

**Testimony of Sarah Mason, Principal Consultant to the California State
Senate Committee on Business, Professions and Economic Development
Before the Little Hoover Commission
Public Hearing on Occupational Licensing
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State Capitol, Room 437**

Good morning Mr. Chair and Members. Thank you for the opportunity to present before the Commission as you review the impacts of occupational licensing.

My name is Sarah Mason and I serve as a Principal Consultant to the California State Senate Committee on Business, Professions and Economic Development. I will speak generally about the Committee's sunset review oversight process and also answer the specific questions the Commission provided related to: criteria used during sunset review; challenges in conducting review and; upcoming Legislative action addressing the recent Supreme Court ruling on *North Carolina Board of Dental Examiners v. Federal Trade Commission*.

Sunset Review in California. The concept of sunset review law first began back in the 1970's. Over thirty states have some sort of sunset review law on the books, the genesis for which is the idea that by placing termination dates on specific government programs or agencies, there becomes an inherent need to review that program to determine whether it is still operating effectively, and most importantly if it should be allowed to terminate, or sunset, or continue operating. General conversations about sunset or sunrise laws typically refer to the statutory expiration and subsequent review of *regulatory licensing agencies*. Of course there are other specific programs which may be subject to sunset, but the idea of bringing an agency before a legislative body in a more formalized review process, before allowing it to continue, or before authorizing a new program to be established, is unique to this type of law.

California was a bit of a "Johnny-come-lately" to establishing something that resembles this formal sunset process. In 1994, the Legislature passed and Governor signed SB 2036 by then-Senator Dan McCorquodale which first created the sunset review process in California. The bill established the Joint Legislative Sunset Review Committee to provide specific review criteria and minimum standards of evaluation for legislative and state agency use, and to subject all boards of the Department of Consumer Affairs (DCA) to periodic review and sunset. Only the licensing board would have sunset under this law, rather than the board and the regulation of the profession. The thought was that in most instances, there will remain a continued need to license those professions regulated by boards under the DCA and that to automatically terminate the licensing requirements would not provide any added benefit to the review of the boards. Another reason for this approach is that throughout 1993 and 1994, the predecessor to this Committee, the Senate Business and Professions Committee, along with the then-Assembly Consumer Protection Committee, began a review of some of the 32 regulatory boards under the DCA. At the time, there was more concern with the boards' operation and activities (or lack thereof), than whether there was a need to continue the licensing of a particular profession. The Legislature and the Administration believed then that the more immediate task at hand was to review these consumer

boards at regular intervals. If it was determined the board should sunset, then there would be adequate time to determine if the entire licensing program should be eliminated as well.

The specter of termination has really served to galvanize most of these agencies and the professions they regulate, so as to make necessary statutory and administrative changes to increase the efficiency and effectiveness of these programs under review. If a regulatory program is considered as unnecessary, or performance of the board is exceptionally poor, a recommendation would be made to either sunset the agency, reconstitute the board membership, or shorten its time frame for another review.

In the past, the Legislature had often struggled to make some changes to a particular board, or to deregulate certain programs. Sunset review now provides a regular opportunity to review operations of all boards, without seeming to pick on any one entity at any given time. Prior to sunset review only three agencies were ever eliminated by the Legislature, they included the Board of Fabric Care (licensing dry cleaners), the Auctioneer Commission and the Board of Polygraph Examiners. In the meantime, the Legislature continued to create new boards or programs and licensure categories with little, if any, assessment of their need or viability.

The sunset review process is in part built on an assumption in law, that if a board is operating poorly, and lesser measures have been or appear to be ineffective in rectifying the problems, the board should be allowed to sunset.

Under previous sunset review statutes, the elimination of a board meant the transfer of that program's responsibilities to a bureau under the DCA. However, concerns about lack of public input, accountability, and transparency under a bureau governance structure were raised. Under a bureau, the bureau chief is in charge and reports to the Director of the DCA. In bureaus, many decisions are made through a closed-door administrative management structure. Under a board governance structure, on the other hand, board members are appointed and hold hearings in public. The board members appoint an executive officer who manages the operations of the board and reports to the board members in public. Some boards have members that are subject to confirmation by the Senate. This process is seen as more accountable and transparent and as offering the public more opportunity to participate.

In recent years, when problems have been identified with a variety of boards, the most effective means of achieving resolution and change has been by reconstitution of the board. This essentially creates a new board by allowing appointing authorities to appoint new members to replace problem members and to reappoint effective members. The new board may then replace the executive officer if the executive officer has been ineffective in managing the operations. This has happened with the Dental Board, the Board of Optometry, the Acupuncture Board, the Athletic Commission and most recently the Board of Registered Nursing and has proven to be an effective method for initiating needed changes.

Now, per the statute, when a board does actually sunset, the board and licensing program goes away.

Today, the Senate Committee on Business, Professions and Economic Development still follows the process as was originally established under the Joint Legislative Sunset Review Committee to conduct regular oversight of entities under the DCA and within state government. The sunset date for each board allows enough time for the board to be reviewed by the Committee, in partnership with the Assembly Committee on Business and Professions, and for legislation to be passed to extend the sunset date of the board and make appropriate policy changes to board operations and regulation of the profession.

