

FILED

APR 30 2019

**OKLAHOMA SECRETARY
OF STATE**

**J. Kevin Stitt
Office of the Governor
State of Oklahoma**

**EXECUTIVE DEPARTMENT
EXECUTIVE ORDER 2019-17**

I, J. Kevin Stitt, Governor of the State of Oklahoma, pursuant to the power and authority vested in me by Sections 1 and 2 of Article VI of the Oklahoma Constitution, hereby order all state licensing boards or commissions on which a controlling number of members are market participants in the occupation the board or commission regulates (“Qualifying Boards”) to immediately adopt and implement the procedures described herein.

Background

On July 6, 2015, former Attorney General Scott Pruitt issued a letter to then-Governor Mary Fallin recommending reform of certain practices of Qualifying Boards in light of the opinion of the United States Supreme Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015) (“*N.C. Dental*”). The letter stated that under *N.C. Dental*, Qualifying Boards are unable to claim state-action immunity in defense of federal anti-trust claims unless the challenged action by the board is (i) enforcing a clearly articulated and affirmatively expressed state policy, and (ii) actively supervised by the state. Accordingly, the letter advised Governor Fallin to implement procedures to ensure that substantive non-rulemaking decisions of Qualifying Boards are subject to active supervision by a politically accountable state actor with the power to review, veto, and modify such decisions. On July 17, 2015, Governor Fallin issued Executive Order 2015-33, which required Qualifying Boards to submit all proposed licensure or prohibition actions to the Office of the Attorney General “for review and written analysis of possible violation of law.”

Since the issuance of Executive Order 2015-33, the Federal Trade Commission has issued guidance for complying with the directive set forth in the *N.C. Dental* decision and courts have further interpreted the *N.C. Dental* ruling itself. Based on this new information and the experience drawn from the Attorney General’s review of Qualifying Board action under the previous administration, Executive Order 2015-33 is hereby withdrawn and replaced by this Order.

Attorney General Review of Qualifying Board Actions

All Qualifying Boards—as defined herein—proposing to take non-rulemaking action that has anticompetitive effects shall submit such proposed action to the Office of the Attorney General for review and confirmation that the action is enforcing a clearly articulated and affirmatively expressed state policy. Proposed actions that must be submitted for review include, but are not limited to, (i) actions affecting a class or category of individuals, (ii) actions contested by the respondent, (iii) actions based on alleged conduct not admitted by the respondent, (iv) revocation or suspension of a license, (v) actions stemming from a complaint filed by a competitor of the

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respondent, and (vi) actions that are purely discretionary by the Board, collectively referred to as “proposed qualifying actions.” Qualifying Boards shall comply with the following procedures for all such proposed qualifying actions:

1. All proposed qualifying actions with potential anticompetitive effects shall be submitted to the Office of the Attorney General for a written determination of whether the proposed qualifying action accords with state policy¹;
2. Upon receipt of the written determination from the Office of the Attorney General, the Qualifying Board shall abide by the Attorney General’s recommendation, if any; and
3. Failure to follow the recommendation, if any, of the Office of the Attorney General shall constitute misconduct and shall subject such board member(s) to removal for cause by the appointing authority.

Notwithstanding the aforementioned procedures, Qualifying Boards need not submit for review proposed actions that do not carry anti-trust implications. Such actions include, but are not limited to, (i) actions to which the respondent consents or agrees, (ii) actions resulting from a criminal conviction in a court of competent jurisdiction, (iii) actions in which the Board has performed the ministerial, non-discretionary task of implementing a mandatory statute, (iv) actions that impose only a fine or a requirement for additional education, and (v) actions that do not affect the status of the license or otherwise prevent the licensee from continuing to participate in the occupation. Qualifying Boards may contact the Attorney General to seek a determination whether a specific action is subject to the requirements of this Order.

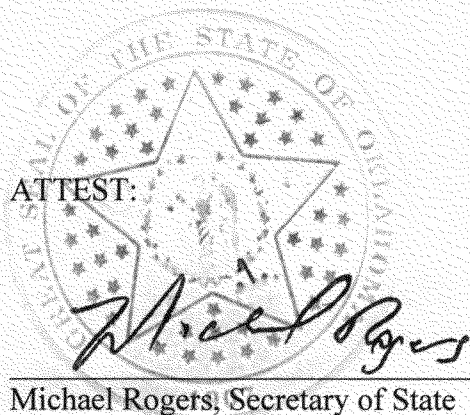

Copies of this Executive Order shall be distributed to all Cabinet Secretaries and to the Chief Administrative Officers of all Qualifying Boards for immediate implementation.

IN WITNESS WHEREOF, I have set my hand and caused the Great Seal of the State of Oklahoma to be affixed at Oklahoma City, Oklahoma, this 30th day of April, 2019.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA



J. KEVIN STITT

ATTEST:



Michael Rogers, Secretary of State

¹ A copy of any written determination provided by the Office of the Attorney General shall be provided to the Office of the Governor.