

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Appropriations

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BILL: CS/CS/SB 582

INTRODUCER: Judiciary Committee; Regulated Industries Committee; and Senator Latvala

SUBJECT: Regulatory Boards

DATE: April 4, 2017

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Kraemer</u>	<u>McSwain</u>	<u>RI</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Davis/Sanders</u>	<u>Hansen</u>	<u>AP</u>	<u>Pre-meeting</u>

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 582 requires the Department of Business and Professional Regulation (DBPR), the Department of Health (DOH), and the Department of Financial Services (DFS) (as to the Board of Funeral, Cemetery, and Consumer Services) (departments) to review final decisions of all regulatory boards under their jurisdiction. Each department must determine if final regulatory board decisions constitute anticompetitive conduct that does not:

- Promote state policy;
- Comport with the standards established by the Legislature; or
- Comport with the authority delegated to a board by the Legislature.

The bill requires department officials who are not active market participants to review final disciplinary actions, rules, declaratory statements, actions concerning unlicensed activity, and licensure application denials. Each department must approve, modify, or void final board decisions and issue an order that will constitute state action. The review of a final board decision is a limited legal review and is not subject to a legal challenge.

Legal defense costs of a board or board members for antitrust actions must be paid from the:

- Professional Regulation Trust Fund, for boards within the DPBR;
- Regulatory Trust Fund, for the Board of Funeral, Cemetery, and Consumer Services within the DFS; and
- Medical Quality Assurance Trust Fund, for boards within the DOH.

In 2015, the United States Supreme Court held that a state board on which a “controlling number” of decision makers (i.e. regulatory board members) are “active market participants” (i.e., members of the profession or occupation being regulated) must be “actively supervised” in order to seek immunity from federal antitrust laws. The requirement for active supervision is intended to avoid a divergence from a valid state policy caused by implementation of the policy by a board in an anticompetitive manner.<sup>1</sup> The case did not address the liability of regulatory board members for money damages. However, the Court noted that the states “may provide for the defense and indemnification of [board] members in the event of litigation.”<sup>2</sup>

The fiscal impact of the bill is indeterminate.

## II. Present Situation:

### Background

In 2015, the United States Supreme Court (Supreme Court) considered actions taken by the North Carolina State Board of Dental Examiners (*NC State Bd.*).<sup>3</sup> The Supreme Court said:

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. [Citation omitted]. The Board’s concern did not result in a formal rule or regulation reviewable by the independent [North Carolina] Rules Review Commission, even though the [North Carolina law] 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

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<sup>1</sup> See *North Carolina State Bd. of Dental Exam’rs v. Fed. Trade Comm’n (NC State Bd.)*, 135 S. Ct. 1101, 1117, (2015). See also E. Dylan Rivers, *Regulating Regulators: Active Supervision of State Regulatory Boards in the Wake of North Carolina State Board of Dental Examiners v. FTC*, *Florida Bar Journal*, Vol. 90, No. 10, at pp. 43-47 (Dec. 2016).

<sup>2</sup> *Id.* at page 1115.

<sup>3</sup> *NC State Bd.*, 135 S. Ct. at 1117.

expressly stated) that teeth whitening constitutes ‘the practice of dentistry.’ [Citation omitted.] 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.<sup>4</sup>

### **Federal Antitrust Laws**

In *NC State Bd.*, the Supreme Court noted that the federal antitrust laws, including the Sherman Act,<sup>5</sup> which safeguard the nation’s free market structures, were interpreted in a 1943 case styled *Parker v. Brown*,<sup>6</sup> to confer immunity on anticompetitive conduct by the states when acting in their sovereign capacity (i.e. *Parker* state-action immunity). As stated by the Supreme Court, the federal 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.”<sup>7</sup>

The Sherman Act imposes severe penalties for violations<sup>8</sup> and promotes robust competition to empower states and provide citizens with opportunities to pursue their own and the public’s welfare.<sup>9</sup> The Supreme Court, noting that the states “need not adhere in all contexts to a model of unfettered competition,” acknowledged that states may impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives.<sup>10</sup> The Supreme Court explained that:

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.

The Supreme Court then addressed the requirements for a person to invoke *Parker* state-action immunity. The anticompetitive conduct of those authorized by a state to regulate their own

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<sup>4</sup> *Id.* at 1108.

