August 19, 2021

The Honorable Rob Bonta
Attorney General of the State of California
1300 I Street, Suite 1740
Sacramento, CA 95814

Re: **California Regulatory Boards: Complying with U.S. Supreme Court Decision and Reinstating a Vertical Enforcement Program at the Medical Board of California**

Dear Attorney General Rob Bonta:

The Center for Public Interest Law (CPIL) respectfully writes to solicit a response with respect to two important issues affecting California consumers regarding California's major regulatory boards:

1) How will the Attorney General's Office under your leadership bring California into compliance with the U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015), which requires the state to show that it is actively supervising regulatory boards that are controlled by active market participants to avoid antitrust liability?; and

2) How will your office work to improve the enforcement process at the Medical Board of California (MBC) and other occupational licensing agencies in California in order to enhance public protection?

About the Center for Public Interest Law

CPIL is a nonprofit, nonpartisan academic and advocacy organization based at the University of San Diego School of Law. For over 40 years, CPIL has studied occupational licensing and monitored California agencies that regulate business, professions, and trades, including the Medical Board and other Department of Consumer Affairs (DCA) health care boards. CPIL has focused heavily on MBC since 1989 when it published Physician Discipline in California: A Code Blue Emergency ("Code Blue"), a 100-page report based on three years of research which revealed the minimal output, fragmented structure, and questionable priorities of the Medical Board's enforcement program. Based on that report, the Legislature passed at least five MBC enforcement program reform bills between 1990 and 2000.[1] After continuing reports of problems at MBC's enforcement program were published in 2002, the Legislature passed SB

[1] SB 2375 (Presley) (Chapter 1597, Statutes of 1990); SB 916 (Presley) (Chapter 1267, Statutes of 1993); SB 609 (Rosenthal) (Chapter 708, Statutes of 1995); AB 103 (Figueroa) (Chapter 359, Statutes of 1997); SB 16 (Figueroa) (Chapter 614, Statutes of 2000).

1950 (Figueroa) in 2002, which required the DCA Director to appoint a "Medical Board Enforcement Monitor." After a competitive bidding process, the Director appointed CPIL's then Administrative Director, Julianne D'Angelo Fellmeth, to that position in October 2003. Over a two-year period, she directed an in-depth investigation and review of MBC's enforcement and diversion programs, culminating in two reports containing 65 concrete recommendations for reform.[2] At least five pieces of reform legislation (SB 231 in 2005; SB 1438 in 2006; AB 1127 in 2011; SB 304 in 2013; AB 1886 in 2014) have been enacted in response to these reports, mirroring many of the recommendations. As we discuss in detail below, one of the most significant recommendations that was implemented, and then later revoked, was the implementation of a Vertical Enforcement ("VE") model in MBC disciplinary cases.

In addition, CPIL's Executive Director, Professor Robert C. Fellmeth, has spent his career as a nationally-recognized expert on antitrust law. He created the nation's first antitrust enforcement unit in a local law enforcement agency (the San Diego District Attorney's Office), served as a state antitrust prosecutor, and was cross-commissioned as a federal antitrust prosecutor to bring federal actions as well. More recently he has been appointed to consult for the offices of the District Attorney of Los Angeles, San Diego, Orange, and other counties on antitrust cases. As the Price Chair in Public Interest Law at the University of San Diego School of Law, he teaches antitrust law, regulated industries, consumer law, and public interest law and practice. He has also taught the subject at the National College of District Attorneys and National Judicial College.

Complying with U.S. Supreme Court Decision

We were happy to hear your commitment at your Senate Confirmation Hearing that you would look into the Supreme Court's landmark decision in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015), and advise the Legislature as to how the various California consumer protection boards would comply. As you likely know, this holding included the bold general rule that where a regulatory board is controlled by active market participants in the occupation the board regulates, it lacks state sovereignty and thus is subject to federal antitrust liability unless the state can show that it is actively supervising these boards. Currently, California exercises no such supervision according to the standards set forth by the Court. In fact, CPIL sponsored legislation to provide that review for all such vulnerable state agencies in SB 1195 (Hill) in 2016, but it was defeated after vigorous trade association lobbying. Thus, as it stands, boards with a majority of licensee members are at significant risk of exposure to an antitrust lawsuit and the treble damages that would result.

Based on prior Supreme Court decisions, the case states, "[l]imits on state action immunity are most essential when a State seeks to delegate its regulatory power to active market participants." *North Carolina State Board of Dental Examiners*, 574 U.S. at 505. Either the composition of the board receiving such delegation must be changed (*e.g.,* with the addition of a supermajority of non-conflicted "public members") or all actions of a board dominated by active

[2] Julianne D'Angelo Fellmeth and Thomas A. Papageorge, *Initial Report of the Medical Board Enforcement Monitor* (November 1, 2004) (hereinafter "*Initial Report*"); Julianne D'Angelo Fellmeth and Thomas A. Papageorge, *Final Report of the Medical Board Enforcement Monitor* (November 1, 2005).

market participants must be subject to a state supervision mechanism that "provide[s] 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *North Carolina State Board of Dental Examiners,* 574 U.S. at 515, *quoting Patrick v. Burget*, 486 U.S. 94, 100-01 (1988). This alternative requires actual "active supervision" by the state. The Court does not mince words in describing the inadequacy of theoretical or general oversight to accomplish such a cure, noting that such supervision cannot be undertaken by those who are "active market participants" in the relevant trade themselves, and going beyond that threshold as follows: "[T]he supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it…; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy…; , and the 'mere potential for state supervision is not an adequate substitute for a decision by the State…." 574 U.S. at 515 (citations omitted).

