EXHIBIT
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Nomination Process for Idaho Potato Commissioners

The statutory language below defines who is considered a grower, shipper and processor for purposes of qualifying to be nominated and then appointed as a Commissioner of the Idaho Potato Commission. During the existence of the IPC, this statute has been interpreted by the IPC to hold separate meetings where equal consideration of eligibility for appointment to the Commission could be established at the meeting. Proxies have never been allowed. However, the Commission has allowed participation in the nomination meetings to take place by phone and allowed those who call in to vote by either facsimile or by texting their vote to a designated IPC employee. If there are over three nominees for a position, IPC allows up to three votes per ballot. Voting cannot be cumulative.

IPC has used its records to answer questions regarding voting and nomination eligibility. Interpretive language is also included below. This language appears on the ballot forms of the IPC. Only the relevant portions of the Idaho Code relating to nominations of IPC Commissioners are included here. Highlighting is used to provide guidance relative to IPC's administrative interpretation of law. The language differs between the Grower ballot and the Shipper and Processor ballot. Growers, unlike Shippers and Processors, are not licensed by the IPC. It is necessary therefor to provide clarity regarding voting eligibility as to a Grower.

22-1202. POTATO COMMISSION CREATED. There is hereby created and established in the department of self-governing agencies the "Idaho potato commission" to be composed of nine (9) practical potato persons, resident citizens of the state of Idaho for a period of three (3) years prior to their appointment each of whom has had active experience in growing, or shipping, or processing of potatoes produced in the state of Idaho. At least five (5) members of said commission shall be growers who are actually now engaged in the production of potatoes. Two (2) of the members shall be shippers who are actually now engaged in the shipping of potatoes, and two (2) of the members shall be processors who are actually now engaged in the processing of potatoes. The qualifications for members of said commission as above required shall continue throughout their respective terms of office.

Nominations must be made thirty (30) days prior to appointment. All nominations must give equal consideration to

all who are eligible for appointment as defined in this act. The Idaho potato commission shall hold separate meetings of the growers, shippers, or processors, as the nominations to be made shall require, in the various districts, to determine who shall be nominated for appointment.

22-1204. DEFINITIONS. As used in this act:
2. The term "person" means individual, partnership, corporation, association, grower and/or any other business unit.
6. The term "shipper" means and includes one who is properly licensed under federal and state laws and actively engaged in the packing and shipping of potatoes in the primary channel of trade in interstate commerce, and who ships more than he produces.
4. "Shipment" of potatoes shall be deemed to take place when the potatoes are loaded within the state of Idaho, in a car, bulk, truck or other conveyance in which the potatoes are to be transported for sale or otherwise.

On the Shipper Nominating Ballot, the following language is used:

> The Idaho Potato Commission law provides: "Three shippers shall be nominated for each vacancy that occurs from which the Governor shall appoint one."

7. The term "grower" means one who is actively engaged in the production of farm products, primarily potatoes, and who is not engaged in the shipping or processing of potatoes.

On the Grower Nominating Ballot, the following language is used:

> Only one person per farm corporation, partnership, or farm family may vote. Voter must be a potato grower, resident of Idaho area designated for this nomination, over 18 and within the Idaho Potato Commission law that defines a grower (singular) to be "...one who is actively engaged in the production of farm products, primarily potatoes, and who is not engaged in the shipping or processing of potatoes."

10. The term "processor" means a person who is actively engaged in the processing of potatoes for human consumption.

11. The term "processing" means changing the form of potatoes from the raw or natural state into a product for human consumption.

On the Processor Nominating Ballot, the following language is used:

The Idaho Potato Commission law provides: "Three processors shall be nominated for each processor vacancy that occurs from which the Governor shall appoint one. Processor commissioners do not necessarily need to be nominated from geographical areas."

22-1211A. REFERENDUM OF CONTINUANCE OF ADDITIONAL TAX. As soon as possible after July 1, 1972, the commissioner of agriculture shall conduct a referendum among all eligible growers to determine whether or not the additional tax of one cent (1¢) shall be continued. An eligible grower for the purpose of the referendum shall be any grower engaged in the growing of five (5) or more acres of potatoes.

22-1205. ADMINISTRATION AND ENFORCEMENT OF ACT. The administration of this act shall be vested in the Idaho potato commission which shall have power to prescribe and enforce suitable and reasonable rules for the enforcement of the provisions thereof

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IDAHO POTATO COMMISSION

GROWER NOMINATING BALLOT

NOTE: The Idaho Potato Commission law defines a grower to be "one who is actively engaged in the production of farm products, primarily potatoes, and who is not engaged in the shipping or processing of potatoes, and further has been a resident citizen of the State of Idaho for a period of three years prior to his possible appointment.

WRITE IN THREE GROWER NAMES

NOTE: The Idaho Potato Commission law provides: "Three growers shall be nominated, from which the Governor shall appoint one."

NAME_____ ADDRESS_____

NAME_____ ADDRESS_____

NAME_____ ADDRESS_____

I hereby affirm* that to the best of my knowledge I qualify as a grower (singular) under the Idaho potato Commission law; and to the best of my knowledge my nominees qualify as growers under the Idaho Potato Commission law.

Name:_____

Address:_____

Date:_____

*NOTE: Only one person per farm corporation, partnership, or farm family may vote. Voter must be a potato grower, resident of Idaho area designated for this nomination, over 18 and within the Idaho Potato Commission law that defines a grower (singular) to be "...one who is actively engaged in the production of farm products, primarily potatoes, and who is not engaged in the shipping or processing of potatoes."

EXHIBIT

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IDAHO POTATO COMMISSION

PROCESSOR NOMINATING BALLOT

NOTE: The Idaho Potato Commission law defines a processor to be "....a person who is actively engaged in the processing of potatoes for human consumption."

WRITE IN THREE PROCESSORS' NAMES

NOTE: The Idaho Potato Commission law provides: "Three processors shall be nominated for each processor vacancy that occurs from which the Governor shall appoint one. Processor commissioners do not necessarily need to be nominated from geographical areas."

NAME_____ **ADDRESS**_____

NAME_____ **ADDRESS**_____

NAME_____ **ADDRESS**_____

I hereby affirm to the best of my knowledge my nominees and I qualify as processors under the Idaho Potato Commission law.

NAME:_____

ADDRESS:_____

DATE:_____

EXHIBIT
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IDAHO POTATO COMMISSION

SHIPPER NOMINATING BALLOT

NOTE: The Idaho Potato Commission law defines a shipper to be "....one who is properly licensed under federal and state laws and actively engaged in the packing and shipping of potatoes in the primary channel of trade in interstate commerce and who ships more than he produces."

WRITE IN THREE SHIPPER NAMES

NOTE: The Idaho Potato Commission law provides: "Three shippers shall be nominated for each vacancy that occurs from which the Governor shall appoint one.

NAME_____ADDRESS_____

NAME_____ADDRESS_____

NAME_____ADDRESS_____

I hereby affirm to the best of my knowledge my nominees and I qualify as shippers under the Idaho Potato Commission law.

NAME:_____

ADDRESS:_____

DATE:_____

EXHIBIT
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VOTING PROXY

(For Idaho Potato Commission District No 1 Grower Nomination Meeting)

The undersigned, being over the age of 18, is actively engaged in the production of farm products, primarily potatoes, and is not engaged in the shipping or processing of potatoes and in all respects is a Grower located in District No. 1 as those term are defined in Idaho Code §22-1201 et seq. The undersigned represents and warrants its eligibility and asserts the right and privilege to vote on all issues that a Grower may vote upon related to the Idaho Potato Commission. In furtherance of that right and privilege to vote, the undersigned does hereby constitute and appoint [redacted] to be my proxy agent, with full power of substitution, to vote all of my rights with respect to all matters submitted during the March 19, 2018 Idaho Potato Commission Grower Nomination Meeting to be held at the Idaho Potato Commission offices or at any adjournments thereof as if the undersigned was personally present. I further hereby ratify and confirm all acts that my proxy shall do or cause to be done by virtue of this proxy. I hereby revoke all proxies previously given by me with respect to my voting rights.

IN WITNESS WHEREOF, I have executed this Proxy effective as of March 17, 2018.

[redacted]
Signed

[redacted]
Title

[redacted]
Entity

Stephanie Wicklesen
Brett Jensen
Dave Robison

L:\legal\BTT\Forms\Corporations 2017\Voting Proxy (Potato Commission).wpd

EXHIBIT
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ABSENTEE BALLOT

(For Idaho Potato Commission District No 1 Grower Nomination Meeting)

The undersigned, being over the age of 18, is actively engaged in the production of farm products, primarily potatoes, and is not engaged in the shipping or processing of potatoes and in all respects is a Grower located in District No. 1 as those term are defined in Idaho Code §22-1201 et seq. The undersigned represents and warrants their eligibility and asserts the right and privilege to vote on all issues that a Grower may vote upon related to the Idaho Potato Commission. In furtherance of that right and privilege to vote, the undersigned does hereby nominate and vote for the following three persons to be submitted to the Governor to fill the vacancy for the Grower representative from District No. 1 to serve on the Idaho Potato Commission:

Stephanie Mickelsen

Dave Robison

[redacted] Brett Jensen

I acknowledge compliance with the following language listed in the Nomination Process for Idaho Potato Commissioners: "Only one person per farm corporation, partnership, or farm family may vote. Voter must be a potato grower, resident of Idaho area designated for this nomination, over 18 and within the Idaho Potato Commission law that defines a grower (singular) to be "...one who is actively engaged in the production of farm product, primarily potatoes, and who is not engaged in the shipping or processing of potatoes."

IN WITNESS WHEREOF, I have executed this Ballot effective as of March 19, 2018.

[redacted]

Signed

[redacted]

Title

[redacted]

Entity

L:\legal\BTT\Forms\Corporate 2017\Absentee Ballot (Potato Commission).wpd

EXHIBIT
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March 23, 2018

The Honorable Lawrence G. Wasden
Office of the Attorney General
700 W. Jefferson Street, Suite 210
P.O. Box 83720
Boise, Idaho 83720-0010

Dear General Wasden,

I write to you seeking guidance regarding the events occurring at nomination meetings held on Monday, March 19, 2018 for commissioner positions on the Idaho Potato Commission ("IPC"). The meetings that took place were to select nominees for three positions: a Grower, a Shipper and a Processor Commissioner. A few days prior to the meeting, an industry member (Mr. Mark Mickelsen) raised questions regarding the way the meeting would be conducted and what type of voting, such as the use of proxies and absentee ballots, would be allowed. Responding to these concerns, I prepared the attached document that addressed the concerns that I knew of and outlined the procedures that the IPC had followed since at least 1984. I reviewed this document with IPC's President and CEO Frank Muir, and it was sent to Mark Mickelsen and current IPC Commissioners and Staff on Friday, March 16, 2018. I also had copies handed out prior to the nomination meetings and provided copies to Mark Mickelsen; his wife, Stephanie Mickelsen; and their son, Andrew Mickelsen.

The IPC is a self-governing state agency created under Chapter 12, Title 22, Idaho Code. The criteria for qualifying as a grower, shipper, or processor is set forth in I.C. §§22-1202 and 2204, and relevant portions therein were set forth in the attached memo. In an effort to provide as ample an opportunity for participation as possible, and acknowledging that technology has advanced since IPC's statutes were enacted, IPC several years ago set up a conference line so industry members who could not be physically present could still participate in these nomination meetings. Participation took place by calling in to the meeting, listening to the proceedings, and then text messaging or phoning IPC's Industry Relations Director to request a ballot by facsimile or request the opportunity to vote by text message. This process was designed to provide assurances that such a vote was equivalent to being physically present and would be subject to the same verification processes. As IPC does not have a process by which nominations are made in advance of balloting, IPC determined that participation in a meeting was the correct way to interpret its statutes. A person who wanted to vote would have to be able to learn the names of all nominees, hear them speak, and then cast their votes. It is not possible to do this if one votes before they even know who will be nominated.

The first nomination meeting was for a grower commissioner opening. We opened the conference call line and commenced the meeting. There were four nominees for the grower position: Stephanie Mickelsen, Dave Robison, Brett Jensen, and the incumbent, James Hoff. Each nominee affirmed that they met the statutory qualifications to be a "grower". The candidates gave a short speech and ballots were distributed. Andrew and Stephanie Mickelsen requested multiple ballots and indicated that they intended to vote for several different business entities they owned. They were advised that the IPC has

consistently interpreted its statues to say that: "Only one person per farm corporation, partnership, or farm family may vote." Mark Mickelsen stated that they had checked with their legal counsel and they were advised that they could represent multiple entities in the various capacities of the businesses they owned. Subsequently multiple ballots with apparently different business names were submitted by the Mickelsen family. These ballots didn't name a natural person or address—just an apparent business name and therefore were incomplete.

The ballots were collected and taken to an adjoining room for counting. To count ballots the IPC uses an independent CPA who is assisted by IPC's Industry Relations Director. Several ballots were found to be "Absentee" ballots. There were also "Proxy" ballots submitted. These "ballots" were designed to look like official IPC ballots, but omitted language from IPC's ballots. In accordance with the IPC's long-standing interpretation of its statutes, I made the decision that absentee, proxy, and incomplete ballots were invalid and should not be counted. With those ballots excluded, the top three nominees were Brett Jensen, Dave Robison and Stephanie Mickelsen.

The nomination for the shipper position was the second meeting convened. There were three nominees: Kevin Searle, Lance Poole, and Todd Cornelison. Mr. Poole was nominated by Stephanie Mickelsen. The question was raised about her doing so as she had just affirmed that she was a grower and that under the statute only those who met the definition of "shipper" could participate in the meeting. The response of Stephanie (in part) and Mark (in part) was that they both grow potatoes and are also one-half (1/2) owners in Rigby Produce, a potato shipping facility. The Mickelsens were advised that the nomination could be invalidated upon review. No vote was necessary on this position as only three persons were nominated.

The nomination for a processor member of the Commission took place next. The nominees were John Shields, Brent Mickelsen, and Dan Nakamura, the incumbent. Brent Mickelsen is a nephew of Stephanie and Mark Mickelsen and was nominated by Stephanie Mickelsen. The Mickelsens also have ownership in a processing facility, Potato Products of Idaho. The question was again raised about her being a qualified participant in the meeting after having first affirmed that she was a grower, then shipper, and now processor. The same discussion regarding multiple entities ensued and again they were advised that the nomination could be invalidated. As there were only three nominees, no vote was taken on this position.

Subsequent to meeting, IPC reviewed the grower ballots. We discovered that three ballots were invalid as they had been submitted by seed potato growers, as opposed to potato growers who primarily grow potatoes for human consumption. Seed potato growers do not pay IPC taxes and are not eligible to vote in nomination meetings. IPC has also learned that the capacity of the conference line used was exceeded and at least three people were not able to participate and thus did not vote in the nomination election. It is not possible to determine accurately if there were more potential participants that could not vote or what their vote would have been. Without knowing the number of people who could not participate, we do not know if the outcome would have been affected. We do know that the outcome would not be different with the ballots declared to be invalid not counted. There were several other grower entities present who could have cast multiple votes in the same manner as the Mickelsens, but they chose to follow IPC's interpretation of the statutes and submit a single ballot.

Our questions are these:

1.) Can a person, having declared themselves to be a grower and accepting the nomination to be a grower commissioner, then participate as a shipper and processor in nomination meetings held immediately thereafter?
2.) Under these circumstances is the nomination invalid? If this is the case, there would be fewer than three names to submit to the Governor, so would a new nomination meeting need to be held?
3.) Is IPC's refusal to allow Proxy and Absentee ballots in nomination meetings within its discretion under IPC's statute and Idaho law?
4.) Was the failure to anticipate the number of people who would call in to the nomination meeting and then who could not vote such a factor as to require a new nomination meeting?

IPC has retained all of the ballots and they are available for your review. We very much appreciate your guidance in resolving this matter.

