

BACKGROUND PAPER FOR THE Professional Fiduciaries Bureau

**(Joint Oversight Hearing, March 17, 2014, Senate Committee on
Business, Professions and Economic Development, Assembly Committee
on Business, Professions and Consumer Protection)**

IDENTIFIED ISSUES, BACKGROUND AND RECOMMENDATIONS REGARDING THE PROFESSIONAL FIDUCIARIES BUREAU

BRIEF OVERVIEW OF THE PROFESSIONAL FIDUCIARIES BUREAU

The Professional Fiduciaries Bureau (Bureau) was established to license and regulate non-family member Professional Fiduciaries (PFs), including conservators, guardians, trustees, and agents under durable power of attorney. The Professional Fiduciaries Act (Act) was created in 2006 (SB 1550, Figueroa, Chapter 491, Statutes of 2006). The Bureau currently licenses 638 Professional Fiduciaries.

PFs provide critical services to seniors, disabled persons, and minors. They manage matters for clients including daily care, housing and medical needs, and also offer financial management services ranging from basic bill paying to estate and investment management.

In order to qualify for licensure, an applicant must be at least 21 years old, be a US citizen or be legally admitted to the United States, submit fingerprints and pass a background check, pass an examination that includes national and state components, and have either a baccalaureate degree, an associate degree and three years' relevant work experience, or at least five years' relevant work experience prior to 2012.

Requirements for licensure also include completing 30 hours of approved pre-licensure education courses and earning 15 hours of continuing education (CE) credit each year for renewal. Licensees must comply with reporting requirements and abide by the Professional Fiduciaries Code of Ethics.

The Bureau began operation on July 1, 2007, and is charged with the following responsibilities:

- Educating consumers about their rights;
- Promoting legal and ethical standards of professional conduct;
- Investigating the background of applicants;
- Administering licensing examinations;
- Licensing PFs;
- Investigating complaints from consumers; and,
- Taking disciplinary action and issuing citations .

The Bureau's mission statement is *"To protect consumers through licensing, education, and enforcement by ensuring the competency and ethical standards of Professional Fiduciaries."*

The Bureau Chief is appointed by the Governor, subject to Senate confirmation, and serves under the direction and supervision of the Director of the Department of Consumer Affairs (DCA) and at the pleasure of the Governor. The Chief is responsible for enforcing and administering the Act, which mandates that protection of the public is the Bureau's highest priority. The current Chief is Julia Ansel, who was appointed by the Governor on June 10, 2013.

Advisory Committee Membership

The Bureau has one committee designated in statute, the Advisory Committee (Committee) (Business and Professions Code Section (BPC) 6511), which is tasked with examining the functions and policies of the Bureau and making recommendations on policies, practices, and regulations. It is comprised of seven members, five of whom are appointed by the Governor, one by the Senate Rules Committee, and one by the Speaker of the Assembly. Three members must be California licensed PFs, two must be public members, one must be a representative of the probate courts, and one must be a member of a non-profit organization advocating on behalf of the elderly.

Committee members receive a \$100-a-day per diem and expenses for each meeting. The Committee is required to meet at least once per quarter (four times per year), and all Committee meetings are public. The following is a listing of the current Committee members and their background:

| Bureau/Committee Member Roster | | | | | |
|---------------------------------------|----------------------|-------------------|-------------------|-------------------------|--|
| Member Name | Date First Appointed | Date Re-appointed | Date Term Expires | Appointing Authority | Type (public or professional) |
| Marguerite Lorenz – Chair | 05/2012 | N/A | 01/2016 | Governor | Professional |
| Barbara de Vries – Vice-Chair | 05/2012 | N/A | 01/2016 | Governor | Professional |
| Aileen Federizo | 05/2012 | N/A | 01/2016 | Governor | Professional |
| Diana Amaya | 11/2013 | N/A | 01/2015 | Senate Rules Committee | Public |
| Kathleen Thomson | 07/2013 | N/A | 01/2015 | Governor | Probate Court Investigator |
| Prescott Cole | 07/2013 | N/A | 01/2015 | Governor | Attorney with California Advocates for Nursing Home Reform |
| Hang Le To | 01/2014 | N/A | 01/2015 | Speaker of the Assembly | Public |

The Committee had substantial vacancies in 2012; the membership was down to a single appointment until May of 2012. As a result, the Committee was unable to hold three of its four quarterly meetings in 2012. Two meetings could not be held due to lack of quorum, and one could not be held due to scheduling conflicts. Membership is full at this time and no further quorum issues are anticipated.

