

BACKGROUND PAPER FOR The Department of Consumer Affairs

**(Oversight Hearing, February 27, 2017 Senate Committee on
Business, Professions and Economic Development and the Assembly
Committee on Business and Professions)**

IDENTIFIED ISSUES, BACKGROUND AND RECOMMENDATIONS REGARDING THE DEPARTMENT OF CONSUMER AFFAIRS

BRIEF OVERVIEW OF THE DEPARTMENT OF CONSUMER AFFAIRS

The Department of Consumer Affairs (DCA) is one of eight agencies operating under the direction of the Business, Consumer Services and Housing Agency. DCA notes in its Who We Are and What We Do booklet that California's commitment to protecting consumers began with the passage of the Medical Practice Act of 1876 which was designed to regulate the state's medical professionals who had operated virtually unchecked. Additional professions and vocations were brought under state authority over the following 30 years so that by the late 1920s, the Department of Vocational and Professional Standards was responsible for licensing or certifying accountants, architects, barbers, cosmetologists, dentists, embalmers, optometrists, pharmacists, physicians, and veterinarians. The Consumer Affairs Act was passed in 1970, giving the DCA its current name. Today, DCA issues almost 3 million licenses, certificates, and approvals to individuals and businesses in over 250 categories. This involves setting the qualifications and levels of competency for the professionals regulated by the Department's boards and bureaus which license, register, or certify practitioners; investigate complaints; and discipline violators. Fees paid by DCA licensees fund DCA operations almost exclusively.

The mission of the DCA, as stated in its 2016 Annual Report, is:

To protect consumers through effective enforcement activities and oversight of California's licensed professionals.

Within the DCA are 40 entities, including 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. As regulators, these boards perform two primary functions:

- Licensing—which entails ensuring only those who meet minimum standards are issued a license to practice, and
- Enforcement—which entails investigation of alleged violations of laws and/or regulations and taking disciplinary action, when appropriate.

DCA entities are semiautonomous regulatory bodies with the authority to set their own priorities and policies and take disciplinary action on their licensees. Board members are representatives of the public and the profession a particular board oversees. The composition of each board is outlined in statute, with members appointed by the Governor and Legislature. According to the DCA's 2016 Legislative Resource Booklet, day-to-day operations of a board are managed by an executive officer selected by the board. DCA notes that if a board has a policy issue that it wants to address, it can vote to pursue a regulatory or statutory change. Boards can directly sponsor legislation without prior approval from any other governing body, but the DCA prepares board budgets. DCA states that by nature, the operations of a board tend to be very public because all decisions are made at public meetings. DCA provides administrative support to boards through its various offices and divisions.

DCA has direct control and authority over bureaus. As DCA notes in its 2016 Legislative Resource Booklet, bureaus are a direct extension of the DCA and cannot act on policy matters without first consulting with the DCA. DCA advises that policy decisions start at the bureau level but must be vetted through the DCA, California Business, Consumer Services and Housing Agency and the Governor's Office. According to DCA, the Director supervises and administers the acts of every bureau, but delegates the authority to a bureau chief, who then carries out the will of the Director. Policy decisions of a bureau, as part of the Department, are confidential until approval of the administration. Bureaus may also consult with an advisory committee, typically comprised of representatives in a particular field or profession regulated by a bureau, however, these bodies have little actual power to direct or influence bureau activities and decisions. Some bureau chiefs are appointed by the Governor; others are appointed by the Director of the DCA.

The current Director of DCA is Awet Kidane who was appointed in July 2014. Leadership at the DCA includes a Chief Deputy Director, Deputy Director for Legal Affairs, Deputy Director for Board and Bureau Relations, Deputy Director for Legislation and Regulatory Review, Deputy Director for Communications, Deputy Director for Administrative Services, Deputy Director for the Office of Information Services, Chief of the Division of Programs and Policy Review and Chief of the Division of Investigation.

Enforcement Overview

Enforcement programs allow DCA entities take action against licensees posing a threat to the public. The various practice acts governing boards and bureaus outline the functions for these regulatory bodies to investigate complaints and take disciplinary action against licensees when those licensees have engaged in activities that harm the public.

Enforcement typically begins with a complaint. Complaints are received from the public or can be generated by board and bureau staff when, through the course of their work, potential violations of a particular act are identified. Complaints are processed and either forwarded to another agency with appropriate jurisdiction, forwarded for further investigation or closed and considered resolved. Complaints are generally kept confidential and specific information contained in a complaint is not made public during the investigation process. DCA issued Complaint Prioritization Guidelines for entities to utilize in prioritizing their respective complaint and investigative workloads that establish three categories of complaint identification:

- *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. and the basic rationale for workload timeframes

- *High* – acts that involve negligence/incompetence (without serious injury), physical/mental abuse (without injury), mandatory peer review reporting, prescribing/dispensing without 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.