Sincerely,

Patrick Kole
V.P. Legal and Government Affairs
Idaho Potato Commission

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

April 2, 2018

Patrick J. Kole
VP Legal & Government Affairs
Idaho Potato Commission
661 S. Rivershore Ln., Ste. 230
Eagle, ID 83616

Re: Idaho Potato Commission Commissioner Positions – Our File No. 18-61025

Dear Mr. Kole:

The Idaho Potato Commission asked this Office to answer four questions that arose out of its recent meetings conducted for purposes of nominating three slates of practical potato persons (one slate for a grower, one for a shipper, and one for a processor) from whom the Governor would appoint a grower, a shipper, and a processor commissioner. Those questions are:

(1) Can a person, having declared [himself or herself] to be a grower and accepting the nomination to be a grower commissioner, then participate as a shipper and processor in nomination meetings held immediately thereafter?

(2) [a] Under these circumstances is the nomination invalid? [b] If this is the case, there would be fewer than three names to submit to the Governor, so would a new nomination meeting need to be held?

(3) Is the IPC's refusal to allow Proxy and Absentee ballots in nomination meetings within its discretion under IPC's statute and Idaho law?

(4) Was the failure to anticipate the number of people who would call in to the nomination meeting and then who could not vote such a factor as to require a new nomination meeting?

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400 FAX: (208) 854-8071
Located at 700 W. Jefferson Street, Suite 210

BACKGROUND

These questions arise out of the following recitation of events provided by the Idaho Potato Commission. This Office has not conducted any independent investigation of the facts provided by the Potato Commission.

On Monday, March 19, 2018, the Idaho Potato Commission held three meetings, one each for nominating a slate of growers, a slate of shippers, and a slate of processors from whom the Governor will appoint a grower, a shipper, and a processor commissioner. Eligible growers, shippers, and processors could participate by appearing at the meetings in person or by telephone.

The first meeting was for the purpose of nominating three persons for a grower position on the Commission. There were four nominees for the grower position, each of whom affirmed that they met the statutory qualifications to be a grower: Stephanie Mickelsen, Dave Robison, Brett Jensen, and James Hoff. After nominations closed, Andrew Mickelsen and Stephanie Mickelsen requested multiple ballots so that they could vote for several different businesses that they owned. The Mickelsens submitted multiple ballots with different business names and no natural person or address listed. The IPC did not count these ballots because they were incomplete; neither did the IPC count proxy or absentee ballots. Based upon the ballots counted, the three nominees for the position of grower commissioner to be submitted to the Governor were Brett Jensen, Dave Robison, and Stephanie Mickelsen. Three of the counted ballots came from seed potato growers, *i.e.*, growers producing potatoes intended for planting, not for human consumption. The Commission learned after the meeting that the telephone conference line that it was using had reached capacity during the meeting and that some growers who had wanted to participate could not.

Next, the shipper nominating meeting was held. There were only three nominees, one of whom, Lance Poole, was nominated by Stephanie Mickelsen. Because three is the number of nominees that must be sent to the Governor, no vote was taken. Finally, the processor nominating meeting was held. Again, there were only three nominees, one of who was nominated by Stephanie Mickelsen. Again, no vote was taken because three is the number of nominees that must be sent to the Governor.

Question 1. Can a person, having declared [himself or herself] to be a grower and accepting the nomination to be a grower commissioner, then participate as a shipper and processor in nomination meetings held immediately thereafter?

The Potato Commission Act defines grower, shipper, and processor: "The term 'grower" means one who is actively engaged in the production of farm products, primarily potatoes, and ***who is not engaged in the shipping or processing of potatoes.***" Idaho Code § 22-1204, subsection 7 (emphasis added). "Growers" are contrasted with "shippers," who are "properly licensed under federal and state laws," "pack[] and ship[] potatoes ... in interstate commerce", and "ship[] more than they grow," and with "processors," who "process[] potatoes for human consumption." *Id.*, subsections 6 and 10. Thus, if there are vertically integrated operations that grow and also ship and/or process potatoes for human consumption, the Potato Commission Act has carved them out

of the definition of "grower" and has reserved the term "grower" for one who does not also have shipping operations (other than for potatoes that the grower has grown) or processing operations. I would revise the first question to ask: If a person who is a shipper or a processor is nominated for a grower position or participates in nominating or voting for a grower position, was that person ineligible to be nominated to a grower position and ineligible to nominate growers and to vote for growers? Based upon the definitions quoted above, it appears the answer is "Yes" because growing potatoes does not disqualify one from also being a shipper or a processor, but being a shipper or processor does disqualify one from being a grower.

Question 2: [a] Under these circumstances is the nomination invalid? [b] If this is the case, there would be fewer than three names to submit to the Governor, so would a new nomination meeting need to be held?

The grower nominations were invalid because a shipper and/or a processor was nominated and participated in the process. A new nominating meeting should be called for the grower position. This is would also allow the Potato Commission to cure the incorrect processes of (a) allowing seed potato growers to vote[1] and (b) shutting off some growers from voting when the conference line reached capacity. Assuming that there were no other reasons to disqualify the shipper or processor nominations, the nominations for those positions do not need to be redone.

Question 3: Is the IPC's refusal to allow Proxy and Absentee ballots in nomination meetings within its discretion under IPC's statute and Idaho law?

The Potato Commission Act does not address this question as directly as the previous two questions. The relevant statutory language is:

> All nominations must give equal consideration to all who are eligible for appointment as defined in this act. The Idaho potato commission shall hold separate meetings of the growers, shippers, or processors, ... to determine who shall be nominated for appointment. Notice of said meetings ... shall state the purpose, time and place of said meeting.

Idaho Code § 22-1202. One can glean several things from these sentences. The first sentence requires "equal consideration" for all who are eligible under the Act. That means that the most modest grower, whose potato farm is small and unincorporated, is given "equal consideration" with the largest, who may operate several farms through many different corporations or partnerships or other business organizations. A grower is "***one*** ... actively engaged in the production of farm products, primarily potatoes," Idaho Code § 22-1204, subsection 7, and "one" does not become "many" by creating multiple farming operations or ownership vehicles. A grower

[1] The Potato Commission Act does not consider all potatoes grown in Idaho to be "potatoes" for purposes of the Act. "The term 'potatoes' means and includes ***only potatoes sold or intended for human consumption*** and grown in the state of Idaho." Idaho Code § 22-1204, subsection 3 (emphasis added). Thus, the Act does not apply to growers of seed potatoes, which are intended to be planted, not eaten, and growers of seed potatoes are not "growers" as defined by the Act.

gets only one vote, no matter how many farms he or she may operate or own.

Second, a meeting "to determine who shall be nominated for appointment" means that the process for nominating a slate to be sent to the Governor takes place at the meeting. The statute has no procedure for absentee or proxy ballots for someone who does not attend the meeting, either in person or by telephone. I would not characterize the issue as whether the Potato Commission has discretion not to allow absentee or proxy ballots; I would characterize the question as does the statute allow those not participating in the meeting to vote and would answer that it does not.

Question 4: Was the failure to anticipate the number of people who would call in to the nomination meeting and then who could not vote such a factor as to require a new nomination meeting?

The answer to this question is yes because it is another aspect of giving "equal consideration to all who are eligible for appointment." Those who were blocked from participating in the meeting were not given equal consideration. If a meeting is held at which those eligible to participate are prohibited from participating through no fault of their own (i.e. absenteeism) but instead trying to join and being blocked or locked out of the meeting, then the meeting should be rescheduled to allow all eligible participants who want to attend to be permitted to attend.

I hope you find this helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

BK:tjn

EXHIBIT
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IDAHO POTATO COMMISSION

April 20, 2018

Via US Mail and E-mail

Stephanie Mickelsen
251 N 2800 E
Roberts, ID 83444
sjwmick@gmail.com

Brett Jensen
2000 West 113 North
Idaho Falls, ID 83402
brettjensenfarms@gmail.com

James Hoff
10623 S. Hoff Ln.
Idaho Falls, ID 83406
idahjames@aol.com

Dave Robison
2175 E 400 N
Roberts, ID 83444
drobison64@aol.com

Dear Grower Commissioner Nominees:

On April 10, 2018 I forwarded to you the letter we received from the Attorney General regarding the Nomination Meetings held for upcoming commissioner positions on the Idaho Potato Commission ("IPC"). On Wednesday, April 25, 2018 starting at 8:30 a.m. the IPC will hold its regularly scheduled meeting. As some of you know, the regular meeting is preceded by an agenda meeting that is held the previous day. The agenda meeting begins at 2:00 p.m. on Tuesday, April 24, 2018.

As the two meetings are not being held on the same day, I write to advise you that there will not be a discussion of the nomination meeting at the Agenda meeting. All of the discussion will take place at the regular meeting on Wednesday only. Also, as you will see from the attached revised agenda, the IPC is providing notice that an Executive Session can take place following the public discussion of this matter at the regular meeting.

It is important to note that there has been no discussion of this matter as a commission, and therefore no decision has been made regarding the letter from the Attorney General. Again, this discussion will take place on Wednesday, April 25. As always, you are welcome to attend and participate in the public meeting.

Please feel free to send me any questions via e-mail and please use the "Reply to All" function in your e-mail program so that everyone is included in this discussion.

Sincerely,

Patrick Kole
VP Legal and Government Affairs

Cc: IPC Commissioners and Staff

AMENDED AGENDA #1

IDAHO POTATO COMMISSION MEETING
IPC Commission Office – EAGLE
April 25, 2018 @ 8:30 a.m.

1. CALL TO ORDER & WELCOME –Lynn Wilcox, Chairman

2. MINUTES OF THE MARCH 21, 2018 MEETING

3. STATEMENT OF RECEIPTS & EXPENDITURES (MARCH) – Frank Muir
   A) Review Delinquent Accounts

4. OFFICE PROCEDURES COMMITTEE REPORT – Lynn Wilcox, Chairman
   A) Legal & Government Matters – Pat Kole

5. PRESIDENT'S REPORT – Frank Muir
   A) Advertising, PR; RODS
   B) Big Idaho Potato Truck
   C) Quality Project
   D) Miscellaneous Publicity; videos
   E) Nominations procedures
   F) Districts
   G) Executive Session to Communicate with legal counsel for the Idaho Potato Commission to discuss the legal ramifications of and legal options for pending litigation, or controversies not yet being litigated but imminently likely to be litigated.

6. RETAIL – Randy Hardy, Chairman, Ritchey Toevs, Vice Chairman
   A) Progress Report – Seth Pemsler

7. EXPORT – Peggy Arnzen, Chairman, Dan Nakamura, Vice Chairman
   A) Progress Report – Traci Lofthus

8. FOODSERVICE – Tommy Brown, Chairman, James Hoff, Vice Chairman
   A) Progress Report – Don Odiorne

9. RESEARCH & EDUCATION – Nick Blanksma, Chairman, Mary Hasenoehrl, Vice Chairman

10. INDUSTRY RELATIONS REPORT – Travis Blacker; Dan Nakamura, Chairman

11. LIAISON REPORTS
    A) NPC – Randy Hardy, Chairman
    B) POTATOES USA – Lynn Wilcox, Chairman
    C) IGSA – Peggy Arnzen, Chairman
    D) IACI – Tommy Brown, Chairman
    E) United – James Hoff, Chairman
    F) SIPCO – Ritchey Toevs, Chairman

12. USDA REPORT- Vince Matthews

13. OTHER ITEMS

14. ADJOURNMENT

EXHIBIT 109

State of Idaho
DIVISION OF FINANCIAL MANAGEMENT
Executive Office of the Governor

Tracking #: A997-2018-4

Status: DFM Analyst: Recommended 06/07/18
Gov's Office: Recommended 06/07/18
DFM Admin: Approved 06/07/18

Administrative Rules Request Form

Agency Name:	Miscellaneous Commissions		**Submitted on:** 06/04/2018
Primary Contact:	Patrick Kole	**Phone:** 120-851-4420	**Email:** patrick.kole@potato.idaho.gov
Secondary Contact:	Gracie Bingham	**Phone:** 208-514-4206	**Email:** gracie.bingham@potato.idaho.gov
Person Authorizing Rule:	Patrick Kole	**Phone:** 120-851-4420	**Email:** patrick.kole@potato.idaho.gov

Statutory Authority for the rule making (Idaho Code, Federal Statute or Regulation):

Idaho Code Chapter 12, Sections 22-1205 and 1207

Title, Chapter, and Possible Docket (IDAPA) Number: 29.01.03 - Rules Governing Nominations for Appointment as a Commissioner to the Idaho Potato

This rule is: ☐ Proposed ☑ Temporary ☐ Proposed/Temporary **Effective Date:** 08/30/2018

If this is a temporary rule:

☐ Necessary to protect the public health, safety, or welfare; or
☐ Compliance with deadlines in amendments to governing law or federal programs; or
☑ Conferring a benefit.

Please explain:

Our current nominating process for selecting Commissioners has never been outlined by administrative rules and our nomination meetings in March 2018 revealed deep flaws in the process. We need to clarify our nominating processes through administrative rulemaking to better serve the Idaho potato industry. Adopting this temporary rule will confer a benefit on the industry by providing a sound method for electing the best-qualified Commissioners to serve the Idaho potato industry. The rule is temporary because the nomination process in part hinges on updating our statutes. Modernizing statutory definitions to reflect the current Idaho potato industry and redrawing more proportional grower districts on the Commission will also confer a substantial benefit on the industry. A temporary rule is the first crucial step we need to take in order to confer the benefit of fair nomination practices, more equitable district representation, and definitions that match the realities of our industry today.

If this is a temporary rule which imposes a fee or charge, provide justification as described in Idaho Code 67-5226(2):

Not applicable.

Agency has determined according to Idaho Code 67-5220(1):

☑ This rule is to be negotiated

Agency certifies that the rule : ☐ has been ☑ will be negotiated with interested persons as outlined in Idaho Code 67-5220(3).

☐ Negotiation of this rule is not feasible

☐ Rule is temporary; or
☐ Rule is simple in nature; or
☐ Lack of identifiable representatives of affected interests; or
☐ Affected interests are not likely to reach consensus; or
☐ Other.

Please explain:

Provide a fiscal impact statement for all programs affected. Be sure to reflect both positive and negative impacts and to include all fund sources including both the General Fund and dedicated funds:

This rulemaking will have no fiscal impact.

Provide a short explanation of the need for this rule:

Our March commissioner nomination meetings resulted in discrepancies we need to solve by clarifying our nominating procedures in administrative rules. To prevent future discrepancies we propose to add a chapter clarifying our nominating procedures.

Does this rule adopt amendments to materials previously incorporated by reference? ☐ Yes ☑ No **Filename:**

Provide a short summary of the changes this rule makes:

This rulemaking will specify our commissioner nomination procedures, including commissioner eligibility, nominating process, and voting methods. Our proposed chapter will be titled IDAPA 29.01.03 - "Rules Governing Nominations and Elections for Candidates to be Selected for Commissioner."

Provide a list of those persons or interested group(s) affected by the rule:

Idaho potato growers, shippers, and processors.

DFM Analyst: Amber Christofferson **Recommendation:** ☑ Recommended ☐ Not Recommended ☐ Pending **Date:** 06/07/2018

Comments:

The Commission has been directed by Dennis to run this as a temporary rule and then to rerun it as a proposed after next session. This rule is necessary for their next commissioner nomination meeting.

Special Assistant: Katrine Franks **Recommendation:** ☑ Recommended ☐ Not Recommended **Date:** 06/07/2018

Comments:

Creates new rule section clarifying election procedures that have already been in place. Proceed.

DFM Administrator Action: 06/07/2018

☐ Authorized to Advance to Rulemaking Process, DFM to review draft rule prior to publication

☑ Approved ☐ Not Approved

IDAPA 29 – IDAHO POTATO COMMISSION

29.01.03 – RULES GOVERNING NOMINATIONS AND ELECTIONS FOR CANDIDATES TO BE SELECTED FOR COMMISSIONER

DOCKET NO. 29-0103-1801 (NEW CHAPTER)

NOTICE OF INTENT TO PROMULGATE RULES – NEGOTIATED RULEMAKING

AUTHORITY: In compliance with Sections 67-5220(1) and 67-5220(2), Idaho Code, notice is hereby given that this agency intends to promulgate rules and desires public comment prior to initiating formal rulemaking procedures. This negotiated rulemaking action is authorized pursuant to Sections 22-1205 and 22-1207, Idaho Code.

