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February 6, 2019

The Hon. Dean Grafilo
Director, Department of Consumer Affairs
1625 North Market Street
Sacramento, CA 95834

**Re: CENTER FOR PUBLIC INTEREST LAW'S OPPOSITION TO
DEPARTMENT OF CONSUMER AFFAIRS' PROPOSAL TO CREATE AND
FUND A REDUNDANT REGULATIONS UNIT USING LICENSING FEE
MONEY UNLESS AMENDED**

Dear Director Grafilo:

The Center for Public Interest Law (CPIL) respectfully opposes the above-referenced budget request from the Department of Consumer Affairs (DCA) in its entirety unless it is amended as discussed below. We would be pleased to meet with you or your staff at your convenience to collaborate on how the issues raised below could be addressed to the benefit of consumers and patients.

**BACKGROUND AND SUMMARY OF OPPOSITION TO THE CURRENT
PROPOSAL**

According to the Legislature at DCA's most recent oversight hearing, because of a 2016 Business, Consumer Services and Housing Agency (BCSHA) policy change requiring additional review of DCA board and bureau regulations before submission to the Office of Administrative Law (OAL) for final approval, "[t]he ability for [DCA's] boards to promulgate regulations has come to a virtual standstill."¹

To address this "standstill" and related regulation-approval backlog caused by BCHA's 2016 change in operational policy, DCA, through its budget proposal, seeks permission to assess \$4.61 million over the course of the next three fiscal years to all the boards and bureaus under its purview (on top of the pro rata funds they already pay) to fund a new "Regulations Unit" in DCA's Legal Affairs Division. According to DCA, this request, and

¹See March 5, 2018 Senate Committee on Business, Professions and Economic Development and the Assembly Committee on Business and Professions Background Paper for at pp. 9-10, available at <https://sbp.senate.ca.gov/sites/sbp.senate.ca.gov/files/2018%20DCA%20Background%20Paper.pdf>

the 2016-imposed third layer of review, is necessary because DCA's pre-existing two layers of review were unable to prevent 16% of regulations sent to the OAL for final review from being rejected by that agency. DCA asserts in its proposed budget request that this rejection rate is "unacceptable."

The relationship between the first review currently conducted when DCA's counsel drafts the regulations with board and bureau staff, the newly-proposed Unit, and the review long required by statute before submission to OAL, are not explained in DCA's proposal. If DCA's proposal merely aims to institutionalize and make permanent the 2016 policy change so that there will continue to be three duplicative and redundant layers of regulatory review, we must respectfully oppose the proposal.

Moreover, like the change in policy that caused a "virtual standstill" in all of DCA's regulatory efforts, the budget proposal, without supporting evidence or explanation, is based upon a presumption that a 16% rejection rate of regulations by OAL is so "unacceptable" that the raw number alone justifies the new Unit. This is, respectfully, far from self-apparent. That percentage, broken down into whole numbers, is a mere *eight* regulatory packages out of 55. Worse, even after the 2016 imposition by BCSHA of the third level of standstill-creating review in 2016, OAL rejections were not eliminated but simply reduced, from eight before the new and paralyzing review was imposed, to three. For two reasons, far more is needed beyond the one word "unacceptable" to justify either the 2016 policy change or the Unit:

- First, until DCA explains the why the 2016 policy change was warranted to protect patients and consumers, DCA cannot make a persuasive case favoring creation of the Unit as a way to address the standstill and backlog instead of simply reversing the 2016 policy change.
- Second, until DCA explains why the 2016 change in policy was warranted to protect patients and consumers, DCA cannot make a persuasive case for creating and funding the Unit as a three-year (and likely permanent) fixture in DCA. This is because DCA's proposal is not risk-free to patients and consumers. The requested \$4.61 million to fund the Unit over the course of three years would have to be annually diverted from licensing fees that the boards and bureaus have currently reserved to pay for important enforcement measures that protect patients and consumers from incompetent and unethical licensees. This amount is in addition to the amount of pro rata funds the boards and bureaus already must pay to DCA, ranging from 10% to 30% of their licensing fee income, for services, including legal services, whether or not a board or bureau uses those services.