Investigations by board of bureau staff that determine a licensee has committed a minor violation that does not warrant formal disciplinary action against a license can result in other forms of discipline like a citation and fine. Most programs have an informal and internal process for these types of actions. Complaints warranting additional investigation are either investigated by dedicated board or bureau enforcement staff or referred to the DCA's Division of Investigation (DOI) which provides centralized investigative services for the various regulatory entities. DOI investigators are sworn peace officers who perform a full range of peace officer duties and responsibilities, although DOI does also employ non-sworn investigators. During the course of an investigation, investigators conduct interviews, gather evidence, submit reports, and may refer cases to the office of a local District Attorney if they determine a crime has been committed. Investigations that determine major violations of a practice act have been committed, or are of a serious nature in terms of the potential harm to the public by a licensee, move on for formal disciplinary action. This involves forwarding a case to the Office of the Attorney General (OAG) which acts as the attorney of record for DCA licensing entities in their administrative actions relating to a license. (Licensees of the Medical Board of California (MBC) and the boards MBC provides enforcement services to follow a process under a Vertical Enforcement and Prosecution model in which the MBC investigator and OAG attorney work together on a case from the outset, rather than OAG waiting for referral of a case following an investigation.) OAG attorneys determine whether there is sufficient evidence for an accusation and file this legal document on behalf of their client board or bureau, outlining the charges against a licensee and the violations of a practice act a licensee is accused of. Licensees are able to dispute these charges at an administrative hearing conducted by an Administrative Law Judge (ALJ) in a setting that resembles a court trial. Many entities negotiate agreements to resolve a case before it goes to a hearing; in these instances, a licensee admits to some charges detailed in the original accusation and accepts some form of discipline for those charges rather than continue in the hearing process on all charges. ALJs write a proposed decision based on a hearing and send these to their client who subsequently adopts, modifies or rejects the proposed decision which can result in revocation or suspension of a license, surrendering of a license, placing the licensee on probation or other actions.

DCA recently established performance measures for boards and bureaus assessing: the number of complaints received; the average number of days to complete complaint intake; the average number of days to complete the intake and investigation steps of the enforcement process for closed cases not resulting in formal discipline; the average number of days to complete the enforcement process for those cases closed at the formal discipline stage; the average cost of intake and investigation of complaints; consumer satisfaction with the service received during the enforcement process; the average number of days from the date a probation monitor is assigned to a probationer to the date the

monitor makes first contact; and the average number of days from the time a violation is reported to a program, to the time the assigned probation monitor responds.

Enforcement timelines and delays in enforcement have consistently been a source of significant frustration to the public and Legislature. Entities that regulate health professions have been the focus of much of the concern, however, other non-health programs under the DCA face significant delays in swift outcomes against licensees that could serve to further protect the public from harm. In 2010, DCA created the Consumer Protection Enforcement Initiative (CPEI) aimed at reducing the average length of time it takes health care boards to take formal disciplinary action, with a goal of 12 to 18 months. However, most boards are not meeting these goals and some are taking exponentially longer than this laudable timeframe and enforcement deficiencies remain troubling.

(For more detailed information regarding the responsibilities, operation and functions of the DCA, please refer to the “2016 Annual Report”. This report is available on its website at http://www.dca.ca.gov/publications/2016_annrpt.pdf)

PRIOR SUNSET REVIEW: CHANGES AND IMPROVEMENTS

DCA is reviewed annually through sunset review oversight by the Senate Committee on Business, Professions and Economic Development and the Assembly Committee on Business and Professions. During the 2016 review of DCA, 11 issues were raised. The following are some of the changes, enhancements and other important policy decisions or regulatory changes made pursuant to this review. For those which were not addressed and which may still be of concern to the Committees, they are addressed and more fully discussed under “Current Sunset Review Issues.”

- **DCA took steps aimed at ensuring board members are immune from antitrust liability.** In 2010, the Federal Trade Commission (FTC) brought an administrative complaint against the North Carolina State Board of Dental Examiners (Board) for excluding non-dentists from the practice of teeth whitening. The FTC alleged that the Board’s decision was anticompetitive under the FTC Act because the Board was not acting as a state agent. The Board appealed to the Supreme Court, arguing that it was acting on behalf of the government and should be afforded immunity from antitrust lawsuits. The Supreme Court ruled in the FTC’s favor, stating that regulatory bodies comprised of active market participants in the occupation regulated by that body may invoke state-action antitrust immunity only if it is subject to active supervision by the state. The Supreme Court has stated that to qualify as active supervision “the [state] supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy.” *N. Carolina State Bd.*, 135 S. Ct. at 1116.

The Committees were concerned about the impact the decision in *North Carolina State Board of Dental Examiners v. FTC* would have on California professional regulatory boards. In response to discussions in 2015 and 2016 and the 2016 sunset review oversight hearing DCA participated in, DCA assisted in coming up with a legislative solution to the issue of active supervision. Specifically, SB 1195 (Hill) would have established active supervision by building upon the current authority of the Director of DCA to review certain board decisions unrelated to disciplinary action. The bill would have also ensured that DCA board members are not personally liable in the event they are sued in an antitrust matter related to their board service.

