

BACKGROUND PAPER FOR THE CALIFORNIA ACUPUNCTURE BOARD

Joint Oversight Hearing, February 26, 2018

**Assembly Committee on Business and Professions and
Senate Committee on Business, Professions and Economic
Development**

IDENTIFIED ISSUES, BACKGROUND AND RECOMMENDATIONS

BRIEF OVERVIEW

Function of the Board

The California Acupuncture Board (CAB) is a state licensing board under the Department of Consumer Affairs (DCA). The CAB's purpose is to protect consumers from incompetent and fraudulent acupuncture practice through licensing and regulation of acupuncturists. The CAB and the laws relating to the practice of acupuncture are established under the Acupuncture Licensure Act.¹ An acupuncture license authorizes the holder:

To engage in the practice of acupuncture [and] perform or prescribe the use of Asian massage, acupressure, breathing techniques, exercise, heat, cold, magnets, nutrition, diet, herbs, plant, animal, and mineral products, and dietary supplements to promote, maintain, and restore health.²

For purposes of licensure, the Acupuncture Licensing Act also provides the following for purposes of scope of practice:

- “Acupuncture” is “the stimulation of a certain point or points on or near the surface of the body by the insertion of needles to prevent or modify the perception of pain or to normalize physiological functions, including pain control, for the treatment of certain diseases or dysfunctions of the body and includes the techniques of electroacupuncture, cupping, and moxibustion.”³
- A “Magnet” is a mineral or metal that produces a magnetic field without the application of an electric current.⁴

¹ Business and Professions Code (BPC) §§ 4925-4979.

² BPC § 4937.

³ BPC § 4927(d).

⁴ BPC § 4937(c).

- “Plant, animal, and mineral products” are "naturally occurring substances of plant, animal, or mineral origin, except that it does not include synthetic compounds, controlled substances or dangerous drugs."⁵
- “Dietary supplement” has the meaning as it does under federal law, except that dietary supplement does not include controlled substances or dangerous drugs as defined under state law.⁶

The Acupuncture Licensure Act makes it is a misdemeanor to practice acupuncture or hold oneself out as being able to practice acupuncture, via titles or other methods, unless licensed as an acupuncturist, a physician and surgeon, a dentist, or a podiatrist, or otherwise authorized by law.⁷ The act also makes it unprofessional conduct for a licensed acupuncturist to use the title “Doctor” or the abbreviation “Dr.” unless the licensee possesses a license that allows it or has earned a doctorate degree from an approved program.⁸

The CAB is the agency responsible for administering and enforcing the act. The CAB is also authorized to establish and clarify licensing procedures and practice standards through administrative rulemaking (the process for issuing regulations).⁹

As of June 30, 2017, the CAB oversaw 11,981 licensed acupuncturists. During each of the last three Fiscal Years (FYs),¹⁰ the CAB issued an average of 536 initial licenses and renewed an average of 5,533 licenses.

The CAB’s mission statement, as stated in its *2013–2017 Strategic Plan*, is:

To protect, benefit, and inform the people of California by exercising the licensing, regulatory, and enforcement mandates of the Acupuncture Licensure Act and Acupuncture Regulations.

Board Membership

The CAB has seven board member positions, four public members and three professional members. The Governor appoints five board members: three professional members and two of the public members. The Senate Rules Committee and the Assembly Speaker each appoint one public member. Members receive no compensation but are provided \$100 per diem for each day spent performing official duties and are reimbursed for related travel.

The CAB meetings are subject to the Bagley-Keene Open Meeting Act, which requires public notice and an opportunity for the public to testify.¹¹ The following table lists the current members

⁵ BPC § 4937(d)

⁶ BPC § 4937(e).

⁷ BPC § 4935.

⁸ BPC § 4936.

⁹ California Code of Regulations (CCR), tit. 16, §§ 1399.400-1399.489.1.

¹⁰ A Fiscal Year, or budget year, starts on July 1st and ends on June 30th the following calendar year.

¹¹ Government Code §§ 11120-11132.

of the CAB, including their background, when they were last appointed, their term expiration date, and their appointing authority.

Board Members	Appointment	Term Expiration	Appointing Authority
<p>Amy Matecki, President, Professional Member, is chief of the Integrative Medicine Division at Alameda Health System, where she has been an attending physician since 2004. She is also the medical director for complementary and integrative medicine at the Alta Bates Summit Medical Center and a consultant for integrative medicine and an internal medicine hospitalist at Northern California Hematology and Oncology Consultants Inc. She is president of the International Center for Integrative Medicine, a fellow of the American College of Physicians-American Society of Internal Medicine, and a member of several oncology and Chinese medicine organizations. She earned an MD from Qingdao University Medical College and an MS in traditional Chinese medicine from the Academy of Chinese Culture and Health Sciences.</p>	06/01/17	06/01/21	Governor
<p>Kitman Chan, Vice-President, Professional Member, has been deputy publisher of the Meizhou Huaren Wenyi magazine since 2007 and owner at Kitman Chan CPA since 1984. He is a member of the California Society of Certified Public Accountants, American Institution of Certified Public Accountants and the Chinese Chamber of Commerce, San Francisco</p>	06/01/17	06/01/21	Governor
<p>John Harabedian, Public Member, has been a member of the Sierra Madre City Council since 2012, serving as mayor of Sierra Madre from 2014 to 2015. He has been legal counsel at Bentham IMF since 2016. Harabedian served as a deputy district attorney at the Los Angeles County District Attorney's Office from 2015 to 2016. He was an associate at Latham and Watkins LLP from 2011 to 2015 and a law clerk for the Honorable Josephine Staton at the U.S. District Court, Central District of California from 2010 to 2011. Harabedian was a policy analyst in the Los Angeles Mayor's Office in 2007, a Coro Foundation fellow from 2006 to 2007 and an analyst at Barrington Associates from 2004 to 2005. He earned a Juris Doctor degree from Stanford Law School and a Master of Science degree in comparative social policy from the University of Oxford.</p>	12/22/17	12/22/21	Governor
<p>Francisco H. Hsieh, Public Member, has been a political and business consultant, with clients at the local, state, and federal levels since 1970. Most recently, Mr. Hsieh was a Special Assistant for former Assembly member, Fiona Ma. He has previously served on the Commission on Asian and Pacific Islander American Affairs, as member of the California World Trade Commission, and on the California Transportation Advisory Board. Mr. Hsieh actively promotes San Francisco internationally as a member of the San Francisco-Shanghai Sister City Committee, and as former co-chair of the San Francisco-Taipei Sister City Committee.</p>	06/01/13	06/01/17	Assembly Speaker

