

BACKGROUND PAPER FOR The Department of Consumer Affairs

**Oversight Hearing, March 5, 2019, 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 12 entities operating under the direction of the Business, Consumer Services and Housing Agency (BCHS). 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 about 3.5 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 2018 Annual Report, is:

We protect California consumers by providing a safe and fair marketplace through oversight, enforcement, and licensure of professions.

Within the DCA are 38 entities, including 26 boards, eight 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, BCSH or 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 approved by 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 Dean Grafilo who was appointed in February 2017. Leadership at the DCA currently includes a Chief Deputy Director; Deputy Director, Legal Affairs Division; Assistant Deputy Director, Legal Affairs Division; Deputy Director, Board and Bureau Services; Deputy Director for Legislation and Regulatory Review; Deputy Director, Communications Division; Deputy Director, Administrative Services; Deputy Director, Office of Information Services; Chief, Division of Programs and Policy Review and; Chief, Division of Investigation.

Enforcement Overview

Enforcement programs allow DCA entities to 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 that have 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. SB 467 (Hill, Chapter 656, Statutes of 2015) specifically required that in order to implement the Consumer Protection Enforcement Initiative of 2010, the director, through the Division of Investigation, shall implement "Complaint Prioritization Guidelines" for boards to utilize in prioritizing their respective complaint and investigative workloads. The guidelines shall be used to determine the referral of

complaints to the division and those that are retained by the health care boards for investigation. The three categories of complaint identification and prioritization are as follows:

- *Urgent* – acts that could result in serious patient harm, injury or death and involve, but are not limited to, gross negligence, incompetence, drug/alcohol abuse, practicing under the influence, theft of prescription drugs, sexual misconduct while treating a patient, physical/mental abuse, conviction of a crime etc.
- *High* – acts that involve negligence/incompetence (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 or 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 limited-term non-sworn investigators as part of a pilot project. 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. 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 board 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 has 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 have remained.

(For more detailed information regarding the responsibilities, operation and functions of the DCA, please refer to the “2018 Annual Report”. This report is available on its website at https://www.dca.ca.gov/publications/2018_annrpt.pdf)

CURRENT SUNSET REVIEW ISSUES FOR THE DCA

The following are issues 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.

ISSUE #1: (DYNAMEX). In 2018, the California Supreme Court handed down a decision establishing a new test to determine whether an individual is an independent contractor or employee. What steps has the Department taken to inform, advise, and assist regulatory programs in light of the Dynamex decision?

Background: The April 2018 Supreme Court ruling in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (4 Cal.5th 903) (Dynamex) marks a significant departure from previous standards used to define an employee and independent contractor for purposes of Industrial Welfare Commission (IWC) wage orders. The case was originally brought by two Dynamex delivery drivers who alleged that the courier and delivery company misclassified them as independent contractors when it entered into contracts with drivers, who had previously been classified as company employees, requiring that they provide their own vehicles, pay for their own fuel, vehicle maintenance, insurance, taxes, and workers’ compensation insurance. Prior to the Dynamex ruling, the determination of employee or independent contractor hinged on a test outlining a number of factors that the court adopted in *S. G. Borello & Sons, Inc. v Dept. of Industrial Relations* (48 Cal.3d 341) (Borello). Under Dynamex, the test to determine if a worker is truly an independent contractor comes down to three elements that the individual must meet:

- (A) *The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;*
- (B) *The worker performs work that is outside the usual course of the hiring entity's business;*
and
- (C) *The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.*

Given the varied number of licensed professionals working in myriad business settings regulated by DCA boards and bureaus, many of which will be impacted by the new independent contractor threshold established by Dynamex, it would be helpful for the Committees to understand what steps the Department is taking to inform, advise, and assist regulatory programs.

Staff Recommendation: *DCA should update the Committees on its efforts related to Dynamex.*

ISSUE #2: (PUBLIC ACCESS TO MEETINGS) Is the public easily able to participate in board meetings remotely, particularly given that attendance in person is not an option or feasible for many Californians?

Background: Consumer protection is paramount for state boards and bureaus, and it is vital for the public to be aware and engaged in board and bureau activity to ensure regulators are meeting this goal.

Although DCA boards rotate their meetings geographically throughout the state, attending a meeting midweek, frequently during work hours, is difficult for many stakeholders. DCA offers webcasting services to advance the public nature of these events, but not all boards avail themselves of this benefit, nor are there sufficient resources to guarantee a live stream of all board and committee meetings. Further, varying policies may also hinder public access; some boards, including the Board of Registered Nursing, webcast their board meetings but not their committee meetings, depriving the public of the discussions that lead to board recommendations and action.

Further, even when webcasting is available, there is frequently no way for remote participation. Some boards are doing this routinely; for example, the Medical Board of California uses a robust system for webcasting and live teleconferencing that encourages diverse engagement. It would be helpful for the Committees to understand if these options are available to all programs and how they can be utilized.