DCA advised the Committees in 2016 that it proactively provided training and guidance to boards and entities regarding best practices, including: advising that entities continue to promote their primary mission of consumer protection; advising that entities identify when market-sensitive decisions are being made; advising that entities conduct an analysis of the competitive aspects of decisions and ; advising that entities use current applicable state processes (which contain elements of state supervision), among other efforts. Information about the North Carolina case has been incorporated into quarterly Board Member Orientation Training DCA provides and DCA has presented at many board meetings to brief members on the decision. *It would be helpful for the Committees to receive an update on current DCA-led efforts to protect unpaid, volunteer board members from antitrust action.*

- **Efforts to assist military veterans and spouses navigate the licensure process and speed up licensure timelines appear to be underway.** Last year, the Committees discussed the issue of military, veteran and military spouse licensure by DCA entities given the challenges of transitioning from the military to the civilian workforce and barriers to employment that licensure may present. A 2015 White House report found 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, citing a 2012 survey in which 60 percent of veteran respondents said they had trouble translating their military skills into civilian job experience.

Over the past few years the Legislature has passed and the Governor has signed legislation aimed at assisting military members and their families with occupational licensing processes. DCA reports that entities have implemented bills to:

- grant military licensees the ability to request a waiver from renewal requirements like completing a renewal form and paying renewal fees;
- provide for an expedited licensure process for applicants who are honorably discharged former military personnel or are married to members of the military and licensed in a profession regulated by a particular board in another state; and
- require licensure applications to inquire in if the individual applying for licensure is serving in, or has previously served in, the military.

It would be helpful for the Committees to receive an update on additional proactive steps DCA is taking, beyond assisting entities in the implementation of legislation, to assist military personnel, veterans and military spouses in becoming licensed. It would be helpful for DCA to advise the Committees on any gaps between the intent of the laws and outcomes (as recommended in a recent report issued by the Little Hoover Commission discussed below in Issue #3) and provide recommendations to bridge those gaps. It would be helpful for the Committees to know whether DCA reviews or assesses DCA entities' efforts to inform veterans of their eligibility for expedited licensing, as also recommended in the report.

CURRENT SUNSET REVIEW ISSUES

The following are areas of concern for the DCA to consider, or areas of concern for the Committees to consider, along with background information regarding each particular issue. There are also recommendations the Committee staff have made regarding particular issues or problem areas which need to be addressed. The DCA has been provided with this Background Paper and is asked to respond to both the issues identified and the recommendations of the Committee staff.

ISSUE #1: (INVESTIGATOR VACANCIES). DCA's Health Quality Investigations Unit within the Division of Investigation faces a high vacancy rate, impacting the timeliness of enforcement action. Why is the rate so high? What steps is the DCA taking to recruit, retain, train and properly guide its investigators?

Background: As noted above, DCA's DOI utilizes sworn peace officers to conduct investigations on behalf of DCA boards and bureaus. The Health Quality Investigations Unit (HQIU), which carries out investigations for violations of the Medical Practice Act on behalf of the Medical Board of California (MBC) and other health boards, currently faces 29 vacancies, a rate of 38 percent, in its peace officer investigators. DOI staff has presented to MBC at meetings outlining issues leading to these high rates, including large caseloads and the ability for these individuals to earn higher wages at other state agencies, among other factors. DOI has indicated to MBC that it submitted a pay retention proposal to the California Department of Human Resources (CalHR) which is still pending approval. DOI also implemented a pilot program, adding non-sworn investigators to its teams who can assist in certain aspects of an investigation, many of whom are now in the process of becoming sworn investigators.

While significant attention has been directed on the DOI HQIU vacancies, it would be helpful for the Committees to better understand challenges DOI faces in general, given the key role it plays in effectively and swiftly collecting necessary evidence that can help boards take action to prevent dangerous licensees from interacting with the public. It would also be helpful for the Committees to learn what steps DCA is taking to address the peace officer investigator vacancies, including recruitment and retention efforts, as well as general leadership and outreach the DCA provides to DOI and DOI staff. It would be helpful for the Committees to know whether health board cases are being referred to other DOI investigators or other DOI units.

Compounding the need for information about current DOI vacancies is the increased workload DOI will face as the Bureau of Medical Cannabis (Bureau) within the DCA begins to regulate medical and recreational cannabis. The Bureau's enforcement efforts will definitely rely on DOI sworn investigators and accordingly, DOI was authorized to add sworn investigator positions in the 2016/17 budget. A Budget Change Proposal (BCP) for the Bureau for Fiscal Year 2017/18 notes that over nine percent of the 11,500 licenses the Bureau anticipates issuing in its first year will require enforcement action, leading to approximately 1,135 cases. The BCP compared potential case types, in terms of high and low priority, to those handled by HQIU to note that approximately 545 of the anticipated 1,135 cases will require the expertise of sworn peace officers from DOI.

Staff Recommendation: *The DCA should advise the Committees of the vacancy rate at DOI for investigators not assigned to the HQIU. The DCA should provide information about barriers to DOI having the necessary staff to carry out investigations. The DCA should advise the Committees how other health board investigations are impacted by the HQIU vacancies and challenges. The*

DCA should inform the Committees about steps the Legislature and the DCA can take to ensure that properly trained personnel are in place to conduct critical enforcement investigations.

ISSUE #2: (BReEZe) DCA’s effective implementation of a dynamic information technology (IT) for all entities remains delayed and it is unclear what steps the DCA is taking to address the IT needs of a large number of its programs, including those with significant IT operational challenges. What is the plan for Release 3 entities, some of which rely on insecure, inefficient options like Excel spreadsheets to track critical licensing data? What is the status of the cost-benefit analysis DCA advised it was conducting in 2016 for Release 3 entities? Why are these entities still paying for BreEZe costs when they may never actually be a part of the BreEZe system?

Background: The DCA has been working since 2009 on replacing multiple antiquated standalone IT systems with one fully integrated system. In September 2011, the DCA awarded Accenture LLC with a contract to develop and implement a commercial off-the-shelf customized IT system, which it calls BreEZe. 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 goal of the system is for the public to 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 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. Special Project Report 3.1 of 2015 outlined the changing scope and cost of the BreEZe project (up from original estimates of \$28 million to a new cost of \$95.4 million). Release 1 went live in October 2014, Release 2 went live in January 2016 and Release 3 was removed from the project entirely in 2015.

To date, DCA has not provided the Legislature with a formal plan to expand BreEZe to the 19 boards originally included in Release 3. Instead, DCA advised that it would first conduct a cost-benefit analysis for Release 3 boards (after Release 2 was completed in 2016) and then make a decision about whether programs previously slated for Release 3 of the project will come onto BreEZe and, if so, how that will be implemented. This 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 previously 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. In response to questions from the Committees during last year’s oversight review, DCA stated that in order to find the most appropriate and cost effective IT solution for the remaining boards and bureaus, it would partner with the Department of Technology using their Project Approval Lifecycle process, which includes a cost-benefit analysis, which will help the DCA determine whether BreEZe is a cost-effective solution that meets the business needs of the remaining boards and bureaus.

In April 2016, DCA also advised that it was “assessing what IT solutions, including BreEZe, may be suitable for issuing the Bureau’s licenses” in response to questions about the status of the Bureau of Medical Cannabis Regulation (Bureau). DCA noted that “at this time it is still too early to say which IT solution may work best as the Department is in the process of identifying IT requirements and also

conducting a cost analysis for the Release 3 boards.” DCA stated that “Once regulations have been developed, the Department will be able to identify the business needs of a potential licensing system.” Despite advising that it was waiting for draft regulations for the various licensing structures the Bureau and partner agencies to get a sense of Bureau IT needs, the DCA entered into a contract to initiate use of the Accela platform for the Bureau. Accela is used Colorado entities for cannabis related licensing, various state and local entities in California and a number of cities throughout the U.S.

It does not appear that DCA has ever conducted a review of what Release 3 entities would need from an IT system, despite their previously being slated for inclusion in the BreEZe program. It also does not appear, despite stating to the Legislature that an analysis would be conducted, that the Legislature should expect to receive a cost-benefit analysis for Release 3 entities anytime soon. The DCA has indicated that there is no expected timeframe for completion of this review, a key step in determining the future options for entities, many of which have paid significant sums of money for a system they may never be a part of.

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. DCA has also historically not reported a plan to the Legislature 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.

Staff Recommendation: *The DCA needs to finally provide the Committees information about the steps the DCA is taking to upgrade IT systems for Release 3 entities, in many cases moving entities away from Excel spreadsheets used to backfill data collection system needs. How can the Legislature assist DCA in its efforts to implement technological efficiencies? Is DCA planning to move forward with Accela for Release 3 entities? What is actually happening today at DCA to assess the needs of Release 3 entities? What is actually happening today to assess the cost of BreEZe for these entities and benefit of that system, versus another system? How does the DCA suggest the Legislature respond to licensees of Release 3 entities who continue to voice concerns that staff is redirected from important regulatory functions to provide input on IT systems that appear to be a mirage – and what does the DCA suggest the Legislature should tell licensees who are concerned about the impact of IT costs on funds that could lead to fee increases?*

ISSUE #3: (BARRIERS TO LICENSURE) Studies conducted at the federal level and recently in California by the Little Hoover Commission have focused on barriers to employment and provided suggestions as to where certain requirements for employment should be streamlined, particularly for certain populations of employees. The October 2016 Little Hoover Commission report specifically noted improvements that could be made in the information licensing entities provide applicants to ensure a smoother licensing process. What steps is DCA taking to respond to the report and how is DCA advising entities within the DCA on best practices to assist in the licensure process?