Jeannie Kang, Professional Member , has been chief executive officer and president at Serenity Total Acupuncture Treatment Center since 1998 and a guest lecturer at South Baylo University, Emperor’s College of Traditional Oriental Medicine, and Dongguk University, Los Angeles since 2007. Kang was a doctor of acupuncture and oriental medicine lecturer at Yosan University, a lecturer at the California State Oriental Medical Association in 2007 and a temporary advisor to the World Health Organization for the Traditional Medicine-International Classification of Diseases (ICD-11) Project from 2005 to 2010. Kang is a member of the American Association of Acupuncture and Oriental Medicine and the California State Oriental Medical Association. She earned a Master of Science degree in traditional oriental medicine from South Baylo University.	06/01/17	06/01/21	Governor
Ruben A. Osoria, Public Member , is a Regional Sales Supervisor for Dion International Trucks.	06/01/17	06/01/21	Governor
Vacant, Professional Member			Governor

Committees

Because members of the licensing boards often have professional responsibilities outside of their board responsibilities, they are usually only able to meet a few times a year. As a result, many use smaller committees that are able to meet more frequently, explore issues in-depth, and then make recommendations to the full boards at the public board meetings.

The CAB currently has five committees. It uses committees to address policy issues, issues referred by the public or licensees to the CAB, or recommendations by CAB staff:

- **Education Committee:** Addresses issues related to acupuncture educational standards, tutorial programs, and continuing education.
- **Examination Committee:** Addresses issues related to development and administration of the examination, exam policy, and other examination issues.
- **Enforcement Committee:** Addresses issues related to scope of practice, standard of care, competency, complaints, disciplinary decisions, probation monitoring, reinstatement of licensure, and other enforcement issues.
- **Executive Committee:** Addresses issues related to expenditures, revenue, fund condition, Executive Officer selection and evaluation, legislation and regulations, outreach, committee policies and procedures, and special administrative projects.
- **Research Committee:** Addresses issues related to acupuncture that the CAB would like to explore. Since 2016, the research committee has reviewed the multiple types of doctorate degrees in acupuncture and issues of scope crossover with other healing arts professions.

Fiscal and Fund Analysis

The CAB is a special fund agency, which means it receives no general funds.¹² The CAB is fully funded through the revenues it deposits into the Acupuncture Fund.¹³ The CAB’s use of its funds

¹² For more information related to state funds, see Department of Finance, *Glossary of Budget Terms*, http://www.dof.ca.gov/budget/resources_for_departments/budget_analyst_guide/glossary.pdf.

is subject to authorization of its budget. The CAB may seek adjustments to its budget through Budget Change Proposals (BCPs).

While the CAB has no statutorily mandated minimum reserve level, many regulatory boards are expected to maintain a reserve of operating funds to cover unexpected costs, such as litigation or administrative Pro Rata costs.¹⁴ The CAB currently estimates a reserve of approximately 14 months. The CAB is also awaiting repayment of a General Fund loan for \$1 million. The loan is expected to be paid back in FY 2019-20.

The CAB reports that it is operating with a structural budget deficit: revenues are lower than the authorized budget. For further discussion, see Issue #1 under Current Sunset Review Issues in this paper (page 11) and Fiscal Issues in the CAB's *Sunset Review Report 2018* (pages 8-9).

Fees

The Acupuncture Licensure Act provides for the following fees relating to Acupuncture licenses¹⁵:

- An application fee of \$75.
- Examination and reexamination fees equal to the actual cost for the development and writing of, grading, and administering of each examination
- An initial license fee of \$325. Initial licenses that expire less than one year after issuance are pro-rated by 50 percent.
- A biennial renewal fee of up to \$325.
- A delinquency fee set in accordance with BPC § 163.5 (50 percent of the renewal fee, up to \$150).
- A duplicate renewal receipt fee of \$10.
- An endorsement fee of \$10.
- A duplicate license fee for an additional office location of \$15.¹⁶

The CAB's fees and procedures established are published under CCR, tit. 16, § 1399.460. For additional discussion of fees, please see Fiscal Issues in the CAB's *Sunset Review Report 2018* (pages 9-10)

Licensing

In general, licensing programs serve to protect the consumers of professional services and the public from undue risk of harm. The programs require anyone who wishes to practice a licensed profession to demonstrate a minimum level of competency. Requirements vary by profession, but

¹³ BPC § 4974.

¹⁴ See Government Code § 11270 and BPC § 201.

¹⁵ BPC § 4970-4971.

¹⁶ BPC § 4970.

usually include specific education, examinations, and experience. The requirements for licensure under the Acupuncture Licensing Act are found under BPC §§ 4935-4949.

In terms of license processing timelines, the CAB strives to meet a target of 10 days or less, and has been successful in doing so. This performance measure represents the time starting with receipt of the initial license application to the issuance of the initial license. In FY 2015/16, the average processing time was 2 days and in FY 2016/17 was 2 days.

School Approvals

Under to BPC § 4927.5, schools must have their curriculum approved by the CAB, be accredited by the Accrediting Commission on Asian and Oriental Medicine (ACAOM), and also be approved by the Bureau for Private Postsecondary Education (BPPE). Schools will typically seek and secure BPPE approval prior to applying to the CAB for training program approval. For in-state schools, the school must obtain BPPE approval. For out-of-state schools, they must obtain the equivalent to BPPE approval in their respective state.

Upon submitting a request to the CAB to determine whether it meets California curriculum standards, the CAB has 30 days in which to respond. Site visits will be conducted by the ACAOM and the BPPE to check for ongoing training program compliance.

Examination

The California Acupuncture Licensure Exam (CALE) is the only exam that is currently required and accepted for licensure in California. The CALE is developed by the DCA's Office of Professional Examination Services (OPES). The exam is offered twice a year, in March and August, one in Northern and one in Southern California. All three languages: English, Chinese and Korean examinations are offered at the same time and location.

The CAB approved using computer-based testing in November 2012, because it would be a significant cost savings and mutually convenient for both CAB staff and candidates. The CAB notes that it is currently working with the DCA's Office of Information Services (OIS) and OPES on computer-based testing.

