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NEBRASKA BOARD OF
PUBLIC ACCOUNTANCY

AUG 28 2015

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DOUGLAS J. PETERSON
ATTORNEY GENERAL

August 27, 2015

CONFIDENTIAL

Nebraska State Board of Public Accountancy
Bernie Gitschewski
P.O. Box 94725
Lincoln, NE 68509-4725

Dear Mr. Gitschewski:

The purpose of this letter is to provide an advisory of the potential impact of *North Carolina Board of Dental Examiners v. Federal Trade Commission,* 135 S. Ct. 1101 (2015), upon Nebraska's various state regulatory boards. The Supreme Court of the United States' opinion in that case provides guidance to state regulatory boards on the application of immunity to anticompetitive conduct, when the members of regulatory boards actively participate in the market they are regulating.

In *North Carolina Board of Dental Examiners,* the state's Board of Dental Examiners ["Board"] was comprised of six licensed dentists elected by their peers, one licensed dental hygienist elected by his/her peers, and one public member appointed by the governor. The Board issued "cease and desist" letters to various non-licensed teeth whitening service providers in North Carolina. The cease and desist letters informed the teeth whitening service providers that they were engaged in the unauthorized practice of dentistry without a license. The letters warned that the practice of dentistry without a license was a crime. Upon a challenge by the Federal Trade Commission that the Board violated antitrust laws by its actions, the Board claimed immunity by virtue of the fact that it was authorized to regulate the profession on behalf of the State of North Carolina.

The Supreme Court rejected the Board's argument. The Court found that since the Board was controlled by active market participants (practicing members of the dental profession), it could only enjoy the immunity conferred upon a state sovereign if the following conditions are met: (1) the Board must be following a "clearly articulated state policy" to displace competition; and (2) the Board actions must be conducted under "active state supervision" to ensure that such actions promote the policies of the state.

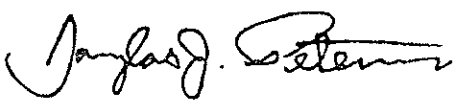
The Court stated that the clear articulation requirement is satisfied if the Legislature has shown that it has foreseen and endorsed the regulation of the challenged activity. That stated, the Court did opine that a clearly articulated state

policy will rarely, on its own, meet the requirements for state-action immunity, because "a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." [1] The Court noted that the practice of teeth whitening was not included in the definition of "dentistry" in North Carolina's Dental Practice Act.

With respect to active state supervision, the Court said first and foremost "active supervision is flexible and context-dependent."[2] The Court found that state-action immunity is not given solely on the basis that a board has been designated under state law as a state agency: "Immunity for state agencies...requires more than a mere façade of state involvement ..."[3] The Court explained, however, that active supervision does not require the state to have day-to-day involvement in the board's operations or in all board decisions. The Court identified three constant requirements of "active supervision" where the state supervisor must: (1) review the substance of the anticompetitive decision and not just the procedures followed to produce it; (2) have the power to veto or modify particular decisions to ensure the decision is consistent with state policy and (3) not be an active market participant itself. Beyond those requirements, the adequacy of supervision will depend on all of the circumstances of each situation.

We are aware that many of Nebraska's boards have a majority of members who actively participate in the market they are called upon to regulate. Action of such boards with respect to an individual license when undertaken in accordance with statutes and/or promulgated rules is unlikely to present an antitrust question such as that presented in *North Carolina Board of Dental Examiners*. However, it is prudent for active participant boards to carefully examine actions that may be considered anticompetitive in nature or that regulate an activity that is not clearly defined by statute. Possible risk areas could include board actions that limit competition among market participants or limit the activity of people outside of the market. Boards are therefore advised to consult closely with their internal legal counsel or, if the board does not have internal legal counsel, with the Assistant Attorney General assigned to represent the board in determining the appropriate course of action in light of this recent decision.

Sincerely,



Douglas J. Peterson
Nebraska Attorney General

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[1] *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1112 (2015).
[2] *Id.* at 1116.
[3] *Id.* at 1111.