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REGULATORY BOARD REVIEW

WEST VIRGINIA BOARD OF DENTAL EXAMINERS

AUDIT OVERVIEW

The Licensure of Dentists and Dental Hygienists by the West Virginia Board of Dental Examiners Is Necessary to Protect the Public

The Board of Dental Examiners Is in Compliance With the General Provisions of Chapter 30

The Board of Dental Examiners Has Complied With Most Recommendations Made in Two Reports Issued in 2005

West Virginia Code §60A-9-4(d) May Create a Loophole Allowing Prescription Drugs to Be Dispensed Without Being Reported to the Controlled Substance Monitoring Datebase

WEST VIRGINIA LEGISLATIVE AUDITOR
PERFORMANCE EVALUATION & RESEARCH DIVISION

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CONTENTS

List of Tables

List of Appendices

EXECUTIVE SUMMARY

This Regulatory Board Review of the West Virginia Board of Dental Examiners is authorized and required by West Virginia Code §4-10-10 to determine its viability as well as its compliance with applicable laws, rules, and best practices. The Board has licensed an average of 2,470 dentists and dental hygienists per year since 2007 and handles approximately 60 complaints against its licensees each year. The following issues are contained in this review.

Report Highlights:

The Licensure of Dentists and Dental Hygienists by the West Virginia Board of Dental Examiners Is Necessary to Protect the Public.

The West Virginia Board of Dental Examiners Is in Compliance With the General Provisions of Chapter 30.

- Although the Board was found to be in compliance with the general provisions of Chapter 30, the Legislative Auditor found that improvements can be made in the areas of public accessibility and financial solvency.

- The complaint form on the Board's website is located in the "forms" link rather than on the front page and could be difficult to find for a user unfamiliar with the page.

- Multiple file formats for the licensure verification function on the Board's website would increase its accessibility to the public.

- Regarding the Board's financial solvency, the Legislative Auditor noted that although it was self sufficient, steadily increasing expenses exceeded a stagnant revenue level in 2010.

The Board Was Found to Have Addressed Five of the Seven Recommendations Made in Two 2005 Reviews That Were Updated in This Review.

- The Board has taken the necessary actions to address the recommendations regarding serious incidents and receiving/ disseminating information, obtaining appropriate training regarding

threats to the public, and documenting Board member recusals from voting.

- The Board has complied with the recommendations that it comply with workers compensation and unemployment compensation laws by not issuing licenses or renewals to those who are in default and that it refer appropriate complaint cases to the Insurance Commissioner's Fraud Unit.

- The Board has not complied with the recommendation that it require all malpractice lawsuits be reported at the time of filing, yet believes that its current system of professional conduct checks yearly renewal information is adequate.

- The Board does not require criminal background checks at the time of application for a dental license or periodically thereafter. At this time the Board does not have statutory authority to do so.

West Virginia Code §60A-9-4(d) May Create a Loophole Allowing Prescription Drugs to Be Dispensed Without Being Reported to the Controlled Substance Monitoring Database.

- The Board of Dental Examiners, Board of Pharmacy, Board of Medicine, and Board of Osteopathy license practitioners who have access to controlled substances. West Virginia Code §60A-9-4 provides an exemption that may increase the ability for practitioners to distribute drugs without reporting.

- A "facility licensed by the state" is not defined. Legislative Services legal counsel provided that criteria exists elsewhere in Code, but is not referenced in this section or in legislative rules.

- The latter part of the exemption allows for a practitioner to dispense drugs under certain circumstances without being reported to the Controlled Substance Monitoring Database. This could provide a loophole for an unscrupulous practitioner to provide controlled substances to individuals for the purpose of personal abuse or to sell to those who do abuse them and for practitioners to profit from exploiting the reporting exemption created by this subsection.

Recommendations

1. The Legislative Auditor recommends that the Board of Dental Examiners be continued.

2. The West Virginia Board of Dental Examiners should consider providing direct access to the complaint form on the main page of the website to improve public accessibility.

3. The Board should improve the public accessibility of its web based license verification to make it more user friendly.

4. The Board should conduct a review of its financial situation and take necessary steps toward ensuring that the Board remains financially self sufficient.

5. The Board should consider requiring the notification of malpractice lawsuits against licensees at the time of filing.

6. The Legislature should consider amending West Virginia Code to authorize the Board of Dental Examiners to conduct FBI criminal background checks on applicants for initial licensure.

7. The Legislature should consider clarifying the meaning of §60A-9-4 and expressly prohibit any potential unintended consequences of this exemption.

ISSUE 1

The Licensure of Dentists and Dental Hygienists by the West Virginia Board of Dental Examiners Is Necessary to Protect the Public.

This report is a Regulatory Board Review required by law and is used to ascertain if there is a need for the continuation, consolidation or termination of the regulatory board. In determining the need for the regulatory board, the Legislative Auditor considers to the extent to which significant and discernable adverse effects on public welfare would occur if the board were abolished. The Legislative Auditor finds that the licensing of dental professionals is necessary for protecting the citizens of West Virginia.

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Statute Defines the Scope of Practice for Dentists and Dental Hygienists

The West Virginia Dental Practice Act, West Virginia Code §30-4-1, states that in order to protect the health and safety of the public, any person practicing or offering to practice as a dentist or dental hygienist must submit evidence that he or she is qualified to practice and is licensed. **The profession of dentistry is licensed in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.** The regulatory entities differ in organization by state, for example, some operate independent boards, while others are regulated by an encompassing health related agency or collection of professional boards. These entities all provide regulation through verifying credentials, monitoring of practice, hearing and investigating complaints, requiring continuing education, and establishing standards, etc.

The profession of dentistry is licensed in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

When provided the opportunity to describe why the West Virginia Board of Dental Examiners is necessary to protect the public, the Board's Executive Secretary stated that:

> *The Board of Dental Examiners adamantly believes in its mission to protect the public. Modern dentistry encompasses diagnosis of serious oral illnesses and conditions, drug prescriptions, surgery and the administration of anesthesia in the dental office, the fabrication of prosthetic devices and the use of advanced technological devices such as*

lasers. Without regulation, the public could be harmed or suffer death through the failure to competently execute any of these areas of modern dentistry.

