BACKGROUND PAPER REGARDING ISSUES TO BE ADDRESSED BY THE DEPARTMENT OF CONSUMER AFFAIRS, OFFICE OF THE ATTORNEY GENERAL, AND THE OFFICE OF ADMINISTRATIVE HEARINGS

(Oversight Hearing, March 9, 2016, by the Senate Committee on Business, Professions and Economic Development and Assembly Committee on Business and Professions)

Overview of the Department of Consumer Affairs

The mission of the Department of Consumer Affairs (DCA) is "To protect consumers through effective enforcement activities and oversight of California's licensed professionals." By statute, consumer protection is the primary purpose for all of the regulatory programs located within the DCA, which consists of 26 boards, ten bureaus, two committees, one program, and one commission (hereafter "boards" unless otherwise noted). Collectively, these boards regulate more than 100 types of businesses and 200 different industries and professions. For example, physicians, acupuncturists, private security companies, and beauty salons are all regulated by the DCA. As regulators, these boards perform two basic functions:

1) Licensing—which entails ensuring only those who meet minimum standards are issued a license to practice, and

2) Enforcement—which entails investigation of alleged violations of laws and/or regulations and taking disciplinary action, when appropriate.

All of the boards and committees, as well as the commission, within the DCA are semiautonomous regulatory bodies with the authority to set their own priorities and policies and take disciplinary action on their licensees. Conversely, the DCA has direct authority and control over the bureaus. The DCA provides administrative support and guidance to the bureaus, boards, committees and commission. Members of the boards, committees, and commission are appointed by the Governor, and the Legislature. Some bureau chiefs are appointed by the Governor; others are appointed by the Director of the DCA. The following table on the next page shows the annual budgets (in thousands) and staffing totals for the DCA's divisions, boards, bureaus, committees, commission, and programs for Fiscal Years 2012-13 through 2016-17.

Expenditures and Positions					
	Fiscal Year 2012–13 Actual	Fiscal Year 2013–14 Actual	Fiscal Year 2014–15 Actual	Fiscal Year 2015-16 Estimated	Fiscal Year 2016-17 Proposed
Budget*	$442,384	$533,978	$570,052	$638,611	$648,898
Positions	2,751	3,164	3,268	3,072	3,109

* Dollars in thousands

Overview of the Office of Administrative Hearings

The mission of the Office of Administrative Hearings (OAH) is to "provide a neutral forum for fair and independent resolution of administrative matters, ensuring due process and respecting the dignity of all". The OAH is divided into two, statewide divisions:

1) General Jurisdiction Division—which provides hearings, mediations, and alternative dispute resolution services to State and local governmental entities.

2) Special Education Division—which contracts with the California Department of Education to handle the special education due process hearing and mediation program.

The OAH handles between 10,000 and 14,000 cases each year.

The following table shows the annual budgets (in millions) and staffing totals for the OAH's divisions, boards, bureaus, committees, commission, and programs for Fiscal Years 2014-16 through 2016-17.

Expenditures and Positions			
	Fiscal Year 2014–15 Actual	Fiscal Year 2015-16 Estimated	Fiscal Year 2016-17 Proposed
Budget*	$30,745	$35,079	$36,225
Positions	146.3	170.8	170.8

* Dollars in thousands

Issue #1: Potential Antitrust Liability for Boards under the DCA

Background

In 2010, the Federal Trade Commission (FTC) brought an administrative complaint against the North Carolina State Board of Dental Examiners (Board) for exclusion of non-dentists from the practice of teeth whitening. The FTC alleged that the Board's decision was an uncompetitive and

unfair method of competition under the Federal Trade Commission Act. This opened the Board to lawsuits and substantial damages from affected parties.

The Board was composed of 6 licensed, practicing dentists and 2 public members. The practice of teeth whitening was not addressed in the statutes comprising the Dental Practice Act. Instead of initiating a rulemaking effort to clarify the appropriate practice of teeth whitening, the Board sent cease-and-desist letters to non-dentists in the state offering teeth whitening services. The Board argued that the FTC's complaint was invalid because the Board was acting as an agent of North Carolina, and according to state-action immunity, one cannot sue the state acting in its sovereign capacity for anticompetitive conduct. A federal appeals court sided with the FTC, and the Board appealed to the United States Supreme Court (Court).

In February 2015, the Court agreed with the FTC and determined that the Board was not acting as a state agent and could be sued for its actions. The Court ruled, "Because a controlling number of the Board's decision-makers are active 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."

The Court was not specific about what may constitute "active participants" or "active supervision." However, the Court did say that "active supervision" requires "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," and that "the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it."

FTC Staff Guidance on Active Supervision of State Regulatory Boards

In October 2015, the FTC released a staff guidance, Active Supervision of State Regulatory Boards Controlled by Market Participants in order to better explain when active supervision of a state regulatory board would be required, in order for a board to invoke the state action defense. The guidance also aimed to highlight what factors are relevant when determining if the active supervision requirement has been satisfied. The FTC states that active supervision includes the ability of a state supervisor to review the substance of the anticompetitive decision and have the power to veto or modify a decision. The state supervisor may not be an active market participant. In addition, the FTC states that active supervision must precede the implementation of the alleged anticompetitive restraint.

The FTC states that the guidance addresses only the active supervision requirement of the state action defense, and antitrust analysis is fact-specific and context-dependent. This means that although a state action defense might not be applicable in a certain case, this does not mean that the conduct of a regulatory board necessarily violates federal antitrust laws.

Implications for the Boards under the DCA

On October 22, 2015, the Senate Committee on Business, Professions and Economic Development and Assembly Business and Professions Committee held a joint informational

hearing to explore the implications of the Court decision on the DCA's 26 professional regulatory boards and consider recommendations.

In response to the Court's decision, State Senator Jerry Hill requested an opinion from the Office of Attorney General Kamala Harris (AG). The AG released the following:

> *North Carolina Dental has brought both the composition of licensing boards and the concept of active state supervision into the public spotlight, but the standard it imposes is flexible and context-specific. This leaves the state with many variables to consider in deciding how to responds.*
>
> *Whatever the chosen response may be, the state can be assured that North Carolina Dental's "active state supervision" requirement is satisfied when a non-market-participant state official has and exercises the power to substantively review a board's action and determines whether the action effectuates the state's regulatory policies.*

The DCA boards are semiautonomous bodies whose members are appointed by the Governor and the Legislature. It is important to note that although a most of the non-healing arts boards have the statutory authority for a public majority allotment in their makeup, more than half of the healing arts and non-healing arts boards are currently comprised of a majority of members representing the profession, based on vacancies and current appointments. There are currently only one health board and four non-health boards that are comprised of a public member majority with their current makeup. While the boards operate largely independently, they also fall within the DCA's jurisdiction. The Legislature provides routine oversight and the Office of Administrative Law reviews regulations stemming from rulemaking undertaken by the boards.

Although the boards are tied to the state through various structural and statutory oversights, it is presently unclear whether current laws and practices are sufficient to ensure that the boards are state actors and, thus, immune from legal action. The recent decision against the Texas Medical Board in the *Teladoc* case[1] emphasizes the need for California to prove that it provides active state supervision. In that case, one of the nation's largest providers of telephone medical services, *Teladoc*, sued the Texas Medical Board after the Board issued a rule that requires physicians to either meet with patients in person before treating them remotely, or to treat

[1] *Teladoc, Inc.et al. v. Texas Medical Board et al*. In June 2011, the Texas Medical Board (TMB) issued a letter to Teladoc, Inc. (Teladoc), stating that the company "inadequately established a defined physician-patient relationship" stated in a new rule issued by the Board. The new rule would require doctors providing remote health care services to document and perform a patient history as well as a physical examination as part of a face-to-face or in-person evaluation.

Teladoc is one of the largest telehealth service providers in Texas, providing health-care consumers access to a network of physicians who dispense medical services by telephone. Teladoc challenged the new TMB rule that their current practices did not establish an adequate physician-patient relationship and consequently sued the TMB on the basis that the rule violated antitrust laws because it would restrict the company's ability to compete, resulting in higher prices and less access to doctors in Texas.

Ultimately, a judge ruled that the TMB was not immune from antitrust laws because the board did not meet the active supervision requirement by the state. The judge cited the *North Carolina Dental Board v. FTC* case as the basis for his ruling. The judge wrote that "for a board to be considered actively supervised, the state supervisor must have the power to veto or modify the board's decisions, and supervision of the Texas Medical Board does not meet that requirement".

them face-to-face via technology while other providers are physically present with them when treating a patient for the first time. *Teladoc* alleges that this rule violates antitrust laws because it would restrict the company's ability to compete, resulting in higher prices and less access to doctors for Texans. The Board argued that it should be immune from antitrust liability as a state agency but a judge rejected that argument, writing that "for a board to be considered actively supervised, the state supervisor must have power to veto or modify the board's decisions, and supervision of the Texas Medical Board does not meet that requirement".

While the direction of legislation in California is still being discussed with stakeholders, it may be necessary for the Legislature to devise a mechanism for independent state review of regulatory board actions, including the ability of some type of state supervisor to veto or modify decisions, as cited in the Texas *Teladoc* case, in order for these boards and board members to ensure that boards can continue to effectively regulate California's professions without fear of being sued.

Executive Officer Active License Requirement for the Board of Registered Nursing

North Carolina State Board of Dental Examiners v. FTC placed limitations on the immunity of regulatory boards controlled by active market participants. This is because individuals who are directly affected by their own rulemaking may not be able to detect their biases, purposefully or inadvertently placing their benefit over those of the public. Or, as the Supreme Court stated, "Dual allegiances are not always apparent to an actor." In the North Carolina case, the focus was on board members, but the argument against interested participants could also be made for boards' administrative managers. Department of Consumer Affairs executive officers (EOs) wield a great deal of power, daily directing and running the administrative machine with often only occasional guidance from an ever-changing board. EOs are vested with substantial decision-making authority and have the ability to shape policy direction of a particular board through their recommendations, management, and relationships.

