# PUBLICATION

## FTC Staff Provides Antitrust Guidance to State Medical Boards [Ober|Kaler]

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Until recently, actions by state medical boards, operating pursuant to a state legislative mandate, were generally thought to be insulated from federal antitrust scrutiny by virtue of the state-action exemption. That changed, of course, when the Supreme Court, in *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015), declared that not all state agencies enjoy sovereign status. Specifically, state medical boards "controlled" by "active market participants" are essentially private parties, not sovereign entities, and their activities, to the extent they adversely affect competition, must: 1) be the foreseen and implicitly endorsed result of legislation displacing competition; and 2) be actively supervised by the state before state-action antitrust immunity will apply.[1]

Alarm bells are appropriately ringing for state medical boards and their members. Not only has the Pandora's Box of antitrust exposure been opened, but certain pressing questions were left unanswered by the Supreme Court's decision, such as: (1) which state agencies remain sovereign; (2) what activities raise potential antitrust risks; and (3) what constitutes active state supervision. Challenges to state board activities are already filling the federal courts but these issues are too fresh to benefit from court interpretation. However, in an effort to fill the void, the FTC's staff posted *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* [PDF] (Guidelines) as guidance on these issues.[2] Although not binding on the FTC, and subject to change, the Guidelines do provide useful insight into how the FTC's staff interprets/answers some of the pressing issues left unresolved by the Supreme Court's decision in *North Carolina State Board of Medical Examiners*.

## Who Are *Active Market Participants*?

The Guidelines broadly define *active market participants* as anyone involved in the occupation the board regulates that either: (i) is licensed by that board; or (ii) provides any service subject to regulatory authority of the board. The Guidelines make it clear that if a person satisfies either of these criteria, it does not matter if that individual is personally unaffected by the challenged restraint at issue. Furthermore, the mode of selection to the board (e.g., appointment by the governor versus elected by other members) is irrelevant for this analysis, and a temporary suspension of membership for purposes of participating in board activities does not negate one's designation as an active market participant.

## How Is *Control* Defined?

According to the Guidelines, numerosity of membership is not determinative. Instead, active supervision is required of any decision affecting competition by a board that is controlled by active market participants as "a matter of law, procedure, or fact …," and the FTC staff will undertake a case-by-case inquiry looking at a number of factors including: a) the governing documents outlining the board's authority; and b) potential veto power by any active market participants over the board's regulatory decisions. To highlight these points, the Guidelines provide the following examples:

1. A board comprised of seven members, four non-active market participants and three active market participants, requiring the affirmative vote of five members to pass any regulation, is “controlled” by active market participants by virtue of the inherent veto power.
2. A board comprised of seven members, four non-active market participants and three active market participants, requiring a simple majority (four votes) to pass regulation is controlled by active market participants if the non-active market participants defer to the wishes of the active market participants when making decisions.
3. A board comprised of seven members, four non-active market participants and three active market participants, is controlled by the active market participants if the active market participants have the power to make decisions on behalf of the board without input from the non-active market participants.

## What Is *Active State Supervision*?

The Guidelines make clear that substantial involvement by the State in supervising the activities of the medical board is necessary for the state-action exemption to apply. The Guidelines suggest that the requirements enumerated by the Supreme Court in *North Carolina State Board of Dental Examiners* are merely a starting point. These include: 1) a substantive review of the anticompetitive decision preceding its implementation, not merely the process for making the decision; 2) the state supervisor must possess the power to veto or modify the decision to ensure it accords with state policy; and 3) the state supervisor cannot be an active market participant. Additional factors the FTC staff will look for include:

4. Evidence that the supervisor has obtained and considered information relevant and necessary to analyze the board decision, including obtaining input from the public via public hearings or comment sessions; investigated relevant market conditions; and undertook needed studies;
5. Evidence that the supervisor compared the board action with the standards established by the state legislature to ensure that they are consistent; and
6. The issuance of a written decision by the supervisor containing an informed explanation of its decision approving, rejecting or modifying of the board action.

## Ober | Kaler's Comments

The FTC's staff has used the Supreme Court's decision in N*orth Carolina State Board of Dental Examiners* as a springboard to further reduce antitrust protections previously afforded medical board activity. This should come as no surprise as it is consistent with public announcements by Commissioners of the FTC's intentions to find ways to attack and minimize existing antitrust exemptions. And, while the Guidelines briefly refer to conduct the FTC staff deems inherently lawful (i.e., “reasonable” restraints such as policing against fraud and deceptive advertisements; ministerial and non-discretionary actions intended to implement a statutory regime; or prosecution of a lawsuit that is not a sham) this should offer little comfort as medical boards are generally tasked with addressing all sorts of issues that have a potential effect on competition.

[1] For a detailed discussion of the case, *see* Steren, “Open Season on Provider-Controlled Licensing Boards” (Health Law Alert 2015: Issue 6).
2 *See* FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants.