



# LEGISLATIVE ALERT

## US SUPREME COURT ISSUES DECISION IN ANTITRUST CASE INVOLVING STATE LICENSING BOARD

Dear Board of Accountancy Presidents, Chairs and Executive Directors,

We have preliminarily reviewed the Supreme Court's decision with NASBA's outside legal counsel, Noel Allen. The following is a general assessment of the case's potential implications for Member Boards. Obviously, the decision left some important questions unanswered, but we wanted to give you our perspective since some of the reported initial responses to the case might be confusing or cause undue concern.

### Overview

For over 70 years State Boards of Accountancy have been presumed to be immune from federal antitrust laws as long as they were established by law as state agencies and their otherwise anticompetitive actions were clearly authorized by state statutes. The Supreme Court holding in *Federal Trade Commission v. N.C. State Board of Dental Examiners* will now require that majority-licensee state licensing boards be "actively supervised" by the state in order to enjoy immunity from antitrust law, especially when the boards are enforcing against unlicensed practitioners. The Court left some unanswered questions, but we note that there are some important legal differences between the conduct the Court attributed to the Dental Board and states' accountancy acts as well as the UAA. Our preliminary review of the various procedures followed by state boards indicates that most member board enforcement activities are already consistent with Court's decision. Of course, NASBA will review the UAA and Model Rules to determine if any adjustments might need to be considered through the usual committee process.

### What is active state supervision?

There is not yet a bright-line test or checklist for answering this question. According to the Supreme Court, active supervision generally entails a neutral state supervisor reviewing the substance of board decisions, with the power to change or veto these decisions. There are many ways this requirement can be met; and currently is being met by boards of accountancy.

### Does a board's composition affect the active state supervision requirement?

Yes; the Supreme Court's decision applies to licensing boards that are "controlled" by "market participants." It seems likely that a majority licensee board might be considered "controlled." The Supreme Court does not define "market participant," but it likely just means a licensed practitioner of the relevant profession.

### Does a board's member selection process affect the active state supervision requirement?

A board's selection process might be a factor in determining the amount of state supervision required.

Though, the issue of majority licensee control is more significant. In the N.C. Dental Board’s case, board members were elected by N.C. dentists. This practice is not used by any U.S. boards of accountancy, which instead generally rely on executive branch appointments.

### **What could be the practical effect of this decision for accountancy boards?**

There are several considerations for accountancy boards which have licensee majorities in light of the outcome of this case. These include:

- Boards may wish to review their enforcement procedures regarding nonlicensees in light of the “active supervision” requirement.
- Boards may choose to ensure that enforcement actions against nonlicensees are taken with explicit, specific statutory support or court precedent.
- Boards should be aware that this decision raises the possibility of increased governmental or private antitrust challenges, as this area of the law continues to evolve.
- Boards should bear in mind that state CPA societies have a constitutional right to communicate their concerns to state boards. Nevertheless, since the decision likened state boards to trade associations, and expressed concerns about the role that the N.C. State Dental Society played in the anticompetitive actions, Boards may wish to consider how they interact with the state societies.

Going forward, NASBA is prepared to assist State Boards of Accountancy via reviews of the relevant Uniform Accountancy Act and Model Rules provisions, as well as providing assistance to states that decide that certain procedural statutory or rule changes are prudent in response to the Supreme Court’s holding in this case.

## **Case Background**

The N.C. Dental Practice Act requires a dental license to provide or advertise “stain removal” services. The Act also grants the Board the power to enforce against nonlicensees, though it did not expressly grant the Board the power to issue cease and desist orders against nonlicensees. Prior to 2010, after receiving numerous complaints from dentists (“Most expressed a principal concern with the low prices charged by nondentists.”) the Dental Board sent over 40 cease and desist letters to unlicensed teeth whitening service providers informing them that the conduct of these non-licensees could be in violation of state law. The Dental Board also sent some letters to mall owners and supply vendors informing them that the teeth whitening businesses with whom they dealt could be violating the state’s Dental Practice Act. The Court found that “These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.” Although the Dental Board disputed these findings, the findings, right or wrong, help distinguish this decision from the way most boards of accountancy conduct themselves.