Background: Recent studies and reports have focused on the impacts of licensing requirements for employment and on individuals seeking to become employed. According to a July 2015 report on occupational licensing released by the White House, strict licensing creates barriers to mobility for licensed workers. In October 2016, the Little Hoover Commission (LHC) released a report entitled *Jobs for Californians: Strategies to Ease Occupational Licensing Barriers*. The report noted that one out of every five Californians must receive permission from the government to work and for millions of Californians that means contending with the hurdles of becoming licensed. The report noted that many of the goals to professionalize occupations, standardize services, guarantee quality and limit competition among practitioners, while well intended, have had a larger impact of preventing Californians from working, particularly harder-to-employ groups such as former offenders and those trained or educated outside of California, including veterans, military spouses and foreign-trained workers. The study found that occupational licensing hurts those at the bottom of the economic ladder twice: first by imposing significant costs on them should they try to enter a licensed occupation and second by pricing the services provided by licensed professionals out of reach.

Specific to the issue of former offenders, witnesses testified to LHC that there is no evidence that shows having a criminal record is related to providing low quality services and that unnecessary restrictions on criminal convictions simply punish people again who have already served their time. Among other things, the report described some of the issues former offenders face, including lack of clarity as to which convictions may result in denial, good-faith difficulties with listing convictions and difficulties navigating the administrative appeals process. LHC wrote that this can be problematic for former offenders who must decide whether to invest in the education, training and fees required for a license.

Most DCA entities are authorized through general BPC provisions to deny a license to an applicant who has been convicted of a crime or offense substantially related to the qualifications, functions or duties of a licensee. However, there is a serious lack of clarity for applicants as to what “substantially related” means and this determination is often left to the discretion of individual boards. Applicants may not have any way to gauge whether their particular conviction is related to the license they seek unless they pore through confusing regulations that are not always easy to access. No DCA entity lists anywhere on its website or in application materials the rationale behind why a relevant crime might make an individual unfit to practice. A rationale can help an applicant see whether a conviction would or would not be excluded based on the applicant’s individual circumstances. Similarly, rehabilitation criteria are often vague and open ended.

While an exhaustive list may not be necessary, it could significantly assist in the process for former offenders to seek licensure if DCA entities provided a list of common convictions that serve as the grounds for license denial. These individuals could also benefit from receiving information about specific evidence an entity requires in consideration of a conviction. For example, DCA entities could

spell out, beyond the generic “compliance with parole conditions”, what information an individual convicted three years ago for driving under the influence could provide to a licensing board that may assist in its decision. DCA entities could also list the rationale or factors used when considering rehabilitation. While the differences between professions, practice settings and consumers make it difficult to create consistent standards across all DCA entities, boards can improve clarity and accessibility of licensing requirements. It would be helpful for the Committees to understand what steps DCA is taking, in light of the LHC report and recommendations, to improve the ability of applicants to gain necessary information about boards’ requirements.

Former offenders are also impacted by what LHC described as the “candor trap,” where an applicant’s disclosures are matched with the applicant’s background check. Licensing boards require applicants to provide conviction information on an application and then compare what the applicant stated with the information received from DOJ during the background check process. Where the disclosures do not match the background check, it can potentially be used to disqualify the applicant. However, the way DCA entities determine honesty and use it as a factor in approving applications is unclear. The BPC authorizes all boards to deny applicants that “knowingly made a false statement of fact that is required to be revealed in the application for the license.” Witnesses at LHC hearings noted that the amount of discretion to determine “knowingly” can be a good or bad thing depending on the individual who happens to be processing the application at the time. It would be helpful for the DCA to inform the Committees of the process DCA entities undertake for using honesty in the application process as a criterion for approving or denying a license, including factors considered when determining whether an applicant knowingly submit false information.

Staff Recommendation: *DCA should advise the Committees of the steps it is taking in response to the LHC report. DCA should ensure DCA entities take the following easy, administrative steps outlined by LHC to assist applicants for licensure, including:*

- *requiring entities to prominently post links on websites and in outreach materials detailing the criteria used to evaluate applicants with criminal convictions so that potential applicants can be better informed about their possibilities of gaining licensure before investing time and resources into education, training and application;*
- *when background checks are necessary, requiring applicants with convictions to provide certified court documents instead of manually listing convictions on applications in an effort to prevent license denials due to unintentional reporting errors.*

The DCA should also advise the Committee as to how it can be assured that the “substantially related” criteria as well as rehabilitation criteria is applied consistently from one board to the next.

ISSUE #4: (MAXIMUS.) **A number of DCA healing arts boards operate programs designed to assist licensees with substance abuse issues. DCA maintains a master contract with a single vendor for administration of these programs on behalf of boards. Are changes to the contract necessary?**

Background: The various practice acts governing certain healing arts boards authorize the establishment of programs to assist licensees with substance abuse. These programs are called

variously “diversion,” “substance abuse rehabilitation,” “recovery,” and “intervention,” but they all share the general principle of monitoring and supporting impaired licensees toward recovery.