Among all regulatory agencies within DCA, the Professional Fiduciaries Bureau is unique in that it has what might be termed a “reverse sunset.” When the sunset process for regulatory boards was originally established, if the statutory authority for a board was made inoperative and repealed by operation of law (sunsetting), the board would be abolished and the regulatory operations would be taken over as a bureau under DCA.

In contrast, BPC 6511 provides that if the Bureau sunsets, the Advisory Committee shall succeed to and be vested with all the duties, powers, purposes, responsibilities, and jurisdiction of the Bureau, i.e., the Bureau would effectively become a board. The law further provides that the Advisory Committee would be established as the Professional Fiduciaries Committee under DCA.

Staffing Levels

The Bureau was originally budgeted 4.0 positions to support the estimated workload identified in SB 1550 (Figueroa, Chapter 491, Statutes of 2006). However, since initial licensee population estimates were apparently too high, in FY 2009/2010 the Bureau’s personnel were reduced to a 0.7 (part-time) Bureau Chief and a 1.0 (full-time) Staff Services Analyst.

The Bureau’s main staffing concern is the inadequate number of personnel to support its enforcement activities. The current Chief was appointed by the Governor on June 10, 2013 and began working on July 31, 2013. The Bureau submitted a BCP for FY 2014-2015 to request funding for an additional staffer devoted full-time to enforcement issues, and it is pending approval.

Fiscal and Fund Analysis

As a Special Fund Agency, the Bureau receives no General Fund support, relying solely on the fees charged for initial applications, licenses and license renewals, which occur annually. Unlike many other boards, the Bureau’s fees are not set in statute (BPC 6592). Instead, fees are set by regulation to cover the Bureau's operational costs and they have not been adjusted since July 2007.

| Fee Schedule and Revenue | | | | | | | |
|---------------------------------|----------------------|-----------------|--------------------|--------------------|--------------------|--------------------|--------------------|
| Fee | Current Fee Amount | Statutory Limit | FY 2009/10 Revenue | FY 2010/11 Revenue | FY 2011/12 Revenue | FY 2012/13 Revenue | % of Total Revenue |
| Application | \$400.00 | Actual cost | \$50,000 | \$42,000 | \$42,000 | \$42,400 | 11% |
| Initial License | \$600.00 + proration | Actual cost | \$86,700 | \$92,845 | \$69,875 | \$73,441 | 20% |
| Renewal | \$700.00 | Actual cost | \$160,300 | \$258,300 | \$305,900 | \$352,800 | 68% |
| Delinquent | \$150.00 | \$150.00 | \$1,050 | \$2,100 | \$1,050 | \$2,100 | .40% |

| | | | | | | | |
|--------------------------------------|---------|---------|-----------|-----------|-----------|-----------|------|
| Renewal | | | | | | | |
| Duplicate/ Replacement License | \$25.00 | \$25.00 | 0 | 0 | 0 | 0 | 0 |
| Dishonored Check | \$25.00 | N/A | 0 | 0 | \$25 | 0 | 0 |
| TOTALS | | | \$298,050 | \$395,240 | \$418,850 | \$470,742 | 100% |

Bureau revenues are steadily increasing, primarily as a result of greater numbers of licensees renewing.

There is no mandated reserve fund level for the Bureau; however, the DCA Budget Office has historically recommended that smaller programs maintain a contingency fund slightly above the standard three to six months of reserve. Maintaining an adequate reserve of at least six months provides for a reasonable contingency fund so that the Bureau has the fiscal resources to absorb any unforeseen costs, such as costly enforcement actions or other unexpected client service costs.

The total revenues for the Bureau in FY 2012/13 were \$470,742, and the total expenditures were \$362,382. The Bureau had approximately 9.4 months in reserve for FY 2012/13, which they anticipate will increase to 12.9 months in FY 2013/14 and 18.5 months in FY 2014/15.

