



# An Update on Active Supervision and the Regulatory Compliance Division

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# What is the Regulatory Compliance Division?

The Regulatory Compliance Division was authorized by SB 1995 during the 86th Regular Legislative Session, and established in November 2019 in the Office of the Governor, to provide an independent review of certain state agencies' proposed rules that affect market competition.



# Federal Antitrust Background

- 1890: Congress passes the Sherman Act, the first antitrust law, as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade”
- 1943: SCOTUS decides Parker, conferring immunity from antitrust laws on the anticompetitive conduct of states acting in their sovereign capacity
- 1980: SCOTUS decides Midcal, establishing two standards for antitrust immunity under Parker: (1) the challenged restraint must be clearly articulated as state policy and (2) the policy must be actively supervised by the state



# Federal Antitrust Background

- 2015: SCOTUS decides North Carolina Dental Board, holding that a state board controlled by active market participants may invoke state-action antitrust immunity only if it also satisfies Midcal's active supervision requirement
- Requirements for active supervision:
  - The substance of the anticompetitive decision must be reviewed;
  - The supervisor must have the power to veto or modify the decision to ensure consistency with state policy;
  - The mere potential for state supervision is inadequate; and
  - The supervisor may not be an active market participant



# What is the Regulatory Compliance Division?

- Following North Carolina Dental Board, the legislature created the Regulatory Compliance Division to provide “active supervision” over certain rulemakings by active market participant-controlled boards.
- The division’s rule review process helps preserve the antitrust immunity of the state’s active market participant-controlled boards and provides important protections for Texas consumers, current license holders, and those who may become licensed.



# Which rules do you review?

- The division's rule review process is only for rules that affect market competition.
- Per Section 57.105(d), Texas Occupations Code, a rule affects market competition if it would:
  - Create a barrier to market participation in the state; or
  - Result in higher prices or reduced competition for a product or service provided by or to a license holder in the state.
- A note on anticompetitive rulemaking ...



# Which rules do you review?

- Some common rule types that have been the subject of past reviews:
  - Licensure/registration/examination requirements
  - Exemptions to licensure and requirements for non-licensees
  - Requirements and processes for expedited licensure for those licensed in other jurisdictions
  - Criminal history rules
  - Telehealth-related rules



# How does a rule review begin?

- A rule review begins on the submission of a rule by the agency that proposed the rule or on the initiation of the division.
  - *Per Section 57.105(a), Texas Occupations Code, an agency must submit any proposed rule affecting market competition relating to the business, occupation, or profession for which the agency issues a license.*
  - *And, per Section 57.106(g), Texas Occupations Code, the division may initiate a review of a proposed rule if the division has reason to believe that the proposed rule may have an anticompetitive market effect.*





# How does a rule review begin?

- If the division initiates a rule review, we'll notify the agency no later than the closure date of the public comment period provided for the rule in the *Texas Register*.
- As explained in 1 TAC Sec. 5.211, we may request information from or ask questions of an agency to help us decide whether or not to initiate a review of a rule.



# What does a rule submission encompass?

- The contents of a complete rule submission include:
  - The rule submission memorandum
  - Any intended amendments to the rule
  - The agency administrative records relating to the rule
  - Any information or comments that the agency has received from the public regarding the rule
  - Any other information that the agency considers relevant to the review of the rule



# What does a rule submission encompass?

- The rule submission memorandum gives an agency the opportunity to explain:
  - The statutory authority for the rule
  - The impetus for the rule and the harm it is intended to address or the improvement it is intended to make
  - The insufficiency of less restrictive alternatives
  - The type and scope of the rule's effect on competition
    - How many licensees will be affected?
    - What will be the cost to licensees?
    - Will it result in cost increases or impede access for consumers?



# What does the analysis focus on?

- The division's review focuses on whether a rule that affects market competition is consistent with state policy as "clearly articulated" by the legislature in state statute.
  - *Per Section 57.106(a), Texas Occupations Code, the division must conduct a thorough, independent review of each submitted rule to determine: (1) if the effect of the rule on market competition is consistent with state policy as established in the agency's governing statute; and (2) whether the rule promotes a clearly articulated legislative policy to displace competition with government action.*



# How long does a rule review take?

- Statute gives the division 90 days, but we do our best to beat that deadline.
- We generally accept public comments for 30 days so most reviews take at least this long. But, an agency can request an expedited review.
- An agency may submit a rule to the division beginning on the date that the rule is proposed in the *Texas Register*.