The Legislative Auditor agrees with the Executive Secretary's statement. As with any profession that could directly impact public safety, it is critical that health care professionals such as dentists and dental hygienists are regulated. Regulation ensures a certain level of initial competency to obtain a license as well as the maintenance of that competency through continuing education requirements. In fields such as dentistry and dental hygiene, licensees must stay abreast of changes in standards, advancements in technology, and the evolving environment of diseases and illnesses. **Therefore, the Legislative Auditor finds that the Board of Dental Examiners is necessary to protect the public and recommends that it be continued.**

Regulation ensures a certain level of initial competency to obtain a license as well as the maintenance of that competency through continuing education requirements.

A fundamental function of the Board is to license dentists and dental hygienists. License requirements for both require that the applicant is at least 18 years of age, of good moral character, is a graduate of and holds a diploma of dentistry/dental hygiene from an approved college, school, or university, has passed all necessary examinations, has not been found guilty of cheating, deception, or fraud in the examination or application, and has paid the application fee. The scope of practice provided by West Virginia Code for dentists and dental hygienists, however, varies greatly. The scope of practice for dentists and dental hygienists are as follows:

Dentists

- Coordinating dental services to meet the oral health needs of the patient,
- Examining, evaluating and diagnosing diseases, disorders and conditions of the oral cavity, maxillofacial area and adjacent and associated structures,
- Treating diseases,
- Providing services to prevent diseases
- Fabricating, repairing or altering dental prosthesis,
- Administering anesthesia in accordance with the provisions of article 4(a) regarding general anesthesia and parental conscious sedation,
- Prescribing drugs necessary for the practice of dentistry,
- Executing and signing a death certificate when it is required in the practice of dentistry,
- Employing and supervising dental auxiliary personnel,

- Authorizing delegated procedures to be performed by dental auxiliary personnel, and
- Performing any other work included in the curriculum of an approved dental school, college or dental department of a university

Dental Hygienists

- Performing a complete prophylaxis, including the removal of any deposit, accretion or stain from the surface of the tooth or a restoration,
- Applying a medicinal agent to a tooth for prophylactic purpose,
- Taking a dental X-ray,
- Instructing a patient on the proper oral hygiene practice,
- Performing all delegated procedures of a dental hygienist specified by rule by the Board, and,
- Performing all delegated procedures of a dental assistant specified by rule by the Board.

In 2010, the Board licensed 2,519 individuals comprised of 1,215 dentists and 1,304 hygienists.

Table 1 shows the number of dentists and dental hygienists licensed by the Board since 2007. Each year provides the number of individuals licensed to practice that are from West Virginia and from out-of-state, but licensed to practice in West Virginia. In 2010, the Board licensed 2,519 individuals comprised of 1,215 dentists and 1,304 hygienists. A majority of licenses issued in both categories go to West Virginia professionals.

Table 1
Licenses Issued by the West Virginia Board of Dental Examiners

	Dentists			Hygienists			
	In-State	Out-of-State	Total	In-State	Out-of-State	Total	Total
2007	859	389	1,248	782	419	1,201	**2,449**
2008	849	374	1,223	812	401	1,213	**2,436**
2009	856	361	1,217	824	434	1,258	**2,475**
2010	861	354	1,215	850	454	1,304	**2,519**

Source: WV Board of Dental Examiners

Conclusion

As with many health-related regulatory boards, the Board of Dental Examiners is necessary to reduce the potential risk to the public through the regulation of the profession. Without regulation, serious harm or death could result from the failure to execute many of the procedures performed by dentists and dental hygienists. The Board's responsibility to require that individuals achieve an initial level of education and competency to obtain a license as well as maintain an appropriate level of training to maintain licensure is also essential to protect public safety. **Therefore, the Legislative Auditor recommends the Legislature consider continuing the Board of Dental Examiners.**

Without regulation, serious harm or death could result from the failure to execute many of the procedures performed by dentists and dental hygienists.

Recommendation

1. The Legislative Auditor recommends that the Board of Dental Examiners be continued.

ISSUE 2

The West Virginia Board of Dental Examiners Is in Compliance With the General Provisions of Chapter 30.

The Board of Dental Examiners was found to be in compliance with the following general provisions of Chapter 30:

- Board members and staff have attended required State Auditor's training (§30-1-2a);
- The Board has adopted an official seal (§30-1-4);
- The Board has one lay member to represent the interests of the public (§30-1-4a);
- The Board meets at least once annually (§30-1-5(a));
- The Board has promulgated rules specifying the investigation and resolution procedure of all complaints (§30-1-6(c));
- The Board has deposited money received as fines into the state general revenue fund (§30-1-10);
- The Board maintains a record of its proceedings (§30-1-12(a));
- The Board submits an annual report to the Governor and the Legislature describing budget data and transactions for the preceding two years (§30-1-12(b)); and
- The Board maintains a complete roster of the names and addresses of all persons licensed and practicing in this state, arranged alphabetically by name and also by the cities or counties in which their offices are located (§30-1-13).

The Board has complied with WVC §30-1-12(c) regarding public accessibility.

The Board Is Accessible to the Public, Yet Improvements Can Be Made to the Board's Website

The West Virginia Board of Dental Examiners' office is located in Crab Orchard, West Virginia just outside of Beckley, West Virginia. The Board has complied with WVC §30-1-12(c) which states in part that in order to promote public accessibility every board shall "ensure that the address and telephone number of the board are included every year in the state government listings of the Charleston area telephone directory." The Board also provides the additional methods of providing public access suggested in this section which include but are not limited to "listings in additional telephone directories, toll-free telephone numbers, facsimile and computer-based communications." The website maintained by the Board also contains useful information for licensees and the public such as:

- applications,
- applicable state laws and legislative rules,
- continuing education requirements,
- Board meeting calendar,
- newsletters,
- disciplinary actions,
- guidelines and position statements,
- license verifications,
- forms (annual reporting, complaint, and donated dental services), and
- general staff and board member information.

Having the complaint form available as a direct link on the main page of the website, appropriately labeled, would remove any doubt that a member of the public would be able to locate it.