SB 1441 (Ridley-Thomas, Chapter 548, Statutes of 2008) required the DCA to develop uniform and specific standards to be used by each healing arts board in dealing with substance-abusing licensees in 16 areas, including requirements and standards for testing and frequency of testing to detect drugs or alcohol while participating in a diversion program or on probation;

As part of the SB 1441 implementation, the DCA convened the Substance Abuse Coordination Committee (SACC), which consisted of representatives from all of the healing arts boards. A series of meetings, subject to the Bagley-Keene Open Meeting Act, were held from 2009 to 2011 to discuss and develop the standards. The “Uniform Substance Abuse Standards” (“Uniform Standards”) were adopted in early 2010, with the exception of the frequency of drug testing. The Department reconvened the SACC in March 2011, where a final vote was taken on an amended schedule for drug testing frequency.

The DCA currently manages a master contract with MAXIMUS, Inc. (MAXIMUS), a publicly traded corporation for the healing arts boards that have a diversion program. Under this model, the individual boards oversee the programs, but services are provided by MAXIMUS. Health practitioners with substance abuse issues may be referred in lieu of discipline or self-refer into the programs to receive help with rehabilitation. After an initial evaluation, individuals accept a participation agreement and are regularly monitored in various ways, including random drug testing, to ensure compliance. MAXIMUS provides the following services: Medical advisors, compliance monitors, case managers, urine testing system, reporting, and record maintenance. The DCA’s master contract standardizes certain tasks, such as designing and implementing a case management system, maintaining a 24-hour access line, and providing initial intake and in-person assessments, but the planning and execution of the programs are tailored to each board according to their needs and mandates. Each board specifies its own policies and procedures. MAXIMUS performs unobserved, as well as observed, drug screening.

The most recent audit of MAXIMUS conducted on behalf of DCA by CPS Human Resources Consulting (CPS Audit) found that overall MAXIMUS is effectively and efficiently managing the various diversion programs (the audit only focused on the contractor and did not look into how boards refer licensees or what boards do with information from MAXIMUS). The CPS audit recommended that MAXIMUS be continued as the vendor. However, the auditor also made recommendations outside the scope of the contract to improve program performance; cost of participation remains an issue for many participants and is often a barrier to successful completion.

Participants’ costs vary by program due to boards’ subsidies, but an average cost for 5-year participation runs from \$19,000 to \$61,000 for a BRN participant to \$30,000 to \$104,000 for others. These costs are borne by the licensee, and a substantial portion of this is due to drug testing.

The SACC determined that random testing must occur between 52-104 times in the first year of program participation, and 36-104 times in subsequent years. At \$100 per test, this costs participants upwards of \$10,000 per year. Although these aggressive testing schedules were established with the best of intentions, drug testing and addiction research has since evolved to suggest that less frequent, but more strategic testing may have the same detection and deterrence effects while being less burdensome on participants. Reducing testing frequency could protect consumers more effectively by enabling impaired licensees to seek affordable treatment. According to diversion program managers

(DPMs) within Maximus, the current testing schedule “reduced the benefits and flexibility of random testing and increased the cost. As a result, some DPMs claim self-referrals into the program have almost stopped....”

The 2013 report, “Drug Testing: A White Paper of the American Society of Addiction Medicine (ASAM),” states that drug testing frequency will vary according to a person’s needs and stage of recovery. At the beginning, as acknowledged by the Uniform Standards, frequency of random drug testing should be high and diminish over time. However, while ASAM’s report recommends testing “commonly once a week, ... [and] after a few months of producing negative drug and alcohol tests, the frequency of random testing is gradually reduced, often to once a month,” the Uniform Standards require testing upwards of twice per week for 5 years. This frequency makes it difficult for the testing to be particularly random and imposes substantial time and monetary costs on participants.

The CPS audit recommended that DCA amend the MAXIMUS contract to require a program staff member whose sole responsibility is to become knowledgeable about health insurance coverage benefits and referral sources, who would periodically update the clinical case managers and compliance monitors in order to reduce the cost burden on participants. The auditor also recommended that MAXIMUS identify an acceptable, but less frequent, random testing schedule that would accomplish the goal of sobriety and reduce participant cost and loss.

Staff Recommendation: *DCA should collaborate with healing arts programs that have substance abuse programs to determine whether Uniform Standard 4 relating to the frequency of drug testing should be revised. In response to the CPS Audit and to improve success rates, DCA may wish to amend the master contract to require Maximus to dedicate an individual to assisting licensees with financial resources.*

ISSUE #5: (BOARD MEMBER TRAINING AND REVIEW OF HIGH LEVEL BOARD STAFF) DCA provides training to board members so they can be successful in their role overseeing the licensing programs. One of these responsibilities is to evaluate the Executive Officers who run the programs. Do board members have sufficient information to perform their duties, and should EO evaluation be performed differently?

