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.)

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL: SB 582

INTRODUCER: Senator Latvala

SUBJECT: Regulatory Boards

DATE: March 20, 2017 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Kraemer	McSwain	RI	**Pre-meeting**
2.			JU	
3.			AP	

I. Summary:

SB 582 requires the Department of Business and Professional Regulation (DBPR) to indemnify,[1] defend, and hold harmless[2] (indemnify or indemnification) current and former members (regulatory board members) of the numerous regulatory boards under its jurisdiction, in certain circumstances. Indemnification is 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 (regulatory service claims).

The bill requires that the DBPR must also indemnify against liability for regulatory service claims any company or business in which a regulatory board member is currently, or was previously, an employee, director, officer, or representative, or in which they have or had an ownership interest.

The indemnification requirement for regulatory service claims applies only if the regulatory board member, when providing regulatory services, acted in good faith and in a manner the board member reasonably believed to be in compliance with the laws of Florida and the United States.

In 2015, the United States Supreme Court held that a state board on which a "controlling number" of decisionmakers (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

[1] 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. 17, 2017).

[2] 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. 17, 2017).

to avoid a divergence from a valid state policy caused by implementation of the policy by a board in an anticompetitive manner.

The terms "controlling number," or "active market participant" are not defined in the case; however, the United States Supreme Court held that states are not authorized "to abandon markets to the unsupervised control of active market participants" acting as regulators, and that such participants are not immune from liability for violations of federal law for their anticompetitive conduct.[3] As a result, those serving on a regulatory board who are also members of the profession or occupation being regulated may be held liable for decisions they make during their regulatory board service.

The case before the United States Supreme Court 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."[4]

The fiscal impact of SB 582 is unknown; the DBPR has not provided its analysis of the bill or its fiscal impact to the agency or to state government. *See* Section V, Fiscal Impact Statement.

The bill is effective upon becoming law.

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 (*N.C. State Bd.*).[5] 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

[3] *See N. Carolina State Bd. of Dental Exam'rs v. F.T.C.*, (*NC State Bd.*), 135 S. Ct. 1101, 1117, 191 L.Ed. 2d 35 (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).
[4] *Id*. at page 1115.
[5] *NC State Bd., supra* note 3.

> 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 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.[6]

Federal Antitrust Laws

In *N.C. State Bd.*, the Supreme Court noted that the federal antitrust laws, including the Sherman Act,[7] which safeguard the nation's free market structures, were interpreted in a 1943 case styled *Parker v. Brown*,[8] 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."[9]

The Sherman Act imposes severe penalties for violations[10] and promotes robust competition to empower states and provide citizens with opportunities to pursue their own and the public's welfare.[11] 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,

[6] *Id.*, at page 1108.
[7] 15 U. S. C. §1 *et seq.*
[8] *See Parker v. Brown,* 317 U. S. 341, 63 S. Ct. 307, 87 L.Ed. 315 (1943).
[9] *See NC State Bd., supra* note 3, at page 1109.
[10] 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. 17, 2017).
[11] *See NC State Bd., supra* note 3, at page 1109.

confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives.[12] The Supreme Court stated:

> 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 profession must result from a procedure that causes the conduct to be deemed state conduct shielded from the federal antitrust laws.[13]

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.[14] 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.[15]

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."[16]

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,"[17] 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.'"[18]

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."[19]

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

---

[12] *Id.*
[13] *See NC State Bd., supra* note 3, at page 1110.
[14] *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L.Ed. 2d 233 (1980).
[15] *See NC State Bd., supra* note 3, at page 1112, citing *Ticor, supra,* at 631, 112 S. Ct. 2169, 119 L.Ed. 2d 410 (1992) (citing *Midcal, supra,* at 105, 100 S. Ct. 937, 63 L.Ed. 2d 233 (1980).
N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1112, 191 L.Ed. 2d 35, 49 (2015).
[16] *See NC State Bd., supra* note 3, at page 1112, *citing Phoebe Putney*, 568 U.S., at ___, 133 S. Ct. 1003, 185 L.Ed. 2d 43, 56 (2016).
[17] *Id.,* at page 1112, *citing Patrick v. Burget,* 486 U.S. 94, at 101, 108 S. Ct. 1658, 100 L.Ed. 2d 83 (1988).
[18] *Id.*
[19] *Id.*

sets out the views of the Staff of the Bureau of Competition on the active supervision requirement addressed in *NC State Bd.*[20] 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.[21]

Delegation of Powers and Duties to Regulatory Agencies

The separation-of-powers doctrine prevents the Legislature from delegating its constitutional duties.[22] An invalid delegation of authority violates the principle of separation of powers mandated in the Florida Constitution.[23] When delegating a regulatory responsibility, the Legislature must provide the agency with adequate standards and guidelines.[24] The executive branch "must be limited and guided by an appropriately detailed legislative statement of the standards and policies to be followed."[25]

In *Askew v. Cross Key Waterways*,[26] 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 . . . ."[27] 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."[28]

Agency Rulemaking

Florida's Administrative Procedure Act, ch. 120, F.S., (APA) provides that rulemaking by agencies is limited in nature and is not a matter of agency discretion. Each agency statement defined as a rule[29] must be adopted by rulemaking as soon as feasible and practicable.

---

[20] 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 (last visited Mar. 17, 2017).

[21] *Id*., at page 13.

[22] *See Board of Architecture v. Wasserman*, 377 So. 2d 653 (Fla. 1979).

[23] *See* FLA. CONST. art. II, s. 3, and *Gallagher v. Motors Insurance Corp.*, 605 So. 2d 62 (Fla. 1992).

[24] *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).

[25] *Florida Home Builders Association v. Division of Labor*, 367 So. 219 (Fla. 1979).

[26] *Askew v. Cross Key Waterways,* 372 So. 2d 913 (Fla. 1978).

[27] *Id*. at 921 (quoting *CEEED v. California Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306, 325 (Cal. App. 3 Dist. 1974).

[28] *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).

[29] 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

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.[30]

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.[31]

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 APA,[32] 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 or capricious; a rule is arbitrary if it is not supported by logic or the necessary facts and is 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, in order for an agency to adopt a rule; there must be a specific law to be implemented; an agency may adopt only rules that implement or interpret the specific powers and duties granted by statute.[33]

---

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.

[30] *See* s. 120.54(1)(a)1., F.S.

[31] *See* s. 120.54(1)(a)2., F.S.

[32] *See* s. 120.52(8), F.S.

[33] *Id.*

Agencies are not authorized to adopt a rule solely on the basis that it 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.[34] Further, agencies are not authorized to implement statutory provisions setting forth general legislative intent or policy.[35] 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."[36]

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 specific grant of rulemaking authority.[37] The requirements for agency rulemaking in s. 120.52(8), F.S., are intended to restrict and narrow the scope of agency rulemaking.[38] 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.[39]

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."[40]

Control over Regulatory Boards by the DBPR

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

- Board of Architecture and Interior Design, part I of ch. 481;
- Florida Board of Auctioneers, part VI of ch. 468;
- Barbers' Board, ch. 476;
- Florida Building Code Administrators and Inspectors Board, part XII of ch. 468;
- Construction Industry Licensing Board, part I of ch. 489;
- Board of Cosmetology, ch. 477;

---

[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *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).
[38] *See Southwest Florida Water Management District*, at pages 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).
[39] *See Day Cruise, supra* note 38, at page 700.
[40] *See Southwest Florida Water Management District*, at page 599.

- Electrical Contractors' Licensing Board, part II of ch. 489;
- Board of Employee Leasing Companies, part XI of ch. 468;
- Board of Landscape Architecture, part II of ch. 481;
- Board of Pilot Commissioners, ch. 310;
- Board of Professional Engineers, ch. 471;
- Board of Professional Geologists, ch. 492;
- Board of Veterinary Medicine, ch. 474;
- Home Inspection Services Licensing Program, part XV of ch. 468; and
- Mold-related Services Licensing Program, part XVI of ch. 468, F.S.

Current law requires that for the boards under its jurisdiction, the DBPR must:[41]

- 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 department, 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; 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 all statutory and rule requirements and to close and terminate deficient license application files.[42]

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,[43] 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

[41] *See* s. 455.203, F.S.
[42] *See* s. 455.203(10), F.S.
[43] Letter to Andy Gardiner, President of the Senate, and Steven Crisafulli, Speaker of the House of Representatives from Attorney General Pam Bondi (December 9, 2015) (on file with the Senate Committee on Regulated Industries).

are not subject to active state supervision, “they now face potential antitrust liability for any actions they take that may unreasonably burden competition as a result of the [United States] Supreme Court decision.[44]

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.[45] 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.[46] 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 three years, or both.[47]

III. Effect of Proposed Changes:

SB 582 requires the Department of Business and Professional Regulation (DBPR) to indemnify, defend, and hold harmless (indemnify or indemnification) the following persons, from certain claims, damages and liability:

- All current and former board members (regulatory board members); and
- Any companies or businesses in which regulatory board members have or had an equity interest or in which they serve or have served as an employee, director, officer, or representative.

The DBPR must indemnify regulatory board members against all claims, actions, demands, suits, investigations, damages, and liability incurred by any board member in connection with any action or inaction by a current or former board member in the course and conduct of his or her service (regulatory service claims).

The indemnification requirement for regulatory service claims applies only if the regulatory board member, when providing regulatory services, acted in good faith and in a manner the board member reasonably believed to be in compliance with the laws of Florida and the United States.

The bill is effective upon becoming law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

---

[44] *Id*. at page 2.
[45] *See* ss. 542.18, 542.19, and 542.20, F.S.
[46] *See* s. 542.21(1), F.S.
[47] *See* s. 542.21(1), F.S.

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 SB 582 is unknown. The DBPR has not provided its analysis of the bill or the fiscal impact to state government or to the DBPR.

The Department of Financial Services (DFS) indicates that the indemnification proposed in the bill provided to professional board members and to their businesses is not provided under the State Risk Management Insurance Trust Fund, and that the expansion of coverage does not affect the DFS.[48] Section 768.28, F.S., deals with the waiver by the state of its sovereign immunity in certain circumstances involving tort[49] actions, and the Division of Risk Management in the DFS is responsible for the management of claims reported by or against certain state agencies[50] for coverage under the State Risk Management Trust Fund.[51]

VI. Technical Deficiencies:

None.

---

[48] *See Agency Legislative Bill Analysis by the Department of Financial Services* for SB 582, dated Feb. 8, 2017, (on file with Senate Committee on Regulated Industries) at pages 1-2.

[49] The term "tort" means a wrongful act (other than a breach of contract) for which relief may be obtained through the award of monetary damages or entry of an injunction. *See* https://www.merriam-webster.com/dictionary/tort (last visited Mar. 17, 2017).

[50] Section 768.28(2), F.S., provides that "state agencies or subdivisions" includes the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state (state university boards of trustees, counties and municipalities, and corporations primarily acting as agencies of the state, counties, or municipalities, including the Florida Space Authority.

[51] *See* http://www.myfloridacfo.com/Division/Risk/ (last visited Mar. 17, 2017).

VII. Related Issues:

Indemnification of current and former regulatory board members of regulatory boards within the Department of Business and Professional Regulation (DBPR) and of any companies or businesses in which a regulatory board member is currently or was previously an employee, director, officer, or representative, or in which they have or had an equity interest, may encourage persons to be willing to serve who otherwise are reluctant to serve on regulatory boards due to the exposure to liability for violation of federal antitrust law. Indemnification where a regulatory board member acts in good faith and upon a reasonable belief of the legality of the actions taken may motivate continued regulatory board service by dedicated board members familiar with the issues facing their own profession or occupation.

In *NC State Bd.*, the United States Supreme Court noted that the states "may provide for the defense and indemnification of [board] members in the event of litigation."[52] The case addressed the anticompetitive conduct of the North Carolina State Board of Dental Examiners in issuing cease and desist letters to 47 persons not licensed as dentists. The requirement in SB 582 that the DBPR indemnify, defend, and hold harmless certain members of regulatory boards only within the DBPR will not provide indemnification coverage to any of the current and former members of other regulatory boards within the jurisdiction of any other state agency in Florida.[53]

VIII. Statutes Affected:

This bill substantially amends section 455.203 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

[52] *Id*. at page 1115.
[53] For example, the Board of Medicine, the Board of Osteopathic Medicine, the Board of Optometry, the Board of Nursing, the Board of Pharmacy, or the Board of Dentistry, among others, within the Department of Health, Division of Medical Quality Assurance. *See*, s. 20.43(3), F.S.