

PRESENTED AT
12th Annual
Advanced Texas
Administrative Law Seminar

August 24-25, 2017
Austin, TX

Administrative Regulation and Sunset Review

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INTRODUCTION¹:

As the 2017 Legislative session opened, a common theme of Sunset Commission review was whether consolidation or transfer of duties of certain agencies was warranted. Ultimately, the Texas State Board of Podiatric Medical Examiners, with its small staff and budget as noted by the Sunset Commission, was statutorily transferred as an advisory Board under the Texas Department of Licensing and Regulation (“TDLR”).

Major changes regarding mental health provider licensing boards were also proposed in the form of HB 2898, merging the licensing and regulation of psychologists, marriage and family therapists, professional counselors, and social workers into a single agency, the Behavioral Health Executive Council (“BHEC”). The bill would have also transferred the Council on Sex Offender Treatment and the licensing of chemical dependency counselors from the Department of State Health Services to BHEC. As of the date of this summary, HB 2898 and the authorization to continue these agencies did not pass in the regular legislative session.

The Sunset bill regarding the Texas Medical Board, HB 340, also failed to pass during the regular session. Thus, the Medical Board and the mental health agencies subject to the newly proposed BHEC agency were subject to special session bills being filed to extend these agencies until September 1, 2019 (SB 20, HB 1). Specifically, SB 20 and SB 60 (riders/funding) were passed by the Senate during the special session and were filed with the House.

Conversely, House Sunset bill HB 1 extending all agencies to 2019, won final approval on the House floor July 25 with no opposition. The House version of the funding bill, HB 2, passed the lower chamber on July 28, 2017. Both have been received by the Senate. It is expected that either special session SB 20 or HB 1 will pass and re-authorize these agencies until 2019.

Though the Sunset bills concerning the Medical Board and mental health agencies likely will extend the agencies to 2019 and the next legislative session, significant legislation was passed affecting the vast majority of healthcare licensees. Citing a national prescription abuse of opioids and overdose concerns, much of the focus of the Sunset Commission recommendations (and ultimately passed legislation) centered on stricter monitoring of controlled substances and the enhanced use by healthcare licensees of the Prescription Monitoring Program (“PMP”) database administered by the Texas State Board of Pharmacy. These broader extensions of the PMP program were contained within HB 2561, re-authorizing the Texas Board of Pharmacy but also imposing additional standard of care requirements to health care providers prescribing controlled substances.

Patient care issues related in office anesthesia standards were also a major concern of the review of the Texas State Board of Dental Examiners. Recent adverse events regarding pediatric dentistry, which were well publicized in the media, spurred the review of current

¹ All of the summaries within this paper have been directly obtained from the Sunset Commission’s Staff Reports with Final Results; available in full at <https://www.sunset.texas.gov/reviews-and-reports>

anesthesia standards and requirements. The Dental Board was directed by the Sunset Commission in August 2016 to create a Blue Ribbon panel composed of experts in the field to review the issue.

The Blue Ribbon Panel reviewed Dental Board investigations from fiscal years 2012 through 2016 involving patient mortalities and patient harm during or following dental treatment at which sedation/anesthesia was administered and evaluated the appropriate substance and application of emergency protocols related to the administration of sedation/anesthesia. After review of 78 cases, the panel concluded that:

- 19 of the adverse events were related to mishandled sedation/anesthesia (i.e. nearing 25% of cases reviewed);
- 6 of the 19 cases were considered as “major events”, with the remainder 13 cases considered as mishaps.

As a result of this study and its recommendations to the Sunset Commission, SB 13 contained major additional requirements as to the administration of dental anesthesia (summarized below).

Also as to the Dental Board, the Sunset Commission noted that the Board seemed to focus on market interest rule-making. This same concern was expressed by the Sunset Commission as to the Texas Board of Chiropractic Examiners. No doubt the Sunset Commission was aware of the recent Supreme Court ruling in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015). In that case, the Federal Trade Commission filed an administrative complaint, alleging that the North Carolina Board’s concerted action to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. The Court held that because a controlling number of the Board’s decision-makers were active market participants in the occupation the Board regulated, the Board can invoke state-action antitrust immunity only if it was subject to “active supervision by the State”, and held the requirement was not met. *Id.*, at 17.

Though the Court did not strictly define “active supervision”, the Court stated that the sufficiency of active supervision must be “flexible and context dependent” with “realistic assurances” that a non-sovereign actor’s anticompetitive conduct promotes state policy rather than merely the party’s individual interests. *Id.*, at 17-18. The Court did provide guidance as to certain elements of active supervision:

The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick*, 486 U. S., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the “mere potential for state supervision is not an adequate substitute for a decision by the State,” *Ticor*, *supra*, at 638.

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First appeared as part of the conference materials for the
12th Annual Advanced Texas Administrative Law Seminar session
"Administrative Regulation and Sunset Review"