Background: The regulatory power granted by the professional practice acts is vested in each DCA board. Although given a modest per diem and reimbursed for necessary travel expenses, DCA board members are volunteers, and the majority have full-time jobs in addition to their oversight responsibilities. DCA boards are only required to meet two times in a given year, though most meet at least quarterly. In order to effectively manage California’s substantial regulatory programs, boards are provided the authority in statute to hire an executive officer (EO), who then effectuates the board’s requests or decisions through day-to-day management.

The DCA is required to provide new board members with an orientation and training within one year of their appointment. Many board members who have received DCA’s orientation, report that the information is somewhat overwhelming. The requirement for training within one year of an appointment can also result in some board members attending a number of meetings prior to receiving formal training from DCA. The Committees have historically reported that this orientation is very focused on legal aspects of being a board member such as on ex-parte communications, open meetings laws, rulemaking process and the administrative discipline process. Understanding these laws is

essential to performing the duties of a board member, but a need clearly remains to offer board members, especially new board members, additional guidance.

Following this global overview of board member responsibilities DCA provides, members may need briefings on current policy matters, explanation of their administrative duties and briefings on the overall structure and function of the various programs within the board – this information comes from EOs.

As the senior staff, the EO is often the only conduit to board members for information about a license program's management. The EO typically has final say on what information is submitted to the board for each meeting, controls staff access and manages data. The EO is the primary contact with stakeholders, including the Legislature, interest groups, other boards, as well as DCA management. This structure creates a dependency by board members on EOs.

This structure has resulted in board members sometimes being the last to know when their programs are underperforming, particularly if the EO is not transparent or plays a role in that underperformance. In the last decade, DCA board EOs have left or been replaced primarily due to external factors, including unfavorable media reports, Legislative scrutiny or findings by the state auditor, even after receiving glowing reviews and positive evaluations from the boards they serve.

- In 2012, after conducting an evaluation of its EO, the California State Athletic Commission (Commission) received an insolvency letter from DCA stating that the Commission was projected to overspend by \$35,000. The EO had previously told members of the Commission that revenue was higher than expected and they were going to end the year with excess funds and, in light of the letter from DCA, claimed that DCA had not provided assistance when requested. The Commission appointed a new EO shortly thereafter.
- In 2012, the Medical Board of California (MBC) was the focus of a series of *Los Angeles Times* articles and a scathing report from the Committees highlighting a passive physician enforcement system and the lack of effective leadership in ensuring MBC fulfilled its consumer protection missions. The EO resigned in early 2013.
- In 2015, the California State Auditor issued reports highlighting deficiencies in the BRN's licensing processing and enforcement efforts. A 2016 report recommended that BRN was so ineffectual in its enforcement responsibilities that they should be removed to the DCA entirely absent rapid reforms. The EO retired in 2016.
- Serious allegations of complaint mismanagement by enforcement staff at the Board of Vocational Nurses and Psychiatric Technicians' (BVNPT) in 2015 and 2016 led the EO to retire. A subsequent internal audit revealed that BVNPT had poorly-trained staff, staff vacancies, was paying excessive overtime and compromised privacy, in addition to findings of significant staff management problems. A new EO was selected in 2016. BVNPT announced at a meeting earlier this year the EO was on leave.

In the most recent BVNPT example, board members were palpably surprised at public meetings when the legislatively mandated enforcement monitor communicated to them the extent of program mismanagement under their watch. In response to one BVNPT member's question as to how BVNPT could have known about these problems, the enforcement monitor urged board members to seek

information outside of board meetings by engaging with other board staff, DCA, interest groups and the Legislature. Several BVNPT members appeared uncomfortable and communicated that they were unaware that they were responsible for program management and were unprepared for the time commitment this work required. To complicate things further, one BVNPT member stated that she was told by DCA's legal department not to communicate with other BVNPT staff. This misunderstanding represents an opportunity for DCA to improve board performance by increasing the information available to potential board members and, once selected, giving them the necessary guidance to govern effectively.

DCA recommends at board member trainings that boards annually review and evaluate the performance of EOs. DCA has a process for annual performance evaluations, steered by a performance appraisal form and best practices for establishing EO supervision expectations. The performance appraisal form requires the board to rate the EO based on 6 criteria: 1) Relationship with the Board; 2) Execution of Board Policy; 3) Board Programs; 4) Governmental Relations; 5) Administrative Functions; and 6) Public Liaison. The best practices document issues guidance on "Administrative Oversight of EO Activities," "Effective Communication between the Chair and the EO," and "Ensuring Effective Management of Board Operations." Unfortunately, the last topic suggests merely reviewing staff leave requests and leave balance management. Nowhere is it suggested that outside information be obtained to double-check information provided by the EO, or how the EO relates to other stakeholders.

EOs work for boards yet some board members have questioned the opposite, assuming that they work for the EO. It appears that a more substantive review of EOs can assist boards in ensuring they continue to fulfill their missions and that a comprehensive review will provide key information to boards that allow them to validate information they have been provided with or find solutions for operational improvements.