Although the Board's website contains information useful to licensees and the public, some improvements can be made. As stated above, the Board does have a complaint form available in the "forms" section. Licensees of the Board who are familiar with the website may not have any trouble finding this form, but the general public may. Having the complaint form available as a direct link on the main page of the website, appropriately labeled, would remove any doubt that a member of the public would be able to locate it. The Legislative Auditor found several other regulatory board websites that have a link to the complaint form or a link to the complaint process located on the front page. **Therefore, the Legislative Auditor recommends that the Board consider providing direct access to the complaint form on the main page of its website to improve public accessibility.**

Providing licensure verification information on the web in a searchable database would provide increased ease of use and would eliminate the file format issue.

The license verification section of the web page provides a list of licensed dentists and hygienists so that members of the public may confirm an individual's status with the Board. Currently, this list is available to download in Microsoft Excel file format only. A user that does not have this particular software would either not be able to access this information or would at least experience difficulty doing so. **Providing this information on the web in a searchable database would provide increased ease of use and would eliminate the file format issue.** Although this would be ideal, the Board should at least consider providing the information in a number of different file formats to increase the probability that a user could access it. **The Legislative Auditor recommends that the Board improve the web based license verification information on its website to make it more user friendly.**

Although the Board Is Currently Financially Self Sufficient, the Trend of Expenses Exceeding Revenues Raises Concerns Regarding Its Long-Term Solvency

West Virginia Code §30-1-6(c) states that the Board may set by rule fees that "shall be sufficient to enable the board to carry out effectively their responsibilities of licensure or registration and discipline of individuals subject to their authority." The Legislative Auditor's 2005 regulatory board review identified that the West Virginia Board of Dental Examiners experienced cash-flow issues following every fiscal year until renewal revenue was received and that this may indicate that revenues were approaching a point where they were becoming insufficient for prudent operations.

Following the 2005 evaluation, the Board updated its legislative rules to reflect an increase in fees.

Following the 2005 evaluation, the Board updated its legislative rules to reflect an increase in fees. In general, the Board increased fees in both dollar amount and the number of fees. For example, the previous fee schedule charged $50 for dental licensure applications and $125 for annual information and renewal. The new schedule, effective in 2006, charges $150 each for a dental licensure application/annual information and renewal. Table 2 shows the primary fees charged to dentists and hygienists under the two different fee schedules.

Table 2
Current Fees for Dentists and Hygienists Compared to Previous Fee Schedule

	Dentists		Hygienists	
	Current	Previous	Current	Previous
Licensure Application	$150	$50	$60	$35
Re-examination Fee	$20	-	$20	$10
Out of State Licensure Application	$150	$100	$60	$50
Temporary Permit	$150	$100	$100	$100
Dental Intern/Dental Residency Permit	$100	$50	-	-
Teaching Permit	$150	$100	$100	$100
Annual Information & Renewal Fee	$150	$125	$65	$50

Source: WV Board of Dental Examiners Legislative Rule Title 5, Series 3 for 2001, 2006

The Board has also enacted additional fees that did not exist under the 2001 fee schedule. Dental hygienists now are charged fees for certificates such as local anesthesia, nitrous oxide monitoring, and bleaching at a cost of $25 each. Fees charged for anesthesia certificates are charged at two levels. The class two certification application fee is $50 with a renewal cost of $25. Class three and four certification are $600 for an application fee and $200 for a renewal. Most other additions to the fee schedule are miscellaneous fees for administrative functions such as verification of licensure, continuing education course approval, and for miscellaneous copies.

Although there has been a slight decrease in total licensees, the increase in existing fees and the addition of anesthesia certification and other fees has resulted in the Board's increased end-of-year balance. This balance has risen from an average of $74,598 for FY 2002-2005 to $235,207 for FY 2007-2010. Table 3 shows the fiscal year, beginning cash balance, revenues, expenses, and end-of-year cash balance.

Table 3 shows a healthy end-of-year cash balance, yet it must be noted that the Board's expenses exceeded revenues by $52,161 in FY 2010. This is a product of steady revenue levels while expenses have increased by $151,754 from FY 2007 – FY 2010.

Table 3
Board of Dental Examiners Financial Data
FY 2007-2010

Fiscal Year	Beginning Cash Balance	Revenues	Expenses	End-of-Year Cash Balance
2007	$90,798	$377,967	$286,351	$182,415
2008	$182,415	$387,824	$303,977	$266,262
2009	$266,262	$387,281	$381,387	$272,156
2010	$272,156	$385,944	$438,105	$219,995

Source: Legislative Auditors Office, Digest of Revenue Sources in West Virginia

Table 3 shows a healthy end-of-year cash balance, yet it must be noted that the Board's expenses exceeded revenues by $52,161 in FY 2010. This is a product of steady revenue levels while expenses have increased by $151,754 from FY 2007 – FY 2010. According to the Board's Executive Secretary, the Board first sought a part-time assignment of an Attorney General in 2007, and eventually a full-time relationship in 2009, due to an increase in case load. Also, the Board contracts with outside dental experts for certain cases. Both of these contractual and professional services expenses have contributed to the increase in expenses. Other stated factors responsible for the increase in

expenses are increases in salaries, printing costs, meeting expenditures, utilities, association dues, postage, mandatory WV OPEB contribution, as well as national and regional travel for active Board members. In response, the Board's Executive Secretary stated that:

> *The President and staff will undertake a review of our expenses and revenue to determine a plan of action to keep the Board financially sound.*

The Legislative Auditor agrees that in light of increasing expenses and stagnant revenues, an analysis must be done to identify corrective actions to ensure the long-term financial stability of the Board.

The Legislative Auditor agrees that in light of increasing expenses and stagnant revenues, an analysis must be done to identify corrective actions to ensure the long-term financial stability of the Board. **Thus, the Legislative Auditor recommends that the Board conduct a review of its financial situation and take necessary steps toward ensuring that the Board remains financially self sufficient.**

The Board Investigates and Resolves Complaints in a Timely Manner and With Due Process

The West Virginia Board of Dental Examiners adheres to a complaint process specified both by legislative rule and an internal procedure created by the Board. Complaints are either received externally from any person, firm, corporation, or public officer or initiated internally by the Board. The complaint form for external complaints is available on the Board's website and an internal reporting form has been developed for Board initiated complaints.

The complaint form for external complaints is available on the Board's website and an internal reporting form has been developed for Board initiated complaints.