Thus, without any more persuasive explanation as to why the system of review that was in place prior to the 2016 imposition of additional DCA review was risky for patients and consumers, neither the public nor the Legislature can determine whether diverting still more money from the boards and bureaus to create the Unit is worth the downside of less money being available to boards and bureaus for other patient and consumer-protecting functions.

Finally, nothing in this proposal would require DCA's new Unit to review proposed regulations for anticompetitive review—an exercise that is patently a cost-beneficial expenditure of funds after the U.S. Supreme Court's decision in *North Carolina Board of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (2015), which holds that state licensing boards influenced by licensees may be held liable for federal antitrust violations if they are not actively supervised by the unlicensed state actors, and such suits may subject the state to millions of dollars in treble damages.

ABOUT THE CENTER FOR PUBLIC INTEREST LAW

CPIL is a nonprofit, nonpartisan, academic center of research, teaching, learning, and advocacy in regulatory and public interest law based at the University of San Diego School of Law. Since 1980, CPIL has studied the state's regulation of business, professions, and trades, and monitors the activities of state occupational licensing agencies, including several of the boards within DCA. CPIL's expertise has long been relied upon by the Legislature, the executive branch, and the courts where the regulation of licensed professions is concerned, particularly the boards, bureaus, and commissions under the umbrella of the DCA.

WHAT WAS THE DCA REVIEW PROCESS BEFORE AND AFTER 2016?

Pre-2016. Prior to 2016, the process for promulgating regulations worked essentially like this. When a board or bureau decided that consumer or patient protection required the promulgation of regulations, boards or bureaus directed their staff *with the aid of DCA counsel already assigned to and paid for by the boards and bureaus* to draft those regulations to make sure they meet requirements for all regulations imposed by the Administrative Procedure Act and enforced by the OAL which must review and approve all regulations for their legality and necessity before they go into effect.

After the DCA counsel assigned to a board or bureau signed off on the draft regulations, the draft would return to the board or bureau for approval. After that, the draft regulations must be posted for a 45-day public comment period; in response to such comments, regulations were often modified and released for an additional 15-day comment period.

After the public comment process was done, the regulations returned to the board or bureau for final approval.

Next, by state law, before regulations were sent to OAL, DCA reviewed and approved them and had the discretion to reject them and send them back to the board or bureau for more work. (*See Business and Professions Code section 313.1*).

If DCA approved the regulations they were sent to the OAL for final review.

Two aspects here warrant emphasis: prior to 2016 (i) DCA counsel were paid by the boards and bureaus to aid them in the drafting of regulations at the earliest stage and (ii) DCA already has in place a statutory mandate to review proposed regulations at the end of the process before they are sent to OAL for final action. Thus, DCA and its counsel had before 2016—and have now—not one but two chances to prevent allegedly “unacceptable” numbers of OAL rejections.

Post-2016. In late 2016, BCSHA imposed on every DCA board or bureau what can be called a new “post-review/pre-review” process. It is “post-review” because it was imposed to review the work DCA counsel was supposed to have already done during the drafting of the regulations. It is “pre-review” because this new review process is in addition to and before (i) the statute-mandated final review DCA conducts of regulations at the end of the process and (ii) before the public reviews and comments on the regulations.

From what we understand, this new “post-review/pre-review” process requires every board and bureau’s draft regulations—whether or not they have ever had a regulatory package rejected by OAL—to be sent to, reviewed, and approved by:

- (i) DCA’s regulations unit;
- (ii) DCA’s legislation unit;
- (ii) DCA’s budget unit;
- (iv) DCA’s legal unit;
- (v) DCA’s Deputy Director;
- (vi) DCA’s Director; and
- (vii) then to more lawyers and/or others at BCSHA.

Finally, and remembering that boards and bureaus are paying for all of this with licensing fees that are best spent on enforcement, the draft regulations go back to the board or bureau that decides whether to proceed. (It might not.) If so, then the regulations are released for

public comment.² They are then by statutory mandate sent again to DCA to review before they are submitted to OAL, which reviews them once more.

WHAT CAUSED THE DEPARTMENT-WIDE CHANGE IN POLICY? WHAT JUSTIFIES THE BUDGET REQUEST?