<sup>5</sup> 15 U.S.C. §1 *et seq.*

<sup>6</sup> *See Parker v. Brown*, 317 U. S. 341 (1943).

<sup>7</sup> *See NC State Bd.*, 135 S. Ct. at 1109.

<sup>8</sup> According to the Federal Trade Commission (FTC), the penalties for violating the Sherman Act can be severe. The FTC states that: (1) although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice; (2) criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids; (3) the Sherman Act imposes criminal penalties of up to \$100 million for a corporation and \$1 million for an individual, along with up to 10 years in prison; and (4) under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over \$100 million. *See* <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Mar. 25, 2017).

<sup>9</sup> *See NC State Bd.*, 135 S. Ct. at 1109.

<sup>10</sup> *Id.*

profession must result from a procedure that causes the conduct to be deemed state conduct shielded from the federal antitrust laws.<sup>11</sup>

To determine whether the anticompetitive conduct is state conduct, the Supreme Court applied the two-part test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, (*Midcal*), a 1980 case arising from the delegation of price-fixing authority by the State of California to wine merchants.<sup>12</sup> Under *Midcal*, antitrust immunity cannot be invoked unless the state (1) articulates a clear policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct.<sup>13</sup>

*Midcal*'s clear articulation requirement is satisfied, stated the Supreme Court, "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."<sup>14</sup>

Further, the Court noted the active supervision requirement demands "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,"<sup>15</sup> and that the 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.'"<sup>16</sup>

*Midcal*'s supervision mandate, stated the Supreme Court, demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."<sup>17</sup>

In October 2015, the Federal Trade Commission issued a document titled "FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants," which sets out the views of the Staff of the Bureau of Competition on the active supervision requirement addressed in *NC State Bd.*<sup>18</sup> The staff guidance indicates that even when the state Attorney General provides advice to the regulatory board on an ongoing basis (as occurs for various boards in Florida), that does not constitute active supervision of a state regulatory board that is controlled by active market participants.<sup>19</sup>

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<sup>11</sup> See *NC State Bd.*, 135 S. Ct. at 1110.

<sup>12</sup> See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

<sup>13</sup> See *NC State Bd.*, 135 S. Ct. at 1112 (citing *FTC. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980)).

<sup>14</sup> See *NC State Bd.*, 135 S. Ct. at 1112, (citing *FTC. V. Phoebe Putney Health Sys.*, 133 S. Ct. 1003, 1006 (2016)).

<sup>15</sup> *Id.* at 1112 (citing *Patrick v. Burget*, 486 U.S. 94, 101 (1988)).

<sup>16</sup> *Patrick*, 486 U.S. at 100 (citation omitted).

<sup>17</sup> *Id.* at 101.

<sup>18</sup> The document includes a statement that the Federal Trade Commission is not bound by the Staff guidance and reserves the right to rescind it at a later date. In addition, staff of the Federal Trade Commission reserves the right to reconsider the views expressed therein, and to modify, rescind, or revoke the document if such action would be in the public interest. See [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf) (last visited Mar. 25, 2017).

<sup>19</sup> *Id.* at page 13.

## Delegation of Powers and Duties to Regulatory Agencies

The separation-of-powers doctrine prevents the Legislature from delegating its constitutional duties.<sup>20</sup> An invalid delegation of authority violates the principle of separation of powers mandated in the Florida Constitution.<sup>21</sup> When delegating a regulatory responsibility, the Legislature must provide the agency with adequate standards and guidelines.<sup>22</sup> The executive branch “must be limited and guided by an appropriately detailed legislative statement of the standards and policies to be followed.”<sup>23</sup>

In *Askew v. Cross Key Waterways*,<sup>24</sup> the Florida Supreme Court acknowledged that “[w]here the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards, there is no violation of the [separation of powers] doctrine . . . .”<sup>25</sup> If legislation lacks guidelines, and “neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.”<sup>26</sup>

## Agency Rulemaking

Florida’s Administrative Procedure Act, ch. 120, F.S., (FAPA) provides that rulemaking by agencies is limited in nature and is not a matter of agency discretion. Each agency statement defined as a rule<sup>27</sup> must be adopted by rulemaking as soon as feasible and practicable.