Presently, the Board of Registered Nursing (BRN) is the only board within the DCA that requires its EO to be currently licensed by the board he or she regulates; the Board of Vocational Nursing and Psychiatric Technicians removed this requirement last year in light of serious allegations of mismanagement. According to the recent hiring bulletin for the BRN's Executive Officer, the EO is responsible for "…planning, organizing and directing the activities of the Board in areas of administration, enforcement and licensure. The Executive Officer serves as the liaison between the Board and stakeholders. The Executive Officer enforces the overall policies established by the Board relating to Board programs…." To place this control with an interested stakeholder may be directly contrary to the intent of a well-balanced regulatory system.

Little Hoover Commission Study

On February 4, 2016, the Little Hoover Commission (Commission) began a review of occupational licensing in California to study the impact that professional licensure can have on upward mobility and opportunities for entrepreneurship and innovation. In addition to examining the results of occupational licensing on the cost and availability of services, the Commission's ongoing study will also explore how state agencies overseeing licensing

requirements balance consumer protection with employment barriers, as well as the connection between occupational licensing regulations and California's robust underground economy. The Commission's second hearing on occupational licensing will be held on March 30, 2016 and will explore the impacts of licensure requirements for certain individuals, including veterans and those with criminal records.

Staff Questions/Recommendations:

1) *How does the DCA plan on addressing the "active state supervision" requirement?*

2) *What does the DCA believe are necessary next steps to ensure robust protection of the public from potentially problematic trust forming coalitions on regulatory boards?*

3) *In light of the FTC guidance on the Active Supervision of State Regulatory Boards Controlled by Market Participants, the Committees should remove the active license requirement for the Executive Officer position for the Board of Registered Nursing.*

Issue #2: BreEZe

Background

The DCA has been working since 2009 on replacing multiple antiquated standalone information technology (IT) systems with one fully integrated system. In September 2011, the DCA awarded Accenture LLC (Accenture) with a contract to develop and implement a commercial off the shelf new customized IT system, which it calls BreEZe. According to the DCA, BreEZe is intended to provide applicant tracking, licensing, renewals, enforcement, monitoring, cashiering, and data management capabilities. In addition, BreEZe is web-enabled and designed to allow licensees to complete and submit applications, renewals, and the necessary fees through the internet. The public also will be able to file complaints, access complaint status, and check licensee information if/when the program is fully operational.

When originally authorized, BreEZe was projected to cost approximately $28 million and scheduled to be fully operational by June 2014. The DCA is not responsible for funding the project costs. The total costs of the project are funded by the special funds of the regulatory entities within the DCA, contributions toward which are based on the total number of licensees a particular entity processes, in proportion to the total number of licensees that all regulatory entities process.

The project plan called for BreEZe to be implemented in three releases. The first release was scheduled for July 2012. The DCA did not meet this target date and Release 1 was launched in October 2013. Release 2 was recently launched in January 2016. There is no current timeline for a Release 3 launch.

On January 27, 2015, the Department of Finance (DOF) submitted a "Section 11.00" (Section 11) letter to the Joint Legislative Budget Committee (JLBC) indicating that the DCA requested to enter into a contract amendment for the BreEZe project that would (1) terminate the contract with Accenture after Release 2, and (2) increase project costs by $17.5 million. In addition to the Section 11 Letter submitted to the JLBC, the DCA also submitted Special Project Report 3.1 (SPR 3.1) that outlined the changing scope and cost of the BreEZe project. Specifically, the cost would be $95.4 million, up from original estimates of $28 million, and 19 of the DCA's boards and bureaus would be eliminated from the project. The following table shows the cost breakdown for BreEZe SPR 3.1.

Projected Costs for BreEZe SPR 3.1 Fiscal Years 2009-10 through 2016-17		
	Project Budget Augmentation	**Redirected Resources**[1]
Release 1 1. Board of Barbering and Cosmetology 2. Board of Behavioral Sciences 3. Medical Board of California 4. Naturopathic Medicine Committee 5. Osteopathic Medical Board of California 6. Physician Assistant Board 7. Board of Podiatric Medicine 8. Board of Psychology 9. Board of Registered Nursing 10. Respiratory Care Board	$38,564,692	$18,843,209
Release 2 1. Board of Occupational Therapy 2. Board of Optometry 3. Board of Vocational Nursing & Psychiatric Technicians 4. Dental Board 5. Dental Hygiene Committee 6. Physical Therapy Board 7. Bureau of Security & Investigative Services 8. Veterinary Board & Technical Exam Committee	$15,248,453	$8,129,250
Release 3 1. Board of Accountancy 2. Acupuncture Board 3. Architects Board 4. Athletic Commission 5. Bureau of Automotive Repair 6. Cemetery & Funeral Bureau 7. Board of Chiropractic Examiners 8. Contractors State License Board 9. Court Reporters Board 10. Bureau of Electronic, Appliance Repair, Home Furnishing and Thermal Insulation, 11. Board of Guide Dogs for the Blind 12. Landscape Architects Technical Committee 13. Pharmacy Board 14. Bureau of Private Postsecondary Education	$11,000,147	$5,679,420

15. Board for Prof Engineers, Land/Geologists 16. Professional Fiduciaries Bureau 17. Speech-Language Path & Audiology & Hearing Aid 18. Structural Pest Control Board 19. Telephone Medical Advice Services Bureau		
Total Project Cost		**$95,465,164**

[1]Redirected resources are existing personnel within the boards and at the DCA who are working on the project. The cost of the staff is absorbed by the employer. Therefore, no additional funding is required for the redirected costs.

Current Project Status and Release 3 Boards

Release 2 of BreEZe went live on January 19, 2016. According to DCA, Release 2 boards have had greater participation and input in the User Acceptance Testing (UAT) part of the project than the boards in Release 1. As of February 24, 2016, the DCA states that there have already been about 131,000 online transactions, over 14,000 new license applications processed through the system, and over 90,000 license renewals completed in BreEZe. In addition, there are 429 new online transactions available for consumers. But, there is still a maintenance backlog of almost 600 hundred items for boards in Release 1 and no current timeline for completion of these system fixes. Maintenance demands are anticipated to double following Release 2.

Under SPR 3.1, DCA has no formal plan to expand BreEZe to the 19 boards in Release 3. Instead, DCA first intends to conduct a cost-benefit analysis for Release 3 boards after Release 2 is completed in 2016 and then make a decision about whether boards previously slated for Release 3 of the project will come onto BreEZe and if so, how that will be implemented . The issue of a lack of cost-benefit analysis at various junctures in the life of the BreEZe project was raised a number of times in a 2015 report by the California State Auditor. DCA has indicated that it will have to hire additional outside staff even to conduct this cost-benefit analysis to begin to determine next steps for IT improvements for these previously scheduled Release 3 entities. DCA reports that there have been severe staff recruitment challenges that have limited BreEZe support, including the departure of the Business Project Manager. DCA also notes that with the large number of positions in SPR 3.1 and difficulty in maintaining support staff, requests for new positions to conduct the cost-benefit analysis may need to be further delayed until Release 2 stabilization when additional maintenance and workload demands are met.

It appears that even the feasibility of a BreEZe future for the former Release 3 boards has not yet been assessed. With about 160 license types, the 19 entities that would have come onto the BreEZe system in Release 3 operate some of the most complex licensing programs in DCA. For example, the Contractors State License Board (CSLB) issues 43 license types and regulates about 300,000 licensees. The Bureau for Private Postsecondary Education tracks data key to prospective students making informed decisions about private higher education and training programs, information vastly different than other licensing entities within the DCA. The California State Athletic Commission relies on information from other states to ensure the safety of the athletes participating in combat sporting events and is tasked with licensing these individuals to protect them, rather than licensure as a means of protecting the public from harm by licensees. These programs have already paid for some BreEZe-related costs. However, it is

not clear whether the system has been evaluated to meet the needs of some of these unique entities within the DCA , many of which are facing significant operational challenges due to their lack of dynamic IT capacity. Further, the DCA is working with some of these programs to provide workaround systems in the interim as a means of addressing current needs that their IT systems are not able to provide, potentially creating a series of new systems that may not even be compatible with BreEZe.

Despite the lack of a plan moving forward, Release 3 boards have already paid more than $4 million for BreEZe. These boards are projected to pay $11 million through Fiscal Year (FY) 2016–17. For example, CSLB is projected to pay a total of $1.1 million from FY 15-16 through FY 16-17 toward the implementation of BreEZe. The total projected cost of the project for CSLB is estimated to be about $3.3 million. It does not appear as though DCA has formed a plan on how to calculate or facilitate refunds in the event DCA determined BreEZe is unsuitable for any of the boards in Release 3. Additionally, DCA does not currently have an estimated timeline for BreEZe costs to end. The Director of the DCA reports that Release 3 boards are paying only for "hardware, software, and staffing and consulting costs." However, it is unclear if the "staffing and consulting costs" are for BreEZe programming services and/or for maintenance costs for the legacy systems the Release 3 boards continue to use while waiting for BreEZe. The DCA has stated that it will be seeking budget authority for FY 2017-18 for continued maintenance and operation costs, as well as ongoing non-project costs.

Implementation of State Auditor's Recommendations

In January 2016, the California State Auditor released a follow up report on the DCA's progress in implementing the recommendations put forth in their February 2015 report on BreEZe. Of the 13 recommendations issued by the Auditor, the DCA had only fully implemented three as of August 2015. The following table shows the other BSA recommendations for the DCA and the progress made for each point. The DCA's one year responses to the BSA recommendations were due February 12, 2016. The Auditor is currently reviewing these responses and will release an update in early March 2016.

