California Board of
PSYCHOLOGY

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MEMORANDUM

DATE	May 6, 2016
TO	Board of Psychology
FROM	Jason Glasspiegel Central Services Coordinator
SUBJECT	Agenda Item #23 (a) – Review and Consideration of Proposed Legislation – SB 1195 (Hill) Professions and Vocations: Boards: Competitive Impact

Background:

This bill provides requirements and procedures for the Director of the Department of Consumer Affairs to review a decision or other action by a board under the Department regarding a restraint or licensee and adds competitive impact as a standard when reviewing regulatory actions of a state board. It prohibits the Board of Registered Nursing's Executive Officer from being a licensee of the Board. It authorizes a veterinary technician to compound a drug for anesthesia for animals in licensed premises. It Relates to veterinary university licenses, and is the Veterinary Medical Board's Sunset Bill.

Location: Senate Appropriations Committee

Status: From Senate Committee on Business, Professions and Economic Development: Do pass to Committee on Appropriations. (6-0)

Hearing: 05/16/2016 10:00 a.m., John L. Burton Hearing Room (4203)

Action Requested:
Staff has no recommended position at this time. The board may want to consider taking a position on this bill.

Attachment A is the analysis of SB 1195 (Hill)
Attachment B is the language of SB 1195 (Hill)
Attachment C is the Senate Business, Professions and Economic Development Committee Analysis of SB 1195(Hill)
Attachment D is a letter from the Director of DCA to the all Executive Officers regarding the Supreme Court's decision on North Carolina Board of Dental Examiners v. Federal Trade Commission

CALIFORNIA STATE BOARD OF PSYCHOLOGY

BILL ANALYSIS

BILL NUMBER: SB 1195 **VERSION:** AMENDED: APRIL 6, 2016

AUTHOR: HILL **SPONSOR:** AUTHOR

BOARD POSITION: NONE

SUBJECT: PROFESSIONS AND VOCATIONS: BOARD ACTIONS: COMPETITIVE IMPACT

Summary: This bill seeks to ensure that boards under the Department of Consumer Affairs (DCA) are in compliance with the recent Supreme Court ruling, *North Carolina State Board of Dental Examiners v. Federal Trade Commission.* This ruling stated that state licensing boards consisting of market participants in the industry regulated by the board can be held liable for violations of antitrust law unless their anti-competitive decision meets two requirements: 1) the anti-competitive action or decision must be based on a clearly articulated and affirmatively expressed state policy to replace competition with regulation of the profession; and 2) the board decision must be actively supervised by the state.

This bill also prohibits the executive officer of the Board of Registered Nursing from being a registered nurse, and makes various changes that are intended to improve the effectiveness of the Veterinary Medical Board (VMB) and extends the VMB's sunset date.

Existing Law:

1) States that the decisions of any board under DCA with respect to setting standards, conducting exams, passing candidates, and revoking licenses are final and not subject to review by the director, except in certain specified circumstances. (Business and Professions Code (BPC) §109(a))

2) Provides the following exceptions to the statute listed above (BPC §§109(b) and (c)):

   a) The director may initiate an investigation of allegations of misconduct in the preparation, administration, or scoring of a board-administered exam or in the review of licensing qualifications.

   b) The director may intervene when the Division of Investigation discloses probable cause that the conduct or activity of a board, its members, or employees has violated criminal law.

3) Allows the director to audit and review inquiries and complaints regarding the following for the Medical Board, the allied health professional boards, and the Board of Podiatric Medicine (BPC §116):

   a) Licensees;

b) Dismissals of disciplinary cases;

c) The opening, conduct, or closure of investigations;

d) Informal conferences; and

e) Discipline short of formal accusation.

4) Allows the director to review a proposed regulation and disapprove it based on the grounds that it is injurious to public health, safety, or welfare, but the board within a specified period can override the director's disapproval. (BPC §313.1)

5) Requires a public entity to pay a judgment against an employee or former employee resulting from a claim or action for an injury arising out of an act or omission occurring within the scope of his or her employment with the public entity, under certain specified circumstances and prohibits the payment of punitive or exemplary damages. (Government Code (GC) §825)

6) Sets forth the procedures required to adopt, amend, or repeal a regulation. (GC §11346.5)

7) Sets forth requirements that the Office of Administrative Law (OAL) must utilize when reviewing proposed regulations. (GC §11349)

8) **Provides for the licensure and regulation of registered nurses by the Board of Registered Nursing, which is within the Department of Consumer Affairs, and requires the board to appoint an executive officer who is a nurse currently licensed by the board.**

9) Repeals the provisions establishing the board and authorizing the board to appoint an executive officer as of January 1, 2017.

This Bill:

1) Requires the Director of DCA, on his own initiative, or upon request by a consumer or licensee, to review any board decision or other action to determine whether it unreasonably restrains trade. (BPC §109(c))

2) Outlines the steps for the director to follow when conducting such a review (BPC §109(c)):

a. Assess whether the board's action or decision reflects a clearly articulated and affirmatively expressed state law. If it does not, the director shall disprove the action;

b. Determine whether the action was the result of the board's exercise of ministerial or discretionary judgment;

c. If the board exercised discretionary judgment, the director must review the board action or decision with respect to the markets impacted, and determine whether the anticompetitive effects of the action or decision are outweighed

by the benefit to the public. The director may employ or contract with independent antitrust or economic experts to accomlish this.

d. If the board action or decision was not previously subject to public comment, the director must release the subject matter of the investigation for a 30-day public comment period.

e. Based on the findings, the director may approve, disapprove, or modify the action or decision, and issue a final written decision within 90 days.

3) States that the decision of the director is final, unless the state or federal constitution requires an appeal. (BPC §109(c))

4) States that the review conducted by the director as noted above does not apply when an individual seeks review of disciplinary or other action pertaining solely to that individual. (BPC §109(d))

5) States that this process shall not be construed to affect, impede, or delay any disciplinary actions of a board. (BPC §109(g))

6) Allows the director to audit and review inquiries and complaints regarding licensees, dismissals of disciplinary cases, the opening, conduct, or closure of investigations, informal conferences, and discipline short of formal accusation by any board or bureau within DCA. (BPC §116)

7) Requires the director to review proposed regulations with respect to markets impacted and potential anticompetitive effects. Allows the director to modify a rule or regulation as a condition of approval. (BPC §313.1)

8) Requires a public entity to pay for a judgment or settlement for treble damage antitrust awards against a member of a regulatory board for an act or omission occurring within the scope of his or her employment as a board member. (GC §825(g))

9) Requires that if a state board has a controlling number of decision makers as active market participants, any regulation it submits to OAL must be reviewed for competitive impact. (GC §11349.1)

10) Defines "competitive impact" as a demonstration that the regulation is authorized by a clearly articulated and affirmatively expressed state law, that the regulation furthers the public protection mission of the state agency, and that the impact on competition is justified in light of the rationale for the regulation. (GC §11349)

11) Requires OAL to reject a regulation proposal that does not demonstrate the regulation is authorized by a clearly articulated and affirmatively expressed state law, does not further public protection, or the impact on competition is not justified by the rationale. (GC §11349.1(d)(6))

12) Allows OAL to employ or contract for the services of independent antitrust or economic experts when reviewing proposed regulations for competitive impact. (GC §11349.1(h))

Prohibit the executive officer of the Board of Registered Nursing from being a licensee of the board.

13) This bill also serves as the sunset bill for the Veterinary Medical Board (VMB) by extending the operation of the board and the authorization of the board to appoint an executive officer to January 1, 2021..

Comment:

1) **Intent.** This bill is a response to a recent Supreme Court ruling, *North Carolina State Board of Dental Examiners v. Federal Trade Commission (FTC).*

   With this ruling, the Supreme Court provided that when the majority of members of a regulatory board are active market participants, then "board members are entitled to state-action antitrust immunity only if they act pursuant to a clearly articulated and affirmatively expressed state policy and their decisions are actively supervised by the state[1]."

   The Supreme Court stated that "active supervision" requires "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." They also noted that "the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it." The FTC has subsequently released guidance materials on active supervision.

   DCA has subsequently begun work with the Legislature to ensure that its boards are in compliance with the Supreme Court ruling. It has outlined three concepts, which this bill addresses, in order to ensure active state supervision of its boards. **Attachment A** contains the DCA policy concepts memo.

2) **Impact to the Board of Psychology.** The membership of this Board is prescribed in statute. BPC §2922 sets the membership at 9 individuals, 5 of whom are to be licensees of the Board, and 4 being public members.

   With this bill, all regulatory changes approved by the Board would be subject to a competitive impact review by OAL. If a review by the Director of DCA is appropriate, see pages 2-3 of the analysis.

3) **DCA Director Authority.** Currently, DCA's director can only investigate board matters when there have been allegations of misconduct or when there is probable cause of criminal conduct. The director is authorized to disprove a regulation on the grounds that it is injurious to public health, safety, or welfare.

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[1] Memo from DCA Director Awet Kidane, *"North Carolina Board of Dental Examiners v. Federal Trade Commission: Policy Concepts,"* March 25, 2016.

This bill would give new powers to the director as follows:

- Authority to review any board decision or other action to determine whether it unreasonably restrains trade;

- Authority to audit and review inquiries and complaints regarding licensees, disciplinary case dismissals, the opening, conduct, or closure of investigations, informal conferences, and discipline by any DCA board or bureau; and

- Authority to review regulations with respect to markets impacted and potential anticompetitive effects, and to approve, disprove, or modify the regulation.

4) **Effect on Licensing and Disciplinary Decisions.** This bill requires the director of DCA to review on his own initiative, or upon request of a consumer or licensee, any board decision or other action to determine whether it unreasonably restrains trade.

   The bill contains language that the review requirements shall not be construed to affect, impede, or delay any disciplinary actions of the Board. The bill also states that the anticompetitive effects review does not apply when an individual seeks review of a disciplinary order solely pertaining to that individual.

   However, the power granted to the director to review licensure and disciplinary decisions is new. If such a request was made, the director would be required to:

   - Assess whether the action or decision reflects a clearly articulated and affirmatively expressed state law;

   - Assess whether the action or decision was the result of the Boards exercise of ministerial or discretionary judgment;

   - Conduct a full review of the anticompetitive effects of the action or decision (licensing decisions only; this would not apply to disciplinary decisions); and

   - Post his or her final written decision approving, modifying, or disapproving the action or decision with an explanation. The director's decision is final.

The Board makes decisions regarding issuance of a license or provision of discipline by examining the circumstances of each particular case (education and experience for licensure, and nature and pattern of the violations for disciplinary) against current law. The proposed authority would create an appeal process that would likely be used by every licensee and applicant receiving an unfavorable outcome.

Disciplinary cases already have the benefit of review by an administrative law judge and if appealed by the Superior Court. For licensing cases, the Board already consults with a subject matter expert who specializes in mental health education when it is unclear if

an individual's particular degree qualifies him or her for licensure. A comparable review by the Director would result in a duplication of efforts and the expenditure of additional financial resources.

5) **Definition of "Clearly Articulated and Affirmatively Expressed" State Law.** This bill requires that board decisions, actions, or regulatory proposals be authorized by a clearly articulated and affirmatively expressed state law.

While the board always strives to accurately reflect the intent of the law, sometimes the law has ambiguities, and reasonable persons may interpret it in different ways. While regulations are generally run based on expressed authority, often times they are run based on implied authority as well. Use of the above statement calls into question whether a Board may still propose regulations based on implied authority. In many cases, regulations must be run based on implied authority, because there is no way that law can account for all scenarios that may arise, and as written the authority is therefore implied. Therefore, staff suggests an amendment redefining "competitive impact," with regards to reviewing regulations, as follow:

Government Code §11349*(g) "Competitive impact" is assessed by a review of the record of the rulemaking proceeding or other documentation that demonstrates that the regulation is authorized by express or implied state law, that the regulation furthers the public protection mission of the state agency, and that the impact on competition is justified in light of the applicable regulatory rationale for the regulation.*

6) **Support and Opposition.**

Support
- University of California, Davis School of Veterinary Medicine

Support if Amended
- California Veterinary Medical Association

Opposition
- None at this time.