Rulemaking is presumed feasible, unless the agency proves that:

- The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
- Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.<sup>28</sup>

<sup>20</sup> See *Board of Architecture v. Wasserman*, 377 So. 2d 653 (Fla. 1979).

<sup>21</sup> See FLA. CONST. art. II, s. 3, and *Gallagher v. Motors Insurance Corp.*, 605 So. 2d 62 (Fla. 1992).

<sup>22</sup> *Askew v. Cross Key Waterways*, 372 So. 2d. 913 (Fla. 1978); *Florida East Coast Industries, Inc. v. Dept. of Community Affairs*, 677 So. 2d 357 (Fla. 1st DCA 1996), review denied, 689 So. 2d 1069 (Fla. 1997).

<sup>23</sup> *Florida Home Builders Association v. Division of Labor*, 367 So. 219 (Fla. 1979).

<sup>24</sup> *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978).

<sup>25</sup> *Id.* at 921 (quoting *CEEED v. California Coastal Zone Conservation Comm’n*, 43 Cal. App. 3d 306, 325 (Cal. App. 3 Dist. 1974)).

<sup>26</sup> *Id.* at 918-919. See generally James P. Rhea and Patrick L. “Booter” Imhof, *An Overview of the 1996 Administrative Procedure Act*, 48 U. Fla. L. Rev. 1 (1996); Dan R. Stengle and James P. Rhea, *Putting the Genie Back in the Bottle: The Legislature Struggles to Control Rulemaking by Executive Agencies*, 21 Fla. St. U. L. Rev. 415 (1993); Stephen T. Maher, *We’re No Angels: Rulemaking and Judicial Review in Florida*, 18 Fla. St. U. L. Rev. 767 (1991).

<sup>27</sup> Under s. 120.52(16), F.S., the term “rule” means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes an agency’s procedure or practice requirements. Also included is any form that imposes any requirement or solicits any information not specifically required by statute or by an existing rule, and the amendment or repeal of a rule. The term does not include: (a) internal management memoranda of an agency that do not affect either the private interests of any person or any plan or procedure important to the public, and that no application outside the agency; (b) legal memoranda or opinions to an agency by the Attorney General, or agency legal opinions prior to their use in connection with an agency action; or (c) the preparation or modification of: agency budgets, memoranda or instructions issued by the Chief Financial Officer or Comptroller about agencies’ submission of payment claims, collective bargaining contractual provisions, or memoranda issued by the Executive Office of the Governor relating to information resources management.

<sup>28</sup> See s. 120.54(1)(a)1., F.S.

Rulemaking is presumed practicable to the extent necessary to provide fair notice to affected persons of agency procedures and principles, criteria, or standards for agency decisions, unless the agency proves that:

- Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
- The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.<sup>29</sup>

An agency action that goes beyond the powers, functions, and duties delegated by the Legislature is an “invalid exercise of delegated legislative authority” under the FAPA,<sup>30</sup> including a proposed or existing rule, if:

- The agency has materially failed to follow the applicable rulemaking procedures or requirements in ch. 120, F.S.;
- The agency has exceeded its grant of rulemaking authority, which must be cited as required by s. 120.54(3)(a)1., F.S.;
- The rule enlarges, modifies, or contravenes the specific provisions of law implemented, which must be cited as required by s. 120.54(3)(a)1., F.S.;
- The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
- The rule is arbitrary, if it is not supported by logic or the necessary facts; or capricious, if it is adopted without thought or reason or is irrational; or
- The rule imposes regulatory costs on the regulated person, county, or city, which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

In addition to a grant of rulemaking authority from the legislature, for an agency to adopt a rule, there must be a specific law to be implemented. As such, an agency may adopt only rules that implement or interpret the specific powers and duties granted by statute.<sup>31</sup>

Agencies are not authorized to adopt a rule solely on the basis that the rule is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency’s class of powers and duties.<sup>32</sup> Further, agencies are not authorized to implement statutory provisions setting forth general legislative intent or policy.<sup>33</sup> Statutory language granting rulemaking authority or generally describing an agency’s powers and functions must “be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.”<sup>34</sup>

Rulemaking is a legislative function within the exclusive authority of the legislature, and it is not sufficient that the rule is “within the agency’s class of powers and duties;” there must be a

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<sup>29</sup> See s. 120.54(1)(a)2., F.S.