State Auditor's Recommendation to the DCA	
Recommendation	**Status**
Management training for all BreEZe project team leads	Partially Implemented Estimated Completion: Jan. 2016
Develop monitoring process for preparing project management documents	Fully Implemented: Jan. 2015
Conduct cost-benefit analysis of implementation of Release 3 entities	Pending Estimated Completion: Feb. 2018
Develop documenting process in fulfilling all of BreEZe's contract terms and submit change requests to CalTech	Pending Estimated Completion: Aug. 2015
Continue to work with Release 1 entities to ensure their BreEZe issues are being handled and other technology issues are met	Fully Implemented: Nov. 2014 However, large backlog of Release 1 maintenance items still remain

Provide BreEZe training as close to rollout date as possible	Pending Estimated Completion: TBD
Develop specific training for BreEZe for each entity's business processes	Pending Estimated Completion: Jan. 2016
For any future IT project, DCA should develop a process to determine: • minimum system requirements specific to each program • qualifications and experience of the project team • sufficient staffing levels • guidelines for adherence to all project management plans • guidelines for organizational change management • guidelines for timely responses to concerns that IV&V and IPO specialists raise	Pending Estimated Completion: July 2015

Legislative Bills with Associated BreEZe Impacts

The poor adaptability of BreEZe to respond to new system demands has resulted in the delay of 11 new substantive policy changes brought forward by the Legislature. These changes have been unable to be incorporated into the current BreEZe system and are currently awaiting workarounds or new builds into the system. The following table shows recent legislation that the DCA indicates has been impacted by BreEZe delays and other problems, as well as the DCA's status on implementation of these changes. Some of this new legislation involves many boards in Release 1 which have been waiting for Release 2 to go live before changes can be made to the system to address new requirements.

Legislative Bills with Associated BreEZe Impacts			
Bill	**Title**	**Summary**	**IT Impact**
AB 186 (Maienschein)	Professions & vocations: military spouses: temporary licenses	Requires specific boards, after appropriate review, to issue temporary licenses to spouses or domestic partners of active members of the U.S. military who are stationed in CA under active duty orders. IT system implementation is deferred until implementation of Release 2. (*Chaptered 2014*)	BreEZe No system implementation at this time. LEGACY No system implementation at this time. Release 3 Boards currently doing a manual work around.
AB 281 (Gallagher)	Collateral Recovery	Effective July 1, 2017, establishes a collateral recovery Disciplinary Review Committee for the purpose of reviewing the request of a licensee to contest the assessment of an administrative fine or the appeal a denial of a license. (*Chaptered 2015*)	BreEZe System implementation no sooner than FY16/17.

AB 684 (Alejo)	Optometrists	Removes Registered Dispensing Opticians (RDO) from the Medical Board of California (MBC) and places it under the Board of Optometry. (*Chaptered 2015*)	BreEZe Optometry Staff administering RDO transactions in BreEZe upon Release 2 go-live. Permanent solution to be implemented no sooner than FY16/17 pending workload capacity.
AB 1057 (Medina)	Licenses: military service	Requires each program to ensure that their application forms for licensure include information about the applicant's status in the military. (*Chaptered 2013*)	BreEZe Implemented by 5 of the 8 Release 2 boards. Remaining Release 2 programs to be implemented no sooner than FY16/17. (Board of Occupational Therapy, Physical Therapy Board, and Veterinary Medical Board) LEGACY Implemented.
AB 1174 (Bocanegra)	Dental Professionals	New and expanded licenses type for Registered Dental hygienists in extended functions (RDAEF) for the Dental Board (*Chaptered 2014*)	BreEZe Implemented upon Release 2 go-live.
AB 2102 (Ting)	Licensees: data collection	Requires the Board of Registered Nursing (BRN), Physician Assistant Board (PAB), and Respiratory Care Board, and the Board of Vocational Nursing and Psychiatric Technicians to collect and report specific demographic data relating to its licensees. (*Chaptered 2014*)	BreEZe Implemented. LEGACY Implemented.
SB 304 (Lieu)	Healing arts: boards	Makes a variety of changes to the functions and admin of the Medical Board of California (MBC) including the creation of the Health Quality Investigation Unit with the DCA'sDivision of Investigation. Creates changes to the enforcement and hospital inspection for Veterinary Medical Board (VMB). Allows the permitting of Veterinary Assistants. (*Chaptered 2013*)	BreEZe Implemented. Permitting of Veterinary Assistants pending Board development and approval of regulations.
SB 562 (Galgiani)	Dentists: mobile or portable dental units	Sets new requirements and regulation of mobile or portable dental clinics by the Dental Board. (*Chaptered 2013*)	BreEZe Implemented upon Release 2 go-live.

SB 809 (DeSaulnier)	Controlled substances: Reporting	Requires the MBC, Dental Board, Pharmacy Board, VMB, BRN, Physical Assistant Committee of the MBC, Osteopathic Medical Board (OMB), Board of Optometry, Podiatric Medicine, and Naturopathic Medical Board to assess an annual CURES fee. (*Chaptered 2013*)	BreEZe Implemented LEGACY Implemented
SB 1116 (Torres)	Physicians and surgeons	Requires MBC and OMB to develop a mechanism for a voluntary contribution to the Steven M. Thompson Physician Corps Loan Repayment Program. (*Chaptered 2014*)	BreEZe OMB implemented; MBC implementation pending a request from MBC. MBC implementation no sooner than FY16/17 .
SB 1226 (Correa)	Veterans: professional licensing	On July 1, 2016 requires a board or bureau to expedite the licensure process for an applicant who holds a current license in another state of the United States. (*Chaptered 2014*)	BreEZe Implemented LEGACY Implemented.

Staff Questions/Recommendations:

1) *What is the status of the large backlog of maintenance needs and system changes for Release 1? When does the DCA project that these maintenance issues will finally be completed?*

2) *The DCA should provide an update on the status of Release 2 of BreEZe. What is the current workload estimate and timeline for Release 2 maintenance requests to be met? Is there adequate staff to handle all of these maintenance requests? How is the DCA prioritizing Release 2 needs with remaining Release 1 needs?*

3) *How does the DCA plan to meet Release 3 entities IT needs in the years until a potential cost-benefit analysis is complete and a decision moving forward is made? Does the DCA have a contingency plan in the event that BreEZe is deemed unsuitable for these entities upon evaluation, assessment and completion of the cost-benefit analysis?*

4) *What is the current status and timeline for ensuring that enacted legislation impacting BreEZe is implemented? The DCA should advise the Committees on the role BreEZe impacts play in the DCA's evaluation of pending legislation?*

Issue #3: Pro Rata

Background

The Committees continue to be interested in exploring the manner in which the DCA boards are charged for administrative services provided by the DCA. Business and Professions Code Section

201 gives the Director, with approval of the Department of Finance, the authority to charge the boards for estimated administrative expenses. Specifically, Section 201 states :

> "A charge for the estimated administrative expenses of the department, not to exceed the available balance in any appropriation for any one fiscal year, may be levied in advance on a pro rata share basis against the funds of any of the boards, bureaus commissions, division and agencies, at the discretion of the director and with the approval of the Department of Finance."

Through its divisions, the DCA provides centralized administrative services to all boards, committees, commission and bureaus (hereafter boards). Most of these services are funded through a pro rata calculation that is based on "position counts." Other functions (such as call center services, complaint resolution, and correspondence units) are based on the past-year workload. The pro rata charges to the boards fund all of the DCA's operations. For FY 16-17, the DCA is budgeted with $114 million and 771 authorized positions.

It is important to note that the boards have no control over the pro rata charges regardless of the quality or quantity of services provided by the DCA. Despite this, the executive officers are held responsible for managing their budgets as well as spearheading requests for fee increases. As shown in the table below, pro rata charges in actual dollars are significant for many boards.

DCA Administrative Cost Distribution		
Board/Bureau	FY 2016-17 Pro Rata	
	Dollars	% of Annual Budget
Medical Board of California	$23.3 million	37%
Board of Registered Nursing	$14.6 million	34%
Bureau of Automotive Repair	$11.8 million	10%
Board of Barbering and Cosmetology	$8.7 million	38%
Bureau of Security and Investigative Services	$7.6 million	48%
Contractors State License Board	$6.8 million	10%
Physical Therapy Board	$1.9 million	36%
Veterinary Medical Board	$1.6 million	33%
Bureau of Medical Marijuana	$1.6 million	43%
Bureau of Electronic Appliance Repair	$1.1 million	35%

The DCA's pro rata calculations are based on position authority rather than the actual number of employees, which may ultimately inflate pro rata charges. In recent years, there have been a number of statewide efforts to reduce expenditures and staffing levels throughout state government. Although these cost-control measures reduced staffing levels at the boards, it was unclear if or how pro rata charges were adjusted as a result of these staffing reductions. In some cases, previous year pro rata charges continue to have an effect on a board or bureau's fiscal stability.

CPS HR Consulting Pro Rata Report

Increasing transparency of pro rata calculations has been a major focus of the Legislature because of the continued lack of clarity in how the DCA determines their administrative cost distribution. Following the 2014 sunset review oversight of the DCA, SB 1243 (Lieu, Chapter 395, Statues of 2014) was passed as an effort to better understand how these assessments are calculated and what impact they have on board operations. SB 1243 required the DCA to conduct a one-time mandatory study of its "current system for prorating administrative expenses to determine if that system is the most productive, efficient, and cost-effective manner for the department and the agencies compromising the department."

The DCA contracted with CPS HR Consulting (CPS), a Sacramento firm that has contracted with and issued a number of reports on behalf of DCA entities, to conduct this study. The primary study objectives were to:

- Determine if the current pro rata system is the most efficient, equitable, transparent, and cost-effective way to allocate and distribute charges.
- Determine whether some of the administrative services offered by the DCA should be outsourced to other state providers.
- Determine whether the agencies currently served should be permitted to elect not to receive and be charged for certain administrative services.
- Identify opportunities and alternatives to sustain or improve the current system for all parties concerned.