Upon receipt, a complaint is entered into the complaint log and the complainant receives acknowledgement of its receipt and whether the matter will be reviewed by the Board or a statement that it is outside the jurisdiction of the Board. If the matter is to be reviewed by the Board, a copy of the complaint and any supporting documentation is sent to the licensee. The licensee has 30 days to respond to all issues of the complaint as well as provide relevant documentation. This response is then forwarded to the complainant. In the event that an investigation is required to determine the truth and validity of the allegations, the Board's investigator generates a report. The disciplinary committee of the Board will review the investigator's report, or conduct the investigation if no investigator is necessary, and report the findings with recommendations to the Board. If no probable cause exists, the complaint is dismissed. If probable cause is present, the Board either issues a consent decree or a

statement of charges and notice of a hearing. Hearings are set by the Board and heard by at least one member or a hearing examiner. Recommended decisions are presented to the full Board for review and voted on to either be adopted or modified. Appropriate disciplinary actions are voted on at this time as well. Communication of the final order is to be sent by certified mail with 30 days to appeal to circuit court. The Executive Secretary also indicated that it is the Board's policy to send a status update per §30-1-5(c).

The Board received 237 complaints from January 1, 2007 through calendar year 2010.

Table 4 shows the complaints received by the Board for calendar years 2007 through 2010. Contained in the table are the total number of complaints filed, resolved complaints, and ongoing complaints along with the average number of calendar days from receipt to resolution.

Table 4
Complaint Information (2007-2010)

Year	Number	Resolved	Ongoing	Average Duration*
2007	52	51	1	166
2008	64	62	2	121
2009	58	53	5	135
2010	63	51	12	103
Total	**237**	**217**	**20**	**131**

**=Resolved complaints in calendar days*
Source: Complaint Log provided by WV Board of Dental Examiners

The Board received 237 complaints from January 1, 2007 through calendar year 2010. This equals roughly 59 complaints per calendar year. The average number of days to resolve a complaint for the specified time period was 131 days, or a little over 4 months.

The average number of days to resolve a complaint for the specified time period was 131 days, or a little over 4 months.

The Legislative Auditor also received an update on the number of complaints filed for calendar year 2011, through April 6. This update showed that 157 cases existed, with 5 being generated internally. This number is nearly three times the Board's yearly average. When asked why this total is significantly higher, the Board stated that "the increased number of complaints this year is due to the abrupt closure of Allcare Dental and Dentures Charleston office." The national chain had roughly 40 locations in 14 states and was forced to close suddenly in January 2011 due to cash flow issues.

The Legislative Auditor inquired as to the reason for the extended period of time taken on complaints still ongoing from 2007 and 2008. In all of these cases, the Board indicated that the use of an out-of-state expert had to be utilized for review. Specifically, the lone case from 2007 had two defendants that were prosecuted separately. This case is currently being negotiated with the opposing counsel for a resolution. Regarding the cases from 2008, in one case the Board has received a signed Consent Decree, which the Board will review for possible approval during its next meeting and the other involves an individual whom has since moved to California and is still ongoing.

The subject matter of complaints listed on the complaint log vary from administrative issues such as failure to renew a license or submit continuing education credits to issues of malpractice and unsatisfactory work. The most common subject areas for which external complaints are filed are unsatisfactory work, pharmaceutical issues, and general standard of work issues. The most common resolution to complaints is for the Board to take no further action due to a lack of probable cause, followed by issuing consent decrees and investigations that are still ongoing.

Continuing education hours are required biennially and must total not less than 35 hours and 20 hours for dentists and dental hygienists respectively.

The Board Has Established Continuing Education Requirements

Legislative rule §5-1-10 for the West Virginia Board of Dental Examiners establishes the continuing education requirements for dentists, dental hygienists, and anesthesia certificate holders. Continuing education hours are required biennially and must total not less than 35 hours and 20 hours for dentists and dental hygienists respectively. Table 5 shows the continuing education requirements, as well as the duration of the license cycle, for West Virginia dentists and dental hygienists compared to surrounding states and the national average. West Virginia appears to be comparable in both the number of hours required and license cycle duration.

West Virginia dentists and dental hygienists compare favorably to surrounding states and the national average in both the number of hours required and license cycle duration.

Table 5
Continuing Education Requirements for West Virginia and Surrounding States

	Hours Required		
	Dentist	Hygienist	Cycle Length
Kentucky	15	15	1 Year
Maryland	30	30	2 Years
Ohio	40	12	2 Years
Pennsylvania	30	20	2 Years
Virginia	15	15	1 Year
West Virginia	**35**	**20**	**2 Years**
National Average	***38.64***	***24.24***	***2.06***

Source: American Dental Association, Department of State Government Affairs

Each licensee is responsible for maintaining their own records and is subject to a random audit by the Board.

These hours must be obtained from a Board approved provider. In this rule, a list of 19 providers is presented for which any course or program offered will be accepted. Contained in this list are general descriptions such as "an accredited dental or dental hygiene school" as well as specific organizations such as the American Dental Association and the American Red Cross. Providers not identified in the list may petition the Board for approval for a duration of two years. In addition to dentists and dental hygienists, class 2 anesthesia certificate holders must complete at least 6 hours of continuing education, while class 3 and 4 permit holders must complete 16 hours. These hours must be completed in one or more of a provided list of areas such as oral or nitrous oxide sedation and conscious sedation.

Every 2 years the Board conducts a total of 100 continuing education audits, or roughly 4% of total licensees on average. The population consists of 50 dentists and 50 hygienists.

Each licensee is responsible for maintaining their own records and is subject to a random audit by the Board. Licensees that cannot complete an audit, have not completed the required hours, or provide false statements of such for renewal are subject to non-renewal by the Board as well as monetary fines and other disciplinary actions. Every 2 years the Board conducts a total of 100 continuing education audits, or roughly 4% of total licensees on average. The population consists of 50 dentists and 50 hygienists. Since 2007, two consent decrees have been issued to licensees that did not respond to a continuing education audit. In the Board complaint log, three other licensees were cited for being "non compliant with continuing education requirements" although these issues were identified upon submitting documentation to the Board at

the time of license renewal and not the result of an audit. In the event that a licensee does not satisfy the continuing education requirements, the Board allows six months to come into compliance. A reporting form is required to be completed on even years by the first of February and supporting documentation is required in the event of an audit.