<sup>30</sup> See s. 120.52(8), F.S.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

specific grant of rulemaking authority.<sup>35</sup> The requirements for agency rulemaking in s. 120.52(8), F.S., are intended to restrict and narrow the scope of agency rulemaking.<sup>36</sup> As stated by the First District Court of Appeal in *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*:

It is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class or powers or duties the Legislature has conferred on the agency.<sup>37</sup>

Furthermore, in *Southwest Florida Water Management District*, the First District Court of Appeal concluded that “[i]t follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough.”<sup>38</sup>

### **Regulatory Boards within the Department of Business and Professional Regulation**

Section 20.165(4)(a), F.S., establishes the following boards and programs within the Division of Professions, Department of Business and Professional Regulation (DBPR), which are noted along with the applicable implementing statute:

- Board of Architecture and Interior Design, part I of ch. 481, F.S.;
- Florida Board of Auctioneers, part VI of ch. 468, F.S.;
- Barbers’ Board, ch. 476, F.S.;
- Florida Building Code Administrators and Inspectors Board, part XII of ch. 468, F.S.;
- Construction Industry Licensing Board, part I of ch. 489, F.S.;
- Board of Cosmetology, ch. 477, F.S.;
- Electrical Contractors’ Licensing Board, part II of ch. 489, F.S.;
- Board of Employee Leasing Companies, part XI of ch. 46,8 F.S.;
- Board of Landscape Architecture, part II of ch. 481, F.S.;
- Board of Pilot Commissioners, ch. 310, F.S.;
- Board of Professional Engineers, ch. 471, F.S.;
- Board of Professional Geologists, ch. 492, F.S.;
- Board of Veterinary Medicine, ch. 474, F.S.;
- Home Inspection Services Licensing Program, part XV of ch. 468, F.S.; and
- Mold-related Services Licensing Program, part XVI of ch. 468, F.S.

Section 20.165(4)(b), F.S., establishes the following boards and commissions within the Division of Real Estate, DBPR, which are noted along with the applicable implementing statute:

<sup>35</sup> See *S.W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, (*Southwest Florida Water Management District*), 773 So. 2d 594, 598-599 (Fla. 1st DCA 2000).

<sup>36</sup> See *Southwest Florida Water Management District*, 773 So. 2d at 597-600, and *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, (*Day Cruise*) 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

<sup>37</sup> See *Day Cruise*, 794 So. 2d at 700.

<sup>38</sup> See *Southwest Florida Water Management District*, 773 So. 2d at 599.

- Florida Real Estate Appraisal Board, created under part II ch. 475, F.S.; and
- Florida Real Estate Commission, created under part I ch. 475, F.S.

In addition, s. 20.165(c), F.S., establishes the Board of Accountancy, created in ch. 473, F.S., within the Division of Certified Public Accounting of the DBPR.

Current law requires that for the boards under its jurisdiction, the DBPR must:<sup>39</sup>

- Adopt rules for biennial license renewal and may issue to selected licensees up to a four-year license;
- Appoint an executive director of each board, subject to the board's approval;
- Submit an annual budget to the legislature;
- Develop a training program for newly appointed members of a board relating to substantive and procedural laws and rules and fiscal information relating to the profession regulated by the board and the structure of the DBPR;
- Adopt rules to implement ch. 455, F.S., on Regulation of Professions and Occupations;
- Establish the procedures to be used by the DBPR for the use of a board's expert or technical advice for the purposes of investigation, inspection, evaluation of applications, other duties of the DBPR, or any other areas deemed appropriate by the DBPR;
- Require electronic recording of all board proceedings (or of any panel thereof) and all formal or informal proceedings conducted by the DBPR, an administrative law judge, or a hearing officer on licensing or discipline, in order to assure the accurate transcription of all recorded matters;
- Select only investigators, including consultants who undertake investigations, who meet criteria established with the advice of each of the boards; and
- Work cooperatively with the Department of Revenue to implement an automated method for disclosing DBPR licensee information to the Department of Revenue, for use in child support enforcement actions, including the denial, suspension, issuance, or reinstatement of a license after formal direction by a court or the Department of Revenue.

