly selected by associations consisting of practicing dentists. The results of the *NC Dental* case warranted consideration of whether additional safeguards were necessary or preferable to provide reassurance to California’s board members, but there was never certainty that any change was imperative to retain their *Parker* immunity.

The Attorney General’s opinion did make a small number of recommendations to improve California’s case for board member immunity under the state action doctrine. First, the opinion outlines how the Government Claims Act allows a public employee to request its agency to pay the amount of a judgment secured against official conduct. However, the Government Claims Act does not apply to punitive damages, and it is unclear whether treble damages authorized in antitrust litigation fit either category. The Attorney General’s opinion stated that board members’ “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.”

Another recommendation in the Attorney General’s opinion was relating to board member training. The DCA was encouraged to incorporate lessons from the *NC Dental* decision into its standard trainings for new board members relating to the need for ensuring adequate transparency and department consultation when taking market-sensitive actions. The training recommended in the opinion was launched almost immediately following the decision in *NC Dental* through a partnership between the DCA and the Attorney General.

Finally, the opinion described how review of board decisions by a supervising state agency was a clear path to increasing the argument for immunity. The opinion stated that California’s existing bureaucracies, including the role of its Director of Consumer Affairs, could receive some “minimal adjustments to procedures and outlooks” to provide added state supervision to board actions. The opinion contemplated what some of these adjustments to current powers under the director might look like, but did not champion any particular modification as necessary to preserve immunity for board members in California.

The Attorney General's analysis and recommendations were ultimately factored into SB 1194 by Senator Jerry Hill, a bill that would have made expansive revisions to how the DCA and regulatory boards operate. While the Attorney General's office testified that the full scope of the bill was not necessary for the state to aggressively defend its board members against personal liability in antitrust litigation, its provisions were intended to add greater confidence to the existence of active state supervision by the DCA. During the bill's final hearing in the Assembly Business and Professions Committee, it was determined that the array of reforms included in the bill was potentially in excess considering existing state supervision and the potential impact on boards to efficiently regulate professionals. However, some provisions in the bill were relatively noncontroversial and may still be worthy of consideration even as little to no new antitrust litigation has been brought against boards in California in the growing years since *NC Dental*.

Current Related Legislation. AB 2409 (Kiley) would establish a right to engage in a lawful profession or vocation without being subject to an occupational regulation that imposes a substantial burden on that right, and would require each occupational regulation to be limited to what is demonstrably necessary and narrowly tailored to fulfill a legitimate public health, safety, or welfare objective. *This bill is pending in the Assembly Business and Professions Committee.*

Prior Related Legislation. SB 247 (Moorlach) from 2017 would have repealed or reduced various occupational licensure requirements relating to fitting or selling hearing aids, locksmithing, barbering or cosmetology, disposing of cremated human remains, performing custom upholstery services, providing landscaping, and private investigation. *This bill failed passage in the Senate Business, Professions and Economic Development Committee.*

SB 1194 (Hill) of 2016 would have substantially increased the powers and responsibilities of the Director of Consumer Affairs to review nonministerial market-sensitive actions by regulatory boards to determine whether the action furthers a clearly articulated and affirmatively expressed state policy. The bill would have also clarified the applicability of treble damage antitrust awards against a regulatory board member for purposes of the Government Claims Act. *This bill failed passage in the Assembly Business and Professions Committee.*

ARGUMENTS IN SUPPORT:

None on file.

ARGUMENTS IN OPPOSITION:

The Board for Professional Engineers, Land Surveyors, and Geologists (BPELSG) under the DCA voted to oppose this bill, citing concerns with the lack of specificity regarding the operational aspects of the Office of Supervision of Occupational Boards. The BPELSG is concerned that the bill does not provide for a funding mechanism and could potentially impact the budgetary resources of regulatory boards under the DCA. The BPELSG also notes that the bill "does not address how the Office of Supervision of Occupational Boards will make determinations or what grounds it would use" to disapprove or terminate a board action. Finally, the BPELSG argues that the additional level of oversight this bill would add to regulatory boards is unnecessary, stating that "there is already sufficient oversight by the Department of Consumer Affairs and the Office of Administrative Law on rulemaking matters, the Office of the Attorney General and the Office of Administrative Hearings on enforcement matters, and the Legislature and the Governor on the Board's overall operations through the sunset review process."