7) **History.**

2016
04/19/16 From committee: Do pass and re-refer to Com. on APPR. (Ayes 6. Noes 0.) (April 18). Re-referred to Com. on APPR.
04/06/16 From committee with author's amendments. Read second time and amended. Re-referred to Com. on B., P. & E.D.
03/29/16 Set for hearing April 18.
03/03/16 Referred to Com. on B., P. & E.D.
02/19/16 From printer. May be acted upon on or after March 20.
02/18/16 Introduced. Read first time. To Com. on RLS. for assignment. To print.

8) Attachments.

Attachment A: Memo from DCA Director Awet Kidane, *"North Carolina Board of Dental Examiners v. Federal Trade Commission: Policy Concepts,"* March 25, 2016.

California LEGISLATIVE INFORMATION

SB-1195 Professions and vocations: board actions: competitive impact. (2015-2016)

AMENDED IN SENATE APRIL 06, 2016

CALIFORNIA LEGISLATURE— 2015–2016 REGULAR SESSION

SENATE BILL **No. 1195**

Introduced by Senator Hill

February 18, 2016

An act to amend Sections ~~4800 and 4804.5 of~~ *109, 116, 153, 307, 313.1, 2708, 4800, 4804.5, 4825.1, 4830, and 4846.5 of, and to add Sections 4826.3, 4826.5, 4826.7, 4848.1, and 4853.7 to,* the Business and Professions Code, *and to amend Sections 825, 11346.5, 11349, and 11349.1 of the Government Code,* relating to ~~healing arts.~~ *professional regulation, and making an appropriation therefor.*

LEGISLATIVE COUNSEL'S DIGEST

SB 1195, as amended, Hill. ~~Veterinary Medical Board: executive officer.~~ *Professions and vocations: board actions: competitive impact.*

(1) Existing law provides for the licensure and regulation of various professions and vocations by boards within the Department of Consumer Affairs, and authorizes those boards to adopt regulations to enforce the laws pertaining to the profession and vocation for which they have jurisdiction. Existing law makes decisions of any board within the department pertaining to setting standards, conducting examinations, passing candidates, and revoking licenses final, except as specified, and provides that those decisions are not subject to review by the Director of Consumer Affairs. Existing law authorizes the director to audit and review certain inquiries and complaints regarding licensees, including the dismissal of a disciplinary case. Existing law requires the director to annually report to the chairpersons of certain committees of the Legislature information regarding findings from any audit, review, or monitoring and evaluation. Existing law authorizes the director to contract for services of experts and consultants where necessary. Existing law requires regulations, except those pertaining to examinations and qualifications for licensure and fee changes proposed or promulgated by a board within the department, to comply with certain requirements before the regulation or fee change can take effect, including that the director is required to be notified of the rule or regulation and given 30 days to disapprove the regulation. Existing law prohibits a rule or regulation that is disapproved by the director from having any force or effect, unless the director's disapproval is overridden by a unanimous vote of the members of the board, as specified.

This bill would instead authorize the director, upon his or her own initiative, and require the director, upon the request of a consumer or licensee, to review a decision or other action, except as specified, of a board within the department to determine whether it unreasonably restrains trade and to approve, disapprove, or modify the board decision or action, as specified. The bill would require the director to post on the department's Internet Web site his or her final written decision and the reasons for the decision within 90 days from receipt of the

request of a consumer or licensee. The bill would, commencing on March 1, 2017, require the director to annually report to the chairs of specified committees of the Legislature information regarding the director's disapprovals, modifications, or findings from any audit, review, or monitoring and evaluation. The bill would authorize the director to seek, designate, employ, or contract for the services of independent antitrust experts for purposes of reviewing board actions for unreasonable restraints on trade. The bill would also require the director to review and approve any regulation promulgated by a board within the department, as specified. The bill would authorize the director to modify any regulation as a condition of approval, and to disapprove a regulation because it would have an impermissible anticompetitive effect. The bill would prohibit any rule or regulation from having any force or effect if the director does not approve the regulation because it has an impermissible anticompetitive effect.

(2) Existing law, until January 1, 2018, provides for the licensure and regulation of registered nurses by the Board of Registered Nursing, which is within the Department of Consumer Affairs, and requires the board to appoint an executive officer who is a nurse currently licensed by the board.

This bill would instead prohibit the executive officer from being a licensee of the board.

~~The~~

(3) The Veterinary Medicine Practice Act provides for the licensure and registration of veterinarians and registered veterinary technicians and the regulation of the practice of veterinary medicine by the Veterinary Medical Board, which is within the Department of Consumer Affairs, and authorizes the board to appoint an executive officer, as specified. Existing law repeals the provisions establishing the board and authorizing the board to appoint an executive officer as of January 1, 2017. *That act exempts certain persons from the requirements of the act, including a veterinarian employed by the University of California or the Western University of Health Sciences while engaged in the performance of specified duties. That act requires all premises where veterinary medicine, dentistry, and surgery is being practiced to register with the board. That act requires all fees collected on behalf of the board to be deposited into the Veterinary Medical Board Contingent Fund, which continuously appropriates fees deposited into the fund. That act makes a violation of any provision of the act punishable as a misdemeanor.*

This bill would extend the operation of the board and the authorization of the board to appoint an executive officer to January 1, 2021. *The bill would authorize a veterinarian and registered veterinary technician who is under the direct supervision of a veterinarian with a current and active license to compound a drug for anesthesia, the prevention, cure, or relief of a wound, fracture, bodily injury, or disease of an animal in a premises currently and actively registered with the board, as specified. The bill would authorize the California State Board of Pharmacy and the board to ensure compliance with these requirements. The bill would instead require veterinarians engaged in the practice of veterinary medicine employed by the University of California or by the Western University of Health Sciences while engaged in the performance of specified duties to be licensed as a veterinarian in the state or hold a university license issued by the board. The bill would require an applicant for a university license to meet certain requirements, including that the applicant passes a specified exam. The bill would also prohibit a premise registration that is not renewed within 5 years after its expiration from being renewed, restored, reissued, or reinstated; however, the bill would authorize a new premise registration to be issued to an applicant if no fact, circumstance, or condition exists that would justify the revocation or suspension of the registration if the registration was issued and if specified fees are paid. By requiring additional persons to be licensed and pay certain fees that would go into a continuously appropriated fund, this bill would make an appropriation. By requiring additional persons to be licensed under the act that were previously exempt, this bill would expand the definition of an existing crime and would, therefore, result in a state-mandated local program.*

(4) Existing law, except as provided, requires a public entity to pay any judgment or any compromise or settlement of a claim or action against an employee or former employee of the public entity if the employee or former employee requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action.

This bill would require a public entity to pay a judgment or settlement for treble damage antitrust awards against a member of a regulatory board for an act or omission occurring within the scope of his or her employment as a member of a regulatory board.

(5) The Administrative Procedure Act governs the procedure for the adoption, amendment, or repeal of regulations by state agencies and for the review of those regulatory actions by the Office of Administrative Law. That act requires the review by the office to follow certain standards, including, among others, necessity, as

defined. That act requires an agency proposing to adopt, amend, or repeal a regulation to prepare a notice to the public that includes specified information, including reference to the authority under which the regulation is proposed.

This bill would add competitive impact, as defined, as an additional standard for the office to follow when reviewing regulatory actions of a state board on which a controlling number of decisionmakers are active market participants in the market that the board regulates, and requires the office to, among other things, consider whether the anticompetitive effects of the proposed regulation are clearly outweighed by the public policy merits. The bill would authorize the office to designate, employ, or contract for the services of independent antitrust or applicable economic experts when reviewing proposed regulations for competitive impact. The bill would require state boards on which a controlling number of decisionmakers are active market participants in the market that the board regulates, when preparing the public notice, to additionally include a statement that the agency has evaluated the impact of the regulation on competition and that the effect of the regulation is within a clearly articulated and affirmatively expressed state law or policy.

(6) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: ~~no~~*yes* Fiscal Committee: yes Local Program: ~~no~~*yes*

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. *Section 109 of the Business and Professions Code is amended to read:*

~~109.(a)The decisions of any of the boards comprising the department with respect to setting standards, conducting examinations, passing candidates, and revoking licenses, are not subject to review by the director, but are final within the limits provided by this code which are applicable to the particular board, except as provided in this section.~~

~~(b)~~

109. *(a)* The director may initiate an investigation of any allegations of misconduct in the preparation, administration, or scoring of an examination which is administered by a board, or in the review of qualifications which are a part of the licensing process of any board. A request for investigation shall be made by the director to the Division of Investigation through the chief of the division or to any law enforcement agency in the jurisdiction where the alleged misconduct occurred.

~~(c)~~

(b) (1) The director may intervene in any matter of any board where an investigation by the Division of Investigation discloses probable cause to believe that the conduct or activity of a board, or its members or employees constitutes a violation of criminal law.

~~The~~

(2) The term "intervene," as used in paragraph ~~(c) of this section~~ *(1)* may include, but is not limited to, an application for a restraining order or injunctive relief as specified in Section 123.5, or a referral or request for criminal prosecution. For purposes of this section, the director shall be deemed to have standing under Section 123.5 and shall seek representation of the Attorney General, or other appropriate counsel in the event of a conflict in pursuing that action.

(c) The director may, upon his or her own initiative, and shall, upon request by a consumer or licensee, review any board decision or other action to determine whether it unreasonably restrains trade. Such a review shall proceed as follows:

(1) The director shall assess whether the action or decision reflects a clearly articulated and affirmatively expressed state law. If the director determines that the action or decision does not reflect a clearly articulated and affirmatively expressed state law, the director shall disapprove the board action or decision and it shall not go into effect.

(2) If the action or decision is a reflection of clearly articulated and affirmatively expressed state law, the director shall assess whether the action or decision was the result of the board's exercise of ministerial or

discretionary judgment. If the director finds no exercise of discretionary judgment, but merely the direct application of statutory or constitutional provisions, the director shall close the investigation and review of the board action or decision.

(3) If the director concludes under paragraph (2) that the board exercised discretionary judgment, the director shall review the board action or decision as follows:

(A) The director shall conduct a full review of the board action or decision using all relevant facts, data, market conditions, public comment, studies, or other documentary evidence pertaining to the market impacted by the board's action or decision and determine whether the anticompetitive effects of the action or decision are clearly outweighed by the benefit to the public. The director may seek, designate, employ, or contract for the services of independent antitrust or economic experts pursuant to Section 307. These experts shall not be active participants in the market affected by the board action or decision.

(B) If the board action or decision was not previously subject to a public comment period, the director shall release the subject matter of his or her investigation for a 30-day public comment period and shall consider all comments received.

(C) If the director determines that the action or decision furthers the public protection mission of the board and the impact on competition is justified, the director may approve the action or decision.

(D) If the director determines that the action furthers the public protection mission of the board and the impact on competition is justified, the director may approve the action or decision. If the director finds the action or decision does not further the public protection mission of the board or finds that the action or decision is not justified, the director shall either refuse to approve it or shall modify the action or decision to ensure that any restraints of trade are related to, and advance, clearly articulated state law or public policy.

(4) The director shall issue, and post on the department's Internet Web site, his or her final written decision approving, modifying, or disapproving the action or decision with an explanation of the reasons and rationale behind the director's decision within 90 days from receipt of the request from a consumer or licensee. Notwithstanding any other law, the decision of the director shall be final, except if the state or federal constitution requires an appeal of the director's decision.

(d) The review set forth in paragraph (3) of subdivision (c) shall not apply when an individual seeks review of disciplinary or other action pertaining solely to that individual.