Continuing Education

Professions and practices can change over time. For instance, new technology, research, or ethical requirements may increase the level of minimum competence needed to protect consumers. Therefore, some licensing boards require licensees to complete additional training or classes to maintain minimum competence post-licensure. This is usually accomplished through continuing education (CE) or continuing competence requirements at the time of renewal.

At the end of an acupuncture licensee's two-year renewal period, the licensee must submit a declaration, under the penalty of perjury, that they have completed the minimum requirement of 50 CE hours. Those who fail to submit the declaration of 50 CE hours have a hold put on their

license that is not removed until they have submitted evidence of their CE coursework completion. If they fail to renew, they are notified by letter that they are no longer eligible to practice acupuncture and must cease from practicing acupuncture until their renewal has been completed.

Enforcement

The CAB has the authority to investigate violations of the Acupuncture Licensing Act, issue citations, deny or take disciplinary action against a license (e.g. probation, suspension, or revocation), refer cases for criminal prosecution, and file for other legal actions, such as injunctions or restitution.

The CAB uses its cite and fine authority in cases in which violations can be remedied through an order of abatement and fine, such as technical violations. The CAB also only issues citations in cases that do not necessitate restrictions on the license to ensure consumer protection. The CAB has authority to issue a citation with a maximum of \$5,000.00. The CAB's top five violations are:

- 1) Continuing Education Audits
- 2) Failure to Register Addresses
- 3) Failure to Disclose a Conviction on an Application to the Board
- 4) Unprofessional Conduct
- 5) Continuing Education Provider violations.

Additional Background Information

For more detailed information regarding the responsibilities, operation and functions of the CAB, please refer to the CAB's *Sunset Review Report 2018*. The report is available on the CAB's website: <http://www.acupuncture.ca.gov>.

PRIOR SUNSET REVIEW: CHANGES AND IMPROVEMENTS

The CAB was last reviewed in 2016. A total of seven issues were raised by the Committees at that time. The following are quotes from the 2016 background paper and sunset report relating to actions which have been taken over the last four years to address the issues. Those that were not addressed and may still be of concern are discussed further under the Current Sunset Review Issues section.

Prior Issue #1: Why are there discrepancies in data reported in the CAB's 2015 Sunset Review Report?

Background: There were data discrepancies within the report that the CAB submitted to the Committees. In order for the Committees to exercise effective oversight, it is imperative that the Board presents data in a consistent and clear fashion.

Staff Recommendation for Prior Issue #1: The CAB should review all of the data it has reported in its 2015 Sunset Review Report and clarify what the accurate data is in the areas of: licensing, processing time for issuing licenses, and CE audits.

CAB's 2017 Response to Prior Issue #1: The CAB continues to report accurate licensing numbers, renewal times and CE audits. Since the last Sunset Review Report in 2015, staff has continued to work with DCA and OIS to confirm the data and avoid any discrepancies. CAB staff now has reference manuals which confirm the process and have received additional training from DCA on how to utilize existing databases.

Prior Issue #2: Why has the CAB failed to meet its enforcement goals?

Background: There seems to be a number of issues with the CAB's ability to meet its consumer protection mandate of effectively enacting enforcement of the profession. The following is a list of enforcement issues that the CAB needs to rectify:

- The CAB reported that it "...has begun to issue citations and fines for non-disclosure" of information applicants are required to submit including: criminal histories, prior disciplinary actions, and other unlawful acts.
- The CAB's average days to process accusations against licensees increased from 565 in 2013/14 to 902 in 2014/15.
- The CAB's average days to complete disciplinary investigations increased from 1083 in 2013/14 to 1132 in 2014/15.
- The CAB reported historical challenges with monitoring licensees who are on probation. In 2012/13, the CAB did not meet its performance targets in the areas of probation and intake.
- In 2013/14, the CAB did not meet its target for intake and investigation or for formal discipline.
- The volume of consumer complaints has risen.
- The CAB is not in compliance with BPC § 801 which requires insurers and uninsured licensees to report malpractice settlements and judgments of \$3000 or more. In 2011, the Committees recommended that the Board seek statutory authority to create a form for insurers and uninsured licensees to make these reports. The CAB reported in its 2015 Sunset Review Report that it "...hopes to [seek] this authority" in legislation next year.

Effective enforcement is the hallmark of a well-run licensing entity, and a necessity for ensuring consumer protection. The CAB's 2013-2017 Strategic Plan notes that its enforcement responsibilities include: addressing enforcement issues, and proposing regulations, policies, and standards to ensure compliance with the Board's statutes and regulations. The Board reported that it is unable to meet its current enforcement mandates and goals because it has not been afforded enough resources.

Staff Recommendation for Prior Issue #2: The CAB should advise the Committees as to its plan to eradicate the backlogs and delays in processing applications and completing investigations, begin monitoring probationers, and report on its efforts to comply with BPC § 801.

CAB's 2017 Response to Issue#2: The CAB continues to make great strides in addressing the Enforcement issues:

- The CAB continues to address applicants' failure to disclose material facts, such as convictions, previous disciplinary actions, and other required information, through the issuance of citations and fines.
- In previous reports it was unclear which statistic was required to be reported for "Average Days Accusations." The CAB erroneously provided data related to the number of days from complaint receipt to the day an accusation or case for prosecution was declined by the OAG. To address the misreported information, the correct statistic has been provided for FY 2014/15 in the CAB's 2017 Sunset Review Report.
- In the CAB's 2016 response to Issue #2, the percentage of cases that were reported closed in relation to all closure types for FY's 2013/14 and 2014/15 were misreported. As evidenced, all of the CAB's process times are improving and the CAB's overall average days for discipline has much improved. The CAB has a decreased and manageable volume of pending disciplinary actions at the close of FY 2016/17. The CAB is no longer seeing a large volume of cases closing with elevated case aging.
- The CAB continuously meets its performance targets for the measures related to probation intake and probation violation response time. Thorough initial probation orientations are conducted with each new probationer so they are afforded the information and tools to comply successfully. Probation monitors regularly conduct quarterly reviews which help to uncover any probation violations so they can be addressed appropriately. Lastly, new forms and correspondence including resources for probationers were developed to improve compliance and enhance the Board's monitoring.
- To add to the response above, the CAB also has a substantial volume of complaints that are investigated outside of the CAB's control. Intake and reviews before the Division of Investigation's (DOI) formal investigations, as well as any desk investigations conducted by staff, are the timelines that are within the CAB's control. The time it takes for DOI to complete investigations is out of the CAB's control and represents 35% of all investigations closed during FY 2013/14. Although the desk investigations are still over the target, the cases within the CAB's control are processed more expediently. Even with the CAB having more control over desk investigations, this alone cannot effectively decrease the process time when the primary cause for increased case aging is insufficient enforcement staff. In FY 2014/15, the CAB obtained authority for an additional position in the enforcement unit which has

helped reduce case aging. This has helped the CAB meet its intake and investigation targets more consistently since Quarter 2 of FY 2015/16.