In response to the Committees' previous inquiries about public access, and specifically webcasting, DCA noted "We continue to make great strides in enhancing the ability of the public to access Board meetings." According to the DCA, from July 1, 2014 through March 1, 2015, the DCA webcast 89 board meetings compared with 77 from July 1, 2013 through March 1, 2014. In addition, the DCA responded that they have implemented recommendations from prior sunset review oversight efforts by working with the boards to standardize meeting procedures when there is a webcast and have placed board website links on the webcast page. It would be helpful for the Committees to receive an update on these efforts.

Staff Recommendation: *DCA should establish universal policies for remote public access of board and committee meetings and report to the Committees on those. DCA should provide data to the Committees outlining the total number of webcasting requests, the number of board and committee meetings held, how many meetings were webcast, and the reasons any board or committee meetings were not webcast. DCA should continue to work to establish means for remote public participation at all board and committee meetings, whether by email, phone, or text message. DCA should report on any staffing or resource deficiencies that would prevent it from meeting these goals.*

ISSUE #3: (SOCIAL MEDIA) Does the DCA have a formal social media policy? What support does the Department provide to boards and bureaus to ensure relevant information on updated pages are maintained?

Background: Programs within the Department are increasingly relying on social media to connect with licensees, consumers, and the public. Social media serves as an effective means by which to conduct outreach and provide current information to interested parties, and can be utilized to ensure broader engagement with the public. Some boards and bureaus appear to use the internet and social media regularly and effectively, highlighting programmatic changes, important enforcement actions, and providing updates that may impact licensees. Other boards and bureaus have what appear to be static, outdated pages that may actually confuse consumers, or are simply used by licensees to advertise that they are licensed. It would be helpful for the Committees to understand if the Department provides guidelines for boards and bureaus that utilize social media, what limitations may exist to removing or deleting obsolete and unused board profiles, how traffic is tracked and evaluated, and where improvements can be made.

Staff Recommendation: *The Department should update the Committees on its efforts to assist boards and bureaus with their social media presence and what steps are taken to ensure that information is valid and reliable.*

ISSUE #4: (AB 2138) How is the DCA assisting boards and bureaus in their implementation of recent legislation updating how criminal history background is considered in licensure?

Background: In October 2016, the Little Hoover Commission released a report entitled *Jobs for Californians: Strategies to Ease Occupational Licensing Barriers* which 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. During the 2016-2017 sunset review oversight of the DCA, DCA was asked what steps it was taking to respond to the report and how the DCA was advising entities on best practices to assist in the licensure process. The DCA stated that it had been assessing the criteria used by boards and bureaus to determine if a past conviction is substantially related, as well as how they consider rehabilitation.

The DCA reported that clarifying criteria through regulations, through FAQs, or some combination of both could assist applicants and potentially encourage more individuals with prior convictions to apply and stated that it "intends to work with the various boards and bureaus to achieve more clarity and remove unnecessary barriers to licensure. Some of the avenues the Department was exploring included: providing clear descriptions of licensing criteria on each program's Web site, potentially re-drafting some regulations to create some consistency and additional clarity, and providing more hands-

on guidance to licensees that inquire about these processes." It would be helpful for the Committees to receive an update on any of these efforts.

In response to criticism about the statutory authority for boards and bureaus to deny a license to an individual who has "done any act involving honesty, fraud, or deceit" for self-benefit or harm to others, AB 2138 (Chiu & Low, Chapter 995, Statutes of 2018) limited discretion provided to regulatory entities within the Department to apply criminal history background, as it relates to denial of an application for licensure. Under AB 2138, an application may only be denied on the basis of prior misconduct if the applicant was formally convicted of a substantially related crime or was subject to formal discipline by a licensing entity. Further, prior conviction and discipline histories are ineligible for disqualification of applications after seven years, with the exception of serious and registerable felonies, as well as financial crimes for certain boards. Among other provisions, the bill additionally requires each board and bureau to report data on license denials, publish its criteria on determining if a prior offense is substantially related to licensure, and provide denied applicants with information about how to appeal the decision and how to request a copy of their conviction history from the Department of Justice. These provisions go into effect on July 1, 2020.

Because AB 2138 significantly modifies current practice for boards in their review of applications for licensure, it is presumed that its implementation will require changes to current regulations for every board and bureau impacted by the bill. While the specificities of each board and bureau's licensee population will result in regulation language unique to every board and bureau, there are likely to still be many rulemaking commonalities among the impacted entities. This provides the DCA with an opportunity to support the boards in their implementation efforts, including legal assistance and other centralized services.