MEETING SCHEDULE: Public meetings on the negotiated rulemaking will be held as follows:

NEGOTIATED RULEMAKING MEETINGS
(ALL TIMES ARE LOCAL)

Tuesday, July 24, 2018 4:00 to 6:00pm	Tuesday, July 31, 2018 5:00 to 9:00 pm	Wednesday, August 1, 2018 5:00 to 9:00 pm
IPC Offices 661 S. Rivershore Ln., Ste. 230 Eagle, ID 83616	Burley Inn & Convention Center 800 N. Overland Avenue Burley, ID 83318	Shoshone-Bannock Hotel 777 Bannock Trail Fort Hall, ID 83203

The meeting sites will be accessible to persons with disabilities, if needed. Requests for accommodation must be made not later than five (5) days prior to the meeting to the agency address below.

METHOD OF PARTICIPATION: Persons wishing to participate in the negotiated rulemaking must do the following:

Interested members of the public who wish to participate must submit any written comments, questions, recommendations, or ideas to the Idaho Potato Commission addressed to Patrick Kole, PO Box 1670, Eagle, ID 83616 or by email to **Patrick.kole@potato.idaho.gov**. Individuals may also attend the public meetings to be conducted on the above dates during which the Idaho Potato Commission will allow oral comments or presentations to be made.

Upon conclusion of the negotiated rulemaking, any unresolved issues, all key issues considered, and conclusion reached during the negotiated rulemaking will be addressed in a written summary. The summary will be made available to interested persons who contact the agency or, if the agency chooses, the summary may be posted on the agency website.

DESCRIPTIVE SUMMARY AND STATEMENT OF PURPOSE: The following is a statement in nontechnical language of the substance and purpose of the intended negotiated rulemaking and the principal issues involved:

This rulemaking will specify our commissioner nomination procedures, including commissioner eligibility, nominating process, and voting methods. Our proposed chapter will be titled IDAPA 29.01.03 - "Rules Governing Nominations and Elections for Candidates to be Selected for Commissioner."

ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS, OBTAINING DRAFT COPIES: For assistance on technical questions concerning this negotiated rulemaking or to obtain a preliminary draft copy of the rule text contact Patrick Kole, VP of Legal and Government Affairs, at (208) 514-4208. Materials pertaining to the negotiated rulemaking, including any available preliminary rule drafts, can be found on the Idaho Potato Commission's web site at the following web address: **www.idahopotato.com**.

Anyone may submit written comments regarding this negotiated rulemaking. All written comments must be directed to the undersigned and must be delivered on or before Wednesday, August 15.

Dated this 8th day of June, 2018.

Patrick Kole, VP Legal and Government Affairs
Idaho Potato Commission
661 S. Rivershore Ln. Ste. 230
PO Box 1670
Eagle, ID 83616
Phone: (208) 514-4208
Fax: (208) 334-2274

000. LEGAL AUTHORITY.
These rules are adopted under the legal authority of the Idaho Potato Commission Law, Chapter 12, Title 22, Idaho Code.

001. TITLE AND SCOPE.

01. Title. The title of this chapter is IDAPA 29.01.03, "Rules Governing Nominations for Appointment as a Commissioner to the Idaho Potato Commission."

02. Scope. These rules govern the way nominations are made by eligible growers, shipper and processors for selection by the Governor to a position of Commissioner of the Idaho Potato Commission.

03. Citation. The official citation of these rules is IDAPA 29.01.02.000, et seq. For example, this rule is cited as IDAPA 29.01.03.001.03. In documents submitted to the Commission or issued by the Commission, these rules may be cited as Idaho Potato Commission "Rules Governing Nominations for Appointment as a Commissioner to the Idaho Potato Commission," IDAPA 29.01.03.

002. WRITTEN INTERPRETATIONS - AGENCY GUIDELINES
For rulemakings conducted before July 1, 1993, written interpretations to these rules in the form of explanatory comments accompanying the order of proposed rulemaking and review of comments submitted in the order adopting these rules are maintained in the files of the Secretary of the Idaho Potato Commission and are available from the office of the Commission Secretary. For rulemakings conducted after July 1, 1993, written interpretations to these rules in the form of explanatory comments accompanying the notice of proposed rulemaking that originally proposed the rules and review of comments submitted in the rulemaking decision adopting these rules maintained in the files of the Secretary of the Idaho Potato Commission and are available from the office of the Commission Secretary. The Commission Secretary may be contacted in writing at the Idaho Potato Commission, P.O. Box 1670, Eagle, Idaho 83616, or may be reached by telephone at (208) 334-2350.

003. ADMINISTRATIVE APPEALS
Administrative appeals are governed under the Commission's Rules of Procedure, IDAPA 29.01.01.000, et. seq.

004. INCORPORATION BY REFERENCE.
There are no documents incorporated by reference into these rules.

005. OFFICE – OFFICE HOURS – MAILING ADDRESS AND STREET ADDRESS.
The principal office of the Commission is in Eagle, Idaho. This office is open from 8 a.m. to 5 p.m., except Saturday, Sunday and legal holidays. The Commission's telephone number is (208) 334-2350. The Commission's FAX number is (208) 334-2274. The Commission's mailing address: Idaho Potato Commission, Post Office Box 1670, Eagle, Idaho 83616. The street address of the Commission is: 661 S. Rivershore Lane, Suite 230, Eagle, Idaho 83616. All documents filed in all proceedings must be filed with the Commission at one (1) of these addresses.

006. PUBLIC RECORDS ACT COMPLIANCE.

Except as provided by Rules 52, 233, and law, all materials filed with the Commission pursuant to these rules and all materials issued by the Commission pursuant to these rules are public documents subject to inspection, examination and copying.

007. -- 009. (RESERVED)

010. DEFINITIONS. The definitions set forth in Section 22-1204, Idaho Code, shall apply to this chapter.

011. Commodity commission—Nominations—Elections—Vacancies.

01. Not less than forty-five days prior to March 31 of each year, the Commission will mail notice to all affected growers, shippers and processors with a call for nominations for the position of a Commissioner of the Commission. The notice shall give the final date for filing nominations, which shall not be less than twenty days prior to March 31. The notice shall also advise that nominating petitions must be signed by three (3) persons qualified to vote for such candidates for a grower position. The designated shipper or processor voting representative to the Commission for Commissioner nominations may nominate up to three (3) qualified persons.

02. On or before March 15, the Commission shall mail ballots to all affected growers, shippers and processors. The mailing list of those eligible to receive a ballot and vote will be compiled from those paying assessments on potatoes to the Commission. Grower ballots shall only be mailed to growers within a district where a nomination is required. Ballots shall be required to be returned to the Commission by March 31. The mail ballot shall be conducted in a manner so that it shall be a secret ballot. Each candidate shall have the opportunity to include a statement explaining their candidacy in a format established by the Commission.

03. Grower Commissioner nominees must be nominated from the districts established in Idaho Code § 22-1202. Three (3) nominees will be submitted to the Governor for consideration.

04. Shipper Commissioner nominees may be nominated from any district. Three (3) nominees will be submitted to the Governor for consideration.

05. Processor Commissioner nominees may be nominated from any district. Three (3) nominees will be submitted to the Governor for consideration.

06. Should there only be three (3) nominees for a position, voting shall not be necessary. Should there be more than three (3) nominees, and if prior to appointment by the governor a candidate withdraws or becomes disqualified for appointment, the Commission shall submit replacement nominees to the Governor in the order the votes were tallied.

07. In the event of a vacancy on the Commission, a special nomination proceeding shall be held as near as possible with the timelines set forth above.

012. After any vote —Nominees provided results—Disputes.

01. Upon completion of any nomination vote, the Commission shall tally the results of the vote and provide the results to the nominees.

02. If a nominee disputes the results of a vote, that nominee, within ten (10) days of the announced results, shall provide in writing a statement of why he believes the vote is disputed and request a recount.

03. Once the vote is tallied and distributed, all disputes are resolved, and all matters in a vote are finalized, the individual ballots may be destroyed.

013. Qualifications

01. Membership qualifications. Commission members shall be citizens and residents of Idaho over the age of eighteen (18) years.

02. Grower members must meet the qualifications set forth in 010.03 and 011.03 above and not be delinquent in payment of their assessments. The qualifications of grower members of the commission as herein set forth must continue during their term of office.

03. Shipper members must meet the qualifications set forth in 010.12 above and not be delinquent in payment of their assessments. The qualifications of shipper members of the commission as herein set forth must continue during their term of office.

04. Processor members must meet the qualifications set forth in 010.10 above and shall not be delinquent in payment of their assessments above. The qualifications of processor members of the commission as herein set forth must continue during their term of office.

05. Each grower, shipper, or processor may only vote on one (1) ballot and may only vote once (1x) for each position to be filled on behalf of himself, partner(s), corporation, association, and/or any other business unit. A grower, shipper, or processor is entitled to only one vote no matter how many farms, packing facilities, processing plants, entities, or any other type of business organization he has an ownership interest in.

06. A designation by a person as a grower, shipper or processor shall continue for the succeeding three years.

Idea | Proposal SOP | Reports

Modify Profile

EALS# Status

EALS #: 212-01

Status: Approved Jul 06, 2018

Agency: Potato Commission

DFM Analyst: Amber Christofferson

Special Assist.: Katrine Franks

Basic Idea Information

* **Title:** Critical Statute Changes for the Idaho Potato Commission

* **Has this or a similar idea been submitted in the past three years?** ○ Yes ◉ No

Contacts

* **Contact 1:** Kole, Patrick — * **Phone:** +1 (208) 514-4208 — * **Email:** patrick.kole@potato.idaho.gov

Contact 2: Bingham, Gracie — **Phone:** +1 (205) 514-4206 — **Email:** gracie.bingham@potato.idaho.gov

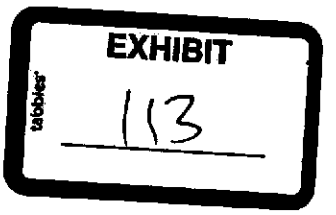
Commentary

* **Brief description of legislative idea and how it will "solve the problem":**

The potato industry has changed significantly over the last several years and our statutes are seriously out of date. In particular, a grower as defined in the code would exclude 60% or more of Idaho potato growers from becoming a grower commissioner. In addition, potato production has shifted from Western to Eastern Idaho such that two potato grower districts produce less than 10% of the Idaho potato crop. We are proposing to redraw the district boundaries to more equitably reflect potato production by creating

* **Fiscal impact of legislative idea:**

None



LEGISLATURE OF THE STATE OF IDAHO
Sixty-fifth Legislature First Regular Session - 2019

IN THE _____

_____ BILL NO. ___

BY _____ COMMITTEE

AN ACT

RELATING TO AGRICULTURE; AMENDING SECTION 22-1202, IDAHO CODE, TO REVISE IDAHO POTATO COMMISSION COMMISSIONER DISTRICTS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 22-1202, Idaho Code, be, and the same is hereby amended to read as follows:

22-1202. POTATO COMMISSION CREATED. There is hereby created and established in the department of self-governing agencies the "Idaho potato commission" to be composed of nine (9) practical potato persons, resident citizens of the state of Idaho for a period of three (3) years prior to their appointment each of whom has had active experience in growing, or shipping, or processing of potatoes produced in the state of Idaho. At least five (5) members of said commission shall be growers who are actually now engaged in the production of potatoes. Two (2) of the members shall be shippers who are actually now engaged in the shipping of potatoes, and two (2) of the members shall be processors who are actually now engaged in the processing of potatoes. The qualifications for members of said commission as above required shall continue throughout their respective terms of office and shall serve at the pleasure of the governor. Three (3) growers shall be nominated for each grower vacancy that occurs, from which the governor shall appoint one (1). Two (2) grower commissioners shall be appointed from the district known as District No. 1, consisting of the counties of Oneida, Franklin, Bear Lake, Caribou, Bannock, Power, Bingham, Bonneville, Teton, Madison, Jefferson, Fremont, Clark, and Butte~~, Custer, and Lemhi~~; one (1) grower commissioner shall be appointed from the district known as District No. 2A, consisting of the counties of Twin Falls, Jerome, Lincoln, Camas, Elmore, Boise, Valley, and Gooding; one (1) grower commissioner shall be appointed from the district known as District No. 2B, consisting of the counties of Cassia, Minidoka, Blaine, Custer and Lemhi; and one (1) grower commissioner shall be appointed from the

district known as District No. 3, consisting of the counties of Owyhee, Ada, Canyon, Gem, Payette, Washington, Adams, Idaho, Lewis, Nez Perce, Clearwater, Latah, Benewah, Shoshone, Kootenai, Bonner, and Boundary. Three (3) shippers shall be nominated for each shipper vacancy that occurs from which the governor shall appoint one (1). Shipper commissioners do not necessarily need to be nominated from geographical areas. Three (3) processors shall be nominated for each processor vacancy that occurs from which the governor shall appoint one (1). Processor commissioners do not necessarily need to be nominated from geographical areas. Nominations must be made thirty (30) days prior to appointment. All nominations must give equal consideration to all who are eligible for appointment as defined in this act. ~~The Idaho potato commission shall hold separate meetings of the growers, shippers, or processors, as the nominations to be made shall require, in the various districts, to determine who shall be nominated for appointment. Notice of said meetings shall be given by publication in one (1) newspaper published in each county of the district or districts in which said nominations are to be made, and the notice shall be published in two (2) issues of each newspaper, the first to be approximately thirty (30) days and the second approximately ten (10) days before said meeting. The notice shall state the purpose, time and place of said meeting. All meetings held for the selection of nominees shall be held prior to March 31 of the year the appointment or appointments are to be made.~~ The Commission shall adopt rules for nominating commissioners to serve on the Commission.

The term of office shall be three (3) years and no commissioner shall serve more than two (2) consecutive terms. The commissioners shall elect a chairman for a term of one (1) year.

Vacancies shall be filled as terms expire. Each of such commissioners shall hold office until his successor has been appointed and qualified. The term of office shall commence on September 15 of the year of appointment and expire on September 14 of the last year of the term of office.

A majority of the members of said commission shall constitute a quorum for the transaction of all business and the carrying out of the duties of said commission. Before entering on the discharge of their duties as members of said commission, each member shall take and subscribe to the oath of office prescribed for state officers.

Each member of the commission shall be compensated as provided by section 59-509(j), Idaho Code, provided however, that compensation paid to members of the commission from and

after April 1, 1992, shall not be considered salary as defined in section 59-1302(31), Idaho Code.