- The CAB continues to see a steady rise in complaints. The increase in complaints can indicate that the CAB is more functional, more effective, or that the public is more aware of the CAB's role. With more staff and more attention to functions of the CAB that were unable to be addressed in previous years, the enforcement program is growing. The number of CE audits conducted have grown over the years and in turn exposes CE provider violations as well. There is also an increase in volume for unprofessional conduct complaints in FY 2016/17 because the CAB began tackling licensees' failure to update addresses with the CAB. Not keeping a current and proper mailing address with the CAB is not only a violation but also turns into more non-compliances, snowballing into a larger problem.
- Complaint volume will likely continue to rise as the CAB increases its effectiveness. Outreach also increases the public's awareness of the CAB and its role in the regulation of the profession. In October 2016, CCR, tit. 16, § 1399.469.3, *Notice to Consumers of Licensure by the Acupuncture Board*, became effective. The regulation requires that all acupuncturists post at each practice location a statement telling consumers that they are licensed by the CAB, providing the CAB's phone number and website. Notice about this new regulation was sent to all licensees to promote compliance, and a printable sign for licensees is available on the Board's website. Having this information accessible to the acupuncture consumer expands the awareness of the CAB. It also informs consumers of the CAB's website so complaints may increase with this information readily available.
- A standardized reporting form for insurers has been posted by the CAB on its website and is in use. This action was completed in June 2017. Providing a standardized form for reporting malpractice cases promotes compliance with BPC § 801 which will improve and enhance the CAB's enforcement and protection of public safety.

Prior Issue #6: Should the CAB receive an increase in staff, budget, and office space in order to implement the provisions of SB 1246?

Background: In August 2015, the CAB submitted a Budget Change Proposal (BCP) to the Department of Finance, requesting an additional four staff positions, (an \$885,000 increase to its budget by 2018 and ongoing expenses), and an expansion of its current office space. Throughout the Board's *2015 Sunset Review Report*, and within the CAB's BCP, the CAB cited its failure to meet enforcement and other workload goals, and attributed these deficiencies to its preparation for the implementation of SB 1246 (Lieu, Chapter 397, Statutes of 2014) which was the CAB's last sunset bill.

Staff Recommendation for Prior Issue #6: The CAB should focus its energy on complying with the requirements of SB 1246 in a way that will not exhaust the CAB's resources. If the CAB has a workload problem, they should make the case for additional staff, increased budget, and office space without using the implementation of SB 1246 as the reason.

CAB's 2017 Response to Issue #6: The CAB withdrew the BCP in March 2016 and will not pursue additional resources based on this issue. With the implementation of SB 1246 now complete, the Board believes current staffing is sufficient to handle the workload as a result of SB 1246.

Major Changes:

- March 10, 2016, the CAB voted to terminate its prior executive officer. Since then, Benjamin Bodea, who has served in several capacities with the CAB since January 2008, has served as the interim, acting, and current executive officer.

**CURRENT SUNSET REVIEW ISSUES FOR THE
CALIFORNIA ACUPUNCTURE BOARD**

This section covers new and unresolved issues relating to the CAB. It includes background information and committee staff recommendations for each issue. Committee staff has provided this paper to the CAB and other interested parties, including the professions, so that they may respond to the issues and recommendations.

FISCAL ISSUES

ISSUE #1: (STRUCTURAL BUDGET DEFICIT). What is the CAB's plan to balance its budget?

Background: This issue is a continuation of Issue #4 from the CAB's 2016 Sunset Review. 2017 DCA Budget Office fund statements suggest that the CAB is operating with an imbalanced budget. Since FY 2014/15, the CAB's spending has exceeded its revenues, despite spending less than its authorized budget.

However, the CAB does not anticipate the need for a fee increase in the near future because its fund has a healthy reserve, estimated at 14 months at the start of FY 17/18 (starting balance of \$4.9 million and a budget authority of \$3.3 million). Further, the CAB is expecting a \$1 million loan repayment from the General Fund in FY 2019/20.

Still, the imbalance will eventually need to be addressed. All boards require a reserve for economic uncertainties, such as unforeseen litigation, and the CAB has noted increased workload due to an increase in the licensee population, enforcement actions, and licensee probationers, which may affect the long-term impact of the structural imbalance on the CAB's reserve.

Staff Recommendation: *The CAB should discuss its plan to address the structural imbalance or otherwise avoid insolvency, such as implementing minimum reserve thresholds, seeking authority to charge a fee for school curriculum approval (Issue #6) or continuing education course review (Issue #10), pursuing improvements or cost savings identified under the Business Modernization Plan (Issue #2), or any other potential options.*

ADMINISTRATIVE ISSUES

ISSUE #2: (BUSINESS MODERNIZATION PLAN AND BREEZE). What is the CAB's status on the transition to BreEZe or its alternative?

Background: This is a continuation of Issue #2 from the CAB's 2014 Sunset Review. The CAB is one of the DCA boards that was scheduled to update its legacy information technology (IT) systems, the Applicant Tracking System (ATS) and Consumer Affairs System (CAS), with the DCA's newer BreEZe system during phase three of the BreEZe rollout.

However, significant issues and delays with the first two phases resulted in DCA suspending the rollout of BreEZe before reaching the phase three boards. At the time, it was unclear what would happen to the funds the phase three boards paid into the project.