The DBPR also has authority to approve applications for professional licenses that meet statutory and rule requirements and to close and terminate deficient license application files.<sup>40</sup>

### **Regulatory Boards within the Department of Health**

Pursuant to s. 456.001, F.S., the term "board" includes any board or commission, or other statutorily created entity, to the extent the entity is authorized to exercise regulatory or rulemaking functions, within the Department of Health (DOH). In other contexts,<sup>41</sup> the term includes a board, or other statutorily created entity, to the extent, such entity is authorized to exercise regulatory or rulemaking functions within the Division of Medical Quality Assurance (DOH boards).

The 22 boards within the DOH are the:

<sup>39</sup> See s. 455.203, F.S.

<sup>40</sup> See s. 455.203(10), F.S.

<sup>41</sup> For ss. 456.003-456.018, 456.022, 456.023, 456.025-456.033, and 456.039-456.082, F.S., the term includes only those entities exercising regulatory or rulemaking functions that are within the Division of Medical Quality Assurance.

- Board of Acupuncture;
- Board of Athletic Trainers
- Board of Chiropractic Physicians;
- Board of Clinical Laboratory Personnel;
- Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling
- Board of Dentistry;
- Board of Hearing Aid Specialists;
- Board of Massage Therapy;
- Board of Medicine;
- Board of Nursing;
- Board of Nursing Home Administrators;
- Board of Occupational Therapy;
- Board of Opticianry;
- Board of Optometry;
- Board of Orthotists and Prosthetists;
- Board of Osteopathic Physicians;
- Board of Pharmacy;
- Board of Physical Therapy;
- Board of Podiatric Medicine;
- Board of Psychology;
- Board of Respiratory Care; and
- Board of Speech-Pathology and Audiology.<sup>42</sup>

Regulatory boards under the jurisdiction of the DOH must:

- Adopt rules for biennial license renewal and may issue to selected licensees up to a four-year license;
- Appoint an executive director of each board, subject to the board's approval;
- Submit an annual budget to the Legislature;
- Develop a training program for newly appointed members of a board relating to substantive and procedural laws and rules and fiscal information relating to the profession regulated by the board and the structure of the DOH;
- Adopt rules to implement ch. 456, F.S., on Regulation of Professions and Occupations;
- Establish the procedures to be used by the DOH for the use of a board's expert or technical advice for the purposes of investigation, inspection, evaluation of applications, other duties of the DBPR, or any other areas deemed appropriate by the DOH;
- Require electronic recording of all board proceedings (or of any panel thereof) and all formal or informal proceedings conducted by the DOH, an administrative law judge, or a hearing officer on licensing or discipline, in order to assure the accurate transcription of all recorded matters;
- Select only those investigators, or consultants who undertake investigations, who meet criteria established with the advice of each of the boards;

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<sup>42</sup> Email from Tom Adams, Policy Chief, General Gov't Unit, Executive Office of the Governor, Office of Policy and Budget, to staff of the Senate Committee on Regulated Industries (Mar. 16, 2017) (on file with the Senate Committee on Regulated Industries and the Senate Committee on Judiciary); *see also* Florida Dep't of Health, *Division of Medical Quality Assurance Annual Report and Long-Range Plan for Fiscal Year 2015-2016*, [http://www.floridahealth.gov/licensing-and-regulation/reports-and-publications/\\_documents/annual-report-1516.pdf](http://www.floridahealth.gov/licensing-and-regulation/reports-and-publications/_documents/annual-report-1516.pdf) (last visited Mar. 26, 2107).

- Work cooperatively with the Department of Revenue to implement an automated method for disclosing DOH licensee information to the Department of Revenue, for use in child support enforcement actions, including the denial, suspension, issuance, or reinstatement of a license after formal direction by a court or the Department of Revenue;
- Set an examination fee that includes all costs to develop, purchase, validate, administer, and defend the examination, and that is certain to cover all administrative costs in addition to the actual per-applicant examination cost;
- Work cooperatively with the Agency for Health Care Administration and the judicial system to recover Medicaid overpayments by the Medicaid program; and
- Investigate and prosecute health care practitioners who have not remitted amounts owed to the state for an overpayment from the Medicaid program pursuant to a final order, judgment, stipulation, or settlement.<sup>43</sup>

