



E. SCOTT PRUITT  
ATTORNEY GENERAL

August 17, 2015

To All Boards and Commissions with Active Market Participant Majorities:

The United States Supreme Court recently decided *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015). Under the law established by the Court's opinion, a state agency and its board members may be the subject of federal antitrust liability when active market participants make up a majority on the board or commission in charge of the agency and the agency engages in anticompetitive conduct. The Court held that the only way to protect state agencies and their board members in these circumstances and to ensure they have immunity from suit is to see that they operate consistently with state policies through supervision by a politically accountable arm of the state. Absent that supervision, federal antitrust liability—including treble monetary damages—may apply. The possibility that a state agency could become the focus of a federal antitrust suit for ordinary government is a significant risk that the State must avoid.

Several weeks ago I raised these concerns in a letter to the Governor. In that letter, I described with more detail the legal issues raised by *North Carolina Dental Examiners* and suggested that Oklahoma remedy the problem by changing the composition of boards and commissions or by designating a state agency or officer to supervise actions taken by boards and commissions that implicate antitrust concerns.

The Governor responded with an executive order choosing the latter option, designating my office as the supervisory entity, and directing you to seek a written analysis from my office of all proposed agency actions that may trigger antitrust concerns. The issuance of a written analysis or legal opinion by my Office accords with the traditional power this Office has to issue written attorney general opinions at the request of an agency. 74 O.S.2011 § 18b(A)(5). As you are aware, attorney general opinions are legally binding on state officials unless set aside by a court of competent jurisdiction. *State ex rel. York v. Turpen*, 1984 OK 26, ¶ 5, 681 P.2d 763, 765. Under the terms of the Governor's executive order, agency officials who fail to seek to this advice from my office, or who fail to follow my advice, will be subject to removal for misconduct. Additionally, my office can seek a writ of mandamus or prohibition from a court directing agency officials to abide by their duty to abide by the terms of an opinion issued by my office.

According to the Supreme Court, the review my office conducts must constitute "active supervision" over agency action, which means that my office must actually review each decision

*and* have the authority to veto or modify them. In performing this “active supervision,” my office must ensure that actions taken by agencies are not “anticompetitive.” Actions are “anticompetitive” when they could lessen competition by discouraging, deterring, or removing a participant from a market. Anticompetitive actions thus include actions such as revoking a license or permit; denying a license or permit; disciplining a licensee, permittee, professional, or other market participant through written reprimand, fines, or other means; preparing guidance documents, position letters, or other informal documents stating an interpretation of law that could deter market participation by increasing costs for market participants; or any informal enforcement action such as a cease and desist letter. Action that could reduce the number of market participants and thus reduce competition in a particular market might also be anticompetitive and should also be forwarded for review.

When your agency intends to take actions that are arguably anticompetitive action as described above, it must forward the proposed action to my office for review. In doing so, you should send a description of the proposed action, a short recital of the relevant statutes or other legal authorities supporting the action, a short description of the facts supporting the action, and a short description of the policy justification for the action. The request should also describe any exigent circumstances that require an immediate response. The request for a written analysis for a single action should be no more than a page in length and should be emailed to both [jared.haines@oag.ok.gov](mailto:jared.haines@oag.ok.gov) and [karen.bray@oag.ok.gov](mailto:karen.bray@oag.ok.gov), with “Request for Review of Agency Action” in the subject line. You may consult directly with Jared Haines by phone prior to developing your request at 405-522-2994.

Preparing these written legal opinions will be a separate function from the ordinary legal counsel provided by attorneys in my Office. An agency whose board or commission has a majority composed of active market participants should submit these requests regardless of whether the agency has counsel from my Office, internal counsel, or private counsel.

Those willing to serve on the State’s boards and commissions should not have to defend against antitrust lawsuits on top of the other responsibilities they have assumed. After taking the steps I have outlined, we can ensure that the antitrust immunity of your agency and board members is preserved.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Scott Pruitt", with a long, sweeping horizontal line extending to the right.

E. Scott Pruitt  
Attorney General of Oklahoma