The California Dental Association (CDA), which represents over 27,000 dentists licensed by the Dental Board of California under the DCA, opposes this bill. CDA describes the existing processes by which actions taken by regulatory boards under the DCA are already subject to review by the Director of Consumer Affairs. CDA argues that “this bill would shift the focus of DCA from the consumer to the marketplace, effectively duplicate an already rigorous regulatory review process, and increase licensing fees for services that are already provided within the agency.”

The California Medical Association (CMA), which represents over 43,000 physicians and surgeons licensed by the Medical Board of California under the DCA, opposes this bill. CMA argues that the Office of Supervision of Occupational Boards “is problematic and duplicative of existing DCA authority, as well as completely unnecessary since the Legislature spent extensive time and resources on DCA oversight over its licensing boards recently, and found no need for a massive systemic change at this time.” CMA refers to the existing authority of the Director of Consumer Affairs to review board actions, and argues that providing this authority to an additional office and director “will only serve to duplicate the ongoing work of the department, with no identifiable benefit.”

The California Nurses Association (CNA), which represents over 100,000 nurses licensed by the Board of Registered Nursing under the DCA, also opposes this bill. CNA calls the bill “unnecessary, costly, and an example of the anti-regulatory ‘Trumpism’ coming out of the nation’s Capitol at this time.” CNA alleges that the additional oversight provided by the bill amounts to “a power grab” that represents “a major usurpation of decision-making authority” by board members. Specifically, CNA believes the powers granted to the Office of Supervision of Occupational Boards is broad and undefined and could be interpreted as giving authority to “unilaterally overturn almost any conceivable licensing board action or decision.”

POLICY ISSUES FOR CONSIDERATION:

The creation of a new Office of Supervision of Occupational Boards within the DCA, empowered to specifically veto any action by a board that disproportionately displaces competition without sufficient evidence of consumer protection imperative, would arguably address both libertarian criticisms of overly burdensome regulation and concerns arising from the Court’s decision in *NC Dental*. However, a full additional level of oversight would likely provoke a series of challenges unjustified by the office’s benefit.

For example, the office’s mandated insertion into virtually every degree of decision-making by a board could prolong and complicate actions necessary to protect consumers. The office’s review and potential veto of “any rule or policy” or “any enforcement action” could impact anything from education provider approvals to licensee disciplinary proceedings to newsletter language. The result would be less clarity and greater delay for professionals licensed under the DCA, as opposed to the improved opportunity, competition, and innovation envisioned by the author.

This unwieldy bureaucratic encumbrance would also be in many ways duplicative of existing supervision received by boards from the DCA and Director of Consumer Affairs. As discussed both in the Attorney General’s *NC Dental* opinion and in committee debate for SB 1194, there is already a tremendous amount of state supervision included in California’s licensure scheme. Further obfuscating the autonomy of regulatory boards is unlikely to be the answer to any call for greater economic prospect or consumer choice.

IMPLEMENTATION ISSUES:

Much of the bill is insufficiently defined. It is unclear how staff within the Office of Supervision of Occupational Boards would be hired or appointed, other than that a minimum of one attorney must be included. While the bill refers to “covered boards,” it defines the term as “any entity under Section 101” – a list containing bureaus, committees, commissions, programs, and even the DCA’s Division of Investigation. Finally, it is uncertain but probable that the expense of operating the office – likely considerable – would be funded through the process currently used by the DCA for distributing administrative costs (pro rata) among its boards; if so, this bill could result in significant fee increases for boards required to pay for it through their special funds.

AMENDMENTS:

- 1) While the additional supervision provided through the creation of a new Office of Supervision of Occupational Boards echoes principles contained in the *NC Dental* decision, this bill may be excessive in light of existing state oversight of actions by regulatory boards. To remove the language establishing this office so that these provisions may be recast:

Strike Section 1 from the bill.

- 2) To provide greater confidence to licensed professionals who serve on state regulatory boards by removing uncertainty as to whether the state would indemnify a board member against personal liability for reasonable, good faith actions taken in the course of their board membership:

Amend Section 825 of the Government Code to insert the following provisions:

(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 official capacity as a member of a regulatory board.

(h) Treble damages awarded pursuant to the federal Clayton Act (Sections 12 to 27, inclusive, of Title 15 of, and Sections 52 and 53 of Title 29 of, the United States Code) for a violation of the federal Sherman Act (Sections 1 to 7, inclusive, 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.

REGISTERED SUPPORT:

None on file.

REGISTERED OPPOSITION:

Board for Professional Engineers, Land Surveyors, and Geologists
California Dental Association
California Medical Association
California Nurses Association

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