Conclusion

The West Virginia Board of Dental Examiners is in compliance with the general provisions of Chapter 30. The Board is accessible to the public and provides relevant information for licensees and the public on its website. Although the complaint form and licensure verification are available on this page, improvements can be made to increase the ease with which the public can access this information. An increase in fees in 2006 has provided the Board with a healthy cash balance, yet the Board needs to assess its financial situation and make the necessary adjustments to ensure that steadily increasing expenses do not threaten the solvency of the Board. Complaints are resolved with due process with an average resolution time of nearly four months. Finally, the Board has established and maintained continuing education requirements that are on par with surrounding states and the national average. The Board's random audit of continuing education enhances licensees' compliance with their important responsibility.

The West Virginia Board of Dental Examiners is in compliance with the general provisions of Chapter 30.

Recommendations

2. The Legislative Auditor recommends that the West Virginia Board of Dental Examiners consider providing direct access to the complaint form on the main page of the website to improve public accessibility.

3. The Legislative Auditor recommends that the Board improve the public accessibility of its web based license verification to make it more user friendly.

4. The Legislative Auditor recommends that the Board conduct a review of its financial situation and take necessary steps toward ensuring that the Board remains financially self sufficient.

ISSUE 3

The Board of Dental Examiners Has Complied With Most Recommendations Made in Two Reports Issued in 2005.

In 2005, the Legislative Auditor issued two reports on the West Virginia Board of Dental Examiners. The first was released in September 2005 and focused on the fact that although the Board had an adequate process for the licensing of dentists, proper procedures needed to be put in place to ensure public safety. The second review was released in November 2005 and covered the necessity of the Board to protect the public, its compliance with the provisions of Chapter 30, and provided an update on the Board's payment of retroactive service credit for a former executive secretary.

In 2005, the Legislative Auditor issued two reports on the West Virginia Board of Dental Examiners. The first was released in September 2005. The second review was released in November 2005.

Following the release of the second review in 2005, the Board's Executive Secretary tendered his resignation. The current Executive Secretary, hired in 2006, started the Board's progress toward implementing the recommendations made by the Legislative Auditor. The following is an update of the Board's progress toward addressing the concerns.

The Board Has Addressed Most of the Recommendations Made in Two Reviews Released in September and November 2005, With the Exception of Malpractice Suit Reporting and Conducting Criminal Background Checks

The September 2005 review cited two specific incidents that put the public at risk.

The September 2005 review cited two specific incidents that put the public at risk. The first of which was a mortality report relating to a dentist's administration of general anesthesia. The former Executive Secretary who received the report did not disseminate the information to the Board members in a timely fashion, and the fatality was not investigated to assess potential risk to public safety until a formal complaint was filed 14 months later. The second event involved a dentist who was practicing on patients while in an alleged confused and disoriented state. Upon receipt of this complaint, the Board immediately suspended the license of the dentist, but did not set a hearing date until 80 days later. At the time, this did not offer proper due process to the dentist and the license had to be reinstated. Because of this oversight and lack of an expedited hearing, the public may have been at risk for an extended period of time.

As a result of the Legislative Auditor's analysis of these situations, a number of recommendations were issued to the Board. The Board was urged to respond appropriately to all serious reports of malpractice to the extent of its authority, adopt a definition of serious incidents and adopt a policy and procedure on how to receive and distribute information to Board members, conduct criminal background checks, and require licensees to report malpractice lawsuits filed against them. **The Legislative Auditor did not find any evidence that the Board was not following the initial recommendation of the September 2005 review covering the Board's response to reports of malpractice and serious incidents**.

The Legislative Auditor did not find any evidence that the Board was not following the initial recommendation of the September 2005 review covering the Board's response to reports of malpractice and serious incidents.

The November 2005 regulatory board review addressed the need to protect the public through the licensure of dental professionals and the Board's compliance with the general provisions of Chapter 30. The Legislative Auditor recommended that Board staff needed to receive training on what constitutes an immediate threat to the public, the practice of documenting Board member recusals in meeting minutes, and what procedures needed to be followed to properly suspend a license. There was also concern about the practice of renewing licenses to individuals who were in violation of the worker's compensation and unemployment compensation laws by being in default of these funds. The following bulleted series states the recommendations made by the Legislative Auditor as well as how the Board has addressed the issue.

<u>The Board Has Addressed the Following Recommendations:</u>

- **The Board should adopt a definition of serious incidents and a policy and procedure on how to receive information and disseminate such information to Board members. (September 2005)**

  To date, the Board has not adopted a definition of serious incidents. The Executive Secretary of the Board did, however, provide a list of proposed legislation for the upcoming session which includes such an addition. House Bill 2498 passed in the 2011 regular session and amended §30-4-20(a)(8) to add "failing to report to the board within 72 hours of becoming aware thereof any life threatening occurrence, serious injury, or death of a patient resulting from dental treatment or complications following a dental procedure" to the list of occurrences that the Board may refuse to issue, refuse to renew, suspend, revoke, or take disciplinary action against. This would be a change from the current requirement that only mandates that holders of anesthesia permits report deaths only.

To date, the Board has not adopted a definition of serious incidents. The Executive Secretary of the Board did, however, provide a list of proposed legislation for the upcoming session which includes such an addition.

With respect to the creation of policy and procedure regarding the dissemination of information to Board members, the Board has developed an internal reporting system. This allows the Board to investigate any event the Board deems necessary and has received from anonymous information, news articles, malpractice reports, etc. To aide in the dissemination of information to all board members, the Board created an internal reporting form. This form contains information on the licensee as well as a description of the incident and other pertinent information. Since the inception of this process in 2007, the Board has initiated 63 of these internal reports. The subject matter of these cases mirror that of external complaints in that they generally have dealt with standard of care, pharmaceutical issues, and general unprofessional conduct. **The Legislative Auditor concludes that the Board has addressed this recommendation**.

With respect to the creation of policy and procedure regarding the dissemination of information to Board members, the Board has developed an internal reporting system.