CAB BreEZe Expenditures (dollars in thousands)								
FY 09/10	FY 10/11	FY 11/12	FY 12/13	FY 13/14	FY 14/15	FY 15/16	FY 16/17	FY 17/18
\$1	\$5	\$18	\$21	\$29	\$17	\$43	\$38	\$33

After an investigation into the issues, the California State Auditor noted that the problems were in part due to a failure to adequately identify the business needs of each entity.¹⁷ Before moving forward with BreEZe for the phase three boards, the State Auditor recommended that the DCA work with the California Department of Technology (CalTech) to analyze the costs and benefits of switching for each of the remaining boards.¹⁸

To that end, the DCA is working with CalTech to utilize Caltech's Project Approval Lifecycle¹⁹ to determine whether BreEZe is the correct solution for each of the remaining boards. The DCA has also updated and expanded its Organizational Change Management process, currently called the Business Modernization Plan, which is performed through its Strategic Organization, Leadership, and Individual Development (SOLID) unit. The intent of the Business Modernization Plan process is to provide comprehensive business analyses, which is the first step of the Project Approval Lifecycle.

Currently, the CAB is still using CAS and ATS for its licensing, enforcement, and examination functions. However, SOLID and the CAB have started the Business Modernization Plan. The CAB is currently at Stage 3, Business Process Mapping, which will map business processes and assess business needs.

Whether moving forward with BreEZe or another IT solution, the Business Modernization Plan should help provide the CAB with planning, information, and training to improve operational and administrative issues going forward. However, the CAB reports that this project creates

¹⁷ California State Auditor, *California Department of Consumer Affairs' BreEZe System*, Report 2014-116, February 2015, at page 24.

¹⁸ *Id.* at page 49-51.

¹⁹ California Department of Technology, *How Do I Start a Project?* (2018), available at <https://cdt.ca.gov/project-delivery/how-do-i-start-a-project/>.

workload issues as staff redirects its attention from their regular duties. The CAB anticipates completing its Business Modernization Plan in 2021-2022.

Staff Recommendation: *The CAB should discuss its progress with the Business Modernization Plan, when it anticipates moving to the next stage in CalTech's Project Approval Lifecycle, whether the BreEZe contributions will cover the costs of the Business Modernization Plan, and how the redirection of staff resources will impact the CAB's operations.*

ISSUE #3: (WORKLOAD AND STAFF MANAGERS). What are the impediments preventing the CAB from hiring additional managers?

Background: The CAB reports that an increasing licensing population and an increased demand for data collection, reporting, and analysis has resulted in an increase in staff workload, which may be increasing faster than its approved staffing can address. To address this growing backlog, the CAB continues to seek additional staff through the BCP process to provide a long-term solution to its staffing needs and ensure the CAB meets its performance measures.

In addition, many other boards have an assistant executive officer, chief program managers (such as a chief of enforcement), or both. However, at the CAB the executive officer is the only position at the manager classification. As a result, the CAB has no secondary manager to assist with daily operations and oversight of staff. The CAB notes that these are complex functions that require a skill set above the analyst classification.

For example, one way to address key vacancies, improve retention, and assist with succession planning is to cross-train staff. However, the time needed to properly do so would likely need involvement from management and draw the executive officer away from other key duties.

Staff Recommendation: *Given that this is a high priority for the CAB, the CAB should discuss the difficulties it has faced in trying to hire additional managers and what would be needed to do so.*

ISSUE #4: (BOARD MEMBER CONFLICT OF INTEREST POLICIES). Does the CAB review potential conflicts of interest outside of public board meetings?

Background: Pursuant to Government Code § 87100, the CAB's administrative manual prohibits board members from using their official position to influence government decisions in which they have a financial interest.²⁰ The manual specifies that board members who have a financial interest in a decision shall disqualify themselves from influencing the decision.

While this is a standard policy across all boards, and appointees are vetted for conflicts of interest during the appointments and confirmation process, conflicts may still arise during public

²⁰ California Acupuncture Board, *Board Member Administrative Manual*, October 20, 2017, at page 19.

board meetings. Even if the recusal occurs before a vote is taken, the board member in question may have already exerted some influence over the decision.

To avoid this situation, it may be helpful to assist board members with managing conflicts before they arise. For example, it may be helpful to review and flag new or long-term employment, business affiliations, and other financial interests prior to board meetings, such as during the onboarding process or during the development of meeting agendas.

Staff Recommendation: *The CAB should discuss its current process for managing board member conflicts of interest and whether that process can be improved.*

ISSUE #5: (STRATEGIC PLAN). When does the CAB anticipate completing its 2013-2017 Strategic plan and adopting its 2018-2022 Strategic Plan?

Background: This is a continuation of Issue #3 from 2016. At the CAB's May 26, 2017, Board Meeting, it reported that it has implemented most of its 2013-2017 Strategic Plan, with the few remaining items in progress. The CAB has also reported that it would begin developing its 2018-2022 Strategic Plan in Fall 2017.

Staff Recommendation: *While the CAB has made considerable progress on completing its 2013-2017 Strategic Plan, it should discuss the status of the remaining items and progress on the development of its 2018-2022 Strategic Plan.*

EDUCATION AND EXAMINATION ISSUES

ISSUE #6: (SCHOOL APPROVAL). Are there additional updates, issues, or hurdles relating to the school approval process?

Background: School approval has been raised as an issue in every CAB sunset review since the CAB became a board: Issue # 6 from 2016, Issue #12 from 2014, Issue #4 from 2012, Issue #9 from 2005, Issue #9 from 2002, Issue #9 from 1998. Until January 1, 2017, the CAB was one of only a handful of DCA boards that approved schools and performed site-visits.

In 1998, when the Acupuncture Committee became the CAB, the Joint Legislative Sunset Review Committee asked the CAB to evaluate its school approval process and compare the state examination to the national examination. When the CAB at the time failed to do so, the CAB's 2002 sunset bill required the Little Hoover Commission to so.²¹

The Little Hoover Commission found that, at the time, the school approval process used by the national accreditor, the Accreditation Commission of Acupuncture and Oriental Medicine (ACAOM) was superior to the process used by the CAB. In 2012, the CAB continued to show deficiencies and workload issues in its school approval process, including failure to conduct site-visits and approval of schools that did not meet the CAB's own standards.

²¹ SB 1951 (Figueroa), Chapter 714, Statutes of 2002.

Because the issues at the board level persisted, and there appeared to be a superior alternative, the CAB's 2014 sunset bill changed the acupuncture training program approval process to transfer the CAB's site-visit and accreditation authority to the ACAOM.²² Effective January 1, 2017, acupuncture training programs must meet the following²³:

- 1) Offers curriculum with a minimum of 3,000 hours that is approved by the CAB;
- 2) Is approved by the Bureau of Private and Post-Secondary Education (BPPE); and
- 3) Is accredited by ACAOM or is in ACAOM's pre-accreditation process.