In light of this, we strongly recommend changing the respective boards' compositions to a public member majority. Not only is it the right thing to do for public protection, but it will decrease the boards' risk of exposure to lawsuits.

Implementing Vertical Enforcement Program for the Medical Board of California

As you may be aware, a central recommendation in the Medical Board's Enforcement Monitor's Initial Report in 2004 was to implement a system of Vertical Enforcement (also known as "VE" or Vertical Prosecution), which required the Medical Board of California (MBC) and the Health Quality Enforcement (HQE) unit of the Attorney General's Office to utilize VE in investigating and prosecuting MBC disciplinary matters.[3] Specifically, in order to fully and efficiently implement VE, the Monitor recommended transfer of MBC's investigators into HQE where the prosecutors who specialize in physician discipline matters are located. The Enforcement Monitor cited a number of benefits that would likely result from the use of VE and the transfer, including (1) improved efficiency and effectiveness arising from better communication and coordination of efforts—including more efficient recognition of cases deserving interim suspension order (ISO) treatment due to the early involvement of the prosecutor, (2) reduced case cycle times—including decreased time to procure needed medical records due to the earlier involvement of the prosecutor, (3) the earlier closure of investigations where the Board will not be able to sustain its burden of proof, (4) improved commitment to cases by both investigator and prosecutor, (5) improved morale, recruitment and retention of investigators, (6) improved training for investigators and prosecutors, and (7) the potential for improved perception of the fairness of the process (in that the investigators would no longer be subject to actual or perceived pressures or undue influence by the physician-dominated Medical Board).[4]

[3] Initial Report at Chapter IX, pages 163-77; Julianne D'Angelo Fellmeth and Thomas A. Papageorge, Final Report of the Medical Board of California Enforcement Program Monitor (November 1, 2005); at Chapter IX, pages 109-20.

[4] Initial Report at Chapter VII, pages 138–40. Note that complex white collar crime cases, including civil unfair competition matters in the offices of the district attorney throughout California, are routinely investigated by investigators supervised by deputy district attorneys. These are not simple cases that can be investigated and then "handed off" to a prosecutor previously uninvolved in the matter. Issues including the elements of the offense, what

While the Legislature did accept the recommendation to institute VE at the MBC, it did not transfer the investigators to the AG's office. Thus, the program was never implemented as intended, and the structural and geographical separation of investigators from prosecutors created a host of problems throughout the program's tenure. To complicate matters, the Legislature—effective July 1, 2014—transferred MBC's investigators not to the Attorney General's Office as suggested by the Monitor, but to the Department of Consumer Affairs, thus introducing a third party into the already fraught relationship between MBC and HQE. This transfer caused investigator attrition and investigative case cycle times to skyrocket immediately. Ultimately, these problems led to the sunset of the program and the return to the "hand-off" model of investigation, in which investigators at the Department of Consumer Affairs' Health Quality Investigations Unit (HQIU) investigate the complaints on their own, and then "hand-off" the investigations to the Attorney General's Office.[5]

In 2019 the MBC's Vertical Enforcement program[6] was repealed at the Board's request. We are only now seeing the impact of this sunset, and the numbers are not good. The investigation times and overall case processing times are at unacceptable levels. Specifically, after the removal of the VE provisions, "the field's timeframe for investigating cases has increased from FY 16/17 467 days, FY 17/18 510 days, FY 18/19 547 [days], and FY 19/20 572 days."[7]

At MBC's February 2021 meeting, it held a lengthy discussion with Gloria Castro, Senior Assistant Attorney General, of HQE. The MBC members expressed concern as to the increasing number of days it was taking the AG's office to file a case. Ms. Castro reported that a contributing factor is the sunset of VE. Alarmingly, she went on to report that HQE returned 77 cases to the MBC for further investigation in FY 19/20—11 times the number returned in FY 16/17 before VE was sunset. Not only that, but the Board's Sunset Report reveals that investigation cycle times increased by two months since the sunset of VE.[8] Delayed investigations—including investigations of egregious matters—delay the filing of accusations against physicians, which filing makes the matter public so patients can protect themselves from potentially dangerous doctors. Obviously, this is a multi-pronged problem that has severe public safety impacts.

In light of the significant public protection implications of the current state of the Enforcement Program, we implore you to look into this matter, and advocate once again that the investigators should move to the Attorney General's Office as originally proposed so that all of the team members (prosecutors and investigators) can work together as expeditiously as possible to maintain consumer protection. At a minimum, we believe that MBC should revert to the system in which the investigators are employed by the MBC, and the Attorney General assigns a

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evidence is needed to prove those elements, and how such evidence can be obtained and organized for effective and admissible presentation require early attorney involvement.

[5] For a complete history of the implementation and eventual sunset of VE, see the following issues of the California Regulatory Law Reporter, available at https://digital.sandiego.edu/crlr/: Volume 23, Issue 1 (Fall 2017) at 37–40; Volume 23, Issue 2 (Spring 2018) at 46–47; Volume 24, Issue 2 (Spring 2019) at 44–45.

[6] Gov't Code § 12529.6 (enacted in 2006).

[7] Sunset Review Oversight Report 2020, 91 (2020).

[8] Id.

Deputy in District Office (DIDO) to work in each MBC field office to provide legal assistance and guidance to investigators.[9]

Thank you for your consideration of this request. My staff and I would be more than happy to meet with you and your staff to discuss these recommendations further.

Please mail your responses to Center for Public Interest Law, University of San Diego School of Law, 5998 Alcala Park, San Diego, CA 92110 or email to cpil@sandiego.edu.

Very sincerely,

Robert C. Fellmeth
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[9] See Initial Report, Chapter VII.