SECTION 2: An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

LEGISLATURE OF THE STATE OF IDAHO
Sixty-fifth Legislature First Regular Session - 2019

IN THE _____

_____ BILL NO. ___

BY _____ COMMITTEE

AN ACT

RELATING TO AGRICULTURE; AMENDING SECTION 22-1202, IDAHO CODE, TO REVISE IDAHO POTATO COMMISSION COMMISSIONER DISTRICTS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 22-1202, Idaho Code, be, and the same is hereby amended to read as follows:

22-1202. POTATO COMMISSION CREATED. There is hereby created and established in the department of self-governing agencies the "Idaho potato commission" to be composed of nine (9) practical potato persons, resident citizens of the state of Idaho for a period of three (3) years prior to their appointment each of whom has had active experience in growing, or shipping, or processing of potatoes produced in the state of Idaho. At least five (5) members of said commission shall be growers who are actually now engaged in the production of potatoes. Two (2) of the members shall be shippers who are actually now engaged in the shipping of potatoes, and two (2) of the members shall be processors who are actually now engaged in the processing of potatoes. The qualifications for members of said commission as above required shall continue throughout their respective terms of office and shall serve at the pleasure of the governor. Three (3) growers shall be nominated for each grower vacancy that occurs, from which the governor shall appoint one (1). ~~Two (2) grower commissioners shall be appointed from the district known as District No. 1, consisting of the counties of Oneida, Franklin, Bear Lake, Caribou, Bannock, Power, Bingham, Bonneville, Teton, Madison, Jefferson, Fremont, Clark, Butte, Custer, and Lemhi; one (1) grower commissioner shall be appointed from the district known as District No. 2A, consisting of the counties of Twin Falls, Jerome, Lincoln, Camas, Elmore, Boise, Valley, and Gooding; one (1) grower commissioner shall be appointed from the district known as District No. 2B, consisting~~

~~of the counties of Cassia, Minidoka, Blaine, Custer and Lemhi; and one (1) grower commissioner shall be appointed from the district known as District No. 3, consisting of the counties of Owyhee, Ada, Canyon, Gem, Payette, Washington, Adams, Idaho, Lewis, Nez Perce, Clearwater, Latah, Benewah, Shoshone, Kootenai, Bonner, and Boundary.~~ One (1) grower commissioner shall be appointed from the district known as District No. 1, consisting of the counties of Fremont, Jefferson, Madison, and Teton; one (1) grower commissioner shall be appointed from the district known as District No. 2, consisting of the counties of Bingham, Butte and Clark; one (1) grower commissioner shall be appointed from the district known as District No. 3, consisting of the counties of Power, Oneida, Franklin, Bear Lake, Bannock, Caribou, and Bonneville; one (1) grower commissioner shall be appointed from the district known as District No. 4, consisting of the counties of Cassia, Minidoka, Jerome, Lincoln, Blaine, Custer, and Lemhi; and one (1) grower commissioner shall be appointed from the district known as District No. 5, consisting of the counties of Boundary, Bonner, Kootenai, Benewah, Latah, Nez Perce, Lewis, Shoshone, Clearwater, Idaho, Adams, Valley, Washington, Payette, Gem, Boise, Canyon, Ada, Elmore, Owyhee, Camas, Gooding, and Twin Falls; Three (3) shippers shall be nominated for each shipper vacancy that occurs from which the governor shall appoint one (1). Shipper commissioners do not necessarily need to be nominated from geographical areas. Three (3) processors shall be nominated for each processor vacancy that occurs from which the governor shall appoint one (1). Processor commissioners do not necessarily need to be nominated from geographical areas. ~~Nominations must be made thirty (30) days prior to appointment. All nominations must give equal consideration to all who are eligible for appointment as defined in this act. The Idaho potato commission shall hold separate meetings of the growers, shippers, or processors, as the nominations to be made shall require, in the various districts, to determine who shall be nominated for appointment. Notice of said meetings shall be given by publication in one (1) newspaper published in each county of the district or districts in which said nominations are to be made, and the notice shall be published in two (2) issues of each newspaper, the first to be approximately thirty (30) days and the second approximately ten (10) days before said meeting. The notice shall state the purpose, time and place of said meeting. All meetings held for the selection of nominees shall be held prior to March 31 of the year the appointment or appointments are to be made.~~ The

Commission shall adopt rules for nominating commissioners to serve on the Commission.

The term of office shall be three (3) years and no commissioner shall serve more than two (2) consecutive terms. The commissioners shall elect a chairman for a term of one (1) year.

Vacancies shall be filled as terms expire. Each of such commissioners shall hold office until his successor has been appointed and qualified. The term of office shall commence on September 15 of the year of appointment and expire on September 14 of the last year of the term of office.

A majority of the members of said commission shall constitute a quorum for the transaction of all business and the carrying out of the duties of said commission. Before entering on the discharge of their duties as members of said commission, each member shall take and subscribe to the oath of office prescribed for state officers.

Each member of the commission shall be compensated as provided by section 59-509(j), Idaho Code, provided however, that compensation paid to members of the commission from and after April 1, 1992, shall not be considered salary as defined in section 59-1302(31), Idaho Code.

SECTION 2: This section shall be in full force and effect for appointments to the commission on and after September 1, 2020.

EXHIBIT
number 115

LEGISLATURE OF THE STATE OF IDAHO
Sixty-fifth Legislature First Regular Session - 2019

IN THE _____

_____ BILL NO. ___

BY _____ COMMITTEE

AN ACT

RELATING TO AGRICULTURE; AMENDING SECTION 22-1204, IDAHO CODE, TO REVISE DEFINITIONS RELATED TO THE IDAHO POTATO COMMISSION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 22-1204, Idaho Code, be, and the same is hereby amended to read as follows:

22-1204. DEFINITIONS. As used in this act:

1. The term "commission" means the Idaho potato commission.

2. The term "person" means individual, partnership, corporation, association, grower and/or any other business unit.

3. The term "potatoes" means and includes only potatoes sold or intended for human consumption and grown in the state of Idaho.

4. "Shipment" of potatoes shall be deemed to take place when the potatoes are loaded within the state of Idaho, in a car, bulk, truck or other conveyance in which the potatoes are to be transported for sale or otherwise.

5. The term "dealer" means and includes any person engaged in the business of buying, receiving, processing, or selling potatoes for profit or remuneration.

6. The term "shipper" means and includes one who is properly licensed under federal and state laws and actively engaged in the packing and shipping of potatoes in the primary channel of trade in interstate commerce in the state of Idaho, and who ships more than he produces. Each shipper entity shall designate annually its voting representative to the Commission for Commissioner nominations. Designated representatives may only vote on one ballot in any election.

7. The term "grower" means one who: ~~is actively engaged in the production of farm products, primarily potatoes, and who is not engaged in the shipping or processing of potatoes.~~

a. Is actively engaged in the production of potatoes in the state of Idaho and derives a substantial portion of his income therefrom;

b. Is not primarily engaged in the shipping or processing of potatoes;

c. Grows potatoes on five (5) or more acres, and

d. Has been actively engaged in growing potatoes in the state of Idaho for a period of at least three (3) years prior to nomination and has paid assessments to the commission on potatoes in each of the preceding three (3) calendar years.

e. Each grower entity shall designate annually its voting representative to the Commission for Commissioner nominations. Designated representatives may only vote on one ballot in any election.

8. Potatoes shall be deemed to be delivered into the primary channel of trade when any such potatoes are sold or delivered for shipment, or delivered for canning and/or processing into by-products.

9. The term "hundredweight" means each one hundred (100) pound unit or combination of packages making a hundred (100) pound unit of any shipment of potatoes based on invoice and/or bill of lading records.

10. The term "processor" means a person who is actively engaged in the processing of potatoes in Idaho for human consumption~~.~~ and licensed to do business in the state of Idaho. Each processor entity shall designate annually its voting representative to the Commission for Commissioner nominations. Designated representatives may only vote on one ballot in any election.

11. The term "processing" means changing the form of potatoes from the raw or natural state into a product for human consumption.

12. The term "handler" means and includes any person processing potatoes or handling them in the primary channel of trade.

13. The term "tax" means an assessment levied on potatoes covered by this act for the sole purpose of financing, on behalf of the potato industry in Idaho, the commission's activities in carrying out the purposes of this act.

SECTION 2: An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

LEGISLATURE OF THE STATE OF IDAHO
Sixty-fifth Legislature First Regular Session - 2019

IN THE _____

_____ BILL NO. ___

BY _____ COMMITTEE

AN ACT

RELATING TO AGRICULTURE; AMENDING SECTION 22-1204, IDAHO CODE, TO REVISE DEFINITIONS RELATED TO THE IDAHO POTATO COMMISSION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 22-1204, Idaho Code, be, and the same is hereby amended to read as follows:

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1. The term "commission" means the Idaho potato commission.

2. The term "person" means individual, partnership, corporation, association, grower and/or any other business unit.

3. The term "potatoes" means and includes only potatoes sold or intended for human consumption and grown in the state of Idaho.

4. "Shipment" of potatoes shall be deemed to take place when the potatoes are loaded within the state of Idaho, in a car, bulk, truck or other conveyance in which the potatoes are to be transported for sale or otherwise.

5. The term "dealer" means and includes any person engaged in the business of buying, receiving, processing, or selling potatoes for profit or remuneration.

6. The term "shipper" means and includes one who is properly licensed under federal and state laws and actively engaged in the packing and shipping of potatoes in the primary channel of trade in interstate commerce in the state of Idaho, and who ships more than he produces. Each shipper entity shall designate annually its voting representative to the Commission for Commissioner nominations. Designated representatives may only vote on one ballot in any election.

7. The term "grower" means one who: ~~is actively engaged in the production of farm products, primarily potatoes, and who is not engaged in the shipping or processing of potatoes.~~

a. Is actively engaged in the production of potatoes in the state of Idaho and derives a substantial portion of his income therefrom;

b. Is not primarily engaged in the shipping or processing of potatoes;

c. Grows potatoes on five (5) or more acres, and

d. Has been actively engaged in growing potatoes in the state of Idaho for a period of at least three (3) years prior to nomination and has paid assessments to the commission on potatoes in each of the preceding three (3) calendar years.

e. Each grower entity shall designate annually its voting representative to the Commission for Commissioner nominations. Designated representatives may only vote on one ballot in any election.

8. Potatoes shall be deemed to be delivered into the primary channel of trade when any such potatoes are sold or delivered for shipment, or delivered for canning and/or processing into by-products.

9. The term "hundredweight" means each one hundred (100) pound unit or combination of packages making a hundred (100) pound unit of any shipment of potatoes based on invoice and/or bill of lading records.

10. The term "processor" means a person who is actively engaged in the processing of potatoes in Idaho for human consumption~~.~~ and transacting business in the state of Idaho. Each processor entity shall designate annually its voting representative to the Commission for Commissioner nominations. Designated representatives may only vote on one ballot in any election.

11. The term "processing" means changing the form of potatoes from the raw or natural state into a product for human consumption.

12. The term "handler" means and includes any person processing potatoes or handling them in the primary channel of trade.

13. The term "tax" means an assessment levied on potatoes covered by this act for the sole purpose of financing, on behalf of the potato industry in Idaho, the commission's activities in carrying out the purposes of this act.

SECTION 2: An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

EXHIBIT
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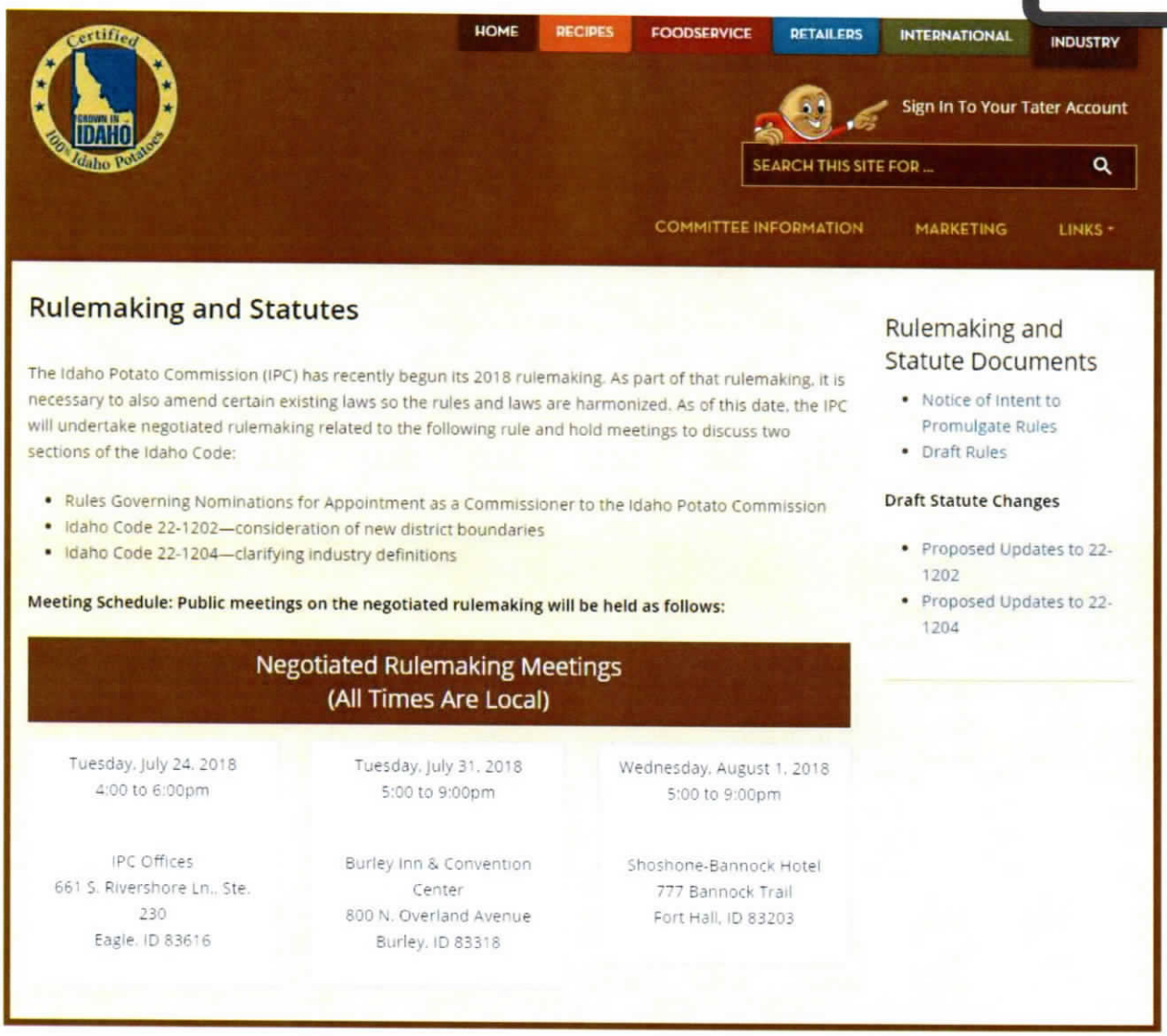
116



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Rulemaking and Statutes

The Idaho Potato Commission (IPC) has recently begun its 2018 rulemaking. As part of that rulemaking, it is necessary to also amend certain existing laws so the rules and laws are harmonized. As of this date, the IPC will undertake negotiated rulemaking related to the following rule and hold meetings to discuss two sections of the Idaho Code:

- Rules Governing Nominations for Appointment as a Commissioner to the Idaho Potato Commission
- Idaho Code 22-1202—consideration of new district boundaries
- Idaho Code 22-1204—clarifying industry definitions

Meeting Schedule: Public meetings on the negotiated rulemaking will be held as follows:

Negotiated Rulemaking Meetings (All Times Are Local)

Tuesday, July 24, 2018	Tuesday, July 31, 2018	Wednesday, August 1, 2018
4:00 to 6:00pm	5:00 to 9:00pm	5:00 to 9:00pm
IPC Offices 661 S. Rivershore Ln., Ste. 230 Eagle, ID 83616	Burley Inn & Convention Center 800 N. Overland Avenue Burley, ID 83318	Shoshone-Bannock Hotel 777 Bannock Trail Fort Hall, ID 83203

Rulemaking and Statute Documents

- Notice of Intent to Promulgate Rules
- Draft Rules

Draft Statute Changes

- Proposed Updates to 22-1202
- Proposed Updates to 22-1204

EXHIBIT
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IDAHO POTATO COMMISSION

July 6, 2018

Re: 2018 IPC Rulemaking Information

Dear Potato Industry Stakeholder,

The Idaho Potato Commission (IPC) has recently begun its 2018 rulemaking. As part of that rulemaking, it is necessary to also amend certain existing laws so the rules and laws are harmonized. The purpose of this letter is to inform you of our rulemaking efforts and the proposed changes to our laws as well as provide information on how you can participate and obtain more information.

As of this date, the IPC will undertake negotiated rulemaking related to the following rule and hold meetings to discuss two sections of the Idaho Code:

- Rules Governing Nominations for Appointment as a Commissioner to the Idaho Potato Commission
- Idaho Code 22-1202—consideration of new district boundaries
- Idaho Code 22-1204—clarifying industry definitions

Information related to this rulemaking docket and draft legislation is accessible on the IPC's website: https://idahopotato.com. The website will be updated as necessary so the information is timely and up to date. The website will include dates, times and locations of meetings, draft rules as they are being negotiated, drafts of the proposed legislation and other pertinent information associated with both of these activities.

I invite and encourage you to keep abreast of the IPC's activities throughout the summer and fall. Additionally, because you are uniquely situated to know the industry's areas of interest or concern, please help us spread the word about rulemaking and legislative information and opportunities by steering potentially interested parties toward the IPC website or the administrative bulletin. If you have any questions or suggestions, I can be reached via email at Patrick.kole@potato.idaho.gov or by phone at (208) 514-4208.