The CAB reports that implementation of the new school approval process is complete and that it continues to work collaboratively with ACAOM to understand each other's processes. It also noted that ACAOM and its recognition by the U.S. Department of Education has made it possible for students to obtain federal student loans.

Because the CAB no longer performs site-visits, application fees for program approval were also eliminated. However, the CAB still approves curriculum and needed to update its enforcement and monitoring regulations but does not have the authority to charge a curriculum review fee. As a result, school curriculum review functions are being subsidized by licensees through the other fees.

Staff Recommendation: *The CAB should update the Committees on any outstanding issues relating to the school approval process transition, including any outstanding statutory changes needed to complete the transition, foreseeable hurdles, and whether it will perform a fee audit or seek statutory authority to charge a curriculum review fee.*

ISSUE #7: (FOREIGN EDUCATION AND TRAINING). Are there additional updates, issues, or hurdles relating the implementation of the approval process for education and training obtained outside of the United States?

Background: While the CAB relies on ACAOM for training program accreditation, ACAOM does not approve schools outside of the United States. To address this issue, the CAB's 2016 sunset bill, AB 2190 (Salas), Chapter 667, Statutes of 2016, established the process for applying education and training obtained outside of the United States to the requirements for licensure.

The CAB has been working on implementing this process and developing a framework, including reaching out to other DCA boards with similar statutory mandates. CAB staff plan to bring a regulatory package before the board members by spring 2018.

Staff Recommendation: *The CAB should discuss its progress on implementing AB 2190, including any hurdles or unforeseen issues, such as lack of credential evaluation service providers, costs, or large disparities in curriculum or courses.*

²² SB 1246 (Lieu), Chapter 397, Statutes of 2014.

²³ BPC § 4927.5.

ISSUE #8: (EXAMINATION). Are there updates from the CAB on the use of the California Acupuncture Licensing Examination (CALE) or the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM) examination?

Background: Like school approval, the question of whether the CAB should switch from the CAB-administered CALE to the NCCAOM-administered national examination has been raised in every CAB sunset review since 1998: Issue #5 from the CAB's 2016 Sunset Review, Issue #11 from the CAB's 2014 Sunset Review, Issue #6 from 2012, Issue #10 from 2005, Issue#17 from 2002, and Issue #5 from 1998.

As with school approval, the CAB's 2002 sunset bill also required the Little Hoover Commission to compare the NCCAOM to the CALE. At the time, the Little Hoover Commission found that both examinations were statistically and psychometrically sound, but that the CALE's "more extensive technical documentation of underlying exam factors was determined to be superior."²⁴ As a result, no action relating to the CALE was taken at the time.

During the CAB's 2012 sunset review, the comparison between the state and national examination came up again due to issues with examination translations, low pass rates, examination security, and costs of administration. Since then, the CAB has worked with the DCA's Office of Professional Examination Services (OPES) to address the examination issues raised, perform a 2015 occupational analysis of acupuncture practice in California (which serves as the basis for the CALE),²⁵ and initiate a 2016 review of the NCCAOM, which included an audit and linkage study to identify the areas of California practice covered.²⁶

OPES concluded that the NCCAOM meets California validity and defensibility standards. However, OPES also noted that it does not cover the practice areas, laws, and regulations that are unique to California, which is expected of an examination administered across multiple states. As a result, the OPES recommended two options that would meet the acupuncture test plan under the 2015 occupational analysis: (1) continue to require the CALE only or (2) require the NCCAOM Examination and a CA Supplement.

Based on the OPES findings, the CAB voted to recommend the introduction of legislation that would require applicants to take the NCCAOM examination with a California Supplement with an implementation date of January 1, 2019, or later. In considering whether to introduce legislation this year, there are additional issues to consider:

²⁴ Little Hoover Commission, *Regulation of Acupuncture: A Complementary Therapy Framework*, September 2004, at page 53.

²⁵ Office of Professional Examination Services, DCA, *Occupational Analysis of the Acupuncturist Profession*, January 2015.

²⁶ Office of Professional Examination Services, DCA, *Review of the National Certification Commission for Acupuncture and Oriental Medicine Examinations*, January 2016.

Computer-Based Testing

The CALE is provided in a paper-and-pencil format. The CAB is working with OPES and the DCA's Office of Information Services (OIS) to implement computer-based testing, which may improve security, accessibility, and costs.

The NCCAOM examination is computer-based. It also utilizes adaptive testing, which improves examination reliability and security, but requires a larger number of test questions. The NCCAOM's vendor is Pearson VUE.

Testing Sites and Frequency

Due to the security and administrative limitations of paper-and-pencil testing, the CALE is only offered twice per year in English, Chinese, and Korean, and only once in the spring in southern California and once in the fall in northern California. Applicants taking the CALE must ensure the CAB has received their applications no later than 120 days prior to the date of the examination for which the application is made. This may change if the CAB is able to switch to computer-based testing.

The NCCAOM English examination is available year-round at Pearson VUE sites around the world. The Chinese and Korean examinations are not offered year-round and are only scheduled when a certain number of candidates are registered per examination.

Testing of Essential Knowledge

The CALE is administered in a single exam without modules or "must pass" components. In 2004, the Little Hoover Commission noted that this could allow a test taker to pass the exam without sufficient knowledge in certain sections, such as Regulations Relating to Public Health and Safety. This could potentially be addressed by making test sections "must pass" or creating a separate supplement focusing on laws and regulations relating to public health and safety (jurisprudence examination).

The NCCAOM is composed of four modules that must be passed individually, though a test taker may opt to do all four in one sitting. At one point, the NCCAOM had proposed merging its Foundations of Oriental Medicine module with its Acupuncture with Point Location module, which would have potentially reduced the number of modules to three and the cost by one module. However, because the associated costs and burden would be high and difficult to recoup without California acceptance, the NCCAOM will likely not move forward until a decision is memorialized in statute. Either way, a California supplemental examination would need to be added under the CALE test plan.

Educational Requirement and Prerequisites

In California, applicants taking the CALE must complete an "approved educational and training program," before taking the CALE. The program must include "at least 3,000 hours of which at

least 2,050 hours are didactic and laboratory training, and at least 950 hours are supervised clinical instruction.”²⁷

The NCCAOM requires at least 1905 hours for its Acupuncture Program and 2625 hours for its Oriental Medicine program (which includes acupuncture and herbology). However, even if the NCCAOM examination was accepted in California, an applicant who passed the NCCAOM examination would still need to meet the California-specific education requirements.