## A note on transparency ...

- When conducting a review, the division may only consider information that is:
  - Submitted to the division in writing, from an identified source;
  - Submitted in a public hearing; or
  - Generally known to the public.
- The division must make all information used as part of a review available to the public.



# What happens after a review?

- An agency may not finally adopt or implement a rule under the division's review until the division issues a determination letter approving or rejecting the rule and explaining our reasons why.
  - If we approve a rule, the rule may be adopted and implemented.
  - If we reject a rule, we will provide either general or precise instructions for revision.



# What happens after a review?

## Approved

- Rule may be adopted as proposed

## Disapproved with Precise Instructions

- Rule may be adopted if precise instructions are followed  
**OR**
- State agency may re-propose rule in *Texas Register* with different changes to address deficiencies identified in determination letter

## Disapproved with General Instructions

- Prior to adoption, state agency must re-propose rule in *Texas Register* with changes to address deficiencies identified in determination letter

Rule must be  
resubmitted to  
division for  
subsequent  
review





# What happens after a review?

- For rules amended after division review, we do have a process for providing addenda to previously issued determination letters, established in 1 TAC Sec. 5.206(c) and (d).
- Determination letters are not subject to appeal, and the division's approval of a rule does not preclude subsequent legal challenges to the rule.



# Division Rule Review Process

## Standard Process for All Rules



## Additional Process for Rules Affecting Market Competition





# What about rules undergoing a QRR?

- Per Section 2001.039, Texas Government Code, agencies are required to review and consider for re-adoption each of their rules every four years.
- Section 57.105(b) and (b-1), Texas Occupations Code, make clear that rules undergoing a quadrennial rule review are also subject to the division's rule review process.



# Division Stats (as of November 18, 2021)

- Since its establishment on November 18, 2019, the division has:
  - Reviewed 95 rules
    - Approved 86 rules
    - Disapproved 6 rules with general instructions
    - Disapproved 3 rules with precise instructions
  - Issued 30 determination letters
  - Averaged a review period of 59 days



## For More Information

- Visit the division website to view the list of agencies subject to the division rule review process, rules currently under review, and previously issued determination letters.
- Sign up to receive email notifications from the division.



<https://gov.texas.gov/organization/regulatory-compliance>



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## Regulatory Compliance Division

The Regulatory Compliance Division conducts an independent review of certain state licensing agencies' proposed rules that affect market competition. The division, after review of a proposed rule, issues a determination letter approving or rejecting the rule. A state agency may not finally adopt a proposed rule under the division's review until the division has approved the rule.

The Regulatory Compliance Division was authorized by Senate Bill 1995 during the 86th Regular Legislative Session and is established in accordance with Subchapter C, Chapter 57, Texas Occupations Code. Senate Bill 1995 was passed in response to the United States Supreme Court's decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission and guidance later issued by the Federal Trade Commission.

The division reviews proposed rules that affect market competition to assess their consistency with state policy as clearly articulated by the Legislature in state statute. Affected state agencies are required to submit all proposed rules affecting market competition, including new rules, rule changes, rule repeals, and rules that the agencies propose to readopt or repeal after a review under Section 2001.039, Texas Government Code. A rule affects market competition if it would create a barrier to market participation in the state or would result in higher prices or reduced competition for a product or service provided by or to a license holder in the state. The division's review process ensures that there is sufficient legal authority for proposed rules that may be anticompetitive, thus providing important protections for Texas consumers, licensed professionals, and state boards and their volunteer members.

### In This Section

#### Organization

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#### Regulatory Compliance Email Sign Up

Sign up here to be notified by email when the Regulatory Compliance Division commences a rule review and when the division issues a determination letter on a proposed rule under review.

Submit



# Other Resources

- Subchapter C, Chapter 57, Texas Occupations Code – Division's governing statute
- 1 TAC Secs. 5.201 – 5.213 – Division rules
- Division Guidance for Affected State Agencies – Available at <https://gov.texas.gov/organization/regulatory-compliance>



# Questions?