Here is how DCA describes in its budget proposal the problem that lead to the 2016 pre-review/post-review change in policy and how it justifies its budget request:

In 2017 [*sic*], OAL considered a total of 55 regulatory packages submitted by DCA entities. OAL disapproved 16 percent of those packages, an unacceptably high disapproval rate. Since the process modifications in late 2016, however, there was steady improvement in the disapproval rate, going from a 21.8 percent disapproval rate in the first half of 2017, to only 7.6 percent being disapproved between July 2017 and February 2018. To date in 2018 (through early December), the disapproval rate is 4.5 percent.³

For three reasons, these data do not in and of themselves reveal a problem justifying either the 2016 change in policy that lead to DCA-wide regulatory paralysis or the budget proposal.

First, why did the two existing reviews fail to prevent an “unacceptable” outcome? Crucially, the proposal does not explain why the two previously existing reviews by DCA—by board or bureau counsel during the drafting and the statute-mandated review by DCA before submission to OAL—failed to prevent OAL from rejecting the packages at an “unacceptably” high rate. In failing to do so, the proposal does not persuasively reassure that the new Unit will not suffer from the identical flaws that have caused DCA to seek its enactment.

² Regulations are often changed in meaningful ways after public comment. The new level of DCA review that was instituted in 2016 occurs *before* public comment. That means that the review proposed by DCA, if modeled on the current process, will inevitably be scrutinizing regulations that could easily be significantly different than those that will be sent to DCA for its statute-mandated final review and, then, to OAL. That the proposed new Unit will possibly, therefore, divert licensing fees best spent on enforcement to impose a third level of review on regulations that are not even finished is yet another reason why the budget proposal should be amended, if not rejected. Notably, if DCA counters by saying, no, the Unit will only review regulations after they are final, then the Unit is exactly duplicative of the statute-mandated final review that has long existed and already exists. (*See* Business and Professions Code section 313.1)

³ *See* DCA budget request at p. 21, available at http://web1a.esd.dof.ca.gov/Documents/bcp/1920/FY1920_ORG1111_BCP2814.pdf

Second, is 16% “unacceptable”? DCA’s proposal says that a 16% rejection rate of regulatory packages by OAL out of 55 is “unacceptable.” It certainly is not preferable, but is 16% so bad as proportionally to warrant all this additional review afflicting every board and bureau some of which claim too little funds to perform core duties as it is, some of which may never have had regulations rejected? Was it so “unacceptable” to bring the public protection regulatory work of entire department to a “virtual standstill”? To better test this premise, let’s translate the percentages into raw numbers. 16% of 55 is 8. The pre-review review policy was thus apparently imposed because of 55 regulatory packages submitted by DCA boards and bureaus to OAL, 8 were rejected.

Underscoring the additional reviews will not predictably result in a forecast number of OAL rejections, the number of rejections jumped a bit to 21.8% soon after the post-2016 third pre-review review was imposed, but, according to DCA, it now is at 4.5%.

Observe, then, the new 2016, “virtual standstill” causing, third layer of review did not eliminate OAL ejections, it simply reduced them from 16.5% to 4.5%.⁴

Third, is a 4.5% rejection rate worth the cost? Actually, the proposal does not tell us whether the 21% or the 4.5% rejection rates are based on the same 55 baseline number of regulatory packages but, for purposes of opposing the proposal as it reads now, the difference is not dispositive. To illustrate why the cost of fixing this problem is possibly not worth doing so, take as an illustrative baseline the more certain numbers offered by DCA; namely, because 16% of 55 packages were rejected by OAL the new policy was imposed and the new policy resulted in a lower rejection rate of 4.5%. Using these numbers means that the rejection rate for regulatory packages went down from 8 (16% of 55) to 3 (4.5% of 55). *The difference = 5.*

Next, let us assume that the same 4.5% OAL rejection rate can annually be expected of the proposed Unit at a cost of \$1.47 million a year. Assuming that the new Unit like the 2016 pre-review review prevents every year at least five regulatory packages from being rejected, DCA’s boards and bureaus will have spent \$294,500 per package to obtain this result (\$1.47 million/5)

⁴ A certain number of OAL rejections are inevitable. OAL in part reviews regulations for “clarity” and “authority.” Government Code section 11349.1. Reasonable minds, regulators, and judges can and do differ about whether regulations read clearly and are authorized by statute.