| Bureau Fund Condition | | | | | | |
|--|------------|------------|------------|------------|------------|-------------|
| | FY 2009/10 | FY 2009/10 | FY 2011/12 | FY 2012/13 | FY 2013/14 | FY 2014/15 |
| Beginning Balance | \$85,000 | \$140,000 | \$58,000 | \$234,000 | \$348,000 | \$484,000 |
| Revenues and Transfers | \$298,000 | \$183,000 | \$420,000 | \$479,000 | \$578,000 | \$670,000 |
| Total Revenue | \$383,000 | \$323,000 | \$478,000 | \$713,000 | \$926,000 | \$1,154,000 |
| Budget Authority | \$357,000 | \$282,000 | \$305,000 | \$403,000 | \$442,000 | \$449,000 |
| Expenditures | \$237,000 | \$267,000 | \$241,000 | \$365,000 | \$442,000 | \$449,000 |
| Loans to General Fund | 0 | 0 | 0 | 0 | 0 | 0 |
| Accrued Interest, Loans to General Fund | 0 | 0 | 0 | 0 | 0 | 0 |
| Loans Repaid From General Fund | 0 | 0 | 0 | 0 | 0 | 0 |
| Fund Balance | \$146,000 | \$56,000 | \$237,000 | \$348,000 | \$484,000 | \$704,000 |
| Months in Reserve | 6.6 | 2.8 | 7.0 | 9.4 | 12.9 | 18.5 |

Expenditures by Program Component

For the last four fiscal years, the Bureau has expended approximately 60% of its budget on enforcement, 1% on examinations, 30% on licensing, and 9% on administration.

The Bureau is authorized to seek cost recovery for the expenses incurred in investigation and enforcement of disciplinary proceedings under BPC 125.3.

Licensing

The Bureau has 638 active PF licensees. The licensing population has been increasing since the Bureau's inception in 2007, although it has yet to reach the levels anticipated when the authorizing statute was passed. The Bureau registers approximately 100 new licensees per year.

The Bureau provides public protection by ensuring licenses are issued only to applicants who meet the minimum requirements of current statutes and regulations and who have not committed acts that would be grounds for denial.

Current law (California Code of Regulations Section 4424) requires the Bureau to inform an applicant within 90 days whether an application is complete or incomplete. For an incomplete application, once the applicant has successfully cleared any deficiencies, and the application is complete and accepted for filing, the Bureau is required to inform the applicant in writing within 30 days that the applicant is approved or denied for licensure. The Bureau is currently well within these timeframes; the Bureau took an average of 23 days to process complete applications in 2012, and 96 days to process incomplete applications. The Bureau has established a 10% target reduction in that time for FY 2013-2014.

Continuing Education

15 hours of CE are required annually. The Bureau approves CE providers, and may request documentation of approved education courses for pre-licensing and CE credit, including records of attendance or independent study.

Licensees self-certify completed CE hours, and although the Bureau has not conducted audits on its licensees previously, it has started the process of auditing CEs for 2014. Its goal is to audit approximately 5% of licensees annually.

Enforcement

The Bureau's target for completing investigations is 365 days, which they are well within. The Bureau is not seeing an increase in the volume of complaints received – the average is about 95 per year.

The table below shows timeframes for the last three years for investigations and formal discipline. The Bureau addresses violations related to unlicensed practice, reporting violations, and unprofessional conduct. It reports that it is currently requesting additional resources to expand its enforcement efforts and decrease completion times.

| Enforcement Timeframes | FY 2010/11 | FY 2011/12 | FY 2012/13 |
|---------------------------------------|------------|------------|------------|
| Investigations: Average Days to Close | 227 | 133 | 184 |
| Discipline: Average Days to Complete | N/A | 360 | 226 |

The table below identifies the disciplinary actions taken by the Bureau in the past three years.

| Formal Disciplinary Actions | FY 2010/11 | FY 2011/12 | FY 2012/13 |
|------------------------------------|------------|------------|------------|
| Accusations Filed | 2 | 0 | 1 |

| | | | |
|-----------------------------|-----|-----|----|
| Revocation | 1 | 0 | 0 |
| Voluntary Surrender | 0 | 0 | 1 |
| Suspension | 0 | 0 | 0 |
| Probation with Suspension | 0 | 0 | 0 |
| Probation | 2 | 0 | 4 |
| Probationary License Issued | 2 | 0 | 4 |
| Cite and Fine* | N/A | N/A | 11 |

*Cite and Fine authority became effective on June 16, 2012.

PRIOR SUNSET REVIEWS: CHANGES AND IMPROVEMENTS

The Bureau was last reviewed by in 2011 by the Senate Business, Professions and Economic Development Committee (BPED). During the previous sunset review, BPED raised eight issues. Below are actions which have been taken to address those issues. For those which were not addressed and which may still be of concern, they are more fully discussed under “Current Sunset Review Issues.”