(e) The director shall report to the Chairs of the Senate Business, Professions, and Economic Development Committee and the Assembly Business and Professions Committee annually, commencing March 1, 2017, regarding his or her disapprovals, modifications, or findings from any audit, review, or monitoring and evaluation conducted pursuant to this section. That report shall be submitted in compliance with Section 9795 of the Government Code.

(f) If the director has already reviewed a board action or decision pursuant to this section or Section 313.1, the director shall not review that action or decision again.

(g) This section shall not be construed to affect, impede, or delay any disciplinary actions of any board.

SEC. 2. *Section 116 of the Business and Professions Code is amended to read:*

116. (a) The director may audit and review, upon his or her own initiative, or upon the request of a consumer or licensee, inquiries and complaints regarding licensees, dismissals of disciplinary cases, the opening, conduct, or closure of investigations, informal conferences, and discipline short of formal accusation by ~~the Medical Board of California, the allied health professional boards, and the California Board of Podiatric Medicine. The director may make recommendations for changes to the disciplinary system to the appropriate board, the Legislature, or both.~~ *any board or bureau within the department.*

(b) The director shall report to the ~~Chairpersons~~ *Chairs* of the Senate ~~Business and Professions~~ *Business, Professions, and Economic Development* Committee and the Assembly ~~Health~~ *Business and Professions* Committee annually, commencing March 1, ~~1995,~~ *2017,* regarding his or her findings from any audit, review, or monitoring and evaluation conducted pursuant to this section. *This report shall be submitted in compliance with Section 9795 of the Government Code.*

SEC. 3. *Section 153 of the Business and Professions Code is amended to read:*

153. The director may investigate the work of the several boards in his department and may obtain a copy of all records and full and complete data in all official matters in possession of the boards, their members, officers, or ~~employees, other than examination questions prior to submission to applicants at scheduled examinations.~~ *employees.*

SEC. 4. *Section 307 of the Business and Professions Code is amended to read:*

307. The director may contract for the services of experts and consultants where necessary to carry out ~~the provisions of~~ this chapter and may provide compensation and reimbursement of expenses for ~~such~~ *those* experts and consultants in accordance with state law.

SEC. 5. *Section 313.1 of the Business and Professions Code is amended to read:*

313.1. (a) Notwithstanding any other ~~provision of~~ law to the contrary, no rule or ~~regulation, except those relating to examinations and qualifications for licensure,~~ *regulation* and no fee change proposed or promulgated by any of the boards, commissions, or committees within the department, shall take effect pending compliance with this section.

(b) The director shall be formally notified of and shall ~~be provided a full opportunity to~~ review, in accordance with the requirements of Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, *the requirements in subdivision (c) of Section 109,* and this section, all of the following:

(1) All notices of proposed action, any modifications and supplements thereto, and the text of proposed regulations.

(2) Any notices of sufficiently related changes to regulations previously noticed to the public, and the text of proposed regulations showing modifications to the text.

(3) Final rulemaking records.

(4) All relevant facts, data, public comments, market conditions, studies, or other documentary evidence pertaining to the market impacted by the proposed regulation. This information shall be included in the written decision of the director required under paragraph (4) of subdivision (c) of Section 109.

(c) The submission of all notices and final rulemaking records to the director and the ~~completion of the~~ director's ~~review,~~ *approval,* as authorized by this section, shall be a precondition to the filing of any rule or regulation with the Office of Administrative Law. The Office of Administrative Law shall have no jurisdiction to review a rule or regulation subject to this section until after the ~~completion of the~~ director's review and ~~only then if the director has not disapproved it.~~ *approval.* The filing of any document with the Office of Administrative Law shall be accompanied by a certification that the board, commission, or committee has complied with the requirements of this section.

(d) Following the receipt of any final rulemaking record subject to subdivision (a), the director shall have the authority for a period of 30 days to *approve a proposed rule or regulation or* disapprove a proposed rule or regulation on the ground that it is injurious to the public health, safety, or ~~welfare.~~ *welfare, or has an impermissible anticompetitive effect. The director may modify a rule or regulation as a condition of approval. Any modifications to regulations by the director shall be subject to a 30-day public comment period before the director issues a final decision regarding the modified regulation. If the director does not approve the rule or regulation within the 30-day period, the rule or regulation shall not be submitted to the Office of Administrative Law and the rule or regulation shall have no effect.*

(e) Final rulemaking records shall be filed with the director within the one-year notice period specified in Section 11346.4 of the Government Code. If necessary for compliance with this section, the one-year notice period may be extended, as specified by this subdivision.

(1) In the event that the one-year notice period lapses during the director's 30-day review period, or within 60 days following the notice of the director's disapproval, it may be extended for a maximum of 90 days.

(2) If the director approves the final rulemaking ~~record or declines to take action on it within 30 days,~~ *record,* the board, commission, or committee shall have five days from the receipt of the record from the director within which to file it with the Office of Administrative Law.

(3) If the director disapproves a rule or regulation, it shall have no force or effect unless, within 60 days of the

notice of disapproval, (A) the disapproval is overridden by a unanimous vote of the members of the board, commission, or committee, and (B) the board, commission, or committee files the final rulemaking record with the Office of Administrative Law in compliance with this section and the procedures required by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. *This paragraph shall not apply to any decision disapproved by the director under subdivision (c) of Section 109.*

(f)~~Nothing in this~~ *This* section shall *not* be construed to prohibit the director from affirmatively approving a proposed rule, regulation, or fee change at any time within the 30-day period after it has been submitted to him or her, in which event it shall become effective upon compliance with this section and the procedures required by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

SEC. 6. *Section 2708 of the Business and Professions Code is amended to read:*

2708. (a) The board shall appoint an executive officer who shall perform the duties delegated by the board and who shall be responsible to it for the accomplishment of those duties.

(b) The executive officer shall *not* be a ~~nurse currently licensed~~ *licensee* under this chapter and shall possess other qualifications as determined by the board.

(c) The executive officer shall not be a member of the board.

(d) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

~~**SECTION 1.**~~***SEC. 7.*** Section 4800 of the Business and Professions Code is amended to read:

4800. (a) There is in the Department of Consumer Affairs a Veterinary Medical Board in which the administration of this chapter is vested. The board consists of the following members:

(1) Four licensed veterinarians.

(2) One registered veterinary technician.

(3) Three public members.

(b) This section shall remain in effect only until January 1, 2021, and as of that date is repealed.

(c) Notwithstanding any other law, the repeal of this section renders the board subject to review by the appropriate policy committees of the Legislature. However, the review of the board shall be limited to those issues identified by the appropriate policy committees of the Legislature and shall not involve the preparation or submission of a sunset review document or evaluative questionnaire.

~~**SEC. 2.**~~***SEC. 8.*** Section 4804.5 of the Business and Professions Code is amended to read:

4804.5. (a) The board may appoint a person exempt from civil service who shall be designated as an executive officer and who shall exercise the powers and perform the duties delegated by the board and vested in him or her by this chapter.

(b) This section shall remain in effect only until January 1, 2021, and as of that date is repealed.

SEC. 9. *Section 4825.1 of the Business and Professions Code is amended to read:*

4825.1. These definitions shall govern the construction of this chapter as it applies to veterinary medicine.

(a) "Diagnosis" means the act or process of identifying or determining the health status of an animal through examination and the opinion derived from that examination.

(b) "Animal" means any member of the animal kingdom other than humans, and includes fowl, fish, and reptiles, wild or domestic, whether living or dead.

(c) "Food animal" means any animal that is raised for the production of an edible product intended for consumption by humans. The edible product includes, but is not limited to, milk, meat, and eggs. Food animal includes, but is not limited to, cattle (beef or dairy), swine, sheep, poultry, fish, and amphibian species.

(d) "Livestock" includes all animals, poultry, aquatic and amphibian species that are raised, kept, or used for

profit. It does not include those species that are usually kept as pets such as dogs, cats, and pet birds, or companion animals, including equines.

(e) "Compounding," for the purposes of veterinary medicine, shall have the same meaning given in Section 1735 of Title 16 of the California Code of Regulations, except that every reference therein to "pharmacy" and "pharmacist" shall be replaced with "veterinary premises" and "veterinarian," and except that only a licensed veterinarian or a licensed registered veterinarian technician under direct supervision of a veterinarian may perform compounding and shall not delegate to or supervise any part of the performance of compounding by any other person.

SEC. 10. *Section 4826.3 is added to the Business and Professions Code, to read:*

4826.3. *(a) Notwithstanding Section 4051, a veterinarian or registered veterinarian technician under the direct supervision of a veterinarian with a current and active license may compound a drug for anesthesia, the prevention, cure, or relief of a wound, fracture, bodily injury, or disease of an animal in a premises currently and actively registered with the board and only under the following conditions:*

(1) Where there is no FDA-approved animal or human drug that can be used as labeled or in an appropriate extralabel manner to properly treat the disease, symptom, or condition for which the drug is being prescribed.

(2) Where the compounded drug is not available from a compounding pharmacy, outsourcing facility, or other compounding supplier in a dosage form and concentration to appropriately treat the disease, symptom, or condition for which the drug is being prescribed.

(3) Where the need and prescription for the compounded medication has arisen within an established veterinarian-client-patient relationship as a means to treat a specific occurrence of a disease, symptom, or condition observed and diagnosed by the veterinarian in a specific animal that threatens the health of the animal or will cause suffering or death if left untreated.

(4) Where the quantity compounded does not exceed a quantity demonstrably needed to treat a patient with which the veterinarian has a current veterinarian-client-patient relationship.

(5) Except as specified in subdivision (c), where the compound is prepared only with commercially available FDA-approved animal or human drugs as active ingredients.

(b) A compounded veterinary drug may be prepared from an FDA-approved animal or human drug for extralabel use only when there is no approved animal or human drug that, when used as labeled or in an appropriate extralabel manner will, in the available dosage form and concentration, treat the disease, symptom, or condition. Compounding from an approved human drug for use in food-producing animals is not permitted if an approved animal drug can be used for compounding.

(c) A compounded veterinary drug may be prepared from bulk drug substances only when:

(1) The drug is compounded and dispensed by the veterinarian to treat an individually identified animal patient under his or her care.

(2) The drug is not intended for use in food-producing animals.

(3) If the drug contains a bulk drug substance that is a component of any marketed FDA-approved animal or human drug, there is a change between the compounded drug and the comparable marketed drug made for an individually identified animal patient that produces a clinical difference for that individually identified animal patient, as determined by the veterinarian prescribing the compounded drug for his or her patient.

(4) There are no FDA-approved animal or human drugs that can be used as labeled or in an appropriate extralabel manner to properly treat the disease, symptom, or condition for which the drug is being prescribed.

(5) All bulk drug substances used in compounding are manufactured by an establishment registered under Section 360 of Title 21 of the United States Code and are accompanied by a valid certificate of analysis.

(6) The drug is not sold or transferred by the veterinarian compounding the drug, except that the veterinarian shall be permitted to administer the drug to a patient under his or her care or dispense it to the owner or caretaker of an animal under his or her care.

(7) Within 15 days of becoming aware of any product defect or serious adverse event associated with any drug compounded by the veterinarian from bulk drug substances, the veterinarian shall report it to the federal Food

and Drug Administration on Form FDA 1932a.

(8) In addition to any other requirements, the label of any veterinary drug compounded from bulk drug substances shall indicate the species of the intended animal patient, the name of the animal patient, and the name of the owner or caretaker of the patient.

(d) Each compounded veterinary drug preparation shall meet the labeling requirements of Section 4076 and Sections 1707.5 and 1735.4 of Title 16 of the California Code of Regulations, except that every reference therein to "pharmacy" and "pharmacist" shall be replaced by "veterinary premises" and "veterinarian," and any reference to "patient" shall be understood to refer to the animal patient. In addition, each label on a compounded veterinary drug preparation shall include withdrawal and holding times, if needed, and the disease, symptom, or condition for which the drug is being prescribed. Any compounded veterinary drug preparation that is intended to be sterile, including for injection, administration into the eye, or inhalation, shall in addition meet the labeling requirements of Section 1751.2 of Title 16 of the California Code of Regulations, except that every reference therein to "pharmacy" and "pharmacist" shall be replaced by "veterinary premises" and "veterinarian," and any reference to "patient" shall be understood to refer to the animal patient.

(e) Any veterinarian, registered veterinarian technician who is under the direct supervision of a veterinarian, and veterinary premises engaged in compounding shall meet the compounding requirements for pharmacies and pharmacists stated by the provisions of Article 4.5 (commencing with Section 1735) of Title 16 of the California Code of Regulations, except that every reference therein to "pharmacy" and "pharmacist" shall be replaced by "veterinary premises" and "veterinarian," and any reference to "patient" shall be understood to refer to the animal patient:

(1) Section 1735.1 of Title 16 of the California Code of Regulations.

(2) Subdivisions (d),(e), (f), (g), (h), (i), (j), (k), and (l) of Section 1735.2 of Title 16 of the California Code of Regulations.

(3) Section 1735.3 of Title 16 of the California Code of Regulations, except that only a licensed veterinarian or registered veterinarian technician may perform compounding and shall not delegate to or supervise any part of the performance of compounding by any other person.

(4) Section 1735.4 of Title 16 of the California Code of Regulations.

(5) Section 1735.5 of Title 16 of the California Code of Regulations.

(6) Section 1735.6 of Title 16 of the California Code of Regulations.

(7) Section 1735.7 of Title 16 of the California Code of Regulations.

(8) Section 1735.8 of Title 16 of the California Code of Regulations.

(f) Any veterinarian, registered veterinarian technician under the direct supervision of a veterinarian, and veterinary premises engaged in sterile compounding shall meet the sterile compounding requirements for pharmacies and pharmacists under Article 7 (commencing with Section 1751) of Title 16 of the California Code of Regulations, except that every reference therein to "pharmacy" and "pharmacist" shall be replaced by "veterinary premises" and "veterinarian," and any reference to "patient" shall be understood to refer to the animal patient.

(g) The California State Board of Pharmacy shall have authority with the board to ensure compliance with this section and shall have the right to inspect any veterinary premises engaged in compounding, along with or separate from the board, to ensure compliance with this section. The board is specifically charged with enforcing this section with regard to its licensees.

***SEC. 11.** Section 4826.5 is added to the Business and Professions Code, to read:*

***4826.5.** Failure by a licensed veterinarian, registered veterinarian technician, or veterinary premises to comply with the provisions of this article shall be deemed unprofessional conduct and constitute grounds for discipline.*

***SEC. 12.** Section 4826.7 is added to the Business and Professions Code, to read:*

***4826.7.** The board may adopt regulations to implement the provisions of this article.*

SEC. 13. *Section 4830 of the Business and Professions Code is amended to read:*

4830. (a) This chapter does not apply to:

(1) Veterinarians while serving in any armed branch of the military service of the United States or the United States Department of Agriculture while actually engaged and employed in their official capacity.

(2) Regularly licensed veterinarians in actual consultation from other states.

(3) Regularly licensed veterinarians actually called from other states to attend cases in this state, but who do not open an office or appoint a place to do business within this state.

~~(4)Veterinarians employed by the University of California while engaged in the performance of duties in connection with the College of Agriculture, the Agricultural Experiment Station, the School of Veterinary Medicine, or the agricultural extension work of the university or employed by the Western University of Health Sciences while engaged in the performance of duties in connection with the College of Veterinary Medicine or the agricultural extension work of the university.~~

~~(5)~~

(4) Students in the School of Veterinary Medicine of the University of California or the College of Veterinary Medicine of the Western University of Health Sciences who participate in diagnosis and treatment as part of their educational experience, including those in off-campus educational programs under the direct supervision of a licensed veterinarian in good standing, as defined in paragraph (1) of subdivision (b) of Section 4848, appointed by the University of California, Davis, or the Western University of Health Sciences.

~~(6)~~

(5) A veterinarian who is employed by the Meat and Poultry Inspection Branch of the California Department of Food and Agriculture while actually engaged and employed in his or her official capacity. A person exempt under this paragraph shall not otherwise engage in the practice of veterinary medicine unless he or she is issued a license by the board.

~~(7)~~

(6) Unlicensed personnel employed by the Department of Food and Agriculture or the United States Department of Agriculture when in the course of their duties they are directed by a veterinarian supervisor to conduct an examination, obtain biological specimens, apply biological tests, or administer medications or biological products as part of government disease or condition monitoring, investigation, control, or eradication activities.

(b) (1) For purposes of paragraph (3) of subdivision (a), a regularly licensed veterinarian in good standing who is called from another state by a law enforcement agency or animal control agency, as defined in Section 31606 of the Food and Agricultural Code, to attend to cases that are a part of an investigation of an alleged violation of federal or state animal fighting or animal cruelty laws within a single geographic location shall be exempt from the licensing requirements of this chapter if the law enforcement agency or animal control agency determines that it is necessary to call the veterinarian in order for the agency or officer to conduct the investigation in a timely, efficient, and effective manner. In determining whether it is necessary to call a veterinarian from another state, consideration shall be given to the availability of veterinarians in this state to attend to these cases. An agency, department, or officer that calls a veterinarian pursuant to this subdivision shall notify the board of the investigation.

(2) Notwithstanding any other provision of this chapter, a regularly licensed veterinarian in good standing who is called from another state to attend to cases that are a part of an investigation described in paragraph (1) may provide veterinary medical care for animals that are affected by the investigation with a temporary shelter facility, and the temporary shelter facility shall be exempt from the registration requirement of Section 4853 if all of the following conditions are met:

(A) The temporary shelter facility is established only for the purpose of the investigation.

(B) The temporary shelter facility provides veterinary medical care, shelter, food, and water only to animals that are affected by the investigation.

(C) The temporary shelter facility complies with Section 4854.

(D) The temporary shelter facility exists for not more than 60 days, unless the law enforcement agency or

animal control agency determines that a longer period of time is necessary to complete the investigation.

(E) Within 30 calendar days upon completion of the provision of veterinary health care services at a temporary shelter facility established pursuant to this section, the veterinarian called from another state by a law enforcement agency or animal control agency to attend to a case shall file a report with the board. The report shall contain the date, place, type, and general description of the care provided, along with a listing of the veterinary health care practitioners who participated in providing that care.

(c) For purposes of paragraph (3) of subdivision (a), the board may inspect temporary facilities established pursuant to this section.

SEC. 14. *Section 4846.5 of the Business and Professions Code is amended to read:*

4846.5. (a) Except as provided in this section, the board shall issue renewal licenses only to those applicants that have completed a minimum of 36 hours of continuing education in the preceding two years.

(b) (1) Notwithstanding any other law, continuing education hours shall be earned by attending courses relevant to veterinary medicine and sponsored or cosponsored by any of the following:

(A) American Veterinary Medical Association (AVMA) accredited veterinary medical colleges.

(B) Accredited colleges or universities offering programs relevant to veterinary medicine.

(C) The American Veterinary Medical Association.

(D) American Veterinary Medical Association recognized specialty or affiliated allied groups.

(E) American Veterinary Medical Association's affiliated state veterinary medical associations.

(F) Nonprofit annual conferences established in conjunction with state veterinary medical associations.

(G) Educational organizations affiliated with the American Veterinary Medical Association or its state affiliated veterinary medical associations.

(H) Local veterinary medical associations affiliated with the California Veterinary Medical Association.

(I) Federal, state, or local government agencies.

(J) Providers accredited by the Accreditation Council for Continuing Medical Education (ACCME) or approved by the American Medical Association (AMA), providers recognized by the American Dental Association Continuing Education Recognition Program (ADA CERP), and AMA or ADA affiliated state, local, and specialty organizations.

(2) Continuing education credits shall be granted to those veterinarians taking self-study courses, which may include, but are not limited to, reading journals, viewing video recordings, or listening to audio recordings. The taking of these courses shall be limited to no more than six hours biennially.

(3) The board may approve other continuing veterinary medical education providers not specified in paragraph (1).

(A) The board has the authority to recognize national continuing education approval bodies for the purpose of approving continuing education providers not specified in paragraph (1).

(B) Applicants seeking continuing education provider approval shall have the option of applying to the board or to a board-recognized national approval body.

(4) For good cause, the board may adopt an order specifying, on a prospective basis, that a provider of continuing veterinary medical education authorized pursuant to paragraph (1) or (3) is no longer an acceptable provider.

(5) Continuing education hours earned by attending courses sponsored or cosponsored by those entities listed in paragraph (1) between January 1, 2000, and January 1, 2001, shall be credited toward a veterinarian's continuing education requirement under this section.

(c) Every person renewing his or her license issued pursuant to Section 4846.4, or any person applying for relicensure or for reinstatement of his or her license to active status, shall submit proof of compliance with this section to the board certifying that he or she is in compliance with this section. Any false statement submitted pursuant to this section shall be a violation subject to Section 4831.

(d) This section shall not apply to a veterinarian's first license renewal. This section shall apply only to second and subsequent license renewals granted on or after January 1, 2002.

(e) The board shall have the right to audit the records of all applicants to verify the completion of the continuing education requirement. Applicants shall maintain records of completion of required continuing education coursework for a period of four years and shall make these records available to the board for auditing purposes upon request. If the board, during this audit, questions whether any course reported by the veterinarian satisfies the continuing education requirement, the veterinarian shall provide information to the board concerning the content of the course; the name of its sponsor and cosponsor, if any; and specify the specific curricula that was of benefit to the veterinarian.

(f) A veterinarian desiring an inactive license or to restore an inactive license under Section 701 shall submit an application on a form provided by the board. In order to restore an inactive license to active status, the veterinarian shall have completed a minimum of 36 hours of continuing education within the last two years preceding application. The inactive license status of a veterinarian shall not deprive the board of its authority to institute or continue a disciplinary action against a licensee.

(g) Knowing misrepresentation of compliance with this article by a veterinarian constitutes unprofessional conduct and grounds for disciplinary action or for the issuance of a citation and the imposition of a civil penalty pursuant to Section 4883.

(h) The board, in its discretion, may exempt from the continuing education requirement any veterinarian who for reasons of health, military service, or undue hardship cannot meet those requirements. Applications for waivers shall be submitted on a form provided by the board.

(i) The administration of this section may be funded through professional license and continuing education provider fees. The fees related to the administration of this section shall not exceed the costs of administering the corresponding provisions of this section.

(j) For those continuing education providers not listed in paragraph (1) of subdivision (b), the board or its recognized national approval agent shall establish criteria by which a provider of continuing education shall be approved. The board shall initially review and approve these criteria and may review the criteria as needed. The board or its recognized agent shall monitor, maintain, and manage related records and data. The board may impose an application fee, not to exceed two hundred dollars ($200) biennially, for continuing education providers not listed in paragraph (1) of subdivision (b).

(k) (1) ~~On or after~~ *Beginning* January 1, 2018, a licensed veterinarian who renews his or her license shall complete a minimum of one credit hour of continuing education on the judicious use of medically important antimicrobial drugs every four years as part of his or her continuing education requirements.

(2) For purposes of this subdivision, "medically important antimicrobial drug" means an antimicrobial drug listed in Appendix A of the federal Food and Drug Administration's Guidance for Industry #152, including critically important, highly important, and important antimicrobial drugs, as that appendix may be amended.

SEC. 15. *Section 4848.1 is added to the Business and Professions Code, to read:*

4848.1. *(a) A veterinarian engaged in the practice of veterinary medicine, as defined in Section 4826, employed by the University of California while engaged in the performance of duties in connection with the School of Veterinary Medicine or employed by the Western University of Health Sciences while engaged in the performance of duties in connection with the College of Veterinary Medicine shall be licensed in California or shall hold a university license issued by the board.*

(b) An applicant is eligible to hold a university license if all of the following are satisfied:

(1) The applicant is currently employed by the University of California or Western University of Health Sciences as defined in subdivision (a).

(2) Passes an examination concerning the statutes and regulations of the Veterinary Medicine Practice Act, administered by the board, pursuant to subparagraph (C) of paragraph (2) of subdivision (a) of Section 4848.

(3) Successfully completes the approved educational curriculum described in paragraph (5) of subdivision (b) of Section 4848 on regionally specific and important diseases and conditions.

(c) A university license:

(1) Shall be numbered as described in Section 4847.

(2) Shall cease to be valid upon termination of employment by the University of California or by the Western University of Health Sciences.

(3) Shall be subject to the license renewal provisions in Section 4846.4.

(4) Shall be subject to denial, revocation, or suspension pursuant to Sections 4875 and 4883.

(d) An individual who holds a University License is exempt from satisfying the license renewal requirements of Section 4846.5.

SEC. 16. *Section 4853.7 is added to the Business and Professions Code, to read:*

4853.7. *A premise registration that is not renewed within five years after its expiration may not be renewed and shall not be restored, reissued, or reinstated thereafter. However, an application for a new premise registration may be submitted and obtained if both of the following conditions are met:*

(a) No fact, circumstance, or condition exists that, if the premise registration was issued, would justify its revocation or suspension.

(b) All of the fees that would be required for the initial premise registration are paid at the time of application.

SEC. 17. *Section 825 of the Government Code is amended to read:*

825. (a) Except as otherwise provided in this section, if an employee or former employee of a public entity requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity and the request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action with his or her reasonable good-faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed. However, where the public entity conducted the defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise, or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the public entity is required to pay the judgment, compromise, or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his or her employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay that part of a claim or judgment that is for punitive or exemplary damages.

(b) Notwithstanding subdivision (a) or any other provision of law, a public entity is authorized to pay that part of a judgment that is for punitive or exemplary damages if the governing body of that public entity, acting in its sole discretion except in cases involving an entity of the state government, finds all of the following:

(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.

(2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

(3) Payment of the claim or judgment would be in the best interests of the public entity.

As used in this subdivision with respect to an entity of state government, "a decision of the governing body" means the approval of the Legislature for payment of that part of a judgment that is for punitive damages or exemplary damages, upon recommendation of the appointing power of the employee or former employee, based upon the finding by the Legislature and the appointing authority of the existence of the three conditions for payment of a punitive or exemplary damages claim. The provisions of subdivision (a) of Section 965.6 shall apply to the payment of any claim pursuant to this subdivision.

The discovery of the assets of a public entity and the introduction of evidence of the assets of a public entity shall not be permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages.

The possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial.

(c) Except as provided in subdivision (d), if the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if those provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

(d) The subject of payment of punitive damages pursuant to this section or any other provision of law shall not be a subject of meet and confer under the provisions of Chapter 10 (commencing with Section 3500) of Division 4 of Title 1, or pursuant to any other law or authority.

(e) Nothing in this section shall affect the provisions of Section 818 prohibiting the award of punitive damages against a public entity. This section shall not be construed as a waiver of a public entity's immunity from liability for punitive damages under Section 1981, 1983, or 1985 of Title 42 of the United States Code.

(f) (1) Except as provided in paragraph (2), a public entity shall not pay a judgment, compromise, or settlement arising from a claim or action against an elected official, if the claim or action is based on conduct by the elected official by way of tortiously intervening or attempting to intervene in, or by way of tortiously influencing or attempting to influence the outcome of, any judicial action or proceeding for the benefit of a particular party by contacting the trial judge or any commissioner, court-appointed arbitrator, court-appointed mediator, or court-appointed special referee assigned to the matter, or the court clerk, bailiff, or marshal after an action has been filed, unless he or she was counsel of record acting lawfully within the scope of his or her employment on behalf of that party. Notwithstanding Section 825.6, if a public entity conducted the defense of an elected official against such a claim or action and the elected official is found liable by the trier of fact, the court shall order the elected official to pay to the public entity the cost of that defense.

(2) If an elected official is held liable for monetary damages in the action, the plaintiff shall first seek recovery of the judgment against the assets of the elected official. If the elected official's assets are insufficient to satisfy the total judgment, as determined by the court, the public entity may pay the deficiency if the public entity is authorized by law to pay that judgment.

(3) To the extent the public entity pays any portion of the judgment or is entitled to reimbursement of defense costs pursuant to paragraph (1), the public entity shall pursue all available creditor's remedies against the elected official, including garnishment, until that party has fully reimbursed the public entity.

(4) This subdivision shall not apply to any criminal or civil enforcement action brought in the name of the people of the State of California by an elected district attorney, city attorney, or attorney general.

(g) Notwithstanding subdivision (a), a public entity shall pay for a judgment or settlement for treble damage antitrust awards against a member of a regulatory board for an act or omission occurring within the scope of his or her employment as a member of a regulatory board.

SEC. 18. *Section 11346.5 of the Government Code is amended to read:*

11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest drafted in plain English in a format similar to the Legislative Counsel's digest on legislative bills. The informative digest shall include the following:

(A) A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.

(B) If the proposed action differs substantially from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes.

(C) A policy statement overview explaining the broad objectives of the regulation and the specific benefits anticipated by the proposed adoption, amendment, or repeal of a regulation, including, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government, among other things.

(D) An evaluation of whether the proposed regulation is inconsistent or incompatible with existing state regulations.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

(7) If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, makes an initial determination that the action may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

(A) Identification of the types of businesses that would be affected.

(B) A description of the projected reporting, recordkeeping, and other compliance requirements that would result from the proposed action.

(C) The following statement: "The (name of agency) has made an initial determination that the (adoption/amendment/repeal) of this regulation may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

(ii) Consolidation or simplification of compliance and reporting requirements for businesses.

(iii) The use of performance standards rather than prescriptive standards.

(iv) Exemption or partial exemption from the regulatory requirements for businesses."

(8) If a state agency, in adopting, amending, or repealing any administrative regulation, makes an initial determination that the action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this declaration, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support its initial determination.

An agency's initial determination and declaration that a proposed adoption, amendment, or repeal of a regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

(9) A description of all cost impacts, known to the agency at the time the notice of proposed action is submitted

to the office, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

If no cost impacts are known to the agency, it shall state the following:

"The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action."

(10) A statement of the results of the economic impact assessment required by subdivision (b) of Section 11346.3 or the standardized regulatory impact analysis if required by subdivision (c) of Section 11346.3, a summary of any comments submitted to the agency pursuant to subdivision (f) of Section 11346.3 and the agency's response to those comments.

(11) The finding prescribed by subdivision (d) of Section 11346.3, if required.

(12) (A) A statement that the action would have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative regulation, makes an initial determination that the action would have that effect.

(B) The agency officer designated in paragraph ~~(14)~~ *(15)* shall make available to the public, upon request, the agency's evaluation, if any, of the effect of the proposed regulatory action on housing costs.

(C) The statement described in subparagraph (A) shall also include the estimated costs of compliance and potential benefits of a building standard, if any, that were included in the initial statement of reasons.

(D) For purposes of model codes adopted pursuant to Section 18928 of the Health and Safety Code, the agency shall comply with the requirements of this paragraph only if an interested party has made a request to the agency to examine a specific section for purposes of estimating the costs of compliance and potential benefits for that section, as described in Section 11346.2.

(13) If the regulatory action is submitted by a state board on which a controlling number of decisionmakers are active market participants in the market the board regulates, a statement that the adopting agency has evaluated the impact of the proposed regulation on competition, and that the proposed regulation furthers a clearly articulated and affirmatively expressed state law to restrain competition.

~~(13)~~

(14) A statement that the adopting agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. For a major regulation, as defined by Section 11342.548, proposed on or after November 1, 2013, the statement shall be based, in part, upon the standardized regulatory impact analysis of the proposed regulation, as required by Section 11346.3, as well as upon the benefits of the proposed regulation identified pursuant to subparagraph (C) of paragraph (3).

~~(14)~~

(15) The name and telephone number of the agency representative and designated backup contact person to whom inquiries concerning the proposed administrative action may be directed.

~~(15)~~

(16) The date by which comments submitted in writing must be received to present statements, arguments, or contentions in writing relating to the proposed action in order for them to be considered by the state agency before it adopts, amends, or repeals a regulation.

~~(16)~~

(17) Reference to the fact that the agency proposing the action has prepared a statement of the reasons for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed action, pursuant to subdivision (b).

~~(17)~~

(18) A statement that if a public hearing is not scheduled, any interested person or his or her duly authorized

representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Section 11346.8.

~~(18)~~

(19) A statement indicating that the full text of a regulation changed pursuant to Section 11346.8 will be available for at least 15 days prior to the date on which the agency adopts, amends, or repeals the resulting regulation.

~~(19)~~

(20) A statement explaining how to obtain a copy of the final statement of reasons once it has been prepared pursuant to subdivision (a) of Section 11346.9.

~~(20)~~

(21) If the agency maintains an Internet Web site or other similar forum for the electronic publication or distribution of written material, a statement explaining how materials published or distributed through that forum can be accessed.

~~(21)~~

(22) If the proposed regulation is subject to Section 11346.6, a statement that the agency shall provide, upon request, a description of the proposed changes included in the proposed action, in the manner provided by Section 11346.6, to accommodate a person with a visual or other disability for which effective communication is required under state or federal law and that providing the description of proposed changes may require extending the period of public comment for the proposed action.

(b) The agency representative designated in paragraph ~~(14)~~ *(15)* of subdivision (a) shall make available to the public upon request the express terms of the proposed action. The representative shall also make available to the public upon request the location of public records, including reports, documentation, and other materials, related to the proposed action. If the representative receives an inquiry regarding the proposed action that the representative cannot answer, the representative shall refer the inquiry to another person in the agency for a prompt response.

(c) This section shall not be construed in any manner that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary or cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, if there has been substantial compliance with those requirements.

SEC. 19. *Section 11349 of the Government Code is amended to read:*

11349. The following definitions govern the interpretation of this chapter:

(a) "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

(b) "Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.

(c) "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

(d) "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.

(e) "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.

(f) "Nonduplication" means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity

standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.

(g) "Competitive impact" means that the record of the rulemaking proceeding or other documentation demonstrates that the regulation is authorized by a clearly articulated and affirmatively expressed state law, that the regulation furthers the public protection mission of the state agency, and that the impact on competition is justified in light of the applicable regulatory rationale for the regulation.

SEC. 20. *Section 11349.1 of the Government Code is amended to read:*

11349.1. (a) The office shall review all regulations adopted, amended, or repealed pursuant to the procedure specified in Article 5 (commencing with Section 11346) and submitted to it for publication in the California Code of Regulations Supplement and for transmittal to the Secretary of State and make determinations using all of the following standards:

(1) Necessity.

(2) Authority.

(3) Clarity.

(4) Consistency.

(5) Reference.

(6) Nonduplication.

(7) For those regulations submitted by a state board on which a controlling number of decisionmakers are active market participants in the market the board regulates, the office shall review for competitive impact.

In reviewing regulations pursuant to this section, the office shall restrict its review to the regulation and the record of the rulemaking ~~proceeding.~~ *except as directed in subdivision (h).* The office shall approve the regulation or order of repeal if it complies with the standards set forth in this section and with this chapter.

(b) In reviewing proposed regulations for the criteria in subdivision (a), the office may consider the clarity of the proposed regulation in the context of related regulations already in existence.

(c) The office shall adopt regulations governing the procedures it uses in reviewing regulations submitted to it. The regulations shall provide for an orderly review and shall specify the methods, standards, presumptions, and principles the office uses, and the limitations it observes, in reviewing regulations to establish compliance with the standards specified in subdivision (a). The regulations adopted by the office shall ensure that it does not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations.

(d) The office shall return any regulation subject to this chapter to the adopting agency if any of the following occur:

(1) The adopting agency has not prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5 and has not included the data used and calculations made and the summary report of the estimate in the file of the rulemaking.

(2) The agency has not complied with Section 11346.3. "Noncompliance" means that the agency failed to complete the economic impact assessment or standardized regulatory impact analysis required by Section 11346.3 or failed to include the assessment or analysis in the file of the rulemaking proceeding as required by Section 11347.3.

(3) The adopting agency has prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5, the estimate indicates that the regulation will result in a cost to local agencies or school districts that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, and the adopting agency fails to do any of the following:

(A) Cite an item in the Budget Act for the fiscal year in which the regulation will go into effect as the source from which the Controller may pay the claims of local agencies or school districts.

(B) Cite an accompanying bill appropriating funds as the source from which the Controller may pay the claims of local agencies or school districts.

(C) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has approved a request by the agency that funds be included in the Budget Bill for the next following fiscal year to reimburse local agencies or school districts for the costs mandated by the regulation.

(D) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has authorized the augmentation of the amount available for expenditure under the agency's appropriation in the Budget Act which is for reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4 to local agencies or school districts from the unencumbered balances of other appropriations in the Budget Act and that this augmentation is sufficient to reimburse local agencies or school districts for their costs mandated by the regulation.

(4) The proposed regulation conflicts with an existing state regulation and the agency has not identified the manner in which the conflict may be resolved.

(5) The agency did not make the alternatives determination as required by paragraph (4) of subdivision (a) of Section 11346.9.

(6) The office decides that the record of the rulemaking proceeding or other documentation for the proposed regulation does not demonstrate that the regulation is authorized by a clearly articulated and affirmatively expressed state law, that the regulation does not further the public protection mission of the state agency, or that the impact on competition is not justified in light of the applicable regulatory rationale for the regulation.

(e) The office shall notify the Department of Finance of all regulations returned pursuant to subdivision (d).

(f) The office shall return a rulemaking file to the submitting agency if the file does not comply with subdivisions (a) and (b) of Section 11347.3. Within three state working days of the receipt of a rulemaking file, the office shall notify the submitting agency of any deficiency identified. If no notice of deficiency is mailed to the adopting agency within that time, a rulemaking file shall be deemed submitted as of the date of its original receipt by the office. A rulemaking file shall not be deemed submitted until each deficiency identified under this subdivision has been corrected.

(g) Notwithstanding any other law, return of the regulation to the adopting agency by the office pursuant to this section is the exclusive remedy for a failure to comply with subdivision (c) of Section 11346.3 or paragraph (10) of subdivision (a) of Section 11346.5.

(h) The office may designate, employ, or contract for the services of independent antitrust or applicable economic experts when reviewing proposed regulations for competitive impact. When reviewing a regulation for competitive impact, the office shall do all of the following:

(1) If the Director of Consumer Affairs issued a written decision pursuant to subdivision (c) of Section 109 of the Business and Professions Code, the office shall review and consider the decision and all supporting documentation in the rulemaking file.

(2) Consider whether the anticompetitive effects of the proposed regulation are clearly outweighed by the public policy merits.

(3) Provide a written opinion setting forth the office's findings and substantive conclusions under paragraph (2), including, but not limited to, whether rejection or modification of the proposed regulation is necessary to ensure that restraints of trade are related to and advance the public policy underlying the applicable regulatory rationale.

SEC. 21. *No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.*

SENATE COMMITTEE ON BUSINESS, PROFESSIONS AND ECONOMIC DEVELOPMENT

Senator Jerry Hill, Chair
2015 - 2016 Regular

Bill No:	SB 1195	**Hearing Date:**	April 18, 2016
Author:	Hill		
Version:	April 6, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	Nicole Billington, Bill Gage		

Subject: Professions and vocations: board actions: competitive impact

SUMMARY: Grants authority to the Director of the Department of Consumer Affairs (DCA) to review a decision or other action, except as specified, of a board within the DCA to determine whether it unreasonably restrains trade and to approve, disapprove, or modify the board decision or action, as specified; eliminates the requirement that the executive officer of the Board of Registered Nursing be a registered nurse; clarifies when a judgment or settlement for treble damages antitrust award would be granted for a member of a regulatory board; provides for an additional standard for the Office of Administrative Law to follow when reviewing regulatory actions of state boards. Also makes various changes that are intended to improve the effectiveness of the Veterinary Medical Board (Board) and extends the Board's sunset dates.

Existing law:

1) Provides for the licensure and regulation of various professions and vocations by the boards within the DCA, and authorizes those boards to adopt regulations to enforce the laws pertaining to the profession and vocation for which they have jurisdiction.

2) Makes decisions of any board within the DCA pertaining to setting standards, conducting examinations, passing candidates, and revoking licenses final, except as specified, and provides that those decisions are not subject to review by the Director of the DCA. (Business and Professions Code (BPC § 109 (a))

3) Provides that the Director may initiate an investigation of any allegations of misconduct in the preparation, administration, or scoring of any examination which is administered by a board, or in the review and qualifications which are part of the licensing process of any board. (BPC § 109 (b))

4) Provides that the Director may intervene in any matter of any board where an investigation by the Division of Investigation discloses probably cause to believe that the conduct or activity of a board, or its members or employees constitutes a violation of criminal law. (BPC § 109 (c))

5) Authorizes the Director to audit and review, upon his or her own initiative, or upon the request of a consumer or licensee, inquiries and complaints regarding licensees, dismissals of disciplinary cases, the opening, conduct, or closure of investigations, informal conferences, and discipline short of formal accusation by the Medical Board of California, the allied health professional boards, and the California Board of

Podiatric Medicine and the Director may make recommendations for changes to the disciplinary system to the appropriate board, the Legislature, or both. (BPC § 116 (a))

6) Requires the Director to annually report to the chairpersons of certain committees of the Legislature information regarding findings from any audit, review, of monitoring and evaluation. (BPC § 116 (b))

7) Authorizes the Director to contract for services of experts and consultants where necessary. (BPC § 307)

8) Requires regulations, except those pertaining to examinations and qualifications for licensure and fee changes proposed or promulgated by a board within the DCA, to comply with certain requirements before the regulation or fee change can take effect, including that the Director is required to be notified of the rule or regulation and given 30 days to disapprove the regulation. (BPC § 313.1)

9) Prohibits a rule or regulation that is disapproved by the Director from having any force or effect, unless the Director's disapproval is overridden by a unanimous vote of the members of the board, as specified.

10) Provides, until January 1, 2018, for the licensure and regulation of registered nurses by the Board of Registered Nursing (BRN) which is within the DCA, and requires the BRN to appoint an executive officer who is a nurse currently licensed by the BRN.

11) Establishes the California Veterinary Medicine Practice Act until January 1, 2017, and requires the Veterinary Medical Board (VMB) within the Department of Consumer Affairs (DCA) to, among other things, license and regulate veterinarians, registered veterinary technicians (RVTs), RVT schools and programs, and veterinary premises. (BPC § 4800 et seq.)

12) Requires a public entity to pay any judgment or any compromise settlement of a claim or action against an employee or former employee of the public entity if the employee or former employee requests the public entity to defend him or her against any claim or action against him or her for an injury arising out of an act or omission occurring within the scope of his or her employment as an employee of the public entity, the request is made in writing not less than 10 days before the day of the trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action. (Government Code § 825)

13) Specifies that the Administrative Procedure Act governs the procedure for the adoption, amendment, or repeal of regulations by state agencies and for review of those regulatory actions by the Office of Administrative Law and requires the review of the office to follow certain standards, including, among others, necessity, as defined. (Government Code § 11340 et seq.)

This bill:

1) Authorizes the Director, upon his or her own initiative, and require the Director, upon the request of a consumer or licensee, to review a decision or other action,

except as specified, of a board within the DCA to determine whether it unreasonably restrains trade and to approve, disapprove, or modify the board decision or action, as specified.

2) Requires the Director to post on the DCA's website his or her final written decision and the reasons for the decision within 90 days from receipt of the request of a consumer or licensee.

3) Commencing on March 1, 2017, would require the Director to annually report to the chairs of specified committees of the Legislature information regarding the Director's disapprovals, modifications, or findings from any audit, review or monitoring and evaluation.

4) Authorizes the Director to seek, designate, employ, or contract for services of independent antitrust experts for purposes of reviewing board actions for unreasonable restraints of trade.

5) Requires the Director to review and approve any regulation promulgated by a board within the DCA, as specified, and would authorize the Director to modify any regulation as a condition of approval, and to disapprove a regulation because it would have an impermissible anticompetitive effect.

6) Prohibits any rule or regulation from having any force or effect if the Director does not approve the regulation because it has an impermissible anticompetitive effect.

7) Extends the sunset date for the VMB and Executive Officer of the Board until January 1, 2021.

8) Authorizes a veterinarian and registered veterinarian technician who is under the director supervision of a veterinarian with a current and active license to compound a drug for anesthesia, the prevention, cure, or relief of a wound, fracture, bodily injury, or disease of an animal in a premises currently and actively registered with the VMB, as specified, and would authorize the California State Board of Pharmacy and the VMB to ensure compliance with these requirements.

9) Requires veterinarians engaged in practice of veterinary medicine employed by the University of California or by Western University of Health Sciences while engage in the performance of specific duties to be licensed as a veterinarians in the state or hold a university license issued by the VMB, and that the applicant for a university license to meet certain requirements, including that the applicant passes a specified exam.

10) Provides that a veterinary premise registration may be canceled after five years of delinquency, unless the VMB finds circumstances or conditions that would justify a new premise registration to be issued.

11) Makes technical changes to BPC regarding the VMB.

12) Requires a public entity to pay a judgment or settlement for treble damage antitrust awards against a member of a regulatory board for an act or omission occurring

within the scope of her or her employment as a member of a regulatory board.

13) Adds competitive impact, as defined, as an additional standard for the Office of Administrative Law (Office) to follow when reviewing regulatory actions of a state board on which a controlling number of decisionmakers are active market participants in the market that the board regulates, and requires the Office to, among other things, consider whether the anticompetitive effects of the proposed regulation are clearly outweighed by the public policy merits.

14) Authorizes the Office to designate, employ, or contract for the services of independent antitrust or applicable economic experts when reviewing proposed regulations for competitive impact.

15) Requires state boards on which a controlling number of decisionmakers are active market participants in the market that the board regulates, when preparing the public notice, to additionally include a statement that the agency has evaluated the impact of the regulation on competition and that the effect of the regulation is within a clearly articulated and affirmatively expressed state law or policy.

FISCAL EFFECT: Unknown. This bill is keyed "fiscal" by Legislative Counsel.

COMMENTS:

1. **Purpose.** This bill is sponsored by the Author, and is one of five "sunset bills" the Author is sponsoring this Session. According to the Author, this bill is necessary to make changes to the California Veterinary Medicine Practice Act relating to the operation of the Veterinary Medical Board and to both the authority of the Director of the DCA and the Office of Administrative Law to assure compliance with a recent U.S. Supreme Court Decision, *North Carolina State Board of Dental Examiners v. FTC*. These changes arose from issues raised in the Board's sunset review process, and require legislative action.

2. **Oversight Hearings and Sunset Review of Licensing Boards and Programs.** Beginning in 2015, the Senate Business, Professions, and Economic Development Committee and the Assembly Business and Professions Committee (Committees) conducted joint oversight hearings to review 12 regulatory entities: DCA, Acupuncture Board, Board of Behavioral Sciences, California Massage Therapy Association, Court Reporters Board, Board of Pharmacy, Physician Assistant Board, Board of Podiatric Medicine, Bureau of Private Postsecondary Education, Board of Psychology, Bureau of Real Estate, Bureau of Real Estate Appraisers, and Veterinary Medical Board. The Committees conducted three hearings in March to review these entities. This bill and the accompanying sunset bills are intended to implement legislative changes as recommended by staff of the Committees and which are reflected in the Background Papers prepared by Committee staff for each agency and program reviewed this year.

3. **Potential Antitrust (Anticompetitive) Actions of Boards – Compliance with *North Carolina State Board of Dental Examiners v. FTC.***

In 2010, the Federal Trade Commission (FTC) brought an administrative complaint against the North Carolina State Board of Dental Examiners (Board) for exclusion of non-dentists from the practice of teeth whitening. The FTC alleged that the Board's decision was an uncompetitive and unfair method of competition under the Federal Trade Commission Act. This opened the Board to lawsuits and substantial damages from affected parties.

The Board was composed of 6 licensed, practicing dentists and 2 public members. The practice of teeth whitening was not addressed in the statutes comprising the Dental Practice Act. Instead of initiating a rulemaking effort to clarify the appropriate practice of teeth whitening, the Board sent cease-and-desist letters to non-dentists in the state offering teeth whitening services. The Board argued that the FTC's complaint was invalid because the Board was acting as an agent of North Carolina, and according to state-action immunity, one cannot sue the state acting in its sovereign capacity for anticompetitive conduct. A federal appeals court sided with the FTC, and the Board appealed to the United States Supreme Court (Court).

In February 2015, the Court agreed with the FTC and determined that the Board was not acting as a state agent and could be sued for its actions. The Court ruled, "Because a controlling number of the Board's decision-makers are active participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met."

The Court was not specific about what may constitute "active participants" or "active supervision." However, the Court did say that "active supervision" requires "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," and that "the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it."

FTC Staff Guidance on Active Supervision of State Regulatory Boards. In October 2015, the FTC released a staff guidance, "*Active Supervision of State Regulatory Boards Controlled by Market Participants*," in order to better explain when active supervision of a state regulatory board would be required in order for a board to invoke the state action defense. The guidance also aimed to highlight what factors are relevant when determining if the active supervision requirement has been satisfied. The FTC stated that active supervision includes the ability of a state supervisor to review the substance of the anticompetitive decision and have the power to veto or modify a decision. The state supervisor may not be an active market participant. In addition, the FTC states that active supervision must precede the implementation of the alleged anticompetitive restraint.

The FTC stated that the guidance addresses only the active supervision requirement of the state action defense, and antitrust analysis is fact-specific and context-dependent. This means that although a state action defense might not be

applicable in a certain case, this does not mean that the conduct of a regulatory board necessarily violates federal antitrust laws.

Implications for the Boards under the DCA. On October 22, 2015, the Senate Committee on Business, Professions and Economic Development and Assembly Business and Professions Committee held a joint informational hearing to explore the implications of the Court decision on the DCA's 26 professional regulatory boards and consider recommendations.
In response to the Court's decision, the Chair of this Committee, State Senator Jerry Hill, requested an opinion from the Office of Attorney General Kamala Harris (AG). The AG released the following:

> *North Carolina Dental has brought both the composition of licensing boards and the concept of active state supervision into the public spotlight, but the standard it imposes is flexible and context-specific. This leaves the state with many variables to consider in deciding how to responds.*
>
> *Whatever the chosen response may be, the state can be assured that North Carolina Dental's "active state supervision" requirement is satisfied when a non-market-participant state official has and exercises the power to substantively review a board's action and determines whether the action effectuates the state's regulatory policies.*

The DCA boards are semiautonomous bodies whose members are appointed by the Governor and the Legislature. It is important to note that although a most of the non-healing arts boards have the statutory authority for a public majority allotment in their makeup, more than half of the healing arts and non-healing arts boards are currently comprised of a majority of members representing the profession, based on vacancies and current appointments. There are currently only one health board and four non-health boards that are comprised of a public member majority with their current makeup. While the boards operate largely independently, they also fall within the DCA's jurisdiction. The Legislature provides routine oversight and the Office of Administrative Law reviews regulations stemming from rulemaking undertaken by the boards.

Although the boards are tied to the state through various structural and statutory oversights, it is presently unclear whether current laws and practices are sufficient to ensure that the boards are state actors and, thus, immune from legal action. The recent decision against the Texas Medical Board in the *Teladoc* case emphasizes the need for California to prove that it provides active state supervision. In that case, one of the nation's largest providers of telephone medical services, *Teladoc*, sued the Texas Medical Board after the Board issued a rule that requires physicians to either meet with patients in person before treating them remotely, or to treat them face-to-face via technology while other providers are physically present with them when treating a patient for the first time. *Teladoc* alleged that this rule violates antitrust laws because it would restrict the company's ability to compete, resulting in higher prices and less access to doctors for Texans. The Board argued that it should be immune from antitrust liability as a state agency but a judge rejected that argument, writing that "for a board to be considered actively supervised, the state

supervisor must have power to veto or modify the board's decisions, and supervision of the Texas Medical Board does not meet that requirement."

It appears necessary for the Legislature and the Department to devise a mechanism for independent state review of regulatory board actions, including the ability of some type of state supervisor to veto or modify decisions, as cited in the Texas *Teladoc* case, in order for these boards and board members to ensure that boards can continue to effectively regulate California's professions without fear of being sued.

During the sunset review hearing in March, in which several DCA issue were discussed, the need to respond to the implications surrounding this recent Court decision were reviewed by the Committees and the DCA. The DCA at that time was asked to address two questions and was asked to respond to the Committees in 30 days:

(1) How does the DCA plan on addressing the "active state supervision" requirement; and,

(2) What does the DCA believe are necessary next steps to ensure robust protection of the public from potentially problematic trust forming coalitions on regulatory boards..

It was also recommended by the Committees, that in light of the FTC guidance on the active supervision of state regulatory boards controlled by market participants, that the Committees should remove the active license requirement for the Executive Officer position for the BRN and that that there should basically be no Executive Officer of any board who was a licensee of the board they serve.

As indicated earlier, *North Carolina State Board of Dental Examiners v. FTC* placed limitations on the immunity of regulatory boards controlled by active market participants. This is because individuals who are directly affected by their own rulemaking may not be able to detect their biases, purposefully or inadvertently placing their benefit over those of the public. Or, as the Supreme Court stated, "Dual allegiances are not always apparent to an actor." In the North Carolina case, the focus was on board members, but the argument against interested participants could also be made for boards' administrative managers. The DCA executive officers (EOs) wield a great deal of power, daily directing and running the administrative machine with often only occasional guidance from an ever-changing board. EOs are vested with substantial decision-making authority and have the ability to shape policy direction of a particular board through their recommendations, management, and relationships.

Presently, the Board of Registered Nursing (BRN) is the only board within the DCA that requires its EO to be currently licensed by the board he or she regulates; the Board of Vocational Nursing and Psychiatric Technicians removed this requirement last year in light of serious allegations of mismanagement. According to the recent hiring bulletin for the BRN's Executive Officer, the EO is responsible for "...planning, organizing and directing the activities of the Board in areas of administration, enforcement and licensure. The EO serves as the liaison between the Board and

stakeholders. The EO enforces the overall policies established by the Board relating to Board programs...." To place this control with an interested stakeholder may be directly contrary to the intent of a well-balanced regulatory system.

Response by the DCA. On April 11, 2016, the DCA responded to the questions and recommendations of the Committees as follows:

(1) How does the DCA plan on addressing the "active state supervision" requirement?

According to the DCA, they have proactively provided training and guidance to its constituent entities regarding the North Carolina case, including the active state supervision requirement. Based upon the case, the California Attorney General's opinion, and the Federal Trade Commission's published guidelines, the Department has provided guidance to its entities regarding best practices, including:

- Continuing to promote their primary mission of consumer protection;
- Identifying when the board may be making market-sensitive decisions;
- Conducting an analysis of the competitive aspects of decisions;
- Utilizing the applicable state processes which contain elements of state supervision;
- Considering objective evidence; and,
- Adequately documenting the discussions on a particular decision.

The Department and the Attorney General's Office have also collaborated to develop and present training regarding the case for executive officers and board presidents. Additionally, DCA indicates that information related to the case has been incorporated in the Board Member Orientation Training which is held each quarter. Presentations regarding the case have taken place at numerous board meetings.

The Department addressed potential statutory changes and identified two areas where it believes that the law should be strengthened and clarified.

First, the existing regulatory review process must be made stronger. Under current law, the Director reviews board regulations and has the authority to disapprove them if they are "injurious to the public health, safety or welfare." However, current law does not specifically authorize the Director to disapprove regulations for anticompetitive impacts in the market without furthering a clearly articulated state policy. In order to ensure appropriate state supervision, the Department believes that the Director should have the specific authority to disapprove regulations that will have anticompetitive impacts in the market, if these are not substantiated by state policy.

Second, the DCA stated that current potential liability of board members needs to be addressed. Lawsuits regarding antitrust violations, if successful, can lead to awards of treble damages. The Department believes that these damages are not punitive in nature, and wishes to clarify this position in statue to ensure that if a board member is acting pursuant to a state policy, they will be indemnified by the

state for an antitrust violation in the same way they are for other types of lawsuits.

(2) What does the DCA believe are necessary next steps to ensure robust protection of the public from potentially problematic trust forming coalitions on regulatory boards?

As noted above, the Department states that it will continue to encourage the boards to utilize best practices and provide training in this area, which should assist in mitigating the potential for board actions which violate antitrust laws. As discussed at the hearing, the Department believes that some legislative change is warranted in the areas of the Director's review of regulations, the classification of treble damages arising in anti-trust litigation as damages that can be indemnified by the state, and the employment of Executive Officers that are licensees. The Department further states that it will continue to evaluate the impact of the North Carolina case and continue to work closely with the Administration and committee staff to vet policies related to potential antitrust liability based upon the board governance model.

(3) In light of the FTC guidance on the Active Supervision of State Regulatory Boards Controlled by Market Participants, the Committees should remove the active license requirement for the Executive Officer position for the Board of Registered Nursing.

The Department agrees, in concept, with the Committees' recommendation that the active license requirement for executive officers should be removed. Having a nonmarket participant serve as an executive officer is critical in minimizing the impact an active market participant executive officer may have on the operations. This would be an additional step in addressing the concerns of the North Carolina case.

This measure is intended to address the concerns raised by the DCA and both its suggested changes and recommendations to comply with the recent U.S. Supreme Court decision. It will expand the authority of the Director to review and take appropriate action regarding regulations or board decisions which may have potential antitrust (anticompetitive) implications, clarify potential liability for board members involved in possible antitrust litigation, and eliminate the requirement that the Executive Officer of the BRN be a registered nurse.

4. **Background on VMB.** The mission of the Veterinary Medical Board (VMB) is to protect consumers and animals through development and maintenance of professional standards, licensing of veterinarians, registered veterinary technicians, and premises, and diligent enforcement of the California Veterinary Medicine Practice Act. The Board is composed of eight members: four veterinarians, one RVT, and three public members. The Board licenses 12,086 Veterinarians and 6,424 RVTs. The licensee population has increased steadily over the past five years. The Board also requires registration of all premises where veterinary medicine, veterinary dentistry, veterinary surgery, and the various branches thereof, is being practiced. The Board currently registers 3,636 veterinary premises.

The pet-owning public expects that the providers of their pet's health care are well-trained and are competent to provide these services. The Board assures the public that veterinarians and RVTs possess the level of competence required to perform these services by developing and enforcing standards for examinations, licensing, and hospital and school inspection. The Board also conducts regular practice analyses to validate the licensing examinations for both veterinarians and RVTs. Additional eligibility pathways have also been approved for licensure of internationally trained veterinary graduates and certification of RVTs to allow qualified applicants from other states in the U.S. and countries around the world to come to California and to improve the provision of veterinary health care for consumers and their animals. The Board's goals, as stated in its Strategic Plan, include decreased enforcement cycle times, enhanced quality and training of hospital inspectors, inspecting existing hospitals within one year of registration, and working with DCA to reduce the amount of unlicensed activity occurring in the marketplace.

5. **Review of the VMB – Issues Identified and Recommended Changes.** The Board was last reviewed by the Senate Committee on Business, Professions and Economic Development and Assembly Committee on Business, Professions and Consumer Protection (now Assembly Business and Professions) in 2012-13. At that time, both committees identified 12 issues for discussion. The Board's sunset date was only extended for two years because of serious concerns raised by the Committees during its review. However, it was determined that the Board would only have to submit a report to the Committees that addressed only the most significant issues for the Board to discuss. On December 1, 2015, the Board submitted its required Supplemental Sunset Review Report to the Committees.

   The following are some of the major issues pertaining to the Board along with background information concerning the particular issue. Recommendations were made by Committee staff regarding the particular issue areas that needed to be addressed.

   a) **Issue: University Licensure.**

      Background: Exiting law, BPC Section 4830(a)(4) allows for an exemption to licensure for veterinarians working at both veterinary medical schools in California, UC Davis and Western University.

      States that have veterinary schools typically have exemptions or some form of university licensure to accommodate the schools' hiring needs. Veterinary schools hire veterinarians from all over the world who sometimes come into a state for a limited period of time, and who do not practice outside the confines of the university. However, problems can arise when the university veterinary hospital is providing services to the general public and the consumer does not have recourse through a licensing board for standard of care issues.

      The Board receives calls periodically from consumers whom are unhappy with the services at a university teaching hospital and request the Board to intervene. Since veterinarians working at the universities are exempt from licensure, the Board states that it has no authority to pursue disciplinary action and must advise

the consumer to seek recourse through the university's complaint mediation process. The exemption presents consumer protection issue, and the Board believes that all veterinarians providing treatment to the public's animals should be licensed and regulated. Faculty recruited for clinical positions within the university typically specialize in certain species and conditions, are experts in their field of study, and have undergone intensive specialty testing that exceeds the examinations required for entry-level licensure. In fact, for employment in clinical faculty positions, the university requires specialty training or other advanced clinical training. Some faculty may have graduated from foreign veterinary schools that are recognized but not accredited by the American Veterinary Medical Association. As reported by UC Davis and Western University, requiring full licensure would negatively impact the universities' ability to attract and recruit the best qualified veterinarians.

During the past two years, the MDC has debated the issue of requiring veterinarians working in a university setting to obtain a University License and therefore, no longer be exempt from Board oversight. As part of the MDC's research, former legal counsel reviewed the pertinent statutes, BPC section 4830 (a)(4), and concluded that the existing exemption for veterinarians employed by the universities would need to be amended to either to strike the language in section 4830 (a)(4) and thus require a license for university personnel or include language in 4830 (a)(4) that would qualify when a "University License" must be issued in order for a veterinarian employed by a university to provide veterinary services to the public's animals.

The MDC voted to recommend to the Board that a separate University License be issued to veterinarians who are employed by and who engage in the practice of veterinary medicine in the performance of their duties for the university. Both UC Davis and Western University are supportive of requiring a University License for veterinarians practicing within the university setting as it will provide consumer recourse through the Board and allow the Board to assist the university in handling enforcement matters involving university employees.

The Board voted to approve the request for a statutory change at its October 2015 meeting and requests assistance from the Legislature to amend Section BPC Section 4830 and add new BPC 4848.1.

The change would require an implementation date set out at least 6 months from the effective date to enable university personnel to comply with the proposed examination requirements (California jurisprudence exam) and educational course on regionally specific diseases and conditions.

Recommendation and Proposed Statutory Change: The Committees may wish to amend Business and Professions Code to require the Board to separately license veterinarians practicing within a university setting.

This bill requires the Board to provide a separate licensure category for veterinarians practicing solely within the university setting.

b) **Issue: Delinquent Registration Status.**

Background: Currently there is no provision for the premises registration to cancel after five years, as would be consistent with other license types regulated by the Board. Instead hospital premises registrations are left in a delinquent status indefinitely and remain on the Board's records. The records are accessible on the Board's website under the "License Verification" feature. It is confusing for consumers who use the website to find registered veterinary premises and retrieve data on hospitals that have been in a delinquent status for more than five years. Many of these hospitals are no longer operating veterinary premises, yet there is not mechanism by which the Board may cancel the premises registration. In addition, the retention of electronic records for delinquent premises registrations is a resource issue for the Board as there is a "per record" cost for maintaining the data.

Recommendation and Proposed Statutory Change: The Committees may wish to amend Business and Professions Code to allow the Board to cancel the premises registration of veterinary premises that have remained in delinquent status for more than five years.

This bill allows for a premise registration to be canceled after five years of delinquency.

c) **Issues: Drug Compounding.**

Background: During hospital inspections, Board inspectors routinely encounter bulk form drugs used for compounding medications stored at veterinary hospitals. If the drugs are not properly stored, labeled, or are expired, the inspector will advise the Licensing Manager of the compliance issue. However, there are no specific provisions in the Practice Act to provide oversight of a veterinarian compounding drugs for use in day-to-day veterinary practices and for dispensing to clients. Instead, the Board has looked to laws and regulations governing pharmacies (BPC Sections 4051, 4052, and 4127 & Title 16 CCR Sections 1735-1735.8 and 1751 et. seq.) since veterinarians are authorized prescribers under BPC Section 4170. Pharmacy regulations not only include specific requirements for pharmacies that compound and dispense medications, but also define the "reasonable quantity" of a compounded medication that may be furnished to a prescriber (in this case, veterinarian) by the pharmacy to administer to the prescriber's patients within their facility, or to dispense to their patient/client. It should be noted that the Board of Pharmacy is currently pursuing a regulatory amendment to its Compounding Drug Preparation regulations that includes amendments to the "reasonable quantity" definition of compounded drugs that may be supplied to veterinarians for the purposes of dispensing. In addition to pharmacy provisions, federal law provides for Extralabel Drug Use in Animals, CFR Title 21 Part 530.13, which authorizes veterinarians to compound medications in following situations:

- There is no approved animal or human drug available that is labeled for, and in a concentration or form appropriate for, treating the condition diagnosed.

- The compounding is performed by a licensed veterinarian within the scope of a professional practice.

- Adequate measures are followed to ensure the safety and effectiveness of the compounded product.

- The quantity of compounding is commensurate with the established need of the identified patient.

The Board has been actively engaged in discussions regarding the regulation of veterinarians compounding drugs since October 2014 when the US Government Accountability Office contacted the Board to obtain information on California's regulation of animal drug compounding. At that time, the federal Food and Drug Administration (FDA) was considering changes to its guidance on Compounding Animal Drugs from Bulk Drug Substances. Ultimately, the FDA released Draft Guidance #230 in May 2015, which was intended to provide parameters for compounding animal drugs.

At its October 20, 2014 meeting, the MDC reviewed the issue of drug compounding by veterinarians for their animal patients. The issue, as raised by Board legal counsel, was that there is no explicit grant of authority in the Practice Act authorizing licensed veterinarians to compound drugs pursuant to federal law. Board counsel advised that provisions for veterinarians to compound drugs for animal patients would need to be added to the veterinary medicine scope of practice. The MDC examined the lack of statutory guidance for veterinarians and ultimately recommended that the Board consider a legislative proposal to grant veterinarians the authority to compound drugs for their animal patients under the existing limitations of CFR Title 21 Part 530.13.

Recommendation and Proposed Statutory Change: The Committees may wish to amend Business and Professions Code to grant limited state authority for veterinarians to compound drugs.

This bill establishes authority for drug compounding in the practice of veterinary medicine.

Note: The exact language for this section is still under revision and will likely be amended at a later date.

6. **Prior Related Legislation.** SB 1243 (Lieu, Chapter 395, Statutes of 2014) Extended until January 1, 2017, the provisions establishing the Veterinary Medical Board and the term of the executive officer of the Board.

SB 304 (Lieu, Chapter 515, Statutes of 2013) extended until January 1, 2016, the provisions establishing the VMB, subjects the VMB to a review by the appropriate policy committees of the Legislature, and clarifies that the review of the VMB shall be limited to those issues identified by the appropriate policy committees.

7. **Arguments in Support.** The University of California – Davis School of Veterinary Medicine supports the licensing provisions for veterinarians practicing solely within a university setting. They cite that the proposed change in licensing requirements respects the need for consumer protection in California and provides recourse for consumers with complains while retaining sufficient flexibility for the University to fulfill its mission by recruiting the very best veterinary faculty.

   The California Veterinary Medical Association has a "support, if amended" position on SB 1195. While they support the continued existence of a Veterinary Medical Board, CVMA is concerned with components of the current language as it relates to veterinary drug compounding. The proposed language seeks to substitute the terms "pharmacist" and "pharmacies" with "veterinarian" and "veterinary premises" in statute and in reference to numerous compounding regulations. CVMA believes the compounding for veterinarians is uniquely different from the pharmacy profession and requires separate regulations. They also raise concern that the language may inadvertently cancel out previous statutory agreements relative to veterinary labeling and drug packaging. However, they indicated confidence that they will be able to achieve a positive resolution at an upcoming meeting with stakeholders including the Board, Board of Pharmacy, CVMA, and Committee staff. As previously noted in this analysis, the drug compounding language is still under revision pending the outcome of that meeting.

SUPPORT AND OPPOSITION:

Support:

University of California – Davis School of Veterinary Medicine

Support if Amended:

California Veterinary Medical Association

Opposition: None on file as of April 12, 2016.

-- END --

STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

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MEMORANDUM

DATE	March 25, 2016
TO	Executive Officers Department of Consumer Affairs
FROM	Awet Kidane, Director Department of Consumer Affairs
SUBJECT	***North Carolina Board of Dental Examiners v. Federal Trade Commission*: Policy Concepts**

This memorandum is intended to serve as a follow up to the meeting held on March 7, 2016, in which we discussed the potential policy concepts that the Department of Consumer Affairs (Department) was considering in response to the *North Carolina Board of Dental Examiners v. Federal Trade Commission* (*North Carolina*) decision.

As you are aware, the *North Carolina* case established that when a controlling number of decision makers are active market participants, board members are entitled to state-action antitrust immunity only if they act pursuant to a clearly articulated and affirmatively expressed state policy and their decisions are actively supervised by the state. After careful analysis and consideration, the Department believes the three policy concepts, discussed in our meeting and set out below, will provide further active state supervision to boards as required by the *North Carolina* case and will provide important clarity regarding the payment of damages by the state.

First, the Department believes that removing the active license requirement for executive officer positions will assist with protecting the boards from antitrust liability. This change allows for a nonmarket participant to serve in that critical role thereby minimizing the impact an active market participant executive officer may have on the board's operations.

Second, the existing regulatory review process should be strengthened. Under current law, the Director reviews board regulations and has the authority to disapprove them if they are "injurious to the public health, safety or welfare." Current law does not specifically authorize the Director to disapprove regulations for anticompetitive impacts that do not further a clearly articulated state policy. In order to ensure appropriate state supervision, the Department believes that the Director should have the specific authority to disapprove regulations for anticompetitive impacts without the possibility of a veto override.

And third, the indemnification for board members in antitrust cases needs to be addressed. Specifically, the Attorney General's opinion on the *North Carolina* case indicated that provisions providing indemnity to state actors should be clarified to ensure that treble damages resulting from antitrust violations are not considered punitive and may be paid by the state. This would leave no question that the state will pay treble damages awarded for violations of antitrust law in the same way it pays damages for board members in other types of lawsuits.

The concepts that I discussed with you in our meeting were also shared with the legislative committees during the Department's Joint Legislative Sunset Review hearing on March 9, 2016. The Department is committed to assisting the boards in this area and is continuing to work with the Legislature and Administration to address this important issue.

If you have questions or concerns regarding any of the information provided in this memo, please contact Melinda McClain at (916) 574-7800 or Melinda.McClain@dca.ca.gov, or your assigned legal counsel.