This number would be a rather large part of the annual budget of many of DCA's smaller boards. It represents 588 hours for a mid-level partner at an elite law firm billing at \$500 an hour.⁵

AMENDMENTS TO THE PROPOSAL ARE NEEDED TO ENSURE IT ADVANCES RATHER THAN IMPEDES CONSUMER PROTECTION

1. The Proposal Does Not Guarantee A Reasonable Time Frame For The Unit's Reviews

Boards have reported to us that the pre-review reviews imposed by the 2016 change in policy consume at least a year, in and of themselves, putting aside the rest of the process of drafting, redrafting, public comment, scheduling board votes (many meet just quarterly) and other approvals. This year-plus delay to obtain the result of five fewer regulatory packages from being rejected is solely what appears to have caused the Department-wide "standstill" in public protection rulemaking. Although the proposal is intended to cure the "standstill" by creating the new Unit, the proposal offers no time-certain for the Unit to complete its current backlog work or to prevent more standstills. Thus, the boards and bureaus and their fee-paying licensees, in exchange for involuntarily paying for this Unit, are promised no certain result or improvement at all.

If the Unit is diverting money from scarce licensing funds to resolve a backlog that DCA created unilaterally, **then the proposal should explicitly provide that the Unit's review shall not exceed 30 days from the day it receives the draft regulatory package and that the board or bureau is free to proceed with the business of the people and pursue its regulations on the 31st day.**

Moreover, when DCA counsel designated to a board or bureau is assigned the task of drafting regulations, **the proposal must clarify that such drafting must be done and submitted for submission to the new Unit within 30 days of getting the drafting assignment from the board or bureau.**

2. The Proposal Does Not Even Include The One Kind Of Review That Will Certainly Be Worth The Money

As mentioned above, DCA oversees most of the entities in California that are controlled by what the U.S. Supreme Court terms "active participants" in the trade regulated. The

⁵ And, please note this additional complication. Business and Professions Code section 7136 caps the pro rata that may be charged to the Contractors' State Licensing Board at 10%. Unless this statute is amended or repealed, the funds for the new Unit could not, because of this statute, be spread equally over the boards and bureaus.

February 2015 holding of the Court in *North Carolina Board of Dental Examiners v. FTC* exposes the State to vast litigation exposure from the standard operating procedures of such boards and commissions. The Court determined that these boards are not automatically considered state entities for purposes of the antitrust laws, and thus are now subject to treble damage liability where they commit any act (including those purportedly as a board or commission) that violates federal antitrust law. Much of what these agencies do is inherently anticompetitive. For example, licensure restricts supply, and prevents people from entering the market.

To avoid treble damages liability under federal antitrust law for what might be deemed to be anticompetitive regulations and enforcement policies, California must show that unlicensed government officials are “actively supervising” these boards and commissions that are controlled by “active market participants” in the relevant trade.⁶ Independent and specifically mandated DCA review of proposed regulations and enforcement actions by the proposed Unit for anticompetitive impact would be an important step towards compliance with this law and preventing the state from being potentially liable for millions of dollars in antitrust damages. Yet, nowhere does the budget proposal specifically articulate that such a review would be required of the new Unit and only an explicit mandate to that effect could foreclose antitrust liability.

With the additional, possibly clarifying amendments mentioned herein, **CPIL would support the proposal if it expressly included (i) attorney review of proposed regulations to ensure they do not violate *North Carolina* where (ii) an economist with an expertise in such issues is available for consultation on any regulatory package identified as raising *North Carolina* issues by Unit staff.** This is simple good government prudence and leaving such scrutiny out of the purview of a Unit devoted solely to regulatory review cannot, with respect, be justified.

3. To Prevent Redundancy, The Proposal Must Clarify That The Unit Is The Only Place Where Regulations Are Reviewed For OAL Compliance By DCA Before Submission To OAL

Three reviews are simply unnecessary. One should be ample. If one is not ample then it is because there are problems with the quality of work being reviewed and the answer to that is not review upon review upon review but training current employees to perform better in the first place so that just one review is needed.