### **The Board of Funeral, Cemetery, and Consumer Services within the Department of Financial Services**

The Board of Funeral, Cemetery, and Consumer Services (BFCCS) is housed within the Department of Financial Services.<sup>44</sup> Pursuant to s. 497.103, F.S., all authority expressly provided is vested solely in the BFCCS and all authority not expressly vested in the BFCCS is vested in the DFS,<sup>45</sup> such that:

- The DFS and the BFCCS each has standing to institute judicial or other proceedings against the other for the enforcement of s. 497.103, F.S.;
- The BFCCS has standing as a party litigant to challenge any rule proposed or adopted by the DFS under authority of ch. 497, F.S., upon any grounds enumerated in s. 120.52(8), F.S., concerning the invalid exercise of delegated legislative authority;
- The BFCCS must be represented by the Department of Legal Affairs in any such litigation by the BFCCS against the DFS, and the DFS must provide reasonable funds for the conduct of such litigation by the BFCCS; and
- No applicant, licensee, or person other than the BFCCS has standing in any proceeding under ch. 120, F.S., the Administrative Procedure Act, to assert that any rule adopted by the DFS under asserted authority of ch. 497, F.S., is invalid because it relates to a matter under the authority of the BFCCS.<sup>46</sup>

### **Letter from Attorney General to President of the Senate and Speaker of the House of Representatives**

In a letter dated December 9, 2015 to the President of the Senate and the Speaker of the House of Representatives,<sup>47</sup> the Attorney General addressed the United States Supreme Court's decision in *NC State Bd.* The Attorney General concluded that if the actions of regulatory boards in Florida are not subject to active state supervision, "they now face potential antitrust liability for any

<sup>43</sup> See s. 456.004, F.S.

<sup>44</sup> See s. 497.101, F.S.

<sup>45</sup> See s. 497.103(2), F.S.

<sup>46</sup> See s. 497.103(7), F.S.

<sup>47</sup> Letter to Andy Gardiner, President of the Senate, and Steven Crisafulli, Speaker of the House of Representatives from Attorney General Pam Bondi (Dec. 9, 2015) (on file with the Senate Committee on Regulated Industries and the Senate Committee on Judiciary).

actions they take that may unreasonably burden competition as a result of the [United States] Supreme Court decision.<sup>48</sup>

### **Florida Antitrust Laws**

Chapter 542, F.S., the “Florida Antitrust Act of 1980,” deals with combinations restricting trade or commerce. Such combinations and monopolizations of any trade or commerce are unlawful, unless the activity or conduct is exempt under Florida statutory or common law, or exempt under federal antitrust laws.<sup>49</sup> Penalties for violations include a civil penalty for natural persons of not more than \$100,000, and for corporate or other entities, a civil penalty of not more than \$1 million.<sup>50</sup> A person who “knowingly violates” the law by engaging in the unlawful conduct, or who “knowingly aids in or advises such violation,” may be found guilty of a felony punishable by a fine not exceeding \$100,000 (or a fine of \$1 million if a corporation), or imprisonment not exceeding 3 years, or both.<sup>51</sup>

### **III. Effect of Proposed Changes:**

This bill provides a framework for active supervision of certain final decisions by all regulatory boards under the jurisdiction of the Department of Business and Professional Regulation (DBPR) and the Department of Health, (DOH), and the Department of Financial Services (DFS) as to the Board of Funeral, Cemetery, and Consumer Services (BFCCS).<sup>52</sup>

The bill requires the DBPR, the DOH, and the DFS (as to the BFCCS) to review final decisions of regulatory boards under their jurisdiction and requires each department to determine if final regulatory board decisions constitute anticompetitive conduct that does not:

- Promote state policy;
- Comport with the standards established by the Legislature; or
- Comport with the authority delegated to a board by the Legislature.

Each department, by way of departmental officials who are not active market participants, must approve, modify, or void final board decisions and issue an order that constitutes state action. The final board decisions that require review include final disciplinary actions, rules, declaratory statements, actions concerning unlicensed activity, and licensure application denials. The review of a final board decision is a limited legal review and is not subject to legal challenge.