In November 2013, the Bureau submitted its required sunset report to the Committees in which it described actions it has taken since its prior review. According to the Bureau, the following are some of the more important programmatic and operational changes, enhancements and other important policy decisions or regulatory changes made in response to the prior sunset report:

- **Consider consolidation of the Bureau with another regulatory board, such as the California Board of Accountancy (CBA).**

In May 2010, former Governor Arnold Schwarzenegger suggested consolidating the Bureau under CBA. This consolidation was recommended because the Bureau had few licensees and minimal revenues. The Senate Business, Professions and Economic Development Committee (BPED) held hearings on the proposal in June 2009 and decided against the consolidation.

The Bureau did not consolidate with the California Board of Accountancy.

- **Adopt regulations regarding the disclosure of license identification numbers.**

Regulations requiring licensees to notify clients or consumers that they are licensed by the Bureau have been drafted and are currently under DCA review.

- **Clarify the Enrolled Agent exemption.**

The enabling legislation for the Bureau (SB 1550, Figueroa, Chapter 492, Statutes of 2006) created a limited exemption for enrolled agents (EA), individuals who are certified to represent taxpayers before the Internal Revenue Service (IRS). EAs may prepare and file documents, correspond and communicate with the IRS, provide tax advice, and represent individuals at conferences, hearings, and meetings with the IRS.

The Bureau interprets the exemption to require EAs acting in a Professional Fiduciary capacity to become licensed as a fiduciary. The California Society of Enrolled Agents (CSEA) believes

only those EAs who hold themselves out as a professional fiduciary or solicit fiduciary or conservatory assignments through the courts - and provide specific fiduciary services separate from tax planning - should be required to be licensed.

Senate BPED agrees with the Bureau's position, but acknowledged it may be appropriate to make a clarifying amendment to broaden the exemption in the Fiduciary Act, BPC 6530 (d). This has not yet occurred.

- **Address the low number of enforcement actions.**

The Bureau reported few enforcement actions in the early years of its existence, due to limited staffing and investigative abilities.

Enforcement actions have increased lately, partly due to the passage of SB 543 (Steinberg, Chapter 448, Statutes of 2011), granting the Bureau authority to enter into stipulated settlement agreements with licensees and applicants prior to filing a formal accusation or statement of issues with the Attorney General's (AG) Office. This new enforcement tool allows for accelerated enforcement actions in particular circumstances.

- **Adopt regulations establishing a system for issuing citations and fines.**

The Bureau's cite and fine regulations were approved by the Office of Administrative Law on May 17, 2012, and became effective on June 16, 2012.

- **In light of the smaller than expected licensing population, and the resulting budget limitations, determine if the Bureau is sustainable as a viable regulatory agency.**

Revenue for the Bureau has increased, but spending authority remains the same. BCPs were submitted the last two fiscal years requesting additional PYs and AG costs, and both were denied by the administration as they did not meet the policy direction.

Other major changes:

- Adopted a 2014-2016 Strategic Plan.
- Implemented Cite and Fine Program.
- New Chief appointed in 2013.
- Bureau contracted with subject matter experts to assist with some more complex enforcement cases.
- Posts Cite and Fine information and formal disciplinary actions on the Bureau's Website.
- Created a bi-annual e-newsletter with updates on Bureau activities for distribution to consumers, licensees and other interested parties.

CURRENT SUNSET REVIEW ISSUES

The following are unresolved issues pertaining to BPPE, or areas of concern for the Committees to consider, along with background information concerning the particular issue. There are also recommendations the Committee staff have made regarding particular issues or problem areas which need to be addressed. The BPPE and other interested parties, including the professions, have been provided with this Background Paper and can respond to the issues presented and the recommendations of staff.

BUDGET ISSUE

ISSUE #1: Long term fund condition.

Background: There is no mandated reserve fund level for the Bureau; however, the DCA Budget Office has historically recommended that smaller programs maintain a contingency fund slightly above the standard three to six months of reserve. Maintaining an adequate reserve of at least six months provides for a reasonable contingency fund so that the Bureau has the fiscal resources to absorb any unforeseen costs, such as costly enforcement actions or other unexpected client service costs.

The Bureau anticipates it has approximately 9.4 months in reserve for FY 2012/13, increasing to 12.9 months in FY 2013/14, and 18.5 months in FY 2014/15. While this is within statutory limits, it is three times the recommended reserve.