On June 19, 2015, CPS released this study on the DCA's administrative cost distribution. According to CPS, the data analysis used by the DCA is "consistently inconsistent and inconclusive", and as such does not overtly support or refute the current DCA cost distribution methodology. The study found that the budgets in FY 2013-14 and FY 2014-15 were stable but declined in FY 2015-16 as a result of BreEZe project funding not being included in the FY 2015-16 budget. According to the study, boards and commissions averaged substantially more authorized positions than bureaus, an average of 58 percent of the total DCA authorized positions over a three-year fiscal period. The CPS study also determined that expenses at the DCA Consumer and Client Services Division (which includes the Executive Office, Legal Affairs, Legislative and Regulatory Review, Information Services [including BreEZe], Public Affairs, Publications Design and Editing and Complaint Resolution) were significantly greater than the Division of Investigation (DOI) expenses.

Although the overall data of the study provide inconclusive results on the effectiveness of the DCA's current cost methodology, CPS states that "Using authorized positions to distribute costs has a leveling affect that impacts small more than large clients. Consequently, distributing costs in this manner may result in large clients subsidizing small clients". CPS goes on to state "Using workload to allocate costs appears to be more equitable because other clients do not have to bear an unfair burden".

Among CPS's recommendations, it was suggested that the DCA move away from the current authorized position basis for calculating pro rata and make updates to its methodology aimed at improving cost distribution fairness and efficiency and increasing transparency in the DCA's pro rata cost distribution methodology.

CPS Pro Rata Survey

As a part of the DCA administrative cost distribution study, CPS also conducted an online survey of the boards' executive officers/assistant executive officers and bureau chiefs/deputy chiefs. In total, 37 of the 39 boards participated in the survey. It is important to note that participation in the survey required respondents to identify themselves, which could have potentially inhibited candid responses. The survey included feedback about the DCA's pro rata process, how the DCA units are ranked in terms of perceived importance in carrying out the board missions, satisfaction and feedback specific to each DCA unit, and preferences and feedback on opting out of the DCA's services.

According to CPS, the results of the survey indicate that "comments were generally positive about the overall service level received from DCA". However, CPS also states that general concerns voiced by the boards included "having more control and transparency around the costs or services, a greater desire for collaboration, and a feeling that DCA acts more as a gatekeeper or a control agency rather than a partner in solving business needs".

The survey results further indicated that the DCA's assistance and customer service were ranked higher than its accuracy and timeliness. CPS states that more than half the respondents had not considered opting out of DCA services, while 11 respondents had either considered opting out in the past or are considering opting out now. CPS also states that in some cases, individual comments reflected a desire to opt out of the costs associated with services they did not use and a concern with the actual value proposition of DCA services. CPS states that while overall satisfaction with the DCA provided services are high, many expressed that these services could be provided in alternative cost effective ways. The DCA plans to conduct a pro rata review in October 2016 to allow the boards to provide input into the process of distributing costs.

Fiscal Impact of Pro Rata and BreEZe

Under the current pro rata model, some boards are charged for services that they may not be receiving. The benefits that the boards receive from the DCA as a result of their payments into pro rata are not always clear. Some of the DCA's larger programs, like the Bureau of Automotive Repair (BAR) and Contractors State License Board (CSLB), may not use the full complement of the DCA's services. For example, both BAR and CSLB have their own sophisticated, in-house public information units that serve the sole purpose of supporting their own regulatory programs. As a result, the money that larger boards like BAR and CSLB pay into pro rata appears to subsidize the program needs of smaller boards.

It is important to evaluate whether or not the services the boards receive as a result of their payments into Pro Rata is proportionate. Some of the services the DCA provides to the boards

are efficient and necessary for administrative function. However, some services are neither necessary nor add positive value to the administrative processes of the boards. Pro Rata charges are sporadic and inconclusive in the calculation methodology, which is further emphasized by the results of the CPS study. There is continued interest in increasing transparency of pro rata calculations to allow for better understanding of how these assessments are calculated and what impact they have on board operations, especially in light of assessments now being made for BreEZe.

On February 22, 2016, the DCA provided fund condition reports that demonstrate the impact of development and maintenance of BreEZe on all of the DCA's special funds. According to these reports, 14 of the funds are projected to have less than 3 months in reserve in FY 2016-17. Typically, boards consider seeking fee increases when they project their funds will be at or dip below a three-month reserve. If these projections are accurate, those same 14 regulatory programs could be seeking fee increases next fiscal year. The following table shows the boards that have a three-month or less reserve.

Fiscal Impact of BreEZe SPR 3.1		
Fund Name	**Projected Months in Reserve FY 2016-17**	**BreEZe Release**
Medical Board of California	2.8	1
Registered Dispensing Opticians	0.3	1
Podiatric Medicine, Board of	0.1	1
Respiratory Care Board	1.5	1
Registered Nursing, Board of	1.4	1
Dental Board of California	0.6	2
Physical Therapy Board	3.0	2
Dental Hygiene Committee	2.8	2
Private Postsecondary Education, Bureau of	0.2	3
Guide Dogs for the Blind	0.2	3
Contractors' State License Board	1.3	3
Home Furnishing and Thermal Insulation	3.0	3
Pharmacy, Board of	2.0	3
Structural Pest Control Board	2.5	3

Staff Questions/Recommendations:

1) *The DCA should provide information about CPS HR Consulting and explain CPS' expertise and background in analyzing complex special fund budget allocations. Was the DCA satisfied with the CPS study? Does the DCA believe that the study provided useful recommendations to assist in its pro rata calculations?*

2) *What does the DCA plan to do moving forward taking into account the recommendations in the CPS study? Does the DCA plan to calculate and distribute costs differently than it currently does?*

3) *Given the feedback from the CPS survey, how does the DCA plan to address the concerns raised by the boards about pro rata assessment? Does the DCA view the current model as equitable and cost efficient? How can the DCA improve its current model?*

4) *How has BreEZe impacted the Release 3 boards, especially the seven boards that are listed to have reserves less than three months?*

Issue #4: Board Licensing Fee Increases

Potential Fee Increases Needed

There are currently four boards who are seeking potential fee increases. Of the four boards, three are projected to have reserves less than three months. It is important to note that three of the four of the boards currently seeking fee increases are in Release 3 of BreEZe. They are:

- Board of Registered Nursing
- Contractor's State Licensing Board
- Court Reporters Board
- Board of Pharmacy

Although these four boards are currently the only ones that have come to the legislature asking for a fee increase, the above table indicates that there are a total of 14 boards that will potentially need fee increases to keep their funds from going insolvent. For example the Bureau of Private Postsecondary Education (BPPE) has not formally requested a fee increase but is facing a deficit.

General Fund Loans from Special Funds

The following table outlines the outstanding General Fund Loans from the Special Funds and the accompanying repayment schedule. It should be noted that at the Medical Board's January 2016 board meeting, the Executive Officer of the Board in her report to the Board stated that the repayment schedule for the Medical Board would be pushed back to a later date, per information she received from the DCA.

Outstanding General Fund Loans from Special Funds			
Fund Number	**Fund Name**	**Amount (in thousands)**	**Repayment Year**
0069	State Board of Barbering and Cosmetology Fund	$11,000	2016-17
		$10,000	2017-18

0108	Acupuncture Fund	$4,000	2016-17
		$1,000	2017-18
0264	Osteopathic Medical Board of California Contingent Fund	$1,350	2016-17
		$150	2017-18
0280	Physician Assistant Fund	$1,500	2016-17
0310	Psychology Fund	$6,300	2016-17
		$1,200	2017-18
0704	Accountancy Fund	$21,000	2016-17
0758	Contingent Fund of the Medical Board of California	$6,000	2016-17
		$9,000	2017-18
0763	State Optometry Fund, Professions and Vocations Fund	$1,000	2016-17
0770	Professional Engineers' and Land Surveyors' Fund	$3,200	2016-17
		$800	2018-19
0773	Behavioral Science Fund	$6,300	2016-17
0305	Private Postsecondary Education Administration Fund	$3,000	2016-17
0317	Real Estate Fund	$10,900	2018-19
0400	Real Estate Appraisers Regulation Fund	$3,000	2016-17
		$500	2018-19
0421	Vehicle Inspection Repair Fund	$10,000	2016-17
		$90,000	2018-19
0769	Private Investigator Fund	$1,500	2016-17
3122	Enhanced Fleet Modernization Subaccount	$10,000	2016-17

<u>Staff Questions/Recommendations:</u>

1) *What role does the DCA play in creating program budgets? Do program E.O.s create budgets and then present those for DCA approval? How does the DCA become aware of imbalances in board revenues and expenditures?*

2) *Does the DCA attribute the current fund conditions of some of the boards seeking fee increases to pro rata payments? Based on the results of the CPS study and survey, has the DCA discussed lowering pro rata charges for boards seeking fee increases? Why or why not?*

3) *What plans does the DCA have to support programs facing fund problems?*

Issue #5: Update on the Consumer Protection Enforcement Initiative (CPEI)

Background

Some of the DCA's health care boards have a long history of taking three years or longer to take disciplinary action on their licensees when discipline is warranted. In response to pressure from the media and the Legislature, the DCA created the Consumer Protection Enforcement Initiative (CPEI) in 2010. The specific goal of CPEI was to reduce the average length of time it takes health care boards to take formal disciplinary action from three years to 12 to 18 months. Key components of CPEI include administrative changes, ensuring the boards' enforcement programs are sufficiently staffed and have adequate technology to conduct their regulatory functions, and establishing and publishing precise performance targets.

The Legislature has been very supportive of the DCA's efforts to establish and meet performance measures. In prior years, the Legislature has authorized 220 additional enforcement staff, approved funding for the BreEZe project, and established performance measures for the OAH. All of these efforts have been in support of CPEI.