National Standards, Portability, and Reciprocity

Passing the CALE demonstrates minimum competency to practice acupuncture in California and provides a pathway to licensure in California. Because the CALE is developed by California to meet California standards, it can be difficult for other states, hospitals, or other health systems to determine whether California license holders meet the standards used elsewhere or nationally. As a result, the CALE is not recognized by default in other states, nor are the NCCAOM or other state examinations accepted in California. However, of the states that license acupuncturists, approximately 16 states recognize out-of-state licenses, review substantially-similar qualifications on a case-by-case basis, or are open to reciprocal licensing agreements with other states.

Passing the NCCAOM examination demonstrates competence in the knowledge, skills, and abilities developed by the NCCAOM for entry-level practitioners and provides a pathway to NCCAOM certification. The NCCAOM voluntary certification program is accredited by the National Commission for Certifying Agencies (NCCA) with a separate set of prerequisites, code of ethics, and disciplinary guidelines. The NCCAOM examination provides a pathway to licensure in 46 other states and the District of Columbia.

Examination Fees

The CAB currently charges \$550 for the CALE and \$75 dollars for the application fee. While there is no statutory fee cap for the CALE, BPC § 4970 limits the CALE examination and reexamination fees to the actual cost to the CAB for the development, grading, and administration of the examination.

As of 2018, the NCCAOM charges \$300 per module and an application fee of \$595. Previously, it charged \$300 per module for English and \$500 per module for foreign languages. Currently, with four modules, the total price would be \$1,795, plus any miscellaneous fees like the \$45 examination verification fee. The NCCAOM is willing to work with the CAB and the Legislature to reduce costs.

²⁷ BPC § 4927.5.

Costs to the CAB

The CAB spent an average of \$645,750 administering the CALE in the last four FYs (2013/14 to 2016/17). During the same period, it also collected an average of \$608,500 in examination fees per FY.

CAB Examination Expenditures and Revenue				
(dollars in thousands)	FY 2013/14	FY 2014/15	FY 2015/16	FY 2016/17
Costs	\$659	\$617	\$638	\$669
Total Fees Collected	\$670	\$575	\$641	\$548

If the NCCAOM examination is used in place of the CALE, the CAB would no longer spend or collect fees for administering the exam, the applicants would pay directly to the NCCAOM. However, it would still need to pay for development and administration of the California supplement, and it is unclear which fees would be used to do so. The cost of developing the California supplement is unknown.

Regulatory Capture

The CAB and OPES are state agencies, and the CALE is established in statute. As a result, the Legislature has oversight over the agencies and greater control over fees, format, content, and prerequisites, which can be adjusted in statute. Because licensing is intended to demonstrate minimal practice only, the Legislature can keep licensing requirements to the lowest level necessary to protect consumers.

The NCCAOM is a non-profit, 501(c)(6) trade organization accredited by the NCCA.²⁸ While the NCCAOM must renew NCCA accreditation every five years and can negotiate with the Legislature and state agencies, the Legislature has no formal control over most aspects of the NCCAOM examination. It is unclear whether it is feasible to limit the amount the NCCAOM can charge for the examination in statute. Further, the Legislature would have no direct control if the NCCAOM decided to increase its educational requirements beyond what is required in statute.

Necessity

The CAB reports that pass rates, security, and translations have not been an issue since 2012. As a result, the CALE appears to remain adequate for purposes of California licensure. While the CAB has voted to support legislation that would transition from the CALE to the NCCAOM examination, many stakeholders disagree with this approach.

The NCCAOM also appears adequate for purposes of licensure, though a California supplement that covers practice, laws, and regulations specific to California would need to be developed.

²⁸ National Certification Commission for Acupuncture and Oriental Medicine, *About NCCAOM* (2018), available at <http://www.nccaom.org/about-us/>

Due to the complexity of switching to the NCCAOM examination and developing the supplement, implementation would likely occur after 2019.

Staff Recommendation: *The CAB should discuss feasibility, cost, and time constraints related to: (1) switching the CALE to computer-based testing; (2) developing a California supplement to the NCCAOM examination or for purposes of reciprocity; and (3) working nationally with other states and potentially federal healthcare agencies to increase the portability of the California acupuncture license and improve reciprocity with other out-of-state licenses.*

ENFORCEMENT ISSUES

ISSUE #9: (LICENSEE CONTINUING EDUCATION AUDITS). Has the CAB taken steps to avoid future lapses in its CE audit process?

Background: BPC § 4945 requires the CAB to establish continuing education (CE) standards and requirements for licensed acupuncturists. To ensure licensee compliance with CE requirements, the CAB conducts CE audits at the time of license renewal. The CAB randomly selects 5% of the renewing licensee population. The CAB verifies that the selected licensees have completed the required CE by reviewing Certificates of Completion for submitted coursework.

However, the CAB has not completed any CE audits since FY 14/15 (approximately three years) due to vacancies in its Education and Licensing units. The CAB reports that the vacancies have been filled and that it expected to resume the next of CE audits in December 2017.

Staff Recommendation: *The CAB should update the Committees on the status of its CE audit program. It should also discuss plans for or progress on implementing processes to avoid future lapses in audits, such as additional cross-training of staff or back-up protocols.*

ISSUE #10: (CONTINUING EDUCATION COURSE PROVIDERS). Are there impediments to performing audits of CE providers or affirmatively enforcing the CAB's conflict of interest policy?

Background: Continuing education course providers must also meet the CAB's standards and apply for approval. CE course providers pay a \$150 fee and are approved for two years, after which they may renew for an additional two years. In FY 16/17, the CAB received and approved 112 CE provider applications, received 3,325 course applications, and approved 3,113 courses.

Approved providers must also apply for course approval, but there is currently no fee. CAB staff notes that several CE providers have a disproportionately large number of courses, offering hundreds of courses, including pre-recorded and distance learning courses. Because course review takes time, the smaller CE course providers and licensees may be subsidizing the larger CE course providers.

