University of San Diego SCHOOL OF LAW
CONSUMER PROTECTION POLICY CENTER at the CENTERS FOR PUBLIC INTEREST LAW
5998 Alcalá Park
San Diego, CA 92110-2492
P: (619) 260-4806 | F: (619) 260-4753
www.sandiego.edu/cppc | info@cpil.org

July 2, 2023

Assemblymember Marc Berman
Chair, Assembly Committee on Business & Professions
State Capitol
Sacramento, CA 95814

Re: SB 815 (Roth) – SUPPORT

Dear Assemblymember Berman:

The Center for Public Interest Law (CPIL) strongly supports SB 815 (Roth), the sunset legislation for the Medical Board of California (MBC). The proposed reforms, many of which the Consumer Protection Policy Center (formerly the Center for Public Interest Law) recommended in its oral testimony at the Board's Joint Sunset Review Oversight hearing on March 16, 2023, are critical steps to restoring the public's trust in MBC's ability to protect the public from unethical and incompetent physicians and surgeons.

About the Consumer Protection Policy Center

The Consumer Protection Policy Center (CPPC) is a nonprofit, nonpartisan academic and advocacy organization based at the University of San Diego School of Law. For over 40 years, CPPC has studied occupational licensing and monitored California agencies that regulate businesses, professions, and trades, including the Medical Board and other Department of Consumer Affairs (DCA) health care boards. CPPC has focused heavily on MBC since 1989 when it published *Physician Discipline in California: A Code Blue Emergency* ("*Code Blue*"), a 100-page report based on three years of research which revealed the minimal output, fragmented structure, and questionable priorities of the Medical Board's enforcement program. Based on that report, the Legislature passed at least five MBC enforcement program reform bills between 1990 and 2000.[1] After continuing reports of problems at MBC's enforcement program were published in 2002, the Legislature passed SB 1950 (Figueroa) in 2002, which required the DCA Director to appoint a "Medical Board Enforcement Monitor." After a competitive bidding process, the Director appointed CPIL's then Administrative Director, Julianne D'Angelo Fellmeth, to that position in October 2003. Over a two-year period, she directed an in-depth investigation and review of MBC's enforcement and diversion programs, culminating in

[1] SB 2375 (Presley) (Chapter 1597, Statutes of 1990); SB 916 (Presley) (Chapter 1267, Statutes of 1993); SB 609 (Rosenthal) (Chapter 708, Statutes of 1995); AB 103 (Figueroa) (Chapter 359, Statutes of 1997); SB 16 (Figueroa) (Chapter 614, Statutes of 2000).

two reports containing 65 concrete recommendations for reform.[2] At least five pieces of reform legislation (SB 231 in 2005; SB 1438 in 2006; AB 1127 in 2011; SB 304 in 2013; AB 1886 in 2014) have been enacted in response to these reports, mirroring many of the recommendations.

Increase in Public Member Representation on the Board

CPPC wholeheartedly supports the proposed amendment to section 2001 of the Business and Professions Code to add two public members to the Board, giving the public—and not physicians—the majority of the Board. Such a composition will provide a much-needed shift in perspective as to how to best achieve the Board's statutory paramount priority of protecting the public. It will also send an important message to the public about the Board's commitment in this regard.

Additionally, this is a recommendation for which we at CPPC have been advocating for decades—particularly following the U.S. Supreme Court's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S.494 (2015). This holding included the bold general rule that where a regulatory board is controlled by active market participants in the occupation the board regulates, it lacks state sovereignty and thus is subject to federal antitrust liability unless the state can show that it is actively supervising these boards. Changing the Board's composition to a public member majority is not only the right thing to do for public protection, but it will decrease the Board's risk of exposure to lawsuits.

Increase in Licensing Fees

We also strongly support the proposed increase in licensing fees. It has been over 15 years since any kind of fee increase has occurred. The Board has more than justified its need for additional funds—funds that are critical to enhancing the enforcement program so that it may achieve the Board's paramount priority of public protection.

Increased Prosecutorial Success

In response to the Enforcement Monitor's recent preliminary report, we recommend further amendments to AB 815 which would move the investigators currently housed at the Department of Consumer Affairs to the Attorney General's Office as originally proposed in 2004 so that all the team members can work together as expeditiously as possible to maintain consumer protection. At a minimum, the Legislature should consider reverting to the system in which the investigators are employed by the Board, and the Attorney General assigns a Deputy in District Office to work in each MBC field office to provide legal assistance and guidance to investigators.

As was pointed out in your committee's own Sunset Review background document the intent and structure of the Vertical Enforcement (VE) method was never fully implemented, as cases were conducted with the "handoff method." The entire purpose of the VE model was to eliminate this ineffective method. VE is the norm in complex white-collar cases in our public prosecutor's office across the country.

---

[2] Julianne D'Angelo Fellmeth and Thomas A. Papageorge, *Initial Report of the Medical Board Enforcement Monitor* (November 1, 2004) (hereinafter "*Initial Report*"); Julianne D'Angelo Fellmeth and Thomas A. Papageorge, *Final Report of the Medical Board Enforcement Monitor* (November 1, 2005).

We do not suggest that VE will solve all the criticisms of the Board, however, it will improve efficiency and effectiveness arising from better communication and collaboration of efforts.

We are deeply grateful for your consideration of CPPC's recommendations and fully support and applaud your efforts to ensure that the Board is achieving its statutory mission of public protection.

Sincerely,

Robert Fellmeth
Price Professor of Public Interest Law
Executive Director, Centers for Public Interest Law, Consumer Protection Policy Center & Children's Advocacy Institute
University of San Diego School of Law

Rebecca Marcus
Legislative Advocate
Consumer Protection Policy Center
University of San Diego School of Law

cc Kristina Lawson, President, Medical Board of California
William Prasifka, Executive Director, Medical Board of California
Kimberly Kirchmeyer, Director, Department of Consumer Affairs
Hon. Toni Atkins, Senate President pro Tempore
Hon. Robert Rivas, Speaker of the Assembly