Sincerely,

Patrick Kole
VP, Legal and Government Affairs

Potato Pulse - Announcement Of Hearings For Proposed Changes To IPC Rules And Statutes

Campaign Preview | HTML Source | Plain-Text Email | Details

View this email in your browser

Dear Potato Industry Stakeholder,

The Idaho Potato Commission (IPC) has recently begun its 2018 rulemaking. As part of that rulemaking, it is necessary to also amend certain existing laws so the rules and laws are harmonized. The purpose of this notice is to inform you of our rulemaking efforts and the proposed changes to our laws as well as provide information on how you can participate and obtain more information. As of this date, the IPC will undertake negotiated rulemaking related to the following rule and hold meetings to discuss two sections of the Idaho Code:

- Rules Governing Nominations for Appointment as a Commissioner to the Idaho Potato Commission
- Idaho Code 22-1202—consideration of new district boundaries
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I invite and encourage you to keep abreast of the IPC's activities throughout the summer and fall. Additionally, because you are uniquely situated to know the industry's areas of interest or concern, please help us spread the word about rulemaking and legislative information and opportunities by steering potentially interested parties toward the IPC website or the administrative bulletin. If you have any questions or suggestions, I can be reached via email at Patrick.kole@potato.idaho.gov or by phone at (208) 514-4208.

Sincerely,

Patrick Kole
VP, Legal and Government Affairs

Idaho Statutes

TITLE 22
AGRICULTURE AND HORTICULTURE
CHAPTER 33
WHEAT — PROMOTION OF MARKETING

22-3302. WHEAT COMMISSION CREATED — MEMBERS. There is hereby created and established in the department of self-governing agencies the "Idaho Wheat Commission" to be composed of five (5) members appointed by, and serving at the pleasure of, the governor, one (1) from each of the five (5) commission districts referred to in section 22-3304, Idaho Code, who shall be appointed by the governor from a list of names with at least three (3) names for each appointive office for each district submitted to the governor by the Idaho state wheat growers association, doing business as the Idaho grain producers association, and they shall hold office for a term of five (5) years. The dean of the college of agriculture, university of Idaho, or his duly authorized representative, shall be an ex officio member without vote of the commission.

History:

[22-3302, added 1959, ch. 6, sec. 2, p. 13; am. 1974, ch. 13, sec. 11, p. 138; am. 2012, ch. 77, sec. 2, p. 223.]

EXHIBIT 120

SECTION 1. That Section 22-3301, Idaho Code, be, and the same is hereby amended to read as follows:

22-3301. DECLARATION OF POLICY. It is to the interest of all the people that the abundant natural resources of Idaho be protected, fully developed and uniformly distributed. Among the agricultural industries of the state of Idaho that contribute to the economic welfare of the state is the wheat industry. ~~Because of a surplus of wheat grown in this state, and because a surplus during recurrent years has become excessive and difficult to market in the available markets, it is necessary, in order to provide a profitable enterprise for the wheat growers of the state and to promote employment of labor and to assist the wheat growers and those in the various industries dependent upon the wheat growers, that additional markets be found and developed.~~ It is the purpose of this act to promote the public health and welfare of the citizens of our state by providing means for the protection, promotion, study, research, analysis and development of markets concerning the growing and marketing of Idaho wheat.

SECTION 2. That Section 22-3302, Idaho Code, be, and the same is hereby amended to read as follows:

22-3302. WHEAT COMMISSION CREATED -- MEMBERS. There is hereby created and established in the department of self-governing agencies the "Idaho Wheat Commission" to be composed of five (5) members appointed by, and serving at the pleasure of, the governor, one (1) from each of the five (5) commission districts referred to in section 22-3304, Idaho Code, who shall be appointed by the governor from a list of names with at least three (3) names for each appointive office for each district submitted to the governor by the Idaho ~~S~~state ~~W~~wheat ~~G~~growers ~~A~~association, ~~Inc., a wheat growers association representing wheat growers throughout the state of Idaho~~ doing business as the Idaho grain producers association, and they shall hold office for a term of five (5) years. The dean of the ~~C~~college of ~~A~~agriculture, ~~U~~university of Idaho, or his duly authorized representative, shall be an ex officio ~~members~~ without vote of the commission.

SECTION 3. That Section 22-3304, Idaho Code, be, and the same is hereby amended to read as follows:

22-3304. QUALIFICATION OF MEMBERS. (1) Members of the commission shall be selected and appointed because of their ability and disposition to serve the state's interest and for knowledge of the state's natural resources. Members shall be citizens over twenty-five (25) years of age, residents of the state who have been actually engaged in growing wheat in this state for at least five (5) years, and who derive a substantial portion of their income from growing wheat in the state of Idaho.

(2) There shall be one (1) member from each of the five (5) districts described hereinafter:

District 1. The six (6) northern counties: Boundary, Bonner, Kootenai, Benewah, Latah and Shoshone.

District 2. Nez Perce, Lewis, Idaho, Adams, Washington, Payette, Gem, Boise, Valley and Clearwater Counties.

District 3. Canyon, Owyhee, Ada, Elmore, Camas, Gooding, Twin Falls, Blaine, Lincoln, Jerome, Minidoka and Cassia Counties.

District 4. Lemhi, Custer, Butte, Clark, Fremont, Jefferson, Madison, Teton, Bingham and Bonneville Counties.

District 5. Power, Bannock, Caribou, Oneida, Franklin and Bear Lake Counties.

Idaho Statutes

TITLE 22
AGRICULTURE AND HORTICULTURE
CHAPTER 40
BARLEY — PROMOTION OF MARKETING

22-4002. BARLEY COMMISSION CREATED — MEMBERS. There is hereby created and established in the department of self-governing agencies the Idaho barley commission to be composed of three (3) grower members appointed by, and serving at the pleasure of, the governor, one (1) from each of the three (3) commission districts referred to in section 22-4004, Idaho Code, who shall be appointed by the governor from a list of names with at least three (3) names for each appointive office for each district submitted to the governor by the Idaho grain producers association, inc., a grain growers' association representing barley growers throughout the state of Idaho, and each shall hold office for the term specified in section 22-4005, Idaho Code. The commissioners appointed by the governor may select a barley industry representative to serve a three (3) year term on the commission. The dean of the college of agriculture, university of Idaho, or his duly authorized representative, shall be an ex officio member of the commission without vote.

History:

[22-4002, added 1988, ch. 194, sec. 1, p. 351; am. 2012, ch. 263, sec. 1, p. 731.]

A COMMISSIONER, TO PROVIDE THAT THE GOVERNOR MAY WITHDRAW A COMMISSIONER'S APPOINTMENT AND TO MAKE A TECHNICAL CORRECTION; AND AMENDING SECTION 22-4015, IDAHO CODE, TO REMOVE OBSOLETE LANGUAGE AND TO REVISE THE TAX IMPOSED ON CERTAIN BARLEY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 22-4002, Idaho Code, be, and the same is hereby amended to read as follows:

22-4002. BARLEY COMMISSION CREATED -- MEMBERS. There is hereby created and established in the department of self-governing agencies the Idaho barley commission to be composed of three (3) grower members appointed by, and serving at the pleasure of, the governor, one (1) from each of the three (3) commission districts referred to in section 22-4004, Idaho Code, who shall be appointed by the governor from a list of names with at least three (3) names for each appointive office for each district submitted to the governor by the Idaho grain producers association, inc., a grain growers' association representing barley growers throughout the state of Idaho, and each shall hold office for the term specified in section 22-4005, Idaho Code. The commissioners appointed by the governor may select a barley industry representative to serve a three (3) year term on the commission. The dean of the college of agriculture, university of Idaho, or his duly authorized representative, shall be an ex officio member of the commission without vote.

SECTION 2. That Section 22-4005, Idaho Code, be, and the same is hereby amended to read as follows:

22-4005. TERM OF MEMBERS. (1) Except as provided in subsection (3) of this section, the term of office of a member of the barley commission shall be three (3) years. Any member of the commission who has served for two (2) full consecutive terms shall not be eligible for reappointment until the expiration of a three (3) year period.

(2) Appointments to fill vacancies shall be for the balance of the unexpired term.

(3) (a) Beginning July 1, 1988, a member from district 1 will be appointed for a full four (4) year term ending in 1992. Subsequent terms will be for three (3) years.

(b) Beginning July 1, 1988, a member from district 2 will be appointed for a full three (3) year term ending in 1991. Subsequent terms will be for three (3) years.

(c) Beginning July 1, 1988, a member from district 3 will be appointed for a full two (2) year term ending in 1990. Subsequent terms will be for three (3) years.

(4) The executive committee of the Idaho state wheat growers association, doing business as the Idaho grain producers association, may request the removal of a commissioner, with or without cause, by a majority vote. Upon receipt of the request, the governor may immediately withdraw the commissioner's appointment.

SECTION 3. That Section 22-4015, Idaho Code, be, and the same is hereby amended to read as follows:

22-4015. IMPOSITION OF TAX. (1) ~~From and after the first day of July, 1997, t~~There is hereby levied and imposed a tax of ~~two~~ up to four cents (~~2~~4¢) per hundredweight on all barley grown in the state of Idaho or given to Idaho growers under a crop reduction program, and sold or contracted in this state, and each and every crop grown or barley given to growers under a crop reduction program thereafter. The tax shall be due on barley given to growers un-

EXHIBIT
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IACI

Employers Advocating Economic Opportunity in Idaho

July 30, 2018

Patrick J. Kole
VP Legal & Government Affairs
Idaho Potato Commission
661 S Rivershore Ln., Ste 230
Eagle, ID 83616

Dear Mr. Kole:

The IACI Potato Processors Executive Committee (the Committee) met on June 30, 2018 and discussed proposed rule 29.01.03. The Committee has expressed concerns regarding the rule as it relates to a mail-in nomination process and has requested further information regarding this proposal at our next meeting on August 29, 2018.

In addition, the Committee reviewed the draft legislation from the Commission. While the Committee is supportive of updating the law regarding the appointment process, there was substantial concern regarding the proposal to redistrict the current IPC Commissioner districts. The Committee did support updating the statute to better define growers, shippers, and processors, and to clarify that each entity only gets one vote in whatever designation they have chosen. Again, the Committee would request a chance to discuss the proposed legislation with you further at our August 29 meeting.

Thank you for the opportunity to express our initial feedback regarding the proposed rules and legislation the IPC are currently considering, we look forward to additional discussions regarding these issues in the future.

Sincerely,

John Eaton
Vice President

cc: Paul Saito, Chair, IACI Potato Processors Executive Committee

EXHIBIT
124A

FAMOUS IDAHO POTATOES

MINUTES OF THE REGULAR MEETING
OF THE
IDAHO POTATO COMMISSION
April 25, 2018

The Idaho Potato Commission met at the Eagle office in Eagle, ID on Wednesday, April 25, 2018.

Lynn Wilcox, Chairman

MEMBERS PRESENT:

Randy Hardy
Nick Blanksma
Peggy Arnzen
Dan Nakamura
James Hoff
Ritchey Toevs
Tommy Brown
Mary Hasenoehrl
Frank Muir, President/CEO
Pat Kole, VP Legal/Government Affairs
Don Odiorne, VP Foodservice
Travis Blacker, Industry Relations Director
Jamie Bowen, Marketing Manager
Joanna Hiller, Finance Director
Gracie Bingham, Legal/Finance Assistant
Jeweldean Hull, Executive Administrator/ Special Projects Manager

EXCUSED MEMBERS:

Seth Pemsler, VP Retail

ADVERTISING RESOURCE PERSONS PRESENT:

Laura Martin, Foerstel Design

PO Box 1670 · 661 S. Rivershore Lane, Suite 230 · Eagle, ID 83616
Ph. (208) 334-2350 · Fax (208) 334-2274 · www.idahopotato.com

Linda Whittig, Foerstel Design

OTHERS PRESENT:

Shawn Boyle, Mike Thornton, Zak Miller, Karlene Hardy, Cindy Stark, Sean Ellis, Stephanie Mickelsen, Chuck Stadick, Skylar Jett, Casey Attebery, Doug Gross, Brent Olmstead, Celia Gould.

CALL TO ORDER:

The meeting convened at 8:30 a.m., with Chairman Wilcox presiding. He welcomed everyone.

MINUTES:

MOTION: Motion was made by Mr. Hoff and seconded by Ms. Arnzen to approve the minutes of April 25, 2018 meeting. Motion carried unanimously.

FINANCIAL REPORT:

Mr. Muir briefly summarized the March financials. For the month of March, Fresh revenue finished at $489K, up $33K versus a year ago and Processed revenue finished at $877K, up $308K versus a year ago, total for the month is up $341K. Year-to-date, Fresh is down $8K and Processed is up $345K verses year ago, therefore, total revenue is up $337K versus year ago. Expenditures for the month of March are under-spent $215K due to timing and given a cash basis. We finished the month a little above $1.3 million. Year-to-date we are under-spent $123K due to timing of advertising but that is expected this time of year. The reserve is above $3 mil. which means we are on target for revenue and expenditures. We anticipate tapping into the reserve as expected. Mr. Muir asked for a motion to approve March financials, if there were no further questions.

MOTION: Motion was made by Mr. Blanksma and seconded by Ms. Hasenoehrl to approve March Financials. Motion carried unanimously.

OFFICE PROCEDURES:

Chairman Wilcox said there were no current office procedures to report on.

PRESIDENT'S REPORT:

Chairman Wilcox called upon Mr. Muir who reported on the following: A) Lamb Weston; B) Advertising, PR; RODS; C) Big Idaho Potato Truck; D) Quality Project- report given by Mike Thornton that UI is working with Walmart on quality issues; E) Re-districting

proposal; F) Nominations procedure discussion and overview on statues, testimonies by two of the nominees.

Foodservice:

Presented at AGENDA

Retail:

Presented at AGENDA

Export:

Presented at AGENDA

Research and Education:

Presented at AGENDA

MOTION: Motion was made by Mr. Blanksma and seconded by Mr. Toevs to approve funding of $260,500K for Idaho only research projects. Motion carried unanimously.

MOTION: Motion was made by Mr. Toevs and seconded by Mr. Blanksma to approve a re-nomination meeting in early June given there was not equal consideration given to all who were eligible for appointment as set forth in the April 2, 2018 letter from the Attorney General's Office. Mr. Hoff stated that he would abstain from voting on the Motion. After discussion, the motion passed with eight "yes" votes and one abstention.

Industry Relations:

Chairman Wilcox called upon Mr. Blacker who reported on the following: A) Potatoes USA losing delegates, June 7th re-nomination meeting in Pocatello, ID; B) Ad-Bakers Conference, Meridian, ID, Director of Ag to speak; C) Spore Sampling moving along great, next week spore sampling going out in fields; D) Commissioners Bios on IPC website.

Chairman Hardy, NPC Liaison- Mr. Hardy reported the following: A) Farm Bill is a big issue if doesn't pass, the monies for legal with Mexico will dry up; B) Sunny Purdue and Trans Pacific Trade (TPP).

Chairman Wilcox, Potatoes USA Liaison – Chairman Wilcox report is in folders for everyone to review and covers in detail: A) Domestic Marketing; B) Industry Outreach.

Chairwoman Arnzen, IGSA Liaison – Ms. Arnzen turned time over to Shawn Boyle who reported on: A) Spring Membership was last month in Idaho Falls. Transportation

issues were discussed and Cybersecurity training, tax law update; B) IGSA Scholarship; C) Spring Swing in Mesquite, NV.

Chairman Brown, IACI Liaison – Mr. Brown reported IACI has wrapped up Legislation and getting ready for May primary.

Chairman Hoff, United Liaison – Mr. Hoff turned time over to Mr. Shawver who reported there was a United meeting on 16-17th, Supply and Demand Committee. Supply will be tightening up given harsh weather. Colorado has had issues with frost. Idaho shipments backed off a little, however Idaho is in the driver seat regarding fresh potatoes.

Chairman Toevs, SIPCO Liaison – Mr. Toevs turned time over to Mr. Stadick, who reported on: A) Canadian negotiations and contracts discussion with Idaho, Maine and the basin, concern over planting.

ISDA: Celia Gould, Director for ISDA reported there is an Advisory Group for processed that will be in couple weeks. Jeff Harper, Celia and Frank met on getting grower communication via Potato Pulse. First ever Seed Arbitration case brought to the agency. Inspection Advisory Group proposal.

UI: Brent Olmstead reported that a committee has been formed and meetings with Dept. of Administration. Looking for a designation on Seed Certification.