- **The Board members and staff need to obtain appropriate training regarding incidents that present a threat to the public. (November 2005)**

The Executive Secretary indicated that members receive regular and periodic training. Several members have received training from a number of entities such as the Southern Conference of Dental Deans and Examiners, the American Association of Dental Boards, and Tufts Health Care Institute's programs on pharmaceutical risk. In addition to these industry specific training sessions, the Board itself conducts internal training sessions as well as attending the State Auditor's Training. Specific to the Legislative Auditor's recommendation, the Board receives a yearly briefing on pursuing complaints and specifically the use of summary suspension from the Senior Assistant Attorney General assigned to the Board. **The Legislative Auditor concludes that the Board has complied with this recommendation.**

Since the inception of this process in 2007, the Board has initiated 63 of these internal reports.

- **The Board should document in its board meeting minutes all instances in which a member of the Board is recused from voting. (November 2005)**

The Legislative Auditor found in 2005 that while Board members were said to have recused themselves from particular votes, these recusals were not documented. Since the dental

community is relatively small, it is common for a complaint to be filed against a licensee who is in some way connected to a Board member. Documentation of Board members who have recused themselves from a vote in the official meeting minutes removes any perception of inappropriate influence regarding the action taken by the Board. In response to this recommendation, the Board now documents in the meeting minutes which member recused himself or herself in the same section as the case discussion. **The Legislative Auditor concludes that the Board has complied with this recommendation.**

- **The Board should comply with the worker's compensation and unemployment compensation laws by not issuing licenses or renewals to licensees who are in default in payments for either tax. (November 2005)**

The November 2005 review stated that the Board was issuing licenses to some dentists who were in default in payments of worker's compensation premiums or unemployment compensation taxes.

The November 2005 review stated that the Board was issuing licenses to some dentists who were in default in payments of worker's compensation premiums or unemployment compensation taxes. The State requires that professional licenses are to be denied if the licensee is in default of either. Although the individuals identified in the previous review were in default to varying degrees, two were cited as being behind by a combined $152,880. The recommendation directed the Board to comply with these laws and identified the difficulties with the joint unemployment compensation and workers compensation database.

The Board provided the number of licenses held until the applicants came into compliance, which totals 71 for renewal years 2006-2011.

When the Legislative Auditor requested an update of this situation, the Board stated that it no longer issues or renews licenses to individuals who are in default to either fund. Also, the Board provided the number of licenses held until the applicants came into compliance. Table 6 shows the yearly licenses held by the Board, which totals 71 for renewal years 2006-2011. **The Legislative Auditor concludes that the Board has complied with this recommendation.**

Table 6 Licenses Held By the Board Until Compliance With Workers Compensation and Unemployment Taxes	
Renewal Year	**Number**
2006	16
2007	14
2008	11
2009	9
2010	11
2011	10
Total	**71**
Source: WV Board of Dental Examiners	

The Board has reported one case of suspected insurance fraud to the Insurance Commission and stated that other drug related situations involving suspected drug diversion were reported to the Drug Enforcement Administration.

- **The Board should consider referring appropriate complaint cases to the Insurance Commission for investigation by the Fraud Unit. (November 2005)**

  The Board indicated that occasionally when situations, such as the falsifying of records, arise that could constitute criminal behavior, inter-agency cooperation is utilized. The November 2005 review recommended that the Board refer certain cases to the Office of the Insurance Commissioner's Fraud Unit. Since this recommendation, the Board has reported one case of suspected insurance fraud to the Insurance Commission and stated that other drug related situations involving suspected drug diversion were reported to the Drug Enforcement Administration. The Board has complied with this recommendation as well as formed a working relationship with the state troopers assigned to the West Virginia Board of Pharmacy. This type of information is passed along when identified in the process of investigating complaints relating to violations of the Dental Practice Act. **The Legislative Auditor concludes that the Board has complied with this recommendation.**

<u>The Board Has Not Implemented the Following Recommendations</u>

- **The Board should require that licensees report all malpractice lawsuits at the time of filing. (September 2005)**

The Board does not currently require that all malpractice lawsuits be reported at the time they are filed. Contained in the initial information received from the Board, a description of professional conduct background checks was given. The Board checks out-of-state applicants with the American Association of Dental Examiners Clearinghouse. This provides information on any disciplinary action taken against a licensee in any state and is provided to the Board. When appropriate the Board can then request specific information from the state in which the licensee was disciplined. With respect to the reporting of malpractice lawsuits, the Executive Secretary provided the following:

> *Since the Board renews every license annually and most malpractice situations move very slowly, we have always found the information provided upon license renewal gives the Board adequate time to obtain malpractice information on any licensee and to determine if action needs to be taken in a timely fashion. Additionally, many malpractice providers notify the Board if a licensee of the Board has an action brought against them and the licensee is covered by that particular company.*

Although this system of reviewing the professional conduct of licensees gathers information from a number of sources and at different times, requiring licensees to notify the Board when a malpractice suit is filed against them would add another source of information to the Board.

The Board also requires that malpractice information be provided when a new applicant from another state attempts to obtain licensure in West Virginia. The Board believes that these combined procedures adequately address the review of malpractice situations. Although this system of reviewing the professional conduct of licensees gathers information from a number of sources and at different times, requiring licensees to notify the Board when a malpractice suit is filed against them would add another source of information to the Board. Since the burden of notification would be on the licensee, disruption to the Board and staff should be minimal. **Thus, the Legislative Auditor recommends the Board require the notification of malpractice lawsuits against licensees at the time of filing**.

- **The Board should require criminal background checks at the time of application for a dental license and periodically thereafter. (September 2005)**

The Board does not currently conduct criminal background checks with the FBI nor is it currently seeking authority to do so in its August 26, 2010 list of advocated legislative changes submitted to the Joint Committee on Government Organization. Currently, the Board does not have the authority to conduct federal criminal background checks. Public Law 92-544, provides that a state may only utilize the national fingerprinting process by enacting legislation ". . . *that designates specific licensing or employment purposes for which state and local government agencies may submit fingerprints to the FBI and receive FBI-maintained criminal history record information…"* At this time, West Virginia Code requires that individuals to be employed with the Insurance Fraud Unit of the Office of the Insurance Commission or the Office of the Tax Commissioner, as a license examiner with the Division of Motor Vehicles, and any individual seeking a retail license for the sale of alcohol or insurance must submit to criminal background checks.

Currently, the Board does not have the authority to conduct federal criminal background checks.