The FTC reacted to these letters by investigating the Dental Board for violations of the Federal Trade Commission Act. It ordered that the letters be stopped, and the Board challenged the FTC’s response, first before an administrative law judge, then in an appeal to the FTC itself, then in a separate suit before the U.S. District Court for the Eastern District of North Carolina, then in an appeal to the U.S. Court of Appeals for the Fourth Circuit (both initially and in an en banc appeal). A key decision at each stage of this case has been whether the Dental Board is public or private for purposes of antitrust scrutiny. A public entity need only show that its conduct furthers a “clearly articulated and affirmatively expressed state policy” to displace competition (the clear articulation prong). Private entities must show both the clear articulation prong and that their conduct is “actively supervised” by the state (the active supervision prong). The administrative law judge, the FTC, and the Court of Appeals for the Fourth Circuit all concluded, and the Supreme Court determined, that a market participant controlled state licensing board, like the Dental Board, was

effectively a private entity. The Dental Board's actions, while possibly pursuant to state law, were not actively supervised. Thus, the federal antitrust laws Federal Trade Commission Act applied to the Board.

The Court of Appeals for the Fourth Circuit had noted that the Dental Board's selection process might contribute to a heightened need to show active supervision. But, the Supreme Court tied the active supervision requirement to the mere fact that the Dental Board is "controlled" by "market participants." While the Supreme Court did not provide any specific guidance regarding what a market participant controlled board's composition would be, six out of eight Dental Board members were licensed, practicing dentists who had "earned substantial fees" for teeth whitening. As a result, the Supreme Court decision has probably altered the balance between federal antitrust and state regulation of professions by requiring closer, direct state supervision over majority-licensee boards especially regarding enforcement against unauthorized practitioners.

## **Possible Consequences for Boards of Accountancy**

The way enforcement works for most state accountancy boards differs from the Supreme Court's view of the Dental Board's approach. For example, the UAA (and the vast majority of state accountancy acts) delineate specific services that only CPAs can provide, but allow work-arounds to permit lawful practices by non-licensees (such as the "safe harbor" provision in UAA §14 (h)(1)). Also, nonlicensees can engage in other services that CPAs also provide (such as tax preparation and financial consulting) so long as they do not use misleading or deceptive titles that might lead the public to think that they were CPAs (See UAA §14(c), (d) and (g)).

The Supreme Court laid out a few guidelines relevant to enforce for unauthorized practice. If active supervision is necessary, it "need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide realistic assurance that a non-sovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." The Court further provided a few "constants" with regards to such supervision:

- The state supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.
- The state supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.
- The mere potential for state supervision is not an adequate substitute for a decision by the State.
- The state supervisor may not itself be an active market participant.
- In general, however, the adequacy of supervision will otherwise depend on all the circumstances of a case.

However, it should be noted that per the Court's opinion syllabus, "the inquiry regarding active supervision is flexible and context-dependent."

Potential examples of conduct that could need to be actively supervised by the state may therefore include:

- Investigating an incident of suspected unlicensed practice, in accordance with state law.
- Filing a court action seeking an injunction against an unlicensed individual.
- Referring an incident of suspected unlicensed practice to criminal prosecution.

The existence of active supervision will be key to qualifying for antitrust immunity. The UAA and most states' accountancy acts probably already provide for state supervision when boards are attempting to enforce laws against nonlicensees. See, for example, UAA §15 ("Board may make application to the appropriate

court for an order enjoining such acts or practices.”), and UAA §16(a) (“Whenever . . . the Board has reason to believe that any person or firm has knowingly engaged in acts or practices that constitute a violation of Section 14 of this Act, the Board may bring its information to the attention of the Attorney General of any State (or other appropriate law enforcement officer) who may, in the officer’s discretion, cause appropriate criminal proceedings to be brought thereon.” In light of the Court’s ruling, board will need to take extra care regarding efforts to resolve potential cases without the expense necessitated by formal process. The legal landscape will likely continue to evolve in the coming months and years, as more “active supervision” cases are heard by state and federal courts.

## **Conclusion**

Going forward, NASBA will continue to support its Member Boards and their ability to protect the public through fair, efficient, and effective enforcement. NASBA will review the UAA and Model Rules in light of the Supreme Court’s decision. NASBA will also assist any state board in reviewing procedures in light of best practices with a view toward keeping it out of harm’s way. And, of course, NASBA will continue to monitor developments in this evolving area of the law. In the meantime, please contact me directly ([ddustin@nasba.org](mailto:ddustin@nasba.org) or 615-880-4208) or Noel Allen ([nallen@allenpinnix.com](mailto:nallen@allenpinnix.com) or 919-900-1317) if you have questions about this issue.

Sincerely,  
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