Meeting adjourned at 1:11 p.m.

EXHIBIT
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FAMOUS IDAHO POTATOES

MINUTES OF THE REGULAR MEETING
OF THE
IDAHO POTATO COMMISSION
May 18, 2018

The Idaho Potato Commission met at the Eagle office in Eagle, ID on Friday, May 18, 2018.

Lynn Wilcox, Chairman

MEMBERS PRESENT:

Randy Hardy
Nick Blanksma
Peggy Arnzen
Dan Nakamura
James Hoff
Tommy Brown
Frank Muir, President/CEO
Pat Kole, VP Legal/Government Affairs
Seth Pemsler, VP Retail
Travis Blacker, Industry Relations Director
Joanna Hiller, Finance Director
Gracie Bingham, Legal/Finance Assistant
Jeweldean Hull, Executive Administrator/ Special Projects Manager

EXCUSED MEMBERS:

Mary Hasenoehrl
Ritchey Toevs

ADVERTISING RESOURCE PERSONS PRESENT:

Linda Whittig, Foerstel Design

PO Box 1670 · 661 S Rivershore Lane, Suite 230 · Eagle ID 83616
Ph (208) 334-2350 · Fax (208) 334-2274 · www.idahopotato.com

the names to the Governor for appointment to the Commission. Motion carried unanimously.

MOTION: Motion was made by Mr. Hardy and seconded by Mr. Blanksma to authorize the Commission staff to enter into negotiated rulemaking to develop administrative rules covering nominations for persons eligible for appointment as a commissioner to the Idaho Potato Commission. Motion carried unanimously.

MOTION: Motion was made by Mr. Hardy and seconded by Mr. Brown to approve and to take the re-districting proposal reviewed by the Commission and present it to the industry for comment. Motion passed with 1 opposed and 5 in favor.

Foodservice:

Presented at AGENDA

Retail:

Presented at AGENDA

Export:

Presented at AGENDA

Research and Education:

Presented at AGENDA

Industry Relations:

Chairman Wilcox called upon Mr. Blacker and Celia Gould from ISDA who reported on the following: A) Inspections Meeting, discussed communication with growers. Also working on a session for Potato School next year.

Chairman Hardy, NPC Liaison- Mr. Hardy reported the following: A) Specialty Crop Farm Bill Alliance met on hill.

Chairman Wilcox, Potatoes USA Liaison – Chairman Wilcox had nothing to report.

Chairwoman Arnzen, IGSA Liaison – Ms. Arnzen turned time over to Shawn Boyle who reported on: A) Transportation presentation; B) Sun Valley registration open online June 1st.

Chairman Brown, IACI Liaison – Mr. Brown turned time over to John Eaton who reported on an update with Gubernatorial Elections.

EXHIBIT
tabbies
124C

FAMOUS IDAHO POTATOES

MINUTES OF THE REGULAR MEETING
OF THE
IDAHO POTATO COMMISSION
June 20, 2018

The Idaho Potato Commission met at the Eagle office in Eagle, ID on Wednesday, June 20, 2018.

Lynn Wilcox, Chairman

MEMBERS PRESENT:

Randy Hardy
Nick Blanksma
Peggy Arnzen
Dan Nakamura
James Hoff
Tommy Brown
Mary Hasenoehrl
Ritchey Toevs
Frank Muir, President/CEO
Pat Kole, VP Legal/Government Affairs
Seth Pemsler, VP Retail
Travis Blacker, Industry Relations Director
Ross Johnson, International Marketing Director
Joanna Hiller, Finance Director
Gracie Bingham, Legal/Finance Assistant
Jamie Bowen, Marketing Manager
Jeweldean Hull, Executive Administrator/ Special Projects Manager

ADVERTISING RESOURCE PERSONS PRESENT:

Linda Whittig, Foerstel Design
Laura Martin, Foerstel Design
Sue Kennedy, EHY
Madison Serrano, EHY
Dennis Hardy, EHY
Scott Young, EHY

PO Box 1670 • 661 S Rivershore Lane Suite 230 • Eagle ID 83616
Ph. (208) 334-2350 • Fax (208) 334-2274 • www.idahopotato.com

OTHERS PRESENT:

Cindy Stark, Skylar Jett, Nav Ghimire, Chuck Stadick, Karlene Hardy

CALL TO ORDER:

The meeting convened at 8:31 a.m., with Chairman Wilcox presiding. He welcomed everyone.

MINUTES:

MOTION: Motion was made by Ms. Arnzen and seconded by Mr. Brown to approve the minutes of May 18, 2018 meeting. Motion carried by 8, 1 abstained, Mary Hasenoehrl.

FINANCIAL REPORT:

Mr. Muir briefly summarized the May financials. For the month of May, Fresh revenue finished at $478K, down $25K versus a year ago and Processed revenue finished at $610K, down $183K versus a year ago, total for the month is down $208K. Year-to-date, Fresh is down $92K and Processed is down $138K verses year ago, therefore, total revenue is down $230K versus year ago. Expenditures for the month of May are under-spent $133K due to timing, which is normal this time of year. Year-to-date we are under-spent $567K due to timing on waiting to pay Walmart. The reserve is at $3.3 mil. which means we are on target for revenue and expenditures with our goal still at $2 mil. We still anticipate tapping into the reserve as expected. Mr. Muir asked for a motion to approve May financials, if there were no further questions.

MOTION: Motion was made by Mr. Hoff and seconded by Mr. Hardy to approve May Financials. Motion carried unanimously.

OFFICE PROCEDURES:

Chairman Wilcox called upon Mr. Kole who reported on reviewing steps to follow for administrative rule making and legislative.

PRESIDENT'S REPORT:

Chairman Wilcox called upon Mr. Muir who reported on the following: A) Advertising, PR; RODS; B) Big Idaho Potato Truck; C) FIPB, NFL Draft; D) Lamb Weston update; E) Quality Project; F) Misc. Publicity/Videos; G) Nominations; H) Districts; I) Transportation; J) Inspections.

Foodservice:

Chairman Wilcox called upon Mr. Brown who turned time over to Mr. Odiorne who reported: A) NRA follow up; B) Additional NRA Activities; C) Café Food Educators Conference; D) New Educational Foodservice kits; E) Re-working landing pages to reflect how website is searched and overall traffic; F) Everything Food Blogger Conference.

Retail:

Presented at AGENDA

Export:

Chairman Wilcox called upon Ms. Arnez who turned time over to Mr. Johnson, who reported on the following: A) Market Access; B) Southeast Asia; C) Promotional Activity; D) Future, where the market is?

Research and Education:

Chairman Wilcox called upon Mr. Blanksma who turned time over to Mr. Blacker who reported on: A) Consortium meeting, plan to reduce the Idaho only projects; B) Federal Funding; C) Farm Bill; D) PVMI-productive meeting in Portland.

Industry Relations:

Chairman Wilcox called upon Mr. Blacker who reported on the following: A) Nominations for Potatoes USA; B) Spore Trapping project.

Chairman Hardy, NPC Liaison- Mr. Hardy reported on the Farm Bill, looking as if everything will fall into place for the industry.

Chairman Wilcox, Potatoes USA Liaison – Chairman Wilcox had nothing to report.

Chairwoman Arnzen, IGSA Liaison – Ms. Arnzen reported on: A) Smart potato B) Sun Valley registration open online.

Chairman Brown, IACI Liaison – Mr. Brown had nothing to report.

Chairman Hoff, United Liaison – Mr. Hoff reported there would be an acreage report by the end of the week.

Chairman Toevs, SIPCO Liaison – Mr. Toevs turned time over to Mr. Stadick who reported a possibility of plans for new plant.

Meeting adjourned at 11:30 a.m.

Chairman Hoff, United Liaison – Mr. Hoff turned time over to Mr. Shawver who reported there was a supply/demand meeting and not much change in supply in the country, national shipments are down. Planting is being wrapped up depending on weather. In the midst of starting acreage count then will come up with numbers.

Chairman Toevs, SIPCO Liaison – No report for SIPCO.

Meeting adjourned at 11:30 a.m.

On July 28 an email was sent to members of the Idaho Potato Industry that was not accurate. The email was from Stephanie Mickelsen. Here is what was said and what is true:

- After the disaster of a nominating meeting this spring, the IPC was instructed to work with the stakeholders and create new rules and re-write the code to reflect a new and updated IPC. Pat Kole decided to create some new rules with no input from potato growers. We were told by a current commissioner that they hadn't even seen the re-write until the very morning of the first public hearing.

Facts: As a result of the actions of Mark, Stephanie and Andrew Mickelsen, the Idaho Potato Commissioners directed the staff to take actions to prevent a repeat of the "disaster" the Mickelsens caused at the nomination meeting. This directive was made at a public meeting of the IPC after hours of discussion. In crafting draft rules, Mr. Kole reviewed the laws of potato commissions including Washington, Oregon, Michigan and Maine, other commodity commissions in Idaho including the Wheat and Barley Commissions, and also consulted, as required by state law, with the Idaho Governor's office, the Division of Financial Management and the Office of Administrative Rules. Following that process, an entire morning was spent by the Commissioners in a public meeting where growers reviewed and commented on the drafts. Based upon that input, changes were made based on the comments made. At the next two Commission public meetings there were further discussions about and changes made to these proposals.

The draft rules are currently just that—a draft. The purpose of having informal hearings is to solicit input from industry members and the draft gives us a framework to build upon. Because the IPC is only proposing temporary rules, the IPC is not required by law to hold public hearings. However, in the best interest of the industry, the IPC is gathering input from stakeholders. The IPC submitted a public Notice of Intent to Promulgate Rules, which was published in the administrative bulletin on July 4. The bulletin listed the dates of upcoming hearings and we posted our draft legislation to the website for public view. We sent out a Pulse on July 6 notifying the industry of that bulletin and directing them to visit the website to view drafts of our legislation and rules.

At the hearing on July 24, there was one very small change made in the language that related to a Processor. That change was this: changing the words "licensed to do business in" to "transacting business in". This particular change has nothing to do with growers at all. Further, it's important to understand that the purpose of having these informal hearings is to fine tune what's being proposed and to make changes. Nothing is final at this stage.

- The IPC is proposing rules that will limit voting on growers that have ownership in shipping and processing facilities. The IPC is also trying to make it one vote for any common ownership entity. The problem with this whole proposal is that first off, how in the world will they ever police that? How will they find who owns what business? That information isn't even required by the Idaho Secretary of State's office. They need to address the bigger problem of how do you allow multiple owners of a business the right to vote? Or do you vote by production? The real problem is that currently a farm with 5 acres has one vote and a farm with multiple owners that might have 10,000 acres is only allowed one vote. They won't even allow different owners of a single entity to vote under their current proposal.

Facts: The IPC has operated under the principle of "One person, one vote" since it started nominations for being a Commissioner. This is true for elections to Congress, Statewide

positions such as Governor, Secretary of State, the Idaho Legislature, County Commissioners, City Councils, School Boards, and more. This comment suggests that the bigger a grower is, the more votes a grower should get. This would be harmful to small growers and the IPC's duty is to represent the entire industry, regardless of size. The practical impact of what the Mickelsens are proposing is a property qualification for voting or holding office as an IPC Commissioner. This is prohibited under Art. 1 Section 20 of the Idaho Constitution.

- The IPC wants to make some funny rule that if you vote as a grower then you would be unable to vote as a shipper/processor for a period of 3 years. They are totally ignoring or completely misunderstanding legal entities and how they must have a legal representative to vote for them as they aren't a sole proprietorships. Maybe we growers should vote on the processor and shipper representatives on the IPC???

Facts: Since nominations for IPC Commissioners began, the law required that Commissioners be a grower, shipper or processor. You couldn't be part grower, part shipper or part processor. Times have changed and the law has not kept up with the emergence of growers who have ownership in packing sheds or processing plants. What the IPC is proposing is simply this: what a person predominantly is will determine what they are. Once they make that declaration, then that is who they will represent for the next three years, which is the length of term for being a Commissioner. This would prevent someone from running for the Commission as a grower one year, a shipper the next year and a processor the following year.

- Pat Kole is also proposing that we add language to Idaho Code that says all commissioners shall serve at the pleasure of the governor. Well depending upon who is in the governor's office at a particular time that is a REALLY bad idea. If the state is paying the IPC tax then I think that would be a reasonable proposal, however, since the growers are paying the tax they should have the total and complete say about who is representing them on the commission.

Facts: The IPC is a state agency. The IPC is required to follow a process that requires approval from the Governor to submit legislation for the Legislature to consider. When this proposal was submitted, the IPC asked if including this language "serves at the pleasure of the Governor" was required. The answer was "Yes". It's also important to know this: this language is already in the statutes of the Wheat and Barley Commission.

- The commission needs to take the time to re-write the entire code section. If you listen to Pat Kole he will tell you all the reasons why we can't do that. The Idaho code on the IPC hasn't been re-written in a good 50 years. WE need to work together to update our commission to reflect the current state of the industry and the current needs of the growers it serves.

Facts: This is an election year. The Governor has stated that he wants to give whoever is elected as Idaho's next Governor a clean slate to set their own agenda. As such, only mission-critical legislation can be proposed by state agencies. After reviewing IPC's proposals and learning of the above-referenced "disaster" at the nomination meeting, the Governor's office and the Division of Financial Management gave the IPC permission to propose changes to the nomination process. It is neither a quick nor simple process to propose legislation, particularly this year.

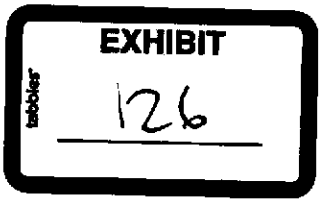
- We need to have a referendum code section that allows the growers the ability to call for referendums if we believe a change needs to take place. Although code refers to a referendum it doesn't really spell out how that can actually occur.

Facts: IPC is unique in that it is an industry commission with 2 shipper commissioners and 2 processor commissioners in addition to the 5 grower commissioners. Clearly, grower commissioners have the majority voice at all times. Having the input, insight and industry-wide perspective of the entire industry has served everyone well. There's a reason why Idaho® Potatoes is the produce industry's most recognized brand.

- IACI (Idaho Association of Commerce and Industry) lobbying group is fighting very hard against having certain individuals appointed to the IPC. IACI shouldn't be involved in the activities of the nominations or the appointment of IPC commissioners.

Facts: IACI has a Potato Committee that includes frozen and dehydrated potato companies. These companies pay assessments to the IPC. IACI, IGSA and PGI have all been involved in the nomination and appointment process for years.

Stephanie asked that you come to the meetings in Burley and at Fort Hall on Tuesday and Wednesday. We strongly welcome your presence and participation and we urge you to come learn what is true.



Aug 1st 2018

My name is Mark Darrington, a sole proprietor and grower of 28 years in the greater Declo, Idaho area. My comments today represent my personal thoughts and perception of the Idaho Potato Commission. These comments are directed to the State of Idaho and members of said commission.

I see the IPC as a state regulated association, more steeped in tradition and efforts of the past, than a tool for those who are taxed and looking for a return on that investment.

To say that there is nothing positive happening is an overstatement. I congratulate and thank the IPC, and Lamb Weston for their cooperation and launch of the Idaho Fry. Well done. Thank you.

As to the current status of other issues, I believe there are several;

1. Representation of the tax dollars received, and taking into account which segment of the industry generates the money. I am told that 35% is generated by fresh and 65% comes from the process industry including dehydration. I also recognize that the most productive farm land tends to be lesser people populated. We have to include consideration of political realities, but I believe grower representation needs to represent end use of the potato, be it fresh or process.
2. I believe the fresh side of our industry is in total chaos. Until those factions come to some meeting of the mind, fresh promotion is literally harming the Idaho name and reputation. This is evidenced in the Huffacre news letter and price report. Also evidenced in Mr. Frank Muiers' comments at last years Bannock Hotel Potato conference, we are shipping a lot of mixed quality and our consumers are giving negative feedback. In my words and experience we are committing a "self-defeating behavior" in what we ship.
3. I remember well the brand recognition of Rambler, Studebaker, and Oldsmobile. Look at Gleem toothpaste and RC Cola. Anyone younger than fifty in the room doesn't recognize what I'm referring to, so let's talk about Facebook and its crash. Big name icons can and do crash and disappear.