Aside from BreEZe, many components of CPEI have been implemented. For example, enforcement staff has been increased and most health care boards have adopted changes in procedure designed to expedite certain enforcement transactions. However, the impact of those efforts have not been identified or measured and most boards have failed to meet their performance targets for formal discipline, which is the stated purpose of the entire initiative.

Complaint Prioritization

Generally, disciplinary cases can be placed into one of two phases: investigation and prosecution. At the DCA, investigations are typically conducted by the DCA employees. Once the investigation is completed, cases that warrant formal disciplinary action are forwarded to the Office of the Attorney General (AG) for prosecution. The AG must use OAH to schedule and conduct the disciplinary hearings.

The table below provides a very high-level overview of the complaint intake, investigation and prosecution processes. There are numerous steps and nuances in the process that are not included in the table. For simplicity, we present the major milestones and the entity that is responsible for the milestone.

Function	Who Performs This Function?
Complaint Intake	Board Employee
Conduct Investigation	Board Employee and/or DOI Investigator
Expert Review of Case File	Expert Consultant (This is typically a licensee on contract with the board or a licensee

	employed by the board.)
Prosecution of Cases	Deputy Attorney General
Conduct Administrative Hearing and Prepare Proposed Decision	Administrative Law Judge employed by the Office of Administrative Hearings
Adopt Final Discipline	Board Members

As noted in the chart above, some aspects of the enforcement programs are not within the DCA's direct control. Cases that go forward for formal discipline are referred to the AG's Office for prosecution. Cases that require a formal hearing must be heard by administrative law judges at the OAH. Both of these entities are outside of the DCA's jurisdiction.

An essential part of CPEI was enhancing use of non-sworn investigative staff to conduct less complex investigations. According to the CPEI Budget Change Proposal (BCP), which was approved in FY 2010-11, "Recognizing the need to make internal changes and acquire additional resources, and as part of these proactive efforts to develop a greater level of consistency as to how these complaints could be categorized, DCA issued 'Complaint Prioritization Guidelines' for Boards to utilize in prioritizing their respective complaint and investigative workloads." The following table identifies the guidelines that establish the three categories of complaint identification and the basic rationale for workload timeframes.

Complaint Prioritization Guidelines	
Category	**Type of Allegations**
Urgent	Acts that could result in serious patient harm, injury or death and involve, but are not limited to, gross negligence, incompetence, drug/alcohol abuse, practicing under the influence, theft of prescription drugs, sexual misconduct while treating a patient, physical/mental abuse, conviction of a crime etc.
High	Acts that involve negligence/incompetence (w/o serious injury), physical/mental abuse (w/o injury), mandatory peer review reporting, prescribing/dispensing w/o authority, involved in aiding and abetting unlicensed activity, complaints about licensees on probation, exam subversion, etc.
Routine	Complaints that involve fraud, general unprofessional conduct, unsanitary conditions, false/misleading advertising, patient abandonment, fraud, failure to release medical records, recordkeeping violations, applicant misconduct, continuing education, non-jurisdictional issues, applicant misconduct.

Performance Measures

While CPEI focused on the health care boards, performance measures were established for all of the enforcement programs at the DCA. CPEI currently measures workload and timelines in the following milestones for enforcement cases:

- Complaint intake
- Complaint intake and conducting investigations
- Formal discipline

One year after the DCA created CPEI, the Governor issued Executive Order B–13–11 requiring the DOF to utilize "performance-based budgeting" to increase efficiency and focus on accomplishing program goals for the DCA and other departments. Pursuant to the Executive Order, the Governor's proposed budgets for FY 2013–14 through FY 15-16 included targets that mirror previously established CPEI targets and measures.

In 2014, the DCA reported to the Committees that it was requiring all boards to "undergo a program evaluation to determine appropriate enforcement and licensing performance measures." According to the Governor's proposed budget for FY 2015-16, the DCA will report on performance targets for its licensing programs in FY 16-17, and actual performance data will be reported in the FY 17-18 budget. Adding performance measures for licensing programs would be helpful, as licensing delays can affect the economic development of the state and individuals' fiscal well-being.

In 2010, the DCA's CPEI stated, "DCA has been working with the Attorney General's Office and the Office of Administrative Hearings to establish performance agreements that will expedite the prosecution of cases. The DCA and the AG's Office are developing expectations for filing accusations, setting settlement conferences, and filing continuance requests."

In March 2014, the DCA was still working on those agreements. The DCA reported that it planned to "continue to work with both OAH and the AG's Office to develop performance measures." It also has been reported that the DCA legal staff were meeting regularly with OAH and the AG's Office to discuss methods and efforts to reduce enforcement time frames.

Absent an agreement between the DCA and the OAH regarding performance measures, Senate Bill 1243 (Lieu), Chapter 395, Statutes of 2014, established performance measures for the OAH beginning January 1, 2016. The OAH issued its First Annual Caseload Statistics and Hearing Timeframe Report to the Legislature on September 30, 2014. Notably, the report was published over a year ahead of the due date. In addition to measuring workload and timelines, the OAH reports that it is in the process of developing targets for those timelines. This effort is consistent with the Committees' past recommendations. The table below summarizes OAH caseload data for DCA boards in FY 2014-15.

Office of Administrative Hearing Caseload Data FY 2014-15	
OAH Actions for DCA Boards	**Caseload / Days**
Number of Cases Filed	3,994
Number of Hearings Held	1,979
Number of Decisions Issued	1,617

Average number of days: • From receiving a request to setting a hearing date • From setting a hearing to conducting the hearing • After conducting a hearing to transmitting proposed decision Total (from request to set hearing to issuance of proposed decision)	 10 164 25 199

Data Collection by the Attorney General

Stemming from 2015 sunset review oversight hearings, SB 467 (Hill, Chapter 656, Statutes of 2015) was passed to address the systematic problems concerning CPEI. Among other things, the bill requires the Department of Justice (DOJ) to submit a report to the DCA, the Governor, and the appropriate policy committees of the Legislature that includes specific statistical information regarding cases referred to the DOJ by each entity in the DCA, including the Division of Investigation within the DCA beginning in 2017.

High Cost to the AG for Data Collection

On December 15, 2015, the DOJ submitted two BCPs. The first BCP requested a budget augmentation of $1,284,000 in FY 2016-17 and ongoing for additional staff in order to implement the provisions of SB 467 regarding the reporting requirements by the AG.

This cost appears to be high, as the reporting requirements are intended to be updates on the AG's current case load concerning entities within the DCA. In addition, the AG has indicated in this BCP that the expenses for the reporting requirement will be passed to the DCA. According to the justification in the December 2015 BCP, costs for the reporting requirements will be absorbed and spread throughout the DCA programs. The justification for this is to mitigate postponing enforcement actions which could result in potential consumer harm. However, the justification of preventing consumer harm does not apply to all entities under the DCA. For example, the Athletic Commission's enforcement actions don't necessarily result in consumer harm, as the primary objective of the Commission is to protect the health and safety of its athletes and not consumers. The above rationale to spread the cost of the reporting requirement is too broad, given the diversity of the entities under the DCA. There should be a review of the necessity and methodology for the budget augmentation for SB 467 implementation.

The second BCP requested an augmentation of $1,373,000 in FY 2016-17 to fund additional investigators in the Licensing Section of the DOJ in order to reduce the average case processing time and meet the goals of CPEI. The rationale behind this request appears to indicate that more staff will reduce the case processing times. However, issues unrelated to staffing—such as delays in scheduling hearings by OAH and difficulties by the DCA in obtaining the necessary information to complete investigations—could be causing a majority of these delays. The additional positions requested for the DOJ might not address the key factors contributing to delays in the enforcement process.

Lengthy Prosecutions Persist

At its inception, the goal of CPEI was to reduce the average enforcement completion timeline from three years or more to between 12 and 18 months by FY 2012–13. Six years after CPEI was launched, most of the boards are meeting performance targets for complaint intake and complaint investigation for cases not referred for formal discipline. However, many of the DCA's boards continue to fail to meet performance targets for formal discipline.

Despite additional resources and administrative changes to facilitate the more timely completion of enforcement cases, it still takes most health care boards more than two years to complete the formal disciplinary process.

Some of the lengthiest averages for formal discipline are shown in the table below. The target number of days for formal discipline is 540 days.

Board Name	Average Days to Formal Discipline*
Chiropractic Examiners Board	1,299
Board of Vocational Nursing & Psychiatric Technicians	1,201
Dental Board	1,165
Veterinary Medical Board	1,199
Board of Psychology	1,497
Acupuncture Board	1,143
California State Board of Pharmacy	903
California Board of Accountancy	824
Board for Professional Engineers and Land Surveyors and Geologists	788
Board of Behavioral Sciences	768

*Based on the Quarterly Performance Measure Reports for Quarter 4, April-June 2015

The cause or causes for the lengthy prosecution timeline remain unclear. The fact that multiple entities have a role throughout the process and the lack of consistent long term data makes it difficult to diagnose the reason.

It is important to note that cases for which formal discipline is sought are subject to due process, which can lengthen the time it takes to close these cases. For example, the subject of pending discipline can request continuances because he or she hired new legal counsel, a witness may be unavailable, or other evidentiary issues. These may be legitimate reasons for delaying a case, but we do not know if these are the causes.

If resources at the AG's Office or OAH have been a factor, staffing levels at both were recently enhanced. The AG's Office was authorized 29 additional positions in the legal services division, 14 of which were directed to their licensing division to support the DCA's enforcement efforts.

OAH has transitioned 10 part-time Administrative Law Judges to full time employees, which is expected enhance efficiencies in calendaring hearing dates.

Review, Revise and Expand Performance Targets

CPEI has resulted in staffing enhancements as well as administrative changes that may have improved efficiencies within enforcement programs.

The fact that many of the boards are generally meeting their internal (intake and investigation) targets is commendable. Lengthy timelines for prosecutions continues, so it may be unreasonable to place a 12 to 18 month expectation on the boards.