⁶ This threat is not theoretical. At least 25 *North Carolina* cases have been filed. See, e.g., *Veritext Corp. v. Bonin*, 259 F. Supp. 3d 484, 493 (E.D. La. 2017); *Colindres v. Battle*, No. 1:15-CV-2843-SCJ, 2016 WL 4258930, at *8-*9 (N.D. Ga. June 6, 2016); *Teladoc, Inc. v. Texas Med. Bd.*, No. 1-15-CV-343 RP, 2015 WL 8773509, at *6-*10 (W.D. Tex. Dec. 14, 2015).

On this critical point, the proposal is unacceptably ambiguous about whether the reviews contemplated for the new Unit are in lieu of the other two current levels of review or a codification of the third standstill-creating review caused by the 2016 change in policy. If the Unit is simply the codification of the current and redundant third level of review CPIL must respectfully oppose the proposal for the reasons mentioned above.

However, provided the Unit was reasonably staffed (see below), **a Unit that was expressly made not redundant of the two other reviews could make sense. Thus, if the proposal expressly set forth that (i) DCA counsel who are assigned to the boards and bureaus would still advise them about the drafting of the regulations (their expertise), (ii) the Unit's review will be confined just to OAL and antitrust compliance or to drafting those documents in the first instance, and (iii) that Unit review replaces the third review currently required by Business & Professions Code section 313.1(c) through (f), then the proposal would no longer be one that could be interpreted as seeking to codify wasteful redundancy.**

4. To Foreclose The Possibility Of Unneeded and Open-ended Diversions Of Money From Boards And Bureaus, the Proposal Must Clearly Distinguish Between Temporary Staff Needed To Address The Backlog And The Modest Staff Needed For The Unit Prospectively

The proposal does not clearly distinguish between the number of staff temporarily needed to work through the self-created backlog and those needed to staff the Unit prospectively. To ensure that money is not unnecessarily diverted from core board and bureau functions, **the proposal must distinguish between temporary and permanent staff and must not retain temporary staff for more than a year.**

The OAL has about 14 lawyers reviewing the regulatory packages of 200 agencies. Prospectively, the **Unit needs no more than two full-time staff and both do not need to be lawyers.** The Unit's duties should be properly cabined to prevent duplication so that only anticompetitive review and OAL compliance are at issue.

Moreover, as noted in footnote 5, *supra*, **Business and Professions Code section 7136 should be amended** so that contractors pay their fair share of reducing at least the backlog.

5. The Proposal Must Specify The Qualifications Of Unit Employees

While the proposal purports to be aimed at preventing OAL rejections, no requirement is promised about whether those hired will be experts in that technical process. Again, if funds

are being diverted from enforcement programs designed to protect the public, **the proposal must clearly establish that the individuals staffing the newly-proposed Unit must be experts in administrative law and anticompetitive review.** Such omitted expertise is the entire point of the Unit's existence.

CONCLUSION

As a nonprofit organization that aims to ensure DCA's licensing boards and bureaus effectively protect patients and consumers, CPIL is supportive of a mechanism by which DCA conducts an appropriate "check" on its boards and bureaus. Unless the proposal is amended to incorporate CPIL's recommendations discussed in this letter, however, the Unit will not with sufficient certainty provide that check. Instead, it will take money away from these agencies' ability to protect the public through their respective enforcement programs without any assured or comparable benefit to consumers or patients.

If the above clarifications and changes are made, CPIL would, with gratitude, enthusiastically support the proposal as one indisputably in the public interest.

As always, we would be happy to work with you and your staff to further discuss these recommendations so that DCA may best achieve its mission to protect the people of California, a goal we know you care passionately about.

Sincerely,



Bridget Fogarty Gramme
Administrative Director
Center for Public Interest Law
University of San Diego School of Law

CC: Hon. Alexis Podesta, Secretary BCSHA
Hon. Maria Elena Durazo and Hon. Jim Cooper, Chairs, Budget Subcommittees 4
Hon. Presidents of DCA licensing boards