While BPC § 4945(d) authorizes the CAB to monitor CE providers, the CAB currently only initiates an audit of a CE provider if the CAB receives a complaint or if it otherwise finds evidence of noncompliance, such as falsified or incomplete Certificates of Completion. Because licensees who attend CE courses may not be aware that a CE course or course provider may be in violation of the CAB’s policies, it may be beneficial to institute an affirmative audit process. For example, CCR, tit. 16, § 1377.483 requires CE course providers to disclose advertisements and other conflicts of interest, and it may be difficult to enforce this policy unless someone in attendance reports noncompliance. Therefore, attendance at a small percentage of courses may help deter potential violators.

Staff Recommendation: *The CAB should discuss possibilities for seeking a CE course review fee and implementing CE provider audits.*

ISSUE #11: (DISCIPLINARY GUIDELINES AND UNIFORM STANDARDS). What is the status of the CAB’s updates to its Disciplinary Guidelines and Uniform Standards?

Background: This is a continuation of Issue #2 from 2016. In 2017, the CAB submitted a regulatory package to the Office of Administrative Law (OAL) for approval, intending to update its Disciplinary Guidelines and Uniform Standards Related to Substance Abusing Licensees. However, the CAB withdrew the package based on OAL disapproval of other Uniform Standards packages. The CAB plans to submit new packages separating the Disciplinary Guidelines and Uniform Standards and incorporating conditions required by the DCA’s Substance Abusing Coordination Committee.

Staff Recommendation: *The CAB should discuss the details regarding OAL disapproval of other regulatory packages updating Uniform Standards and whether the CAB is still on track to have both packages ready in 2018.*

PRACTICE ACT ISSUES

ISSUE #12: (ACUPUNCTURE SERVICES BY NON-ACUPUNCTURISTS). Is action needed to address the performance of acupuncture services by other types of licensed healthcare professionals?

Background: The CAB notes that there have been concerns over the use of acupuncture techniques by other health practitioners, including physical therapists, chiropractors, and naturopathic doctors. For example, there have been reports of the use of needles to release “myofascial trigger points” (muscle knots), which is sometimes referred to as “dry needling.” The CAB’s enforcement staff has investigated several complaints regarding unlicensed practice and use of needles, however the CAB has limited authority over other license types.

Regardless of the profession, the services must fall under each practitioner’s scope of practice and competence, and each profession’s licensing board is responsible for enforcing those requirements. According to staff with the Physical Therapy Board of California, tissue

penetration by needles is prohibited under the physical therapist scope of practice, except for procedures requiring electromyography.

Staff Recommendation: *It is unclear whether action is needed at this time. The CAB should discuss whether this issue is manageable with its current authority and any plans to increase awareness or further coordinate with other DCA boards to streamline referrals.*

ISSUE #13: (PROFESSIONAL TO PUBLIC BOARD MEMBER RATIO). Should the CAB's ratio of professional to public members be adjusted?

Background: This is a continuation of Issue #1 from 2005. The CAB has had a public board member majority since 2006.²⁹ In 2005, the DCA and the Joint Committee on Boards, Commissions and Consumer Protection recommended that the CAB be allowed to sunset and that its functions be transferred to the DCA.

At the time, the DCA noted that “the [CAB] has had trouble with getting involved in the wrong issues and spending too much time on them without even completing work on those issues. For example, over the past several years, the [CAB] has advocated for enhancing the title of its licensees and further increasing the educational requirements for licensees.... For these reasons, and others, Little Hoover found that the [CAB] has at times acted more as a venue for promoting the profession rather than regulating the profession to protect consumers.”³⁰

Still, rather than allow the CAB to sunset, as a compromise, the number of board members was reduced from nine (five professional members and four public members) to seven (four public members and three professional members). This was also in part to address issues with recruiting board members and lack of quorum. Many of the current board members are new, and there is one vacancy on the board (a professional member position).

More recently, the Little Hoover Commission has noted that licensing boards can create potential barriers to entry into a profession and have the potential for economic protectionism.³¹ While professional members can benefit the board by providing first-hand practice experience and expertise, it may be difficult to reorient the professional perspective to that of a regulator. Having more public members can help increase the weight of consumer perspectives but may decrease the number of perspectives on practice-specific issues. If additional practice perspectives are needed, boards might consider consulting with subject matter experts.

In the end, the goal is a balance that will allow the CAB to fulfill its consumer protection mandate. As noted in the Acupuncture Licensure Act, “[p]rotection of the public shall be the highest priority for the Acupuncture Board in exercising its licensing, regulatory, and disciplinary

²⁹ SB 248 (Figueroa), Chapter 659, Statutes of 2005.

³⁰ DCA, *Recommendation to the Joint Committee on Boards, Commissions and Consumer Protection for the CAB's 2005 Sunset Review*, 2005.

³¹ Little Hoover Commission, *Jobs for Californians: Strategies to Ease Occupational Licensing Barriers*, Report #234, 22-23 (2016), available at <http://www.lhc.ca.gov/studies/234/Report234.pdf>.

functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”³²

Staff Recommendation: *The CAB should discuss its current balance of professional to public members and whether any changes are needed.*

ISSUE #14: (TECHNICAL CHANGES). Are there technical changes that can improve the CAB or its functions?

Background: There may be technical changes that can be made to the Acupuncture Licensure Act to help the CAB perform its duties or streamline its processes.

Staff Recommendation: *The CAB should continue to work with the Committees and suggest any technical clean-up that may be needed.*

CONTINUED REGULATION OF THE PROFESSION

ISSUE #15: (SUNSET EXTENSION). Should the State continue to license and regulate acupuncturists under the current CAB?

Background: In the short amount of time since 2016, the CAB has shown an improved commitment to its mission and a willingness to work with the Legislature. This is demonstrated by the CAB’s recent decision to support legislation relating to the examination, progress on implementation of SB 1246 and AB 2190, and overall responsiveness. However, much of the CAB’s progress was made under prior board leadership. Half of the current CAB members are relatively new and there is still one vacant professional member position.

The CAB should also continue to seek ways to improve its structural budget deficit, CE auditing processes, and consumer outreach efforts, such as improving its relationships with stakeholder groups, exploring outstanding issues, and educating the public through ongoing stakeholder meetings.

Staff Recommendation: *The CAB should continue to regulate licensed acupuncturists order to protect the interests of the public. However, given the CAB’s inconsistent past and recent membership change, the CAB should be extended for two years with a reduced reporting requirement, unless the CAB can demonstrate that the current progress and focus will continue.*

³² BPC § 4928.1.