As with most medical professions, the field of dentistry is strictly regulated due to the potential harm unfit individuals practicing could cause to the public. The second listed requirement to obtain a dental license is that the individual is of "good moral character." Currently, the Board receives information regarding the professional conduct of its licensees, but not information regarding any criminal history an individual might have. Given that licensees in the dental field are not only performing medical procedures **but also prescribing prescription medication**, the public could be at risk if practicing dental professionals are not of good moral character. Requiring a criminal background check for applicants would ensure that the professionals the public relies on to perform these procedures and prescribe medication are fit to do so. **Therefore, the Legislative Auditor recommends that the Legislature should consider amending West Virginia Code to authorize the Board of Dental Examiners to conduct FBI criminal background checks on applicants for initial licensure.**

Requiring a criminal background check for applicants would ensure that the professionals the public relies on to perform these procedures and prescribe medication are fit to do so.

Conclusion

The West Virginia Board of Dental Examiners has addressed several of the issues reported in two 2005 reviews by the Legislative Auditor. The creation of a process for disseminating information among members through the creation of an internal reporting procedure has aided the Board in responding appropriately to serious incidents. The Board has also sought training regarding industry specific issues and due process issues such as summary suspension of licenses as recommended. Cooperation with other agencies to ensure other laws were not violated has been improved. This is evidenced by the number of licenses the Board has not renewed until the individual complied with Workers Compensation and Unemployment taxes, as well as the practice of referring cases that may involve criminal behavior to other agencies such as the state troopers assigned to the West Virginia Board of Pharmacy and agents of the Drug Enforcement Administration. Although the Board receives information on the professional conduct of its licensees and out-of-state applicants, the lack of criminal background checks could leave the public open to harm. The Board does not currently have statutory authority to conduct these checks, thus the recommendation to the Legislature is being made that this authority be granted.

The West Virginia Board of Dental Examiners has addressed several of the issues reported in two 2005 reviews by the Legislative Auditor.

Recommendations

5. The Legislative Auditor recommends the Board consider requiring the notification of malpractice lawsuits against licensees at the time of filing.

6. The Legislative Auditor recommends that the Legislature should consider amending West Virginia Code to authorize the Board of Dental Examiners to conduct FBI criminal background checks on applicants for initial licensure.

ISSUE 4

West Virginia Code §60A-9-4(d) May Create a Loophole Allowing Prescription Drugs to Be Dispensed Without Being Reported to the Controlled Substance Monitoring Database.

Issue Summary

The Board of Dental Examiners, like most other healthcare regulators, license practitioners that have access to controlled substances. Given the state of prescription drug abuse in West Virginia, it is important to utilize tools such as the controlled substance database to limit abuse when possible and have record of the practitioners providing these substances when needed. West Virginia Code §60A-9-4 provides an exemption that may increase the ability for practitioners to distribute drugs and thus availability of drugs for individuals to abuse. For these reasons, the Legislature should clarify the intent of this exemption and to whom and where it applies.

The purpose of the West Virginia Controlled Substance Monitoring Act is to require that designated types of information regarding the prescribing, dispensing, and consumption of certain controlled substances be recorded and retained in a single repository.

The Board of Pharmacy's Controlled Substance Monitoring Database may be subject to a statutory loophole allowing for certain prescriptions of controlled substances to go unreported by regulatory entities associated with practitioners that dispense controlled substances, including the Board of Dental Examiners, Board of Pharmacy, Board of Medicine, Board of Osteopathy, etc. The Controlled Substance Monitoring Database houses the required data that distributors of drugs must report. The purpose of the West Virginia Controlled Substance Monitoring Act is to require that designated types of information regarding the prescribing, dispensing, and consumption of certain controlled substances be recorded and retained in a single repository. This program and repository, implemented in 2002, is required to contain Schedule II, III and IV controlled substance prescriptions written or filled in this state.

As a result of conversations with the Board of Dental Examiners' Executive Secretary, the Legislative Auditor is concerned that West Virginia Code includes an exemption that may leave open the possibility of controlled substance abuse.

As a result of conversations with the Board of Dental Examiners' Executive Secretary, the Legislative Auditor is concerned that West Virginia Code includes an exemption that may leave open the possibility of controlled substance abuse. Specifically, §60A-9-4 outlines an exemption in the required information for reporting. Subsection (d) states that:

> *Reporting required by this section is not required for a drug administered directly to a patient or a drug dispensed by a practitioner at a facility licensed by the state: Provided, That the quantity dispensed is limited to an amount adequate to treat the patient for a maximum of seventy-two hours with no greater than two seventy-two-hour cycles in any fifteen-day period of time.*

It is possible that this language allows for abusers of controlled substances to obtain prescription drugs without any record being transferred to the Controlled Substance Monitoring Database.

This exemption is concerning to the Legislative Auditor because, as written, certain issues remain unclear. As such, it is possible that this language allows for abusers of controlled substances to obtain prescription drugs without any record being transferred to the Controlled Substance Monitoring Database. When analyzed in parts, specifically the statutory definition of a facility licensed by the State and the exemption of reporting requirements for controlled substances in certain situations, it is clear that West Virginia Code §60A-9-4 needs clarification.

This subsection states that the exemption applies to a "drug administered directly to a patient or a drug dispensed by a practitioner at a facility licensed by the state." The Legislative Auditor inquired as to what constitutes such a facility in a request for a legal opinion from Legislative Services. Counsel stated that West Virginia Code §16-5B-1 specifies that certain health facilities, and other facilities operated in connection with them, are required to be licensed. This section states in part that:

Although the legal opinion points this section of code out as criteria for the scope of a "facility licensed by the state," counsel also provides that this section is not referenced in the Board of Pharmacy's Legislative Rules dealing with the monitoring of controlled substances.

> *No person, partnership, association, corporation, or any local governmental unit or any division, department, board or agency thereof shall establish, conduct, or maintain in the state of West Virginia any ambulatory health care facility, ambulatory surgical facility, freestanding or operated in connection with a hospital, hospital or extended care facility operated in connection with a hospital, without first obtaining a license…*

Although the legal opinion points this section of code out as criteria for the scope of a "facility licensed by the state," counsel also provides that this section is not referenced in the Board of Pharmacy's Legislative Rules dealing with the monitoring of controlled substances. Specifically, the legal opinion states that the rules "shed no light on what is a 'facility licensed by the state.'"