My solutions;

1. Time to redefine purpose for the IPC for each and all sectors of the Idaho potato industry.
2. Recognize and respond to change in lifestyle and role of technology in all our everyday activities.
3. Build a new strategy and implement.

At the present we are adrift, relying on tradition and small success to define a multi- billion dollar business.

Respectfully submitted:

Mark Darrington

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS *v.* FEDERAL TRADE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13–534. Argued October 14, 2014—Decided February 25, 2015

North Carolina's Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." The Board's principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is "the practice of dentistry." Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board's motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in

all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 5–18.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker* v. *Brown*, 317 U. S. 341, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 5–6.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if "'the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,' and . . . 'the policy . . . [is] actively supervised by the State.'" *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 6–17.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal*'s two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this

harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 6–10.

(2) There are instances in which an actor can be excused from *Midcal*'s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie* v. *Eau Claire*, 471 U. S. 34, 35. That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni*'s holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U. S., at 374, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 633, and *Phoebe Putney, supra,* at ____. The clear lesson of precedent is that *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 10–12.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal*'s second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. 445 U. S., at 105–106. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus,

the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity. Pp. 12–14.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick* v. *Burget*, 486 U. S. 94, 105–106, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 14–16.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 17.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U. S., 100–101. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id.*, 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

Syllabus

supervision is not an adequate substitute for a decision by the State," *Ticor*, *supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 17–18.

717 F. 3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 13–534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER *v.* FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker* v. *Brown*, 317 U. S. 341 (1943).

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. N. C. Gen. Stat. Ann. §90–22(a) (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." §90–22(b).

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See §§90–29 to

90–41. To perform that function it has broad authority over licensees. See §90–41. The Board's authority with respect to unlicensed persons, however, is more restricted: like "any resident citizen," the Board may file suit to "perpetually enjoin any person from . . . unlawfully practicing dentistry." §90–40.1.

The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. §90–22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed by the Governor. *Ibid.* All members serve 3-year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, §138A–22(a), and the Board must comply with the State's Administrative Procedure Act, §150B–1 *et seq.*, Public Records Act, §132–1 *et seq.*, and open-meetings law, §143–318.9 *et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§90–48, 143B–30.1, 150B–21.9(a).

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower

prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Dental Practice Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an

administrative complaint charging the Board with violating §5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. §45. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the Board could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia*, "a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.*, at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F. 3d 359, 370 (2013). This Court granted certiorari. 571 U. S. ___ (2014).

II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1 *et seq.*, serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 632 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id.*, at 635–636, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. See *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 133 (1978); see also Easterbrook, Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in *Parker* v. *Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U. S., at 350–351. That ruling

recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 53 (1982). Since 1943, the Court has reaffirmed the importance of *Parker*'s central holding. See, *e.g.*, *Ticor*, *supra*, at 632–637; *Hoover* v. *Ronwin*, 466 U. S. 558, 568 (1984); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 394–400 (1978).

III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (2013) (slip op., at 7) (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

Although state-action immunity exists to avoid conflicts

between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'" *Phoebe Putney*, *supra*, at ___ (slip op., at 7) (quoting *Ticor*, *supra*, at 636).

An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374 (1991). State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. *Hoover*, *supra*, at 567–568.

But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor. See *Parker*, *supra*, at 351 ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover*, *supra*, at 567–568. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of

Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor*, 504 U. S., at 636.

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal, supra*, at 106 ("The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, *e.g., Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 501 (1988); *Hoover, supra*, at 584 (Stevens, J., dissenting) ("The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence"); see also Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L. J. 486, 500 (1986).

Parker immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own.

See *Goldfarb*, *supra*, at 790; see also 1A P. Areeda & H. Hovencamp, Antitrust Law ¶226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor*, *supra*, at 634–635. Rather, it is "whether anti-competitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws." *Patrick* v. *Burget*, 486 U. S. 94, 100 (1988).

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, a case arising from California's delegation of price-fixing authority to wine merchants. Under *Midcal*, "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *Ticor*, *supra*, at 631 (citing *Midcal*, *supra*, at 105).

Midcal's clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney*, 568 U. S., at ___ (slip op., at 11). The active supervision requirement demands, *inter alia*, "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick*, *supra*, U. S., at 101.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may

satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor*, *supra*, at 636–637. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Midcal's supervision rule "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick*, *supra*, at 100. Concern about the private incentives of active market participants animates *Midcal*'s supervision mandate, which demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick*, *supra*, at 101.

B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from *Midcal*'s active supervision requirement. In *Hallie* v. *Eau Claire*, 471 U. S. 34, 45 (1985), the Court held municipalities are subject exclusively to *Midcal*'s "'clear articulation'" requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the

expense of more overriding state goals." 471 U. S., at 47. *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id.*, at 45, n. 9. Critically, the municipality in *Hallie* exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U. S., at 45.

Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U. S., at 367–368. The Court disagreed, holding there is no "conspiracy exception" to *Parker*. *Omni*, *supra*, at 374.

Omni, like the cases before it, recognized the importance of drawing a line "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." 499 U. S., at 378. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for "corruption" as vague and unworkable, since "virtually all regulation benefits some

segments of the society and harms others" and may in that sense be seen as "'corrupt.'" 499 U. S., at 377. *Omni* also rejected subjective tests for corruption that would force a "deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

Omni's holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor* the Court affirmed that *Midcal*'s limits on delegation must ensure that "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." 504 U. S., at 633. And in *Phoebe Putney* the Court observed that *Midcal*'s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." 568 U. S., at ___ (slip op., at 8) (quoting *Hallie*, *supra*, at 46–47). The lesson is clear: *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

The Board argues entities designated by the States as agencies are exempt from *Midcal*'s second requirement. That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision

turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See Areeda & Hovencamp ¶227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick*, 486 U. S., at 100–101.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had "joined in what is essentially a private anticompetitive activity" for "the benefit of its members." 421 U. S., at 791, 792. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U. S., at 791; see also *Hoover*, 466 U. S., at 569 (emphasizing lack of active supervision in *Goldfarb*); *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 361–362 (1977) (granting the Arizona Bar state-action immunity partly because its "rules are subject to pointed re-examination by the policymaker").

While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market partici-

pants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube*, 486 U. S., at 500. For that reason, those associations must satisfy *Midcal*'s active supervision standard. See *Midcal*, 445 U. S., at 105–106.

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39 (rejecting "purely formalistic" analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See Areeda & Hovencamp ¶227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity.

D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991), and may conclude there are substantial benefits to staffing their

agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48, 64 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, The Hippocratic Oath and the Ethics of Medicine (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (2014); R. Baker, Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of "the privilege and obligation of self-government," has "call[ed] upon dentists to follow high ethical standards," including "honesty, compassion, kindness, integrity, fairness and charity." American Dental Association, Principles of Ethics and Code of Professional Conduct 3–4 (2012). State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky* v. *Delia*, 566 U. S. ___, ___ (2012) (slip op., at 12) (warning in the context of civil rights suits that the "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts"). But this case, which does not

present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb*, 421 U. S., at 792, n. 22; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

> "[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own." *Patrick*, 486 U. S. at 105–106 (footnote omitted).

The reasoning of *Patrick* v. *Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? 162 U. Pa. L. Rev. 1093 (2014).

E

The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes "the practice of dentistry" and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni*, 499 U. S., at 371–372, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticom-

petitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, *supra,* at 100–101; see also *Ticor*, 504 U. S., at 639–640.

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. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–534

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER *v.* FEDERAL TRADE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker* v. *Brown*, 317 U. S. 341 (1943). In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff

them in this way.[1] Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.[2] But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker*, and the answer to that question is clear. Under *Parker*, the Sherman Act (and the Federal Trade Commission Act, see *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 635 (1992)) do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

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[1] S. White, History of Oral and Dental Science in America 197–214 (1876) (detailing earliest American regulations of the practice of dentistry).

[2] See, *e.g.*, R. Shrylock, Medical Licensing in America 29 (1967) (Shrylock) (detailing the deterioration of licensing regimes in the mid-19th century, in part out of concerns about restraints on trade); Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976); Shepard, Licensing Restrictions and the Cost of Dental Care, 21 J. Law & Econ. 187 (1978).

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate "their purely internal affairs." *Leisy* v. *Hardin*, 135 U. S. 100, 122 (1890). In exercising their police power in this area, the States had long enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade.[3]

The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power "to the utmost extent." *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, *e.g.*, *Kidd* v. *Pearson*, 128 U. S. 1, 17–18 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it "exerts a substantial economic effect on interstate commerce." *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital*

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[3] See Handler, The Current Attack on the *Parker* v. *Brown* State Action Doctrine, 76 Colum. L. Rev. 1, 4–6 (1976) (collecting cases).

Building Co. v. *Trustees of Rex Hospital*, 425 U. S. 738, 743, n. 2 (1976) ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in *Parker*.

In *Parker*, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to establish marketing plans for certain agricultural commodities within the State. 317 U. S., at 346–347. Raisins were among the regulated commodities, and so the Commission established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id.*, at 347–348. The *Parker* Court assumed that this program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons," and the Court also assumed that Congress could have prohibited a State from creating a program like California's if it had chosen to do so. *Id.*, at 350. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id.*, at 351.

The Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Con-

gress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U. S., at 351. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical and dental boards, often staffed by doctors or dentists,[4] and had given those boards the authority to confer and revoke licenses.[5] This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent* v. *West Virginia*, 129 U. S. 114, 128 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker* v. *New York*, 170 U. S. 189, 192 (1898), the Court reiterated that a law

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[4] Shrylock 54–55; D. Johnson and H. Chaudry, Medical Licensing and Discipline in America 23–24 (2012).

[5] In *Hawker* v. *New York*, 170 U. S. 189 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.*, at 191–193, n. 1. See also *Douglas* v. *Noble*, 261 U. S. 165, 166 (1923) ("In 1893 the legislature of Washington provided that only licensed persons should practice dentistry" and "vested the authority to license in a board of examiners, consisting of five practicing dentists").

specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

II

As noted above, the only question in this case is whether the North Carolina Board of Dental Examiners is really a state agency, and the answer to that question is clearly yes.

- The North Carolina Legislature determined that the practice of dentistry "affect[s] the public health, safety and welfare" of North Carolina's citizens and that therefore the profession should be "subject to regulation and control in the public interest" in order to ensure "that only qualified persons be permitted to practice dentistry in the State." N. C. Gen. Stat. Ann. §90–22(a) (2013).
- To further that end, the legislature created the North Carolina State Board of Dental Examiners "as the agency of the State for the regulation of the practice of dentistry in th[e] State." §90–22(b).
- The legislature specified the membership of the Board. §90–22(c). It defined the "practice of dentistry," §90–29(b), and it set out standards for licensing practitioners, §90–30. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. §90–41(a).
- The legislature empowered the Board to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from . . . unlawfully practicing dentistry." §90–40.1(a). It authorized the Board to conduct investigations and to hire legal

counsel, and the legislature made any "notice or statement of charges against any licensee" a public record under state law. §§ 90–41(d)–(g).

- The legislature empowered the Board "to enact rules and regulations governing the practice of dentistry within the State," consistent with relevant statutes. §90–48. It has required that any such rules be included in the Board's annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature's Joint Regulatory Reform Committee. §93B–2. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid.*

As this regulatory regime demonstrates, North Carolina's Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

The Board is not a private or "nonsovereign" entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not "'give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.'" *Ante*, at 7 (quoting *Parker*, 317 U. S., at 351). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904), to show what it had in mind. In that case, the Court held that a State's act of chartering a corporation did not shield the corporation's monopolizing activities from federal antitrust law. *Id.*, at 344–345. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and

safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are "controlled by active market participants," *ante*, at 12, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker*, 317 U. S., at 346. If the Commission then agreed that a marketing plan was warranted, the Commission would "select a program committee *from among nominees chosen by the qualified producers*." *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id.*, at 347. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a "sovereign" when it "adopt[ed] and enforc[ed] the prorate program." *Id.*, at 352. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the

Parker doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both "'clearly articulated'" and "'actively supervised by the State itself.'" 445 U. S., at 105. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. And for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina.

Our decision in *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985), which involved Sherman Act claims against a municipality, not a State agency, is similarly inapplicable. In *Hallie*, the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities "are not themselves sovereign." 471 U. S., at 38. But recognizing that a municipality is "an arm of the State," *id.*, at 45, the Court held that a municipality should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), 471 U. S., at 46. That municipalities

are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.

Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N. Y.* v. *Chatham County*, 547 U. S. 189, 193 (2006), and California's sovereignty provided the foundation for the decision in *Parker*, *supra*, at 352. Municipalities are not sovereign. *Jinks* v. *Richland County*, 538 U. S. 456, 466 (2003). And for this reason, federal law often treats municipalities differently from States. Compare *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 71 (1989) ("[N]either a State nor its officials acting it their official capacities are 'persons' under [42 U. S. C.] §1983"), with *Monell* v. *City Dept. of Social Servs., New York*, 436 U. S. 658, 694 (1978) (municipalities liable under §1983 where "execution of a government's policy or custom . . . inflicts the injury").

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court's approach, the North Carolina Board of Dental Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court's analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had

engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *Id.*, at 374. The Sherman Act, we said, is not an anticorruption or good-government statute. 499 U. S., at 398. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U. S., at 374–379. But that is essentially what the Court has done here.

III

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. 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 lay people have little expertise.

As a result of today's decision, States may find it necessary to change the composition of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because "active market participants" constitute "a controlling number of [the] decisionmakers," *ante,* at 14, but this test raises many questions.

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circum-

stances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person "active" in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.[6] So why ask only whether

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[6]See, *e.g.*, R. Noll, Reforming Regulation 40–43, 46 (1971); J. Wilson, The Politics of Regulation 357–394 (1980). Indeed, it has even been

the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision.

IV

The Court has created a new standard for distinguishing between private and state actors for purposes of federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

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charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, "The Nader Report" on the Federal Trade Commission vii–xiv (1969); Posner, Federal Trade Commission, Chi. L. Rev. 47, 82–84 (1969).