Staff Recommendation: *DCA should supplement its EO evaluation process with instructions on how boards can conduct what is known as a "360 review." This type of professional feedback is premised on gathering information from inside and outside the organization – by peers, reporting staff, and other interested parties – to get a global perspective on the EO's performance. This could be done by a subcommittee of a board or by an external consultant. DCA should advise the Committees on its efforts to enhance new member training and how training can be provided in a timely, candid manner so board members understand their role, responsibilities and opportunities.*

ISSUE #6: (REPORTS TO THE LEGISLATURE) DCA is required to prepare and transmit certain reports to the Legislature, many of which provide vital information that assist policymakers in effectively making necessary policy decisions. DCA entities are also required to prepare and transmit reports to the Legislature. It is unclear what DCA's process is for ensuring the appropriate legislative entities receive these reports in a timely manner. How does DCA track its own reporting requirements, as well as the required reports of other DCA entities? Is DCA provided a copy of statutorily required reports to the Legislature?

Background: Various BPC Sections require DCA to complete and submit annual reports to the Legislature to ensure compliance with statutory requirements, enhance transparency and to help expose potential deficiencies in existing law. A few examples include: BPC Section 139(c)(d) which requires the Director of the DCA to compile information provided by the boards and bureaus relative to the methods for ensuring that every licensing examination is subject to periodic evaluation, along with a

schedule specifying when examination validations and occupational analyses must be performed, and submit it to the appropriate fiscal, policy, and sunset review committees of the Legislature by September 30 of each year; BPC Section 201 which requires the DCA to submit a report of the accounting of the pro rata calculation of administrative expenses to the appropriate policy committees of the Legislature on or before July 1 of each year; BPC Section 312(a) which requires the Director of the DCA to submit to the Governor and the Legislature on or before January 1 of each year, a report of programmatic and statistical information regarding the activities of the department and its constituent entities for the previous fiscal year; and BPC Section 472.4(e) requires the Director of the DCA to submit a biennial report to the Legislature evaluating the effectiveness of the program for certifying third party dispute resolution processes used for arbitration of disputes and make available to the public summaries of the statistics and other information supplied by each qualified third-party dispute resolution process, and publish educational materials regarding the purposes of this program. As noted previously, DCA directly controls bureaus, thus any statutorily required report for a bureau is in essence prepared and transmitted by DCA.

Submission requirements and timeframes were enacted by multiple statutes throughout different legislative sessions which may make it difficult to ensure compliance with the reporting deadlines and can affect policy decisions if reports are not available when the Legislature is considering pending legislation.

It would be helpful for the Committees to better understand how DCA tracks BPC reporting requirements for DCA as well as entities within DCA. It would be helpful for the Committees to know what assistance DCA provides to boards in the preparation and submission of reports, including providing certain data, budget projections, workload estimates and other information boards may rely on DCA for. It would be helpful for the Committees to understand how DCA's Legislation and Regulatory Review track reporting requirements and when DCA recommends statutory updates to remove obsolete references to reports.

Staff Recommendation: *The DCA should inform the Committees on when and how it provides the required reports to the Legislature or the appropriate policy committees as specified in the BPC. In addition, the DCA should advise the Committees on ways to streamline the reporting requirements by date or other means as needed to guarantee compliance.*

ISSUE #7: (DEMOGRAPHIC DATA) Multiple entities at DCA collect demographic data, either because they are required by statute to do so or because they have implemented this effort as a best practice. In most instances, certain demographic data is voluntary and entities cannot always compel licensees to disclose this information. What is DCA's policy on the collection of demographic data by DCA entities?

Background: Almost every entity within the DCA collects information from licensees on an ongoing basis, beyond the name and contact information for those licensees. Some entities even collect information on applications for licensure aimed at providing these regulatory bodies current and pertinent data about their licensing population. Demographic data in particular is a critical tool in crafting policy, which is why so many entities collect, track, analyze and make public this important information. The voluntary and secure transmission of information about licensees and, in the case of members of the public served by DCA licensees like private postsecondary institutions, can greatly assist in the creation of substantive policies.

Staff Recommendation: *DCA should advise the Committees of its policy regarding voluntary demographic data collection by licensees. DCA should clarify whether entities are actually not authorized to collect certain information and if so, advise the Committees what DCA plans to do to address the fact that multiple boards collect demographic data, multiple boards are required to collect voluntarily provided demographic data for purposes of statewide health planning and multiple boards use demographic data to better understand their licensing population and the consumers they serve. The Committees may wish to require the Bureau for Private Postsecondary Education within the DCA to collect data voluntarily provided by licensees and students in order to assist in crafting appropriate policies and may wish to ensure provisions are built into this requirement to guarantee that information shall not be disclosed to other state or federal agencies and that information is not considered a public record. The state's public segments of postsecondary education all collect demographic data through the application process whereby students self-identify; this information helps inform the Legislature and institutions about student achievement and the performance of student groups like low-income students, veteran student and first-generation postsecondary education students.*