



National Association of State Boards of Accountancy

150 Fourth Avenue North ♦ Suite 700 ♦ Nashville, TN 37219-2417 ♦ Tel 615/880-4201 ♦ Fax 615/880-4291 ♦ kbishop@nasba.org

Ken L. Bishop  
President & CEO

August 14, 2018

Ken Levine, Director  
Texas Sunset Advisory Commission  
Robert E. Johnson Building – 6<sup>th</sup> Floor  
1501 N. Congress  
Austin, TX 78701

Dear Director Levine:

The National Association of State Boards of Accountancy (NASBA) values the critical work of the Sunset Advisory Commission in its review of the Texas State Board of Public Accountancy (Texas Board) and the Commission's recommendations to help improve board operations. NASBA is also thankful to the Commission for the opportunity to provide comments in response to its Staff Report on the Texas State Board of Public Accountancy (dated August 2, 2018).

Founded in 1908, NASBA represents Boards of Accountancy from 55 states and territories in the U.S. As one of NASBA's most well-regarded member boards, the Texas State Board of Accountancy has a proven track record of enhancing public protection within the state and is viewed as a model for efficient and effective regulation. The Texas Board is also recognized for producing leaders who serve in esteemed positions within the federal government as well as for national and international regulatory bodies. Examples of such leaders include: U.S. Congressman K. Michael Conaway, CPA; Billy M. Atkinson, CPA (2014-15 Chair, FASB Private Company Council); J. Coalter Baker, CPA, (2016-current member, AICPA Professional Ethics Executive Committee; 2015-current member, Joint NASBA/AICPA Uniform Accountancy Act Committee); and Carlos Barrera (2014-current member, AICPA Professional Ethics Executive Committee).

NASBA has several concerns regarding the Commission's recommendations. The most important concern is the recommendation to change the Board's composition and reduce the number of Certified Public Accountants (CPAs) from 10 to 7, and in doing so, creating a majority of public members.

A change to the current composition of the Texas Board will severely diminish the technical expertise and knowledge offered by skilled CPA board members. These experts provide invaluable insight and analysis to make judgments on complex cases and set appropriate technical standards. These individuals are also uniquely qualified to understand highly technical issues and present their findings to the board, thus maintaining public protection and proper adoption of accounting practices free of inadequate oversight. A majority of non-market participants will dilute the critical knowledge base and diminish the capability of the board to effectively carry out its mission—to

protect the public from fraudulent or incompetent CPAs. Further, it will hinder the Board's ability to set and enforce the technical, professional and ethical standards that govern the practice of accountancy.

As Justice Alito stated in his dissent in the Supreme Court's February 2015 opinion in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (N.C. Dental):

*"It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which laypeople have little expertise."*

We can only surmise your recommendation to change the Board's composition emerged from the N.C. Dental opinion. While Texas is not the first state to address the Supreme Court's decision, it would be the first state to change the composition of a Board of Accountancy by reducing the number of CPAs, resulting in a majority of non-CPAs, thereby potentially jeopardizing its public protection mandate. The Federal Trade Commission (FTC) Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (FTC Staff Guidance) states that "Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision." The determination of whether a board is "controlled" by active market participants will be decided based on the individual facts and circumstances unique to each case. The federal courts will ultimately determine how this very fluid issue is resolved.

NASBA strongly believes more time is needed to study the fallout from the N.C. Dental case. More than 30 court cases have been filed since the Supreme Court decision was issued in 2015 and not one involves Boards of Accountancy. To date, most cases where licensing boards are being challenged under federal antitrust laws have been dismissed. These cases underscore the point that most enforcement actions, especially those involving license discipline, are not antitrust violations as they are against a single person, not against competition in general. Antitrust laws protect competition, not individual competitors or potential competitors. These points are clearly stated in the FTC Staff Guidance.

Alternative options to the board composition recommendation, including very limited action, are prudent since Boards of Accountancy rarely, if ever, deal with potentially significant antitrust issues as defined in the FTC Staff Guidance and noted in the Supreme Court ruling. Moreover, the majority of activities undertaken by accountancy boards are related to single-person enforcement actions arising from a licensee's non-compliance with board's rules and/or statutes.