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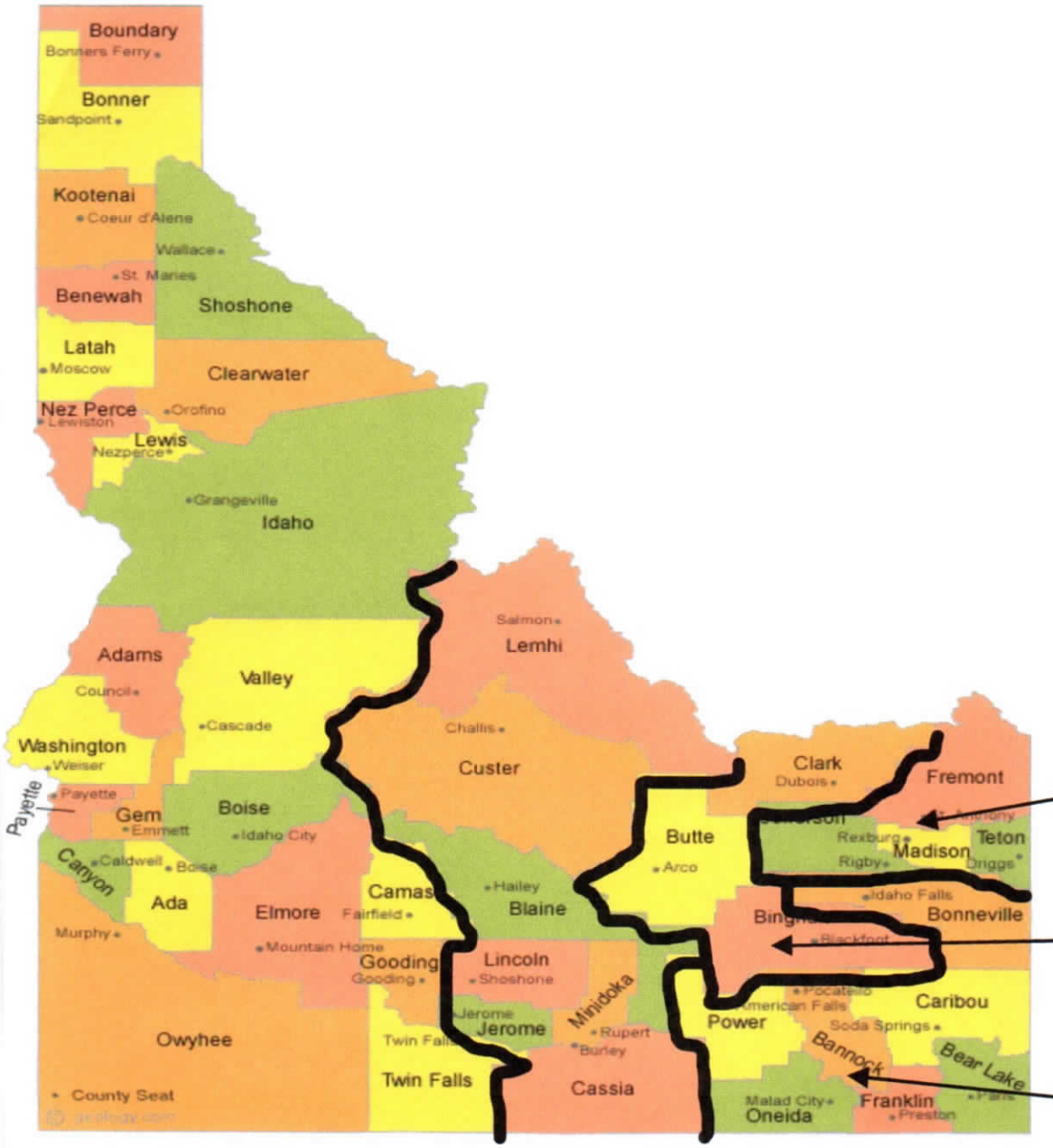
Current Districts

3	2A	2B	1
3%	12%	17%	~~67%~~ 67%
1	1	1	2

Proposed Districts



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8/1/2018

To whom it may concern:

My name is Andrew Mickelsen. I am a seventh generation Idaho Potato Farmer. My family operation has focused on Idaho Potato production for far longer than I have been alive. While we grow some other crops, potatoes are our passion and focus. From our humble beginnings we now grow seed potatoes, grow commercial fresh and process potatoes, package potatoes and process potatoes. Our livelihood literally depends on the success of the Idaho Potato markets price and demand. Without potatoes our operation could not succeed. While many could say they depend on the Idaho Potato as much as we do, no one could say they depend on it more. Our comments and pushes for changes within the commission is not a reckless attempt to destroy the Idaho Potato. Instead, we are pushing for changes so that the Idaho Potato can thrive through my lifetime and the lifetimes of my children.

In order for the continued success of the Idaho Potato changes must be made. Representation on the Idaho Potato Commission is key. Whenever an issue arises about the Idaho Potato everyone turns first to the Idaho Potato Commission. That is why it is so important that we have proper representation on the commission. Additionally, ~2.5% of our cost of growing each crop of potatoes is our dues to the Idaho Potato Commission. Anyone who farms knows that 2.5% can be the difference between making it or breaking it farming. We pay approximately $50 an acre for the commission.

It can not be questioned that the Idaho Potato Commission has helped build and strengthen the Idaho Potato. The commission must be given credit for their accomplishments over the years. We would not be where we are today without the Idaho Potato Commission.

The current election and makeup of commissioner districts does not provide fair or equal representation to Idaho Potato Growers. The districts are unevenly split. The election of commissioners is politicized by having the governor select one out three names submitted. We can never trust that the commissioner we are voting for will be put on the commission. Currently, growers control 5 of the 9 commissioner seats. The IPC tax is intended to charge the growers, processor, and shippers. While farmers all wish that when an additional cost is added to their operation they could pass it on to the consumers, the reality is the farmer is the one who ends up paying. Whether that means we have to cut costs elsewhere or find ways to be more productive. Farmers end up footing the bill.

The Washington Potato Commission is designed with the farmers in mind. 9 of their 15 commissioners are growers. 5 commissioners are appointed by the 9 grower commissioners. The 15th commissioner is appointed by the Washington Department of Ag. Their commissioners are directly elected by their growers. If the commission is not running the way the growers want then the growers can put in the commissioners they want. Because the commissioners are elected directly they are far more accountable to growers than they are the governor.

The Idaho Potato Commission has carved out 2 seats for processors and 2 seats for shippers on the commission. In the state there are 9 Licensed Fresh Idaho Potato Processors. 22% of processors are represented at all times. In the state there are about 40 Licensed Fresh Idaho Potato Shippers. 5% of sheds are represented at all times by commissioners. Assuming an average of 500 acres of potatoes per farmer there would be 640 potato farmers in Idaho. Less than 1% of growers are represented on the commission. This does not sound like one man one vote.

It is time for growers to be in control of the commission. Growers are smart and capable enough to be able to vote for the proper industry representatives to put on the commission, to think about more than just their farm, to be able to decide what is the right amount to spend on marketing. If growers mess up the commission they will be the ones who pay the price. Let growers have the power to decide their own fate. If shippers and processors are going to have guaranteed seats on the commission let the growers vote them in. The growers most appropriately represent processors and shippers. The processors and shippers get every potato they use from growers.

If we can resolve these concerns on the commission we can move the Idaho Potato forward to greater success than ever before. Idaho Growers have built that brand by working as hard and diligently as they do to provide the highest quality potato.

_____

Andrew Mickelsen

EXHIBIT 130

WAC 16-516-020

Potato commission.

(1) Establishment and membership. A potato commission is hereby established to administer this marketing order which shall be composed of nine members who shall be producers elected from districts as provided in subsections (2) and (3) of this section and five members who shall be appointed by the elected producer members as provided in subsection (4) of this section. In addition, the director shall appoint one member to the commission to represent the director as a voting member of the commission.

(2) Representative districts. For the purpose of nomination and selection of producer members of the commission, the affected area of the state of Washington shall be divided into three representative districts as follows:

(a) "District No. 1" shall be and include the counties of Douglas, Chelan, Okanogan, Grant, Adams, Ferry, Stevens, Pend Oreille, Spokane, Whitman and Lincoln.

(b) "District No. 2" shall be and include the counties of Kittitas, Yakima, Klickitat, Benton, Franklin, Walla Walla, Columbia, Garfield, and Asotin.

(c) "District No. 3" shall be and include the counties of Skagit and all other counties in the state of Washington.

(3) Elected membership. Producer members shall be elected from the districts as follows:

(a) Positions 1, 2, 3, and 4 shall be elected from District No. 1.

(b) Positions 5, 6, 7, and 8 shall be elected from District No. 2.

(c) Position 9 shall be elected from District No. 3.

(4) Appointed membership.

(a) Positions 10, 11, 12, 13, and 14 shall be appointed by the elected producers as provided in subsections (1) and (5)(b) of this section.

(b) Position 15 shall be appointed by the director as provided in subsection (1) of this section.

(5) Membership qualifications. Commission members shall be citizens and residents of this state, over the age of eighteen years.

(a) Producer members of the commission shall be producers of potatoes in the district in and for which they are nominated and elected. The producer members shall be and have been actively engaged in producing potatoes for a period of at least three years, and shall derive a substantial proportion of their incomes from the sale of potatoes. A producer member of the commission must have paid an assessment to the commission on potatoes in each of the preceding three calendar years. The qualifications of producer members of the commission as herein set forth must continue during their term of office.

(b) Members of the commission appointed by the elected producers to positions 10, 11, 12, 13, and 14 shall be potato producers or handlers or others active in matters directly relating to Washington state potatoes and have a demonstrated record of service in the potato industry in Washington state.

(6) Term of office. The term of office of the elected and appointed producer members of the commission shall be three years from the date of their election or appointment and until their successors are elected or appointed and qualified. Commencing on July 1, 2005, the term of office for members of the commission shall be as follows: Positions 1, 5 and 7 shall terminate June 30, 2008; positions 3, 4 and 6 shall terminate June 30, 2006; positions 2, 8 and 9 shall terminate June 30, 2007; positions 10 and 11 shall terminate June 30, 2008;

positions 12 and 14 shall terminate June 30, 2006; and position 13 shall terminate June 30, 2007.

(7) Nomination and election of commission members. Nomination and election of commission members shall be as set forth in the act and specified by the director. Dates will be set as follows:

(a) Not earlier than March 18 and not later than April 2 of each year, the director shall give notice by mail to all producers in each district in which one or more open positions will occur in the commission and call for nominations. Nominating petitions shall be signed by five persons qualified to vote for such candidates. Such notice shall state the final date for filing said petitions which shall be not earlier than April 7 and not later than April 12 of each year.

(b) Not earlier than April 17 and not later than May 2 of each year, the director shall mail ballots to all affected producers in each district in which one or more open positions will occur. Ballots must be received by the director not later than June 1 of such year. Such mailed ballot shall be conducted in a manner so that it shall be a secret ballot in accordance with rules adopted by the director. An affected producer is entitled to one vote.

(c) Each appointed producer member of the commission shall be elected by majority vote of the elected commissioners in a public vote at a public meeting held within ninety days prior to the expiration of the appointed member's term.

(8) Vacancies. In the event of a vacancy on the board in an elected or commission-appointed position, the remaining members shall select a qualified person to fill the unexpired term. The appointment shall be made at the board's first or second meeting after the position becomes vacant. Any member so appointed shall serve until the normal expiration of his or her term.

(9) Powers and duties of commission. The commission shall have the following powers and duties:

(a) To administer, enforce, direct and control the provisions of this marketing order and of the act relating thereto;

(b) To elect a chairman and such other officers as the commission may deem advisable; and to select subcommittees of commission members;

(c) To adopt, rescind, and amend rules reasonably necessary for the administration and operation of the commission and the enforcement of its duties under this marketing order;

(d) To employ and discharge at its discretion such administrators and additional personnel, attorneys, research agencies and other persons and firms that it may deem appropriate and pay compensation to the same;

(e) To acquire personal property and lease office space and other necessary real property and transfer and convey the same;

(f) To institute and maintain in its own name any and all legal actions, including actions by injunction, mandatory injunction or civil recovery, or proceedings before administrative tribunals or other governmental authorities necessary to carry out the provisions of the act and of this marketing order;

(g) To keep accurate records of all its receipts and disbursements, which records shall be open to inspection and audit by the department and other legal agencies of the state and make annual reports therefrom to the state auditor;

(h) To borrow money and incur indebtedness;

(i) To make necessary disbursements for routine operating expenses;

(j) To collect the assessments of producers as provided in this marketing order and to expend the same in accordance with and to effectuate the purposes of the act and this marketing order;

(k) To prepare a budget or budgets covering anticipated income and expenses to be incurred in carrying out the provisions of this marketing order during each fiscal year. The commission, at least forty-five days prior to the beginning of its fiscal year, shall prepare and submit to the director its budget, research plan, and its commodity-related education and training plan;

(l) To accept and receive gifts and grants from private persons or private and public agencies and expend the same to effectuate the purposes of the act and this order;

(m) To work cooperatively with other local, state, and federal agencies; universities; and national organizations for the purposes set forth in this marketing order;

(n) To enter into contracts or interagency agreements with any private or public agency, whether federal, state, or local, to carry out the purposes set forth in this marketing order. Personal service contracts must comply with chapter **39.29** RCW;

(o) To enter into contracts or agreements for research in the production, irrigation, processing, transportation, use, distribution and trade barriers impacting potatoes and potato products;

(p) To retain in emergent situations the services of private legal counsel to conduct legal actions on behalf of the commission. The retention of a private attorney is subject to review by the office of the attorney general;

(q) To participate in international, federal, state, and local hearings, meetings, and other proceedings relating to the production, irrigation, manufacture, regulation, transportation, distribution, sale or use of potatoes as requested by any elected official or officer or employee of any agency and as authorized under RCW **42.17.190**, including the reporting of those activities to the public disclosure commission;

(r) To assist and cooperate with the department or any other local, state, or federal government agency in the investigation and control of exotic pests and diseases that could damage or affect trade of the affected commodity;

(s) To acquire or own intellectual property rights, licenses, or patents and to collect royalties resulting from commission-funded research related to the affected commodity;

(t) To engage in appropriate fund-raising activities for the purpose of supporting activities of the commission authorized by this marketing order;

(u) To establish a foundation using commission funds as grant money for the purposes established in this marketing order;

(v) To maintain a list of the names and addresses of affected producers that may be compiled from information used to collect assessments under the provisions of this marketing order and data on the value of each producer's production for a minimum three-year period pursuant to RCW **15.66.140**(18);

(w) To maintain a list of the names and addresses of persons who handle potatoes within the affected area and data on the amount and value of the potatoes handled by each person pursuant to RCW **15.66.140**(19) for a minimum three-year period;

(x) To maintain a list of names and addresses of all affected persons who produce potatoes and the amount, by unit, of potatoes produced during the past three years pursuant to RCW **15.66.143**(1);

(y) To maintain a list of all persons who handle potatoes and the amount of potatoes handled by each person during the past three years pursuant to RCW **15.66.143**(2);

(z) To check records of producers or handlers of the affected commodity during normal business hours to determine whether the appropriate assessment has been paid; and

(aa) To exercise such other powers and perform such other duties as are necessary and proper to effectuate the purposes of the act and of this order.

(10) Procedure for commission.

(a) The commission shall by resolution establish a headquarters which shall continue as such unless and until so changed by the commission, at which headquarters shall be kept the books, records and minutes of the commission meetings.

(b) The commission shall hold regular meetings at least quarterly, with the time and date thereof to be fixed by the resolution of the commission. Notice of the meetings shall be published in the potato commission newsletter and sent to the appropriate general and agricultural media outlets.

(c) The commission may hold such special meetings as it may deem advisable and shall establish by resolution the time, place and manner of calling such special meetings with reasonable notice as required in RCW **42.30.080**.

(d) Any action taken by the commission shall require the majority vote of the members present, provided a quorum is present.

(e) A quorum of the commission shall consist of at least nine members.

(f) No members of the commission shall receive any salary or other compensation from the commission, except that each member shall be paid a specified sum to be determined by resolution of the commission, which shall not exceed the compensation rate set by RCW **43.03.230** or state travel expense rates in accordance with RCW **43.03.050** and **43.03.060** for each day spent in actual attendance at or traveling to and from meetings of the commission or on special assignments for the commission, except the commission may adopt by resolution provisions for reimbursement of actual travel expenses incurred by members of the commission in carrying out the provisions of this marketing order pursuant to RCW **15.66.130**.

(11) Limitation of liability of commission members and employees. Obligations incurred by the commission and any other liabilities or claims against the commission shall be enforced only against the assets of the commission in the same manner as if it were a corporation and no liability for the debts or actions of the commission shall exist against either the state of Washington or any subdivision or instrumentality thereof or against any other commission established pursuant to the act or the assets thereof or against any member officer, employee or agent of the commission in his individual capacity. The members of the commission, including employees thereof, shall not be held responsible individually in any way whatsoever to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as principal agent, person, or employee, except for their own individual acts of dishonesty or crime. No such person or employee shall be held responsible individually for any act or omission of any other member of the commission. The liability of the members of the commission shall be several and not joint and no member shall be liable for the default of any other member.

[Statutory Authority: RCW **15.66.030**, **15.66.053**, **15.66.055**, and chapter **34.05** RCW. WSR 06-03-003, § 16-516-020, filed 1/4/06, effective 2/4/06. Statutory Authority: RCW **15.66.020**. WSR 00-11-180, § 16-516-020, filed 5/24/00, effective 6/24/00. Statutory Authority: RCW **15.66.090**. WSR 80-05-073 (Order 1684), § 16-516-020, filed 4/28/80, effective 6/1/80; Marketing Order, Article II, effective 7/23/56.]

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THE IDAHO POTATO COMMISSION

Established in 1937, the Idaho Potato Commission (IPC) is a state agency that is responsible for promoting and protecting the famous "Grown in Idaho®" seal, a federally registered trademark that assures consumers they are purchasing genuine, top-quality Idaho® potatoes. Idaho's ideal growing conditions, including rich, volcanic soil, climate and irrigation differentiate Idaho® potatoes from potatoes grown in other states.

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FAQs (/frequently-asked-questions)
Contact (/contact)