Staff Recommendation: *The DCA should describe what steps it has taken to support the impacted boards and bureaus' implementation of AB 2138 and how it is working to ensure that each board and bureau has met its statutory requirements in time for the bill's July 1, 2020 effective date.*

ISSUE #5: (BreEZe) What is the status of the project, including work requests for entities on the system, cost estimates, and Release 3 entity needs assessments conducted by DCA staff?

Background: DCA's effective implementation of a dynamic information technology (IT) system for all entities still remains delayed. 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, 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. 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. Release 3 included the following boards, some of which rely on insecure, inefficient options like Excel spreadsheets to track critical licensing data: The Acupuncture Board; Board for Professional Engineers, Land Surveyors, and Geologists; Bureau of Automotive Repair; Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation; Bureau for Private Postsecondary Education; California Architects Board; California Board of Accountancy; California State Board of Pharmacy; Cemetery and Funeral Bureau; Contractors' State License Board; Court Reporters Board of California; Landscape Architects Technical Committee; Professional Fiduciaries Bureau; Speech-Language Pathology and Audiology and Hearing Aid Dispensers Board; State Athletic Commission; State Board of Chiropractic Examiners; State Board of Guide Dogs for the Blind and; Structural Pest Control Board. Release 3 boards have already paid millions of dollars for BreEZe.

The fate of Release 3 programs has been up in the air, and DCA has provided multiple and varied plans for these entities since 2015. At one point 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. In response to questions during the DCA's 2016 sunset review oversight, the Department reported that it would partner with the California Department of Technology (CDT) and use the Project Approval Lifecycle (PAL) process, which includes a cost-benefit analysis, to determine whether BreEZe is a cost-effective solution that meets the business needs of the remaining boards and bureaus. According to the DCA, its expectation is that in some cases, the process will determine that BreEZe is the best solution and in other cases, a different platform may better meet the business needs. According to the DCA at the time, the resources that each of these programs has already committed to this effort will still provide value regardless of which IT solution is ultimately implemented.

DCA requested \$1,327,000 in FY 2017-18, and \$1,207,000 in FY 2018-19 and ongoing to fund ten permanent positions associated with conducting periodic business process reviews of the boards, bureaus, committees, programs, and commission under the DCA, the funding for which would come from the special funds that support these entities. DCA stated in its Budget Change Proposal at the time that the Strategic Organization, Leadership, and Individual Development (SOLID) unit handles all training and strategic planning services for the boards, and is dedicated to the continual improvement and organizational development of the department and its Boards. Additionally, SOLID provides meeting facilitation, organizational change management (OCM) consultation services, and teambuilding workshops to assist board members and staff in dealing with unique issues facing a Board. The DCA indicated that the 18 boards and bureaus that would have been a part of Release 3 for BreEZe will be assessed by the OCM unit within SOLID and that the assessments will help prepare these remaining boards and bureaus for movement to a new IT system.

The 2017-18 Budget AB 97, (Ting, Chapter 14, Statutes of 2017) authorized the \$1,327,000 but only for business process reviews and other associated activities directly related to Release 3 entities pursuing an IT business modernization effort and only 30 days after the DCA notifies the Joint Legislative Budget Committee and the relevant policy and fiscal committees of each house of the Legislature of the DCA's approach to addressing the business needs of each individual Release 3 entity, including a plan and proposed timeline for completing business process documentation and needs specification. The Budget also specified that this notification must attest that Release 3 entities have committed to participate according to the proposed plan the DCA provided. Additionally, the Budget required the Director of the DCA to report progress on Release 3 entities' transition to a new licensing technology platform to the appropriate committees of the Legislature by December 31 of each year. The state government budget trailer bill AB 111 (Committee on Budget, Chapter 19,

Statutes of 2017) also included language described above to require a Release 3 entity to participate in business process reviews and OCM activities in preparation for transition to a new licensing technology platform, either through the relevant unit in the DCA, or through contracted services. SB 547 (Hill, Chapter 429, Statutes of 2017) included the same language related to progress reports provided by the Director of the DCA as contained in the Budget.

DCA's 2018 Annual Business Modernization Report identified progress to-date on OCM efforts with Release 3 boards, including delays of one to two years for some entities to even begin the OCM assessment. The report also highlighted the need for additional resources for other entities to begin this work with the DCA, entities which have all contributed to BreEZe which many assumed would be the product for their IT upgrades.

Staff Recommendation: *DCA should update the Committees on BreEZe including, but not limited to, the status of system upgrade or change requests from programs currently utilizing the system (the number of outstanding requests, who is assigned to address those requests, the timeframe for completion of requests, the impact that delays in completing requests may have on board functions, and any other pertinent information); estimated continued BreEZe cost projections and fund impacts; the timeframe for OCM process assessment completion for Release 3 entities; whether timeframes outlined in the 2018 Annual Business Modernization Report remain current and reliable; and significantly, the existing support (in the form of workaround systems where necessary) DCA is providing Release 3 entities.*