As an alternative, NASBA encourages the Sunset Commission and the Texas Legislature to institute mandatory antitrust training for board members. This concept has been adopted in West Virginia (SB 271 (2016), W.V.A. Code § 30-9-33) and proposed in North Carolina (SB 735 (2018)). This training will provide Texas Board members additional knowledge and awareness of how their actions could stifle competition and potentially violate antitrust laws. This prudent step will help Texas effectively mitigate any antitrust risk while it and other states continue to analyze the Supreme Court's opinion.

NASBA also suggests the creation of a working group to study the long-term effects of changing a board's current composition. This working group could be comprised of legislators, members of the Texas business community, CPA clients, consumer advocates, and outside stakeholders within the accounting profession. Charged to examine how other jurisdictions are addressing the Court's ruling, the working group would incorporate guidance from relevant court cases and determine the best approach for Texas.

As part of that study, NASBA encourages the working group to consider the NASBA whitepaper, entitled "[North Carolina Dental Case Decision – Implications for State Boards of Accountancy](https://nasba.org/mc/legislativesupport/north-carolina-dental-case/)" (<https://nasba.org/mc/legislativesupport/north-carolina-dental-case/>), which addresses this issue in detail. It is a measured piece that clearly articulates what is unique about the regulation of the CPA profession and how the profession has, on a national level, incorporated pro-competitive regulations for a long time. Further, we believe the CPA profession represents a low risk for antitrust actions based on historical performance and national pro-competitive positions.

One additional concern is the Commission's recommendation that the Board amend its peer review rules to better align the frequency of peer review with the risk posed by services provided by CPA firms.

Peer review serves a key role in ensuring quality in the work product of licensees and that such licensees are properly adhering to applicable, technical and professional standards. It is important to note that the Board of Accountancy's peer review requirements are aligned with the Uniform Accountancy Act (UAA) and its accompanying UAA Model Rules, an evergreen model law developed to provide a comprehensive, uniform approach to regulation of the accounting profession.

A key distinction not referenced in the Commission's report is the American Institute of Certified Public Accountants (AICPA) peer review standards. These standards have been adopted by all 50 U.S. Boards of Accountancy and provide for different types of peer reviews, depending on the level of service being performed by the firm under review. A system review (a more intensive review) is required for firms that provide the highest-risk services such as audits. For firms that only provide compilations, a peer review referred to as an engagement review is required. Thus, the existing standards currently tailor the multiple types of peer reviews needed to be performed.

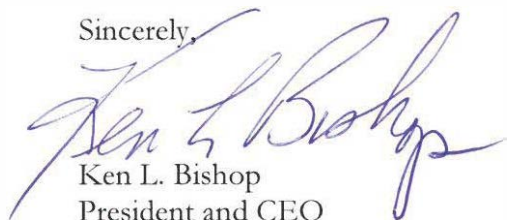
Moreover, the AICPA's peer review standards also require that engagements selected for review provide a reasonable cross-section of the firm's accounting and auditing practice with greater emphasis on those engagements with higher assessed levels of risk. Examples of the factors considered when assessing peer review risk at the engagement level include size; industry area; level of service; personnel (including turnover, use of merged-in personnel or personnel not routinely assigned to accounting and auditing engagements); communications from regulatory, monitoring or enforcement bodies; results of review or inspections performed by regulatory or governmental entities; extent of non-audit services to audit clients; significant client fees to practice office(s) and partner(s); and initial engagements.

The current peer review structure focuses on testing a cross-section of the firm's engagements with emphasis on high-risk engagements and significant risk areas. The peer reviewer should have the flexibility to use their knowledge, skills and experience to make the determination of which

engagements to review. The existing peer review program, implemented by the Texas Board of Accountancy, follows uniform standards adopted throughout the country.

I look forward to discussing these concerns with you further during the Sunset Commission's public hearing on August 29-30, 2018. Feel free to contact me at [kbishop@nasba.org](mailto:kbishop@nasba.org) or 615-880-4201 should you have questions or need additional information.

Sincerely,

A handwritten signature in blue ink, reading "Ken L. Bishop". The signature is fluid and cursive, with the first name "Ken" being more prominent.

Ken L. Bishop  
President and CEO

cc: Texas State Board of Public Accountancy