The following recommendations and questions were put forth in the 2015 sunset report as suggested issues the DCA may consider during its internal evaluation:

- How effective have the Case Acceptance Guidelines been for program implementation?
- Has the DCA reconsidered existing enforcement performance targets?
- How is the DCA collaborating with the AG and OAH in developing new plans?

The same report suggested the DCA should "conduct another system-wide review and analysis of the enforcement programs, similar to CPEI, and develop a new corrective action plan to address shortcomings. That plan should include establishing additional expanded performance measures for boards, for the AG's Office and for OAH. When conducting this review and developing the new plan, DCA should consult with the AG's Office and OAH."

The Department responded that it began a review and analysis of the original CPEI healing arts boards and has been coordinating meetings with those enforcement programs, the Department of Finance, and the Department's enforcement and budget staff. The DCA states that as a result of the review, it was successful in receiving additional staff positions in FY 2014-15. The DCA also stated that it sponsors quarterly enforcement manager meetings to discuss best practices across the Department and assess the value of current performance measures.

Despite additional staff and continuing quarterly enforcement manager meetings, the outcomes of these meetings do not show substantial improvement with the boards that have more systematic CPEI issues. Once again, it is suggested that the DCA should review CPEI as suggested last year, in order to determine if the performance measures could be modified, including reducing the performance targets.

Staff Questions/Recommendations:

1) *As was recommended last year, DCA should conduct system-wide review and analysis of the enforcement programs, similar to CPEI, and develop a new corrective action plan to address shortcomings. That plan should include reconsidering existing enforcement performance targets, establishing additional expanded performance measures for boards, for the AG's*

Office and for OAH. When conducting this review and developing the new plan, the DCA should consult with the AG's Office and OAH.

2) *The DCA should provide the Committees with an update on the progress of the joint performance targets with OAH and the AG's office.*

3) *The AG should report to the Committees on the details concerning the two BCPs for augmentation to implement SB 467 and to hire additional staff for the DOJ. What are the rationales behind requesting these amounts?*

4) *What does the AG view as the main factor for not meeting the goals of CPEI?*

Issue #6: Transfer of Medical Board Investigators and Use of the Vertical Prosecution Model

Background

Senate Bill 304 (Lieu, Chapter 515, Statutes of 2013), transferred the Medical Board of California's (MBC) Peace Officers, Medical Consultants, and some support staff to a newly created Health Quality Investigation Unit (HQIU) within DCA's Division of Investigation (DOI).

HQIU now performs investigative services for MBC, the Osteopathic Medical Board, the Board of Podiatric Medicine, the Board of Psychology, the Physician Assistant Board, and any other entity under the jurisdiction of MBC (e.g., Licensed Midwife Program, Registered Dispensing Optician Program, etc.). Prior to implementation of SB 304, all of the investigative services discussed above were performed by MBC investigative staff. MBC will continue to operate under the Vertical Enforcement and Prosecution (VEP) model, which requires joint investigation by HQIU and employees of the AG's Office.

The budget for FY 2014–15 transferred $15.5 million and 116 positions, plus an executive-level staff to provide review of enforcement cases, settlement negotiations, and liaison with the AG's Office, etc. While this transfer took effect July 1, 2014, several outstanding management issues and protocols have yet to be resolved. Most significantly, DOI and the AG's Office have not agreed upon a Procedural Manual for Vertical Enforcement (VE), which has hampered the flow of investigations and resulting prosecutions.

In July 2015, the VE Prosecution Protocol manual was released. The manual provides a guideline for staff members conducting investigations, strategies to resolve disagreements between investigators and the AG's legal staff, as well as outlines cooperation and communication expectations between the two offices. The manual's heavy emphasis on collaboration and conflict resolution between investigators and the AG's legal staff is the result of strained personnel issues between the two offices. The manual has sought to address these disagreements by providing clarified definitions regarding the roles of each office and the expected amounts of direction and supervision from the AG's Office.

It should be noted, that since the transfer of the MBC investigative staff, there appears to be an increase in criminal prosecutions of Medical Board cases by DOI, which generally do not require the approval of the AG's Office. However, there appears to be some concern on the part of the AG that they may lack involvement in the decision to prosecute a case criminally.

Continued Use of Vertical Prosecution Model

At the January 2016 MBC board meeting, it was reported that recruitment and retention of sworn investigative staff continue to be the biggest hurdles for VE. As a result of the high turnover of investigative staff, there are "holes" in the expertise needed to complete many of these investigations including training to help standardize investigations and expert witness training.

One reason for the high turnover of investigative staff is broken relationships between investigators and the AG's legal staff. It was reported that there may be inequalities in how cases are processed. As stated above, there appears to be an increase in criminal prosecutions of MBC cases by the DOI, which generally do not require the approval of the AG's Office. This is potentially one consequence of the failed relations between the investigative staff and AG's legal staff—as investigators would "step around" the AG's Office by pursuing criminal prosecutions rather than administrative investigations. Strained relationships between investigative staff and AG legal staff have been documented elsewhere. In a 2009 report by Integrated Solutions for Business and Government, Inc. (ISBG) analyzing VE, one recommendation addresses the "zero tolerance and negative communication" between the MBC and Health Quality Enforcement Section (HQES). The report goes on to say that "While both the MBC and HQES have made considerable progress in their working relationship, additional work is necessary to ensure mutual respect and appreciation for the vital roles each bring to the process and, ultimately, to public protection". Despite the newly released 2015 VE manual stressing the importance of collaboration and conflict resolution, it is unclear if this has adequately addressed the problems between the two offices outlined in the 2009 ISBG report.

In addition to staff difficulties, the initial intent and structure of the VE model does not appear to be upheld. At the same January 2016 board meeting, HQIU and HQES staff reported that cases are still being conducted with the "handoff method". The purpose of the VE model was to eliminate this handoff method by aligning investigators and legal staff to handle cases together, instead of the traditional route of investigator gathering information and "handing" the case off to legal staff.

It is unclear at this time what benefits the VE model has provided in terms of reducing caseloads and length of time for any disciplinary action.

Recommendations from Vertical Enforcement Report

On March 1, 2016, the MBC released an update about the VE program along with recommendations to improve the current process. In addition to the continued use of the VE manual, the MBC recommends that investigators and the Deputy Attorney General (DAG)

continue to work on creating better cohesion by finding a mechanism to "more fully utilize the expertise brought to the team by both the investigators and the DAG". These recommendations brought forward by the MBC continue to highlight the breakdown in partnership between the DAG and investigators but are vague in identifying tangible solutions to address the problem, as it appears the problems with the current model are rooted in personnel issues. It would be helpful for the Committees to better understand where and why the breakdown between the investigators and the DAG is occurring and the impact this breakdown has had on the integrity of the VE model.

Staff Questions/Recommendations:

1) *What is the DCA's assessment of the impact of the transfer of investigative staff? How are the DOI, AG, and Board offices working together? How can these offices continue to improve their work relationships? Are the goals of all the offices congruent? Has the new VE manual made an impact in the collaboration between investigators and the DAG?*

2) *In light of continuing problems with VE without any significant benefits in enforcement outcomes or timelines, should the program be continued? If so, what solutions are available to address these continuing problems?*

Issue #7: Status of CURES

Prescription Drug Abuse

For the past number of years, abuse of prescription drugs (taking a prescription medication that is not prescribed for you, or taking it for reasons or in dosages other than as prescribed) to get high has become increasingly prevalent. Federal data for 2014 showed that abuse of prescription pain killers now ranks second, just behind marijuana, as the nation's most widespread illegal drug problem. Abuse can stem from the fact that prescription drugs are legal and potentially more easily accessible, as they can be found at home in a medicine cabinet. Data shows that individuals who misuse prescription drugs, particularly teens, believe these substances are safer than illicit drugs because they are prescribed by a health care professional and thus are safe to take under any circumstances.

A 2013 CDC analysis found that drug overdose deaths increased for the 11th consecutive year in 2010 and prescription drugs, particularly opioid analgesics, are the top drugs leading the list of those responsible for fatalities. According to CDC, 38,329 people died from a drug overdose in 2010, up from 37,004 deaths in 2009, and 16,849 deaths in 1999. CDC found that nearly 60 percent of the overdose deaths in 2010, involved pharmaceutical drugs, with opioids associated with approximately 75 percent of these deaths. Nearly three out of four prescription drug overdoses are caused by opioid pain relievers.

Prescription Drug Monitoring and CURES

CDC recommends the use of Prescription Drug Monitoring Programs (PDMPs) with a focus on both patients at highest risk in terms of prescription painkiller dosage, numbers of prescriptions and numbers of prescribers, as well as prescribers who deviate from accepted medical practice and those with a high proportion of doctor shoppers among their patients. CDC also recommends that PDMPs link to electronic health records systems so that the information is better integrated into health care providers' day-to-day practices. CDC believes that state benefits programs like Medicaid and workers' compensation should consider monitoring prescription claims information and PDMP data for signs and inappropriate use of controlled substances. The organization also acknowledges the value of PDMPs in taking regulatory action against health care providers who do operate outside the limits of appropriate medical practice when it comes to prescription drug prescribing. With rising levels of abuse, PDMPs are a critical tool in assisting law enforcement and regulatory bodies with their efforts to reduce drug diversion.