The Legislative Auditor is also concerned with the latter part of the exemption which allows for a practitioner to dispense an amount of a drug to treat a patient for

> *"...a maximum of seventy-two hours with no greater than two seventy-two-hour cycles in any fifteen-day period of time."*

This could provide a loophole for an unscrupulous practitioner to provide controlled substances to individuals for the purpose of personal abuse or to sell to those who do abuse them. Although the amount would seem to be a minimal one, multiple individuals acting in conjunction could obtain the maximum amount allowed by this exemption, as often as allowed, to increase the total. With this reporting, protection is given to the practitioner providing the drugs. Based on §60A-9-4, the potential exists for this subsection to allow for the abuse of prescription drugs by individuals, and for practitioners to profit from exploiting the reporting exemption created by this subsection. **Therefore the Legislative Auditor recommends that the Legislature clarify the meaning of §60A-9-4 and expressly prohibit any potential unintended consequences of this exemption.**

This could provide a loophole for an unscrupulous practitioner to provide controlled substances to individuals for the purpose of personal abuse or to sell to those who do abuse them.

Recommendation

7. The Legislative Auditor recommends that the Legislature should consider clarifying the meaning of §60A-9-4 and expressly prohibit any potential unintended consequences of this exemption.

Appendix A: Transmittal Letter

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX

John Sylvia
Director

May 25, 2011

Richard D Smith, DDS, President
West Virginia Board of Dental Examiners
1319 Robert C. Byrd Drive
PO Box 1447
Crab Orchard, WV 25827

Dear Dr. Smith:

This is to transmit a draft copy of the Regulatory Board Review of the Board of Dental Examiners. This report is scheduled to be presented during the June 13-15, 2011 interim meeting of the Joint Committee on Government Operations and the Joint Committee on Government Organizations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committees may have.

If you would like to schedule an exit conference to discuss any concerns you may have with the report, please contact us by May 31, 2011. We need your written response by noon on Thursday, June 2, 2011 in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at (304) 340-3192 by Thursday, June 9, 2011 to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

John Sylvia

John Sylvia

Joint Committee on Government and Finance

Appendix B: Objective, Scope and Methodology

This Regulatory Board Review of the Board of Dental Examiners is required and authorized by the West Virginia Performance Review Act, §4-10-10 of the West Virginia Code, as amended.

Objective

The objectives of this review were to determine if the Board of Dental Examiners is operating in compliance with the general provisions of Chapter 30 of the West Virginia Code and other applicable laws and rules, update recommendations made in two reports issued in September and November 2005, and inform the Legislature of a possible loophole in reporting requirements for the Board of Pharmacy's Prescription Drug Monitoring Database.

Scope

This review focused on Board operations from January 1, 2007 – April 6, 2011 as well as an update on the Board's status regarding recommendations made in two separate reports issued in 2005. The Board's compliance with the general provisions of Chapter 30 was determined throughout the review period which began in May 2010. The recommendations updated in this review were made in two separate reports issued in September and November 2005 by the Performance Evaluation and Research Division. The scope of these reviews were January 2005 – August 2005 and fiscal years 2002-2005 respectively.

Methodology

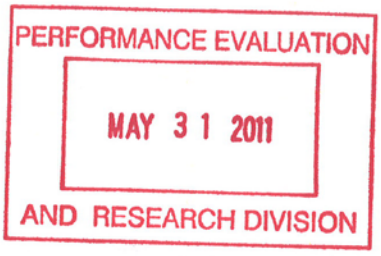
The documents used to perform this review were both provided by the Board as well as generated by Legislative Auditor during the review period that began in May 2010. This information was first used to establish that a need for the Board existed and to provide background information. The Legislative Auditor then compared the documentation of Board operations and to the general provisions of Chapter 30, surrounding states, information from the Legislative Auditor's Budget Division, and best practices to determine its compliance status. Necessary information was also requested and gathered during the review period to assess whether the Board had satisfactorily addressed multiple recommendations made in two previous reviews issued in 2005. Finally, the Legislative Auditor utilized attorneys from Legislative Services to provide a legal opinion regarding the statutory exemption to the reporting requirements to the Board of Pharmacy's Controlled Substance Monitoring Database required by the West Virginia Controlled Substance Monitoring Act.

Appendix C: Agency Response

WEST VIRGINIA BOARD OF DENTAL EXAMINERS
1319 Robert C. Byrd Drive
PO Box 1447
Crab Orchard, WV 25827-1447
(304)252-8266
FAX (304)253-9454
Toll Free (877)914-8266
www.wvdentalboard.org
wvbde@suddenlinkmail.com

May 27, 2011

Mr. John Sylvia
West Virginia Legislature
Performance Evaluation and Research Division
Building 1, Room W-314
1900 Kanawha Blvd., East
Charleston, WV 25305-0610



Dear Mr. Sylvia:

We are in receipt of the draft audit performed by your agency on the West Virginia Board of Dental Examiners. Needless to say, we are very pleased with the results of the audit and pleased with the progress made by this Board in our mission of protecting the public. We would however, note the two following items as a concern and would hope that your agency would make the appropriate adjustments to these items:

1. From page 7 paragraph 4, your report states "...In the event that an investigation is required to determine the truth and validity of the allegations, the Board's investigator has 60 days to do so..." Please note, we are not aware of any statutory or regulatory requirements as stated. Further, such a deadline would be unrealistic and be a detriment to thorough and accurate gathering of information.

2. From page 11, paragraph 3, your report states "...The Board member who received the report did not disseminate the information to other members in a timely fashion, and the fatality was not investigated to assess potential risk to public safety until a formal complaint was filed 14 months later..." Please be advised the information in question was received and not distributed by the individual who was the Executive Secretary to the Board, who left the employment of the Board in 2003.

Thank you very much for your consideration of these matters. Should you need any further information, please do not hesitate to contact us. Please be advised, Executive Secretary, Marc

Harman, will represent the Board at the meeting of the Joint Committee on Government Operations and the Joint Committee on Government Organization during the June interims.

Very truly yours,

Richard D. Smith, DDS

RICHARD D. SMITH, DDS
President

WEST VIRGINIA LEGISLATIVE AUDITOR
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