The bill requires that any legal defense costs of a board or board members for antitrust actions be paid from the:

- Professional Regulation Trust Fund, for boards within the DPBR;
- Regulatory Trust Fund, for the BFCCSA within the DFS; and

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<sup>48</sup> *Id.* at page 2.

<sup>49</sup> *See* ss. 542.18, 542.19, and 542.20, F.S.

<sup>50</sup> *See* s. 542.21(1), F.S.

<sup>51</sup> *See* s. 542.21(1), F.S.

<sup>52</sup> *NC State Bd.* conditions state immunity from antitrust actions, in part, upon, active supervision by state agency officials (i.e., “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”). *See NC State Bd. v. FTC*, 135 S. Ct. 1101, 1112 (2015) (*citing Patrick v. Burget*, 486 U.S. 94, 101 (1988)).

- Medical Quality Assurance Trust Fund, for boards within the DOH.

The bill takes effect upon becoming a law.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The fiscal impact of CS/CS/SB 582 is indeterminate.

The bill requires legal defense costs of a board or board members for antitrust actions to be paid from the Professional Regulation Trust Fund for boards within the DBPR, from the Regulatory Trust Fund for boards within the DOH, and from the Medical Quality Assistance Trust Fund for the BFCCSA within the DFS.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 455.203, 456.004, and 497.103.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Judiciary on March 28, 2017:**

The CS:

- Requires that reviews of final board decisions for anticompetitive conduct be made by departmental officials who are not active market participants;
- Provides that the review of a final board decision constitutes state action;
- Provides that an order issued pursuant to the review may approve, modify, or void a final board decision (rather than disapprove);
- Provides that the review by the Department of a final board decision is not subject to legal challenge;
- Revises the term “licensure application decisions” to “licensure application denials,” thereby removing a requirement that a department review licensure application approvals; and
- Deletes the requirement that financial damages be paid from the State Risk Management Trust Fund by the Division of Risk Management in the Department of Financial Services.

**CS by Regulated Industries on March 21, 2017:**

The committee substitute:

- Removes the requirement that Department of Business and Professional Regulation (DBPR) indemnify,<sup>53</sup> defend, and hold harmless<sup>54</sup> current and former members (and their associated businesses) of the numerous regulatory boards under its jurisdiction, in certain circumstances; such indemnification was required from all claims, investigations, lawsuits, damages, and liability incurred by a regulatory board member related to any action or inaction taken in the course of providing service to a regulatory board, but only if the action was taken in good faith and upon a reasonable belief that it complied with state and federal law.
- Expands the state agencies affected by the bill to include the Department of Health (DOH) and the Department of Financial Services (DFS).
- Requires the DBPR, the DOH, and the DFS (as to the Board of Funeral, Cemetery, and Consumer Services) to review final decisions of all regulatory boards under their jurisdiction.
- Requires each department to determine if final regulatory board decisions constitute anticompetitive conduct that does not:
  - Promote state policy;
  - Comport with the standards established by the Legislature; or
  - Comport with the authority delegated to a board by the Legislature.

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<sup>53</sup> The term “indemnify” means to compensate for loss or damage suffered by a person. *See* <https://www.merriam-webster.com/dictionary/indemnify> (last visited Mar. 26, 2017).

<sup>54</sup> The term “hold harmless” relates to an agreement between parties in which one party assumes the potential liability for injury that may arise from a situation and relieves the other party of that potential liability. *See* <https://www.merriam-webster.com/legal/hold%20harmless> (last visited Mar. 26, 2017).

- Requires each department, based on its findings, to approve, modify, or disapprove final board decisions.
- Provides that final board decisions requiring review include final disciplinary actions, rules, declaratory statements, actions concerning unlicensed activity, and licensure application decisions.
- Provides that the review of a final board decision is a limited legal review, and is subject to legal challenges only through state or federal antitrust legal actions.
- Requires any legal defense costs of a board or board members for antitrust actions be paid from the:
  - Professional Regulation Trust Fund, for boards within the DPBR;
  - Regulatory Trust Fund, for the Board of Funeral, Cemetery, and Consumer Services within the DFS; and
  - Medical Quality Assurance Trust Fund, for boards within the DOH.
- Requires financial damages resulting from antitrust litigation against a regulatory board or board member to be paid from the State Risk Management Trust Fund by the Division of Risk Management in the DFS.

B. Amendments:

None.