California has the oldest PDMP in the nation. Controlled Substance Utilization Review and Evaluation System (CURES) is an electronic tracking program that reports all pharmacy (and specified types of prescriber) dispensing of controlled drugs by drug name, quantity, prescriber, patient, and pharmacy. Pharmacies and dispensers are required to report dispensations of Schedules II through IV controlled substances to DOJ at least weekly. CURES receives about one million prescription records per week. Presently, the database contains approximately 400 million entries of controlled substance prescriptions dispensed in California. Data from CURES is managed by DOJ to assist state law enforcement and regulatory agencies in their efforts to reduce prescription drug diversion. CURES provides information that offers the ability to identify if a person is "doctor shopping" (when a prescription-drug addict visits multiple doctors to obtain multiple prescriptions for drugs, or uses multiple pharmacies to obtain prescription drugs). Information tracked in the system contains the patient name, prescriber name, pharmacy name, drug name, amount and dosage, and is available to law enforcement agencies, regulatory bodies and qualified researchers. The system can also report on the top drugs prescribed for a specific time period, drugs prescribed in a particular county, doctor prescribing data, pharmacy dispensing data, and is a critical tool for assessing whether multiple prescriptions for the same patient may exist. CURES data can be obtained by the Board of Pharmacy, Medical Board of California, Dental Board of California, Board of Registered Nursing, Osteopathic Medical Board of California and Veterinary Medical Board.

The program was made permanent in 2003 and in 2009 an online CURES system at the DOJ was launched to replace the previous system that required mailing or faxing written requests for information, giving health professionals (doctors, pharmacists, midwives, and registered nurses), law enforcement agencies and medical profession regulatory boards instant computer access to patients' controlled-substance records. Amidst concerns about system challenges and usability and in the face of significant budget cuts that threatened the ongoing viability of the system, in 2013, SB 809 (DeSaulnier, Chapter 400, Statutes of 2013) established a funding mechanism to update and maintain CURES while also requiring all prescribing health care practitioners to apply to access CURES information (the date for compliance is now July 1, 2016 pursuant to 2015

legislation extending the timeframe for prescribers to enroll in the system). Use of CURES by prescribers and dispensers at the time of prescribing or dispensing is voluntarily.

The upgraded system, CURES 2.0, became operational in late 2015. The new interface has significantly improved timeframes for accessing information, navigating through the system and general usability. Licensees can apply directly within the web based system, a significant shortfall of the prior CURES which required applicants to submit notarized paper applications to DOJ. Prescribers and dispensers are able to easily generate patient activity reports and can securely send communications to one another about a mutual patient through the system. Through CURES 2.0, prescribers can receive daily informational alerts about patients who reach various prescribing thresholds, based on patterns indicative of at-risk patient behavior, which can be used to determine if action by the prescriber is necessary.

Staff Questions/Recommendations:

1) *The AG should give an update to the Committees on the status of CURES 2.0. Is the system on track to be fully implemented by July 1, 2016?*

2) *What steps is the AG taking to ensure prescribers comply with the requirement to enroll in CURES and how is the AG working with DCA boards to ensure licensees comply with the requirement to enroll? The AG should provide an update on its relationship with DCA boards, including support the AG receives to validate licensee standing (necessary for enrollment), as well as support the AG and CURES provide to regulatory board investigations involving controlled substances.*

3) *The AG should explain how the system can accommodate a potential influx of users and whether users will experience operational delays that impact their ability to receive CURES information.*

4) *Does the AG believe the license fee increases established in SB 809 will continue to provide a stable funding source for CURES?*

Issue #8: Status of the Bureau of Medical Marijuana

Background

Since the approval of the Compassionate Use Act (CUA) and Proposition 215 by voters in 1996, state law has allowed Californians access to marijuana for medical purposes and prohibits punitive action against physicians for making medical marijuana recommendations. The CUA established the right of patients to obtain and use marijuana to treat specified illnesses and any other illness for which marijuana provides relief. The CUA prohibits prosecution for growing or using marijuana for Californians who have the oral or written recommendation of their doctors and for these patients' caregivers. Additionally, the CUA specifically protects physicians who recommend the use of marijuana to patients for medical purposes and exempts qualified

patients and their primary caregivers from California drug laws prohibiting possession and cultivation of marijuana.

The CUA is considered a very general law. While it establishes the right of a patient to obtain medical marijuana pursuant to a physician's recommendation, the initiative then simply encourages the state and federal governments to "implement a plan for safe and affordable distribution of marijuana [to qualified patients]."

In 2015, the Medical Marijuana Regulation and Safety Act (MMRSA) was created by three bills [AB 243 (Wood, Chapter 688, Statutes of 2015), AB 266 (Bonta, Cooley, Jones-Sawyer, Lackey, and Wood, Chapter 689, Statutes of 2015), and SB 643 (McGuire, Chapter 719, Statutes of 2015)], that collectively established a comprehensive state regulatory framework for the licensing and enforcement of the cultivation, manufacture, retail sale, transportation, storage, delivery and testing of medical marijuana in California. Among other things, the MMRSA establishes a new Bureau of Medical Marijuana (Bureau) under DCA which is responsible for licensing and regulating dispensaries, transporters, and distributors. In addition, the Department of Public Health is responsible for regulating manufacturers, testing laboratories, and the production and labeling of edible medical marijuana products. The Department of Food and Agriculture is responsible for regulating cultivation, and other state agencies, such as the Department of Pesticide Regulation and the State Water Resources Control Board, are responsible for developing environmental standards.

The MMRSA took effect on January 1, 2016. The establishment of a massive new regulatory framework for medical marijuana, particularly in light of complexities surrounding federal, state and local law, is a significant undertaking for the DCA. The DCA is authorized for $1.6 million in FY 2015-16 for the Bureau and the Governor's 2016-17 budget authorizes $3.8 million and 25 positions for creation and support of the Bureau. The DCA reports that the Bureau's pro rata payment to DCA for FY 206-17 is $1.6 million (43 percent of the Bureau's budget). The Governor appointed a Bureau Chief in February 2016.

Staff Questions/Recommendations:

1) *The DCA should provide an update on the implementation of the MMRSA by the Bureau. What are the greatest challenges to the new Bureau? What is the DCA doing to ensure stakeholder participation in the early stages of regulatory development?*

2) *What types of services and resources will the Bureau receive as a result of its pro rata payments to the DCA?*

3) *Will Bureau licensing be done through BreEZe? What plans does the DCA have to ensure efficiency in the Bureau's IT and licensure efforts?*

4) *The Committees should consider including a sunset date for the Bureau, at which time a review of Bureau operations will take place to determine its effectiveness in protecting consumers, regulating the industry, and fulfilling its mission.*

Issue #9: Status of Military Licensure

Background

For many returning veterans, the transition from the military to the civilian workforce can be challenging. Employers and veterans are often unsure of how skills utilized in the military can translate into a different work environment, and veterans may be unsure about how to apply and interview for a job. Further, veterans returning from active duty may be dealing with mental and physical health issues or a disability.

Fortunately, the employment situation for veterans is improving. According to the latest U.S. Bureau of Labor Statistics (BLS) estimates, unemployment rates for veterans across the nation are at an all-time low. Further, past and present estimates show that California's own veteran unemployment rates have decreased in recent years.

However, the BLS also estimates that California still has the fifth highest percentage of unemployed veterans. This is significant as California has the highest number of total veterans and the second highest number of veterans in the workforce, which leaves California with the highest raw number of unemployed workforce veterans—64,000 (7.4 % of the state's labor force). Improving employment opportunities through a state-wide hiring initiative for veterans can lay the ground work for pathways to opportunities and sets a positive example for private sector employers. California has had a veteran's preference system in the state hiring process for many years. However, the system has not been analyzed and it is unclear if the system works. In short, we still do not know if the state has effective practices to reach, hire, and retain veterans. In response, the legislature passed AB 1397 (Committee on Veterans Affairs), Chapter 645, Statutes of 2014 to address the analysis gap to inform executive and legislative branch decision makers as to whether we have an effective system in place.

Occupational Licensing in California

In addition to direct hiring initiatives and workforce development, California has also taken steps to improve employment opportunities for veterans by reducing unnecessary occupational licensing burdens. There are many costs associated with licensure, including fees, educational costs, and the inability to perform the work requiring a license. While professional licensing has its benefits, and is often necessary to protect consumers, it is important to ensure that the requirements imposed on licensees are truly tied to benefits provided to consumers. Further, because veterans are a unique population, there are additional considerations to take into account.

According to a July 2015 report on occupational licensing released by the White House, strict licensing creates barriers to mobility for licensed workers, including veterans. The report goes on to state that oftentimes, service members and veterans are required to repeat education or training in order to receive these occupational credentials, even though much or all of their military training and experience overlaps with licensure or certification requirements. Military

applicants may be stationed away from the state where they earned their license. Veterans may also end up moving to a different state when they are discharged. If the state they move to does not accept their license, the military applicants and their families may have to repeat education and training to meet the state-specific requirements. The report states that "according to a 2012 survey, 60% of veteran respondents said they had trouble translating their military skills into civilian job experience".

The impact is even higher on younger workers in highly licensed occupations, who may be just starting out and do not have strong ties to a specific geographical location. According to U.S. Department of Veterans Affairs estimates, California has the second highest number of veterans ages 25-35 (166,506) in the nation.

There is also a significant impact on the spouses of veterans and military applicants. According to the U.S. Department of Defense and the Department of the Treasury, "…about 35[%] of military spouses in the labor force work in professions that require State licenses or certification, and they are ten times more likely to have moved across state lines in the last year than their civilian counterparts."

Redundancy of Education and Training Requirements

The issue of repeating unnecessary education and training can be a problem for all licensed professionals. However, the impact can be particularly troublesome for veterans. Many veterans enter the military at an age when their peers are attending college. Therefore, when they exit the military, they are lacking in educational experience compared to their non-veteran counterparts.

Further, many veterans utilize funds from the Post-9/11 Veterans Educational Assistance Act of 2008 (Post-9/11 GI Bill). The Post-9/11 GI Bill offers educational benefits for those who served since September 11, 2001. It will pay up to 36 months of tuition up to the cost of the most expensive public school in the state and will also provide for some living expenses and books. However, veterans must use the benefits within a 36 school-month time frame. For those suffering from Post-Traumatic Stress Disorder (PTSD), Traumatic Brain Injury (TBI) or other mental or physical injuries, the timeframe may be too short to complete school. As a result, veterans may have a tougher time than their civilian counterparts when they are unable to utilize the license, training, or education they already have. According to a 2012 study by the Institute of Justice, California has the seventh highest average number of days of education required for lower and middle-skill occupations (549 days).18 Hawaii ranks first (724 days) and Pennsylvania ranks last (113 days).