The actual review process starts when the Committee sends boards a detailed questionnaire and a request for information which covers nearly every aspect of the board's operation for the period preceding the last review. The boards are required to respond to this request by December 1 of the year they are scheduled for review. During this time, staff of the Committees review the information provided by the boards, as well as input from various consumer groups, stakeholders, representatives of the regulated profession and other policy committees of the Legislature. This information is synthesized into a background paper, which provides a brief overview of each board's functions and programs, identified issues or problem areas concerning each board and includes preliminary recommendations for members of the Committee to consider. These recommendations include whether each board scheduled for review should be terminated, continued, or reestablished, and whether its programs or functions should be restructured or revised.

The Committees then conduct public hearings to review the issues and preliminary recommendations. Boards up for review are provided an opportunity to respond, along with the regulated industry, consumer groups and the public. The DCA participates in these hearings on behalf of bureaus being reviewed.

Placeholder legislation is introduced prior to the legislative bill introduction deadline and is then subsequently amended in order to reflect necessary statutory changes to a particular entity's practice act, based on the Background Paper and public hearings. We typically combine the sunset extension and necessary changes for non-controversial entities into one or a small number of bills. For more controversial programs or proposals related to an entity that may result in significant opposition or stakeholder engagement, we typically will have a stand-alone bill just dealing with that one board. Those bills then make their way through the legislative process as any other bill does, although the Administration tends to indicate issues or problems earlier on for these bills, given the fact that a regulatory program (or programs for those combined sunset bills) would expire if the Governor does not sign the bill extending a board's operation.

Sunset review by the Senate Business, Professions and Economic Development Committee, and Joint Legislative Sunset Review Committee before it, has really been able to provide meaningful reform and increase efficiencies, resulting over the years in: (1) the elimination of boards or regulatory programs which were unnecessary, or did not operate in the best interest of consumers; (2) the merger or consolidation of boards or regulatory programs to improve overall efficiency and effectiveness of programs and provide cost savings; (3) changes in board composition to increase overall public representation on boards and in some instances creating a public majority; (4) improvements in the enforcement processes of boards by increasing the number of disciplinary actions taken against licensees as well as reducing the backlog of cases

and the time frame to prosecute cases; (5) improvements in the operational efficiencies for individual boards by requiring strategic planning, critical measures of performance in the areas of cost, quality of service and speed of service, and adoption of policies, standards, procedures and guidelines for boards' licensing, examination and enforcement programs; (6) removal and close examination of artificial barriers of entry into the profession by requiring standardization and uniformity of licensing requirements, eliminating excessive requirements, consideration of military experience and providing comity between states; (7) expansion of licensing programs to assure the continuing competency of licensed professionals; (8) close examination of budgetary needs and resources for boards and proposed fee increases when necessary to properly fund and staff these boards; (9) ongoing resolution of proposals for expanding or changing scope of practice for licensed professionals; and, (10) requiring additional and more accurate information to be provided and disclosed to the public regarding the activities of the board and the status of the licensee.

Overview of the Criteria Committee Members Consider When Conducting Sunset Reviews and Evaluating Potential Occupational Regulations. Our Committee strives to consistently balance the benefit to the public and consumers with the economic benefit to a certain profession when evaluating licensing entities and occupational regulation. Licensing laws exist to protect the public from potentially harmful services rendered by unqualified people by defining the practice of the profession in question, limiting that practice to people who satisfactorily complete a specified training regime and pass an examination and restricting the use of a professional title to license holders. In evaluating the success of licensure and a licensing program, we delve deep into both the statutory practice acts and the operations of a board or bureau.

Our criteria include a series of questions posed to the board or bureau, a sample of which I have provided for your review, which is framed by key categories:

- *Administration of a program* (general history, background, responsibilities, duties, goals and composition of a board)
- *Fiscal and staffing* (current reserve level, spending, and if a statutory reserve level exists, amounts and percentages of expenditures by program component, history of fee changes in the last 10 years, board staffing issues/challenges)
- *Licensing* (performance targets/expectations for its licensing program, performance targets/expectations for its licensing program, timelines for application processing and administering exams and issuing licenses, consideration of military education, training, and experience in licensing)
- *Enforcement* (trends in enforcement data, performance barriers, prioritization of cases, citation and fine data, cost recovery and restitution)
- *Public Information Policies* (webcasting, use of the web to provide licensee and consumer outreach/education/awareness about board activities and meetings)
- *Workforce Development and Job Creation* (workforce shortages, successful training programs)
- *Prior Sunset Review Issues Status and New Issues the Board Would Like to Raise*

Challenges the Legislature Encounters When Conducting Its Review Processes and Where Other Government Entities May Be Able to Help. One issue that our Committee faces during our comprehensive sunset review oversight is verifying the accuracy of information we receive from boards and bureaus under review. We rely on the entity to provide data, statistics, budget numbers and the like as part of the evaluative questionnaire they are required to submit to us. We have received reports from boards that provide a fund condition, for example, that does not match the fund condition presented during the budget process and the Legislature's consideration of expenditure requests for the programs we are reviewing. Or we receive statistics on licensing backlogs that rely on data systems within the boards that do not necessarily track licensing data in the way that informs our members about that program's licensing efficiencies. We might receive data from a program that lists a certain number of outstanding enforcement cases but does not provide the timeