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Key Points for Connecting Licensing Board Study Dots ...

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At the heart of the Senate Bill 390 study of licensing board costs is a statute that in 1971 implemented a state reorganization plan attaching disparate boards to departments, 2-15-121, MCA, the administrative attachment statute. That statute, amended only once since enactment in 1971, has been the focus of one court case, Bowen v. Liberty Mutual Insurance Co., which reaffirmed the independence of the attached agency (1987).

A 2015 U.S. Supreme Court ruling may impact that statute. The ruling targets licensing boards as entities run by members of professions and possibly able to limit competition through government-sanctioned board action. Is there an impact expected on 2-15-121, MCA?

The April 2016 meeting of the Economic Affairs Interim Committee will look at three aspects of licensing boards related to 2-15-121, MCA:

- impacts of the U.S. Supreme Court ruling in North Carolina Board of Dental Examiners v. Federal Trade Commission;
- alternate regulatory options as reflected by how Washington State handles licensing boards and regulatory boards; and
- the intersection of funding, public safety considerations, and independence in "running the show" within a governmental operating structure.

Antitrust Concerns and Liability Immunity after the U.S. Supreme Court Decision in NC Dental

Licensing boards typically are composed of governor-appointed members who are themselves licensees of the profession regulated by the board, with usually at least one member a nonlicensee who represents the public or consumer interest. One of the complaints often heard about licensing boards is that they use licensing to limit competition. Not surprisingly, antitrust complaints occasionally go beyond the local level to the Federal Trade Commission. In addition to the case in which the NC Dental Board tried to limit to dentists the ability to engage in teeth-whitening services, the FTC also issued consent orders in the last 10 years in response to the following complaints:

- a [2008 case](#) in which the Missouri Board of Embalmers and Funeral Directors agreed not to limit sales of caskets to board-licensed funeral directors;
- a 2007 [restraint of trade case](#) that required the South Carolina State Board of Dentistry to publicly support a public health program that allowed dental hygienists to provide preventive dental care to



- school children;
- a [2006 case](#) under which the Austin (TX) Board of Realtors agreed not to prevent consumers with certain types of listing agreements from marketing on public real estate-related websites.

The [NC Dental Board case](#)¹ landed in the U.S. Supreme Court, which in a 6-3 decision mainly determined that the dental board was not protected as a state agency from an antitrust lawsuit under the state action immunity doctrine. The main reason given by Justice Anthony Kennedy, writing for the majority, was that "active market participants cannot be allowed to regulate their own markets free from antitrust accountability."

A summary of the case said, in part:

Because a controlling number of the Board's decisionmakers are active market 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. ...When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.

The North Carolina Dental Board decision may have implications for Montana professional and occupational licensing boards, which are attached administratively, as provided in 2-15-121, MCA, to the Department of Labor and Industry. Along with outlining department duties, that statute says an attached entity is to "exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department and without approval or control of the department."

No approval or control under 2-15-121, MCA

Under 2-15-121, MCA: "(1) An agency allocated to a department for administrative purposes only in this chapter shall (a) exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department and without approval or control of the department."

The Federal Trade Commission, which filed the antitrust suit against the North Carolina Dental Board, has issued [guidance](#)² on active supervision for licensing boards, recognizing that many of these boards have de facto majorities of active market participants. The Table lists samples of boards composed of a majority of market participants.

Sample Boards and Range of Market Participants Plus Public Members

Board	# Members	Market Participants	Public Members
Alternative Healthcare	6	2 naturopaths, 2 midwives, 1 OB-GYN	1
Architects/Landscape Architects	6	2 architects, 1 architect professor, 2 landscape architects	1
Dentistry	10	5 dentists, 2 dental hygienists, 1 denturist	1

¹See http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf.

²See https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf

Medical Examiners	13	5 MDs, 1 osteopath, 1 podiatrist, 1 physician's assistant, 1 nutritionist, 1 acupuncturist, 1 volunteer EMT	2
Optometrists	4	3 optometrists	1
Pharmacists	7	4 pharmacists, 1 registered pharmacy technician	2

The guidance specifically says that federal antitrust law does not require active supervision and may, in fact, let antitrust law play out if active supervision is not provided. The guidance also notes that a determination of anticompetitive behavior is fact-specific and depends on context.

Among the points made in the FTC guidance are that, if a state regulatory board wants to have immunity under the state action defense, then two requirements must be met:

- the state legislature must clearly articulate a state policy that allows anticompetitive behavior, in line with the following description in the NC Dental decision: "a state legislature may impose restrictions on occupations, confer exclusive or share rights to dominate a market, or otherwise limit competition to achieve public objectives;" [p. 4].
- if the state policy is broadly general, then active supervision is necessary to prevent active market participants from using anticompetitive policies for personal benefits and not state goals.

The guidance provides examples of what may be considered anticompetitive behavior by a board and what likely is not. Investigation of fraudulent business practices of one electrician, for example, is not likely a problem nor is denial of a license based on failure to meet educational requirements set by rule or law. However, a pattern of disciplinary actions affecting multiple licensees--as could happen if morticians imposed additional rules not vetted by the legislature on crematory technicians--could impact competition.

For active supervision to pass muster with the FTC or the courts, the guidance says, the supervision must include a review of substance, not procedure, and be capable of modifying or vetoing whatever decision is not in line with state policy. A decision must be written. The supervision may be done by an administrator whose office oversees the regulatory board, the state attorney general, or another state official who is not an active market participant [p. 12].

Guidance provided on March 28, 2016, to Montana's licensing boards by Commissioner of Labor and Industry Pam Bucy summarized:

Therefore, until such time as the Legislature chooses to enact more explicit provisions for active supervision, Department of Labor legal staff will continue to monitor board decisions and will continue to advise boards not to regulate or discipline licensees in a manner that unreasonably restrains trade. If a board chooses to regulate or discipline licensees in a manner that unreasonably restrains trade contrary to the express legal advice of Department attorneys, then the board members shall be advised that they risk losing their personal immunity from suit.³

³See March 28, 2016, Memo from Commissioner Bucy to Board members on the FTC Guidance:

Alternate Regulatory Options

Licensing boards are common among states. A [2016 report](#)⁴ compiled by the U.S. Department of Treasury, the Council of Economic Advisers, and the U.S. Department of Labor noted that an estimated 1,100 professions are regulated in at least one state, but fewer than 60 are regulated in all 50 states.

How states regulate varies. Some states use boards or committees as advisory groups only. Others let the boards or committees have policy control, with administrative details either handled by a department (as is done in Montana) or by contract (as is done with some licensing boards in South Dakota and Wyoming). Washington State has a combination of the two approaches. [Engineers](#) and medical doctors are among those with regulatory licensing boards that not only license and adjudicate complaints but recommend policies through rules and regulations. Telephone solicitors, however, are simply licensed and do not have a board.

The field of accountants is one of those licensed in all 50 states. This report will include more information on that profession because of the pilot project established under HB 560 in the 2015 session that allows the board to handle its own budgetary requirements. One of the reasons given during testimony on behalf of HB 560 was to let licensed accountants have control of their own funds. One thought was that the Board of Public Accountants might find ways to decrease expenses so their fees would be more in line with those of other states. Montana's fees of \$150 for annual renewal of an individual's certified public accountant license are among the highest in the nation. Fees vary widely from Hawaii's equivalent of \$21 a year (\$42 for a biennial renewal) to the \$150 equivalent that Montana, Connecticut, and Arizona charge. See Appendix A for a comparison of Board of Public Accountants' licensing fees.

Reasons for variations in costs among the states (and among professions) are not readily available. Listed below are some possible explanations:

- **Licensing frequency.** Washington State charges \$230 to license CPAs for three years. Montana's licensing boards generally charge either for one or two years to enable better budgeting within the biennial budget. The Board of Public Accountants would not fall under that routine now because its funding is statutorily appropriated and operated out of an enterprise fund, at least for the duration of the pilot project. Other states, however, also license for one or two years at much lower costs than Montana.
- **Economies of scale.** Montana has about 3,950 CPAs. Without knowing the numbers of CPAs in other states, a comparison nationally is difficult, but in terms of intrastate comparison, economies of scale generally apply when more licensees share the cost of a board. For example, the 19,000-plus nurses in Montana pay \$100 every two years to renew licenses, while the nearly 600 respiratory therapists pay \$75 to renew licenses every year.
- **Board activities.** One of the ways that the Board of Public Accountants hoped to save money but also provide better checks on compliance with continuing education was to hire a national organization to oversee examinations and the auditing of continuing education rather than to have Montana staff handle those activities. Other board activities that can drive up licensees' costs include decisions to send board members and staff to national association meetings. These meetings may be helpful in learning about hot topics in the profession, but they also might be in far-off resorts. Also a cost-driver may be the frequency in which a board engages in rulemaking or the complexity of the rulemaking. Some rulemaking must be done to adjust to national or state regulatory changes in the profession; other rulemaking is discretionary and when done in a way that pushes boundaries is sure to take more staff time to respond to comments filed by other licensees.

⁴See https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

- **Complaints and screening panels.** The more complaints that a board has to hear, the more that costs are likely to increase not just from board members' time but also from attorney time spent on the complaints. Under SB 76 enacted in the 2015 session, the Department of Labor and Industry received leeway, subject to board approval, to handle routine administrative complaints, such as a licensee not being compliant with requirements for continuing education or initial licensure. In the next year or so, the department may be able to say whether this provision has helped to decrease costs to a board for screening panels. In some professions, the ability of the board to file complaints or the ability for a person to file an anonymous complaint has generated more activity for screening panels, which in turn generates costs. One person told the Economic Affairs Committee in the 2011-2012 interim that an abundance of anonymous complaints amounted to an attempt to kill the Board of Funeral Service through skyrocketing screening panel costs. In 2012 that board had 90 new complaints, compared with 34 the next year.

Funding, Public Safety, and Independence

Funding -- Funding for professional and occupational licensing boards primarily depends on fees charged to licensees. These fees are for licensing and renewal costs, administrative and program expenses, and board costs, including expenses for rulemaking and screening panels. For most boards, the payments go into a special revenue account. Special revenue accounts are included in House Bill 2 appropriations and are subject to HB 2's spending authority limits.

In the 2015 session, successful bills changed how two boards operate in terms of funding:

- the Board of Public Accountants under [HB 560](#) gained the right to operate with an enterprise fund, which is defined in 17-2-102, MCA, as a type of proprietary fund used for operations "that are financed and operated in a manner similar to private business enterprises whenever the intent of the legislature is that costs (i.e. expenses, including depreciation) of providing goods or services to the general public on a continuing basis are to be financed or recovered primarily through user charges, or whenever the legislature has decided that periodic determination of revenue earned, expenses incurred, or net income is appropriate for capital maintenance, public policy, management control, accountability, or other purposes;..."
- the Board of Funeral Service obtained a new funding source, allowed by [House Bill 223](#), which takes a portion of the cost paid for death certificates at either the county or the state level and diverts that amount to help fund the Board of Funeral Service.

Types of funds used for licensing boards might seem arcane, but the fund type is tied to state financing policies.

The Board of Funeral Service is the first licensing board to use funds from the sale of an official public document to help run its operations.

As amended during session, the bill gained sideboards so that licensees still had to pay fees rather than letting the money from sales of public records pay the full cost for the board. The board spends money on inspections of funeral homes, crematories, and cemeteries and on screening panels and adjudication panels for complaints either brought by the board or by consumers and sometimes by competitors.

Both bills have termination dates, with the change in death certificate costs reverting to pre-2015 status after June 30, 2017, and the pilot program for the Board of Public Accountants ending on September 30, 2019. Both boards are likely to ask future legislatures to remove the termination dates if the funding changes are working for them.

Testimony promoting the enterprise approach for the Board of Public Accountants noted several issues. One was that the Governmental Accounting Standards Board (under GASB 34) suggests accounting boards ought to use enterprise funds. It is not clear how many states have adopted that approach or whether GASB 34 actually incorporates governmental entities as small as licensing boards.

Another proponent of HB 560 contended that the current system of funding licensing boards through HB 2 allowed for movement of appropriation authority (not funds) between boards. One result in mid-2014 was that boards or bureaus within the Business Standards Division, perhaps through no fault of their own, overspent their appropriation authority; the Division reallocated appropriation authority from other boards. As explained at one of the Economic Affairs Committee meetings in 2014, the Business Standards Division had been able in the past to move appropriation authority among its bureaus, including the Building Codes Bureau, which had an excess of unneeded appropriation authority during the housing bust of the Great Recession. As the economy picked up, however, the Building Codes Bureau needed its appropriation authority. Whether previous years' budgets were inappropriately lean and benefitted from the recession or whether there were attempts by the Legislature or the Governor's Office to keep the budget looking leaner by limiting appropriation authority is unknown. The solution to unexpected costs, however, may have come from the 2015 Legislature's agreeing to provide the Department with a contingency fund.

Board of Public Accountants' member Dan Vuckovich relayed the impact of the appropriation shuffle to the Senate Business, Labor, and Economic Affairs Committee in saying that his board was notified in April 2014 that the board's budget had to be cut by \$40,000 and that the board could not have another meeting in that fiscal year because other boards had used the Board of Public Accountant's appropriation authority. So, even though the board had a positive cash balance, the board couldn't spend the money. As a result, the board could not meet until after July in the new fiscal year and also could not do compliance audits of members' continuing education or adopt new rules until the new fiscal year. Vuckovich noted that transparency is difficult in budgeting if 32 other boards' budgets impact what his board can do with its budget. He also commented that what the department may see as efficiencies in staffing may result in a board being shorted the staff time for special projects.

As summed up by one staff member for the Department of Labor and Industry, an enterprise fund would mean that licensing boards run as a business, would allow boards to keep on hand more money than the current limit of two times their annual appropriation, and would require fee increases if expenses were greater than revenues.

State Entities Using Enterprise Funds

- Secretary of State, 2-15-405, MCA
- Liquor Control Division, 16-2-108, MCA
- Surplus Property, 18-5-203, MCA
- State Park Visitor Fees, 23-1-105, MCA
- State Lottery, 23-7-401, MCA
- Board of Public Accountants, 37-50-205, MCA
- Unemployment Insurance Fund, 39-51-401, MCA
- Montana Correctional Enterprises, 53-30-132, MCA (also State Prison Ranch)
- Motor Vehicle Electronic Commerce, 61-3-118, MCA (license/permits online)
- Airport Authorities, 67-11-222, MCA
- Board of Hail Insurance, 80-2-222, MCA
- Agricultural Loan Authority, 80-12-311, MCA
- Housing Authority, 90-6-104, 107, 133, MCA
- Facility Finance Authority, 90-7-202, MCA

However, not everyone likes the idea of an enterprise fund-based approach for licensing boards, in part, because the boards are a regulatory not a business activity. The people in charge of a board may see as their chief responsibility cost containment on fees or they may see studies, surveys, pilot projects and other costly, staff-intensive activities as more important for their professional advancement. A board that has to defend a budget request before the department also gives the department the information necessary to defend the budget before the Legislature in contrast to an enterprise fund where the budget primarily reflects the board's activity and, if unchecked, may be used more to promote the profession than to handle restricted activities like licensing, oversight, and regulation..

Policy decisions include:

- should a regulatory board operate as an enterprise;
- is there a better way of budgeting that keeps appropriation authority separate for each board;
- is a lean-staffed department interfering with professional advancement; or
- are too many mid- and high-level employees creating higher costs with boards unable to control staffing?

Public Safety -- Licensing by the state provides consumers with a measure of confidence that the person from whom the consumer is obtaining services has been vetted, by a government agency, as someone qualified to perform the service for which the person is licensed and against whom no serious unprofessional conduct challenges are commonplace. Sometimes state laws specify that only a person licensed by a state board may be eligible to perform a state-sanctioned activity. These include:

- persons counseling offenders (limited to licensees such as physicians, psychologists, social workers, professional counselors, or advanced practice registered nurses with a speciality in psychiatry).
- persons allowed to be in charge of the disposition of a dead body or remove a body from the place of death, such as funeral directors licensed under Title 37, chapter 19;
- persons licensed as sanitarians or professional engineers who, through their employment with a local health department or board of health, enable local review of certain subdivisions; and
- licensed engineers or surveyors who have the authority to say whether a methodology for an easement is accurate to within 5 meters (77-2-102, MCA).

An argument was made during reviews of licensing boards requested under 2011 legislation in HB 525 that those licensees whose jobs enable certain public functions to proceed, such as sanitarians doing subdivision reviews, ought to have their licenses paid in part by the public.

A policy issue is whether a licensee who performs a function for a public agency, such as subdivision review, ought to receive an offset of licensing fees from the general fund because the general public benefits from the person's license.

Similar arguments have been made by the Board of Livestock, which contends that the public safety components of testing at the Veterinary Diagnostic Laboratory are important to public health and safety and therefore ought to be paid, in part, by an appropriation of the general fund.

Independence -- In the 2013 Legislature, licensees of both the Board of Realty Regulation and the Board of Public Accountants sought to have more independence from the Business Standards Division.⁵ Both groups of licensees wanted more independence in terms of budgeting but the real estate-related group additionally wanted to handle the board's own staffing, website design, and myriad other functions. The

⁵[HB 363](#) revising the Board of Realty Regulation passed both houses but a veto override failed. [HB 582](#) revising the Board of Public Accountants passed both houses but was vetoed by the Governor.

requests came at the end of a division reorganization -- in which some board members expressed a concern that they were losing familiar staff who had handled their licensing and board representation. The department had sought through the reorganization to cross-train personnel, coordinate licensing by groups of people who did licensing, and standardize for all boards the concept of an executive officer, among other changes. Previously only those boards specifically identified in statute had an executive officer. Now all boards shared staff in a variety of ways. By the 2015 legislative session the Board of Realty Regulation licensees were not pushing for the previous legislation, but budgeting issues encouraged the accountants to push for a change in the way they operate.

Reasons vary when boards push for independence. From the licensees' perspective, they see a board funded by their own money and little opportunity to weigh in on costs related to big projects like system software, building remodeling, or reorganizations. Some see their compatriots in other states operating with lower licensing fees, better websites (perhaps), and otherwise greener grass. Old-timers may remember when their licensing board was more independent, with fewer attorneys present at meetings and little interference (as they see it) from the department.

The policy question, however, behind independence is to what extent does the state want to grant free rein to the state's licensing power and all that goes with that power in terms of sanctions for unprofessional conduct or limitations on who enters the occupation. As the national report indicated, more professions want the prestige bestowed by a license. But the state power to license usually has strings attached to provide for some accountability. Otherwise, professional associations could handle certifications and a state could be limited to registration, as Montana does with housing contractors.

Licensing by the state entails some type of oversight by the state, whether by a department or by a board of one's peers. Having an independent board suggests state-backed power with little accountability to the state.

Summary

Being independent in light of the North Carolina Dental Board case is likely to mean free to be sued for restraint of trade, without active supervision. The Economic Affairs Interim Committee has the opportunity through the SB 390 Study to determine whether some type of legislative action is necessary to allow more overt control by the Department of Labor and Industry, perhaps based on other states' approaches to handling licensing boards. Although the SB 390 Study focuses on costs and how those charges benefit licensing boards, the policy questions raised in this background report connect the dots between what boards are willing to pay to get state authority and what type of accountability the boards are willing to give the public in exchange for that authority.

Appendix A

Comparison of licensing fees for Boards of Public Accountants across states

Access to state licensing boards via: <https://www.thiswaytocpa.com/exam-licensure/state-requirements/>

Alabama	\$75 for active	Montana	\$150 annual license renewal
Alaska	\$300 application \$390 certificate fee	Nebraska	\$175 biennial license renewal
Arizona	\$300 biennial license renewal	Nevada	\$140 annual license renewal (\$20 off if renew online by credit card)
Arkansas	CPA/PA application fee - \$50 Annual registration - \$110	New Hampshire	\$275 for 3-year license renewal
California	\$50 biennial license renewal	New Jersey	\$90 for 3-year registration
Colorado	\$74 biennial license renewal	New Mexico	\$130 annual license renewal
Connecticut	Initial CPA certificate and license - \$300 Professional Service Fee - \$565. Annual renewal is \$150.	New York	
Delaware	CPA Permit - \$131. Renewal fee - by notification	North Carolina	\$60 annual license renewal
Florida	\$105 biennial license renewal	North Dakota	Not more than \$100 annual renewal fee
Georgia	\$100 biennial license renewal for an individual	Ohio	\$150 - 3-year permit fee \$55 - 3-year registration fee
Hawaii	\$42 biennial license renewal (may be additional fees)	Oklahoma	\$50 annual registration fee to renew individual license \$100 to renew a permit
Idaho	\$120 annual license renewal	Oregon	\$255 biennial license renewal
Illinois	\$40 annual license renewal	Pennsylvania	\$100 biennial license renewal
Indiana	\$105 - 3-year license renewal	Rhode Island	\$375 3-year renewal permit
Iowa	\$100 - annual registration and renewal	South Carolina	
Kansas	\$150 biennial license renewal	South Dakota	\$50 annual license renewal
Kentucky	\$100 biennial license renewal (statute says not more than \$200 biennially)	Tennessee	
Louisiana	\$100 renewal of certificate	Texas	
Maine	\$55 annual renewal	Utah	\$63 annual license renewal

Maryland	\$56 biennial license renewal	Vermont	
Massachusetts	\$161 biennial license renewal	Virginia	
Michigan	\$100 annual license fee	Washington	\$230 for three-year renewal
Minnesota	\$100 annual license renewal	West Virginia	
Mississippi	\$110 annual license registration	Wisconsin	
Missouri	\$80 biennial license renewal	Wyoming	\$200 annual license renewal (\$10 off for electronic filing)

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