In addition, veterans may not receive the support they need from schools. For-profit schools may specifically target veterans and military members for enrollment. These schools sometimes offer special incentives for enrolling military members and have also been known to misrepresent potential career opportunities and salary outcomes to students, while encouraging them to take classes that will have little benefit for their future. Therefore, establishing uniform curricula and ensuring a wide-availability in both public and private schools may help.

One way to address the issue would be to provide military applicants a state license educational credit for military training and education. However, sometimes qualifications are specifically described in statute and provide the regulating entity with little to no discretion over what experience or education can be accepted. Others are limited by schools and the accrediting agencies, many of the DCA entities "…do not determine the applicability of military experience and training to the profession, rather it is the responsibility of approved schools to grant credit toward the educational requirements of a license." In addition, schools may be afraid of risking their accreditation by providing credit that has not been preapproved by an accrediting entity.

As a result, statutory remedies may be necessary. For instance, as a result of the 2015 joint sunset review hearings, SB 466 (Hill, Chapter 489, Statutes of 2015) changed the Board of Registered Nursing's (BRN) statute to ensure that the BRN does not approve schools that do not provide credit for military training. However, the BRN is unique in that it is one of three boards under the DCA that conducts its own school approvals, rather than relying on a school's status with an accrediting agency.

If a model is needed, there are many programs that already translate military experience, such as the American Council on Education (ACE), which is used by the federal Defense Activity for Non -Traditional Education Support (DANTES) program. ACE's College Credit Recommendation Service (CREDIT) connects workplace learners with colleges and universities by helping adults gain access to academic credit for formal courses and examinations taken outside traditional degree programs, including the military.

Many military applicants may already have licenses or training in specific professions. To practice a licensed profession in the military, the individual just needs to be licensed in a state. Therefore, there are ways to offset the costs for those who already have a license. States can avoid duplicating educational and training requirements by providing temporary or provisional licenses, accepting out-of-state licenses (reciprocity), or substituting military training for educational credit.

In California, many boards and bureaus under the DCA offer some sort of reciprocity for professionals licensed in other states. However, most still require additional education and examination beyond and all still require additional licensing fees. Specifically, there are 10 boards or bureaus that offer full reciprocity or accept the passage of a national exam without additional education; 13 boards offer some reciprocity for education or licenses; and 12 that offer no reciprocity.

Licenses also take time to process, and the applications, background checks, and renewals have associated fees. To assist with the issue, the board and bureaus under the DCA must waive renewal requirements for active duty military personnel and expedited processing for their spouses or domestic partners. It is important to examine whether there are licensing requirements that may be unnecessarily burdening veterans and military families.

Staff Questions/Recommendations:

1) *The DCA should report to the Committees on its efforts to increase streamlined access, when appropriate, for veteran licensing and reciprocity.*

2) *What additional solutions have the DCA considered in minimizing employment barriers for veterans? How has the DCA worked with the various boards and bureaus to do so?*

3) *Does the DCA have a method of tracking veteran employment data?*

Issue #10: Use of Information Technology by the Department and Boards

Webcasting

Webcasting can be a valuable tool in allowing public access to board meetings. In the past, very few of the DCA board meetings were webcast; however, in recent years, there has been an increase in webcasting of board meetings. With that increase, many technical difficulties seen in the past have been improved. For example, meeting participants are better at identifying themselves when they speak, and participants are more careful to use microphones. However, sometimes there is sporadic loss of internet feed and poor audio quality for many meetings.

Even more important than webcasting, may be the ability for the public to participate in meetings remotely. Other state boards are now doing this routinely. For example, the Medical Board of California is using a robust system for webcasting and live teleconferencing for participants who may be monitoring the meetings via the internet or the teleconference.

The DCA wrote in last year's sunset report, "We continue to make great strides in enhancing the ability of the public to access Board meetings." According to the DCA, from July 1, 2014 through March 1, 2015, the DCA webcast 89 board meetings compared with 77 from July 1, 2013 through March 1, 2014. In addition, the DCA states that they have implemented recommendations for last year's sunset report by working with the boards to standardize meeting procedures when there is a webcast and have streamlined access to meeting agendas by placing website links on the same page as the webcasts. The Committees acknowledges and commends the DCA and its boards for expanding webcasting services. The Committees also encourage the DCA to continue to enhance this important service to the public in real-time interactive ways. Some state entities now make agendas and meeting materials available on the webcast page.

Cash Handling Procedures

Currently, no boards under the DCA have the capability to process credit card payments for any in person transaction. This means that an individual coming in person to pay for an application, renewal of a license, or an administrative fine cannot use a credit card or any other electronic means of completing the transaction.

Staff Questions/Recommendations:

1) *The DCA should continue to enhance the ability for the public to access and participate in board meetings. For example, DCA should enhance availability of webcasting to all board meetings, improve audio quality, and expand the ability for participants to teleconference into all meetings.*

2) *The DCA should provide the Committees with a plan to incorporate credit cards processing capabilities for individuals conducting business in person for the boards and provide the number of in person transactions that have been completed annually for the past three years.*

Issue #11: Telephone Advice Medical Services Bureau

Background

The Telephone Medical Advice Services Bureau (Bureau) was created in 1999 (AB 285, Corbett, Chapter 535, Statutes of 1999) in response to a situation in which a Senator's constituent was unable to contact her physician over the phone, received inadequate service at a clinic, and then died after surgery at a hospital. Telephone medical advice was not at issue.

Current law now requires any business to register with the Bureau that provides telephone medical advice services to a patient in California, who employs or contracts with five or more health care professionals. A business fills out a registration form provided by the Bureau and pays a fee. The registrant must then renew every two years and file quarterly reports which, among other requirements, list all California and out-of-state employees who provide medical advice services to California patients. The Bureau verifies those licensees. There are 61 registrants as of 2015.

Enforcement

The Bureau ensures that all registrants file quarterly reports and checks to make sure that all the licensees provided on the list by the registrant are properly licensed. However, there is no effort to independently confirm the accuracy of the lists provided – for example, whether the registrant has provided a comprehensive list of their licensed providers or whether any non-California licensed providers offered advice to Californians. Despite this honor system, some discrepancies have been found. In these cases, according to the Bureau, it works with the registrants to correct errors and does not pursue discipline.

Registrants are also required to provide complaint data to the Bureau on a quarterly basis, consisting of numbers of complaints. The Bureau is not made aware of the nature or resolution of the issues from the registrant, but rather the registrant sends the complainant a form to fill out and mail to the Bureau. The Bureau also solicits consumer complaints on its Web site, though the consumer must download the complaint form and mail it to the Bureau.

Even with these obstacles, the Bureau receives, on average, 21 consumer complaints per year. In the past five years, 105 complaints were received, and all but two were closed without referral for investigation. According to the most recent DCA reports, there have been no citations or fines assessed, referrals for criminal or civil action, formal disciplinary actions filed, or consumer restitution ordered by the Bureau in the last five years.

Budget

The Bureau's enabling legislation required DCA to set fees for registration and renewal "sufficient to pay the costs of administration." Fees were set for the initial registration and renewal at $7,500.

Under BPC § 128.5, DCA entities are required to reduce license fees to the amount that will reduce any surplus funds equal to the entity's operating budget for the next two years. The Bureau is in flagrant violation of this statute. The Bureau has had over five years' reserve since at least 2009, when numbers were available, and is presently on track to have nearly a six-year reserve by the end of 2016 ($1,144,000). Fees have not been adjusted since 2001.

Concurrent Authority and Emerging Technologies

It may be argued that consumers are already protected from unlicensed providers by the other DCA regulatory health boards because telehealth statutes have evolved to authorize and regulate the provision of healthcare remotely via the telephone and other technologies.

Although the Bureau insists that "telephone medical advice" differs from "telemedicine," the law does not make such a clear distinction. Under BPC § 4999.7, "telephone medical advice" means a telephonic communication between a patient and a health care professional in which the health care professional's primary function is to provide to the patient a telephonic response to the patient's questions regarding his or her or a family member's medical care or treatment. "Telephone medical advice" includes assessment, evaluation, or advice provided to patients or their family members. Under BPC § 2290.5 "Telehealth" means the mode of delivering health care services and public health via information and communication technologies to facilitate the diagnosis, consultation, treatment, education, care management, and self-management of a patient's health care while the patient is at the originating site and the health care provider is at a distant site. Telehealth facilitates patient self-management and caregiver support for patients and includes synchronous interactions and asynchronous store and forward transfers. Telehealth includes telephone medical advice, and all licensing laws and practice restrictions apply to individuals caring for patients in California whether face to face or remotely.

While telephone medical advice services may have been critical to the provision of remote care in 1999, the Internet and mobile device apps have accelerated and encouraged the provision of remote advice by healthcare professionals. Doctors on Demand, Teladoc, and even Planned Parenthood are some of many current businesses that bypass the telephone to connect patients and healthcare licensees. These emerging platforms are outside of the Bureau's jurisdiction and

the healthcare licensees are subject to regulation by the DCA 's regulatory boards. There have been no widespread issues of unlicensed activity in these areas.

Staff Questions/Recommendations:

1) *It does not appear that the Bureau is providing consumer protection by confirming self-reported registrant data. The Bureau has not managed its budget within statutory mandates, and has failed to keep pace with technological innovations. Because the provision of remote healthcare is already regulated by the DCA health care boards, the Bureau is not necessary.*

2) *It is recommended that the following statutes be repealed: Business and Professions Code Chapter 15, Sections 4999-4999.8, Health and Safety Code Section 1348.8, and Insurance Code Section 10279.*

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