Staff Recommendation: *The Bureau should consider reducing fees sufficient to avoid accumulating a 24 month reserve if it cannot get budget authority to hire additional staff.*

LICENSING ISSUE

ISSUE #2: Should the Bureau establish targets for attracting new licensees?

Background: The Bureau currently has 638 active licensees, a substantially smaller figure than the 1,300 that were anticipated at its inception. The Bureau is aware that it needs to attract more licensees, and in response, it redesigned its website for potential applicants, provided a newsletter providing updates, and created various brochures. In addition, Advisory committee members have agreed to speak on behalf of the Bureau at events within their geographical area, using an outreach presentation developed by the Bureau.

The Bureau has worked with the University of California at Berkeley's Extension Program to assist in developing a curriculum for a Fiduciary Certificate Program to attract students to the industry. This program begins in spring of 2014. The Bureau has also communicated with the California State University at Fullerton and the University of California at Riverside regarding their fiduciary student populations.

The Bureau's 2014-2016 Strategic Plan places Licensure as Goal 1, and prioritizes partnering with other government agencies, professional associations, and advocacy organizations to educate about PF licensing requirements.

Staff Recommendation: *The Bureau should brief the Committees on the potential pool of PFs and provide reasonable yearly targets for attracting new licensees.*

TECHNOLOGY ISSUE

ISSUE #4: What is the status of BReZE implementation by the Bureau?

Background: The BreZE Project will provide DCA boards, bureaus, and committees with a new enterprise-wide electronic enforcement and licensing system. BreZE will replace the existing outdated legacy systems and “work arounds” with an integrated solution based on updated technology.

BreZE will provide all DCA organizations with a solution for all applicant tracking, licensing, renewal, enforcement, monitoring, cashiering, and data management capabilities. In addition to meeting these core DCA business requirements, BreZE will improve DCA’s service to the public and connect all license types for an individual licensee. BreZE will be web-enabled, allowing licensees to complete applications, renewals, and process payments through the Internet. The public will also be able to file complaints, access complaint status, and check licensee information.

BreZE represents an important opportunity to improve the Bureau’s operations to include electronic payments and expedite processing. Staff from numerous DCA boards and bureaus have actively participated with the BreZE Project. Due to increased costs in the BreZE Project, SB 543 (Steinberg, Chapter 448, Statutes of 2011) was amended to authorize the Department of Finance (DOF) to augment the budgets of boards, bureaus and other entities that comprise DCA for expenditure of non-General Fund moneys to pay BreZE project costs.

Staff Recommendation: *The Bureau should update the Committees about the current status of its implementation of BreZE. What have been the challenges to implementing this new system? Do you expect to encounter any service or enforcement delays as a result of the roll-out? Has the project imposed any unexpected costs on the Bureau?*

ADMINISTRATIVE ISSUE

ISSUE #5: If the licensee population does not rise in the next few years, is the Bureau sustainable as an independent regulatory agency?

Background: The original estimated licensee population of 1,300 has not been met since the Bureau's inception in 2007. The current licensee population, 638, is one of the smallest in DCA. Because of this, the renewal fee, \$700, is among the highest. Stakeholders note that the high cost of licensing may be a deterrent to prospective PFs.

The Bureau receives approximately 100 complaints per year and assigns the majority of them to a desk investigation, which takes nearly six months to close.

The Bureau's administration relies on a part-time Chief and one full time Staff Services Analyst, hampering additional recruitment and enforcement efforts. Although the Bureau's fund has ample reserves, its Budget Change Proposal requests for additional staff have been rejected by the Business, Consumer Services, and Housing Agency (Agency) for the past two years. Previous discussions to merge the Bureau with the California Board of Accountancy to optimize resources were rejected by BPED in 2009.

Staff Recommendation: *The Legislature should initiate discussions with the Bureau and Agency to discuss whether to maintain the Bureau independently if its current staffing and licensing levels do not change.*

CONTINUED REGULATION OF THE PROFESSION BY THE BUREAU

ISSUE #6: Should the licensing and regulation of PFs be continued and be regulated by the existing Bureau membership?

Background: The health, safety and welfare of consumers are protected by the presence of a strong licensing and regulatory Bureau with oversight over PFs.

The Bureau should be continued with a 4-year extension of its sunset date so that the Legislature may once again review whether the issues and recommendations in this Background Paper have been addressed.

Staff Recommendation: *Recommend that the licensing and regulation of PFs continue to be regulated by the Bureau in order to protect the interests of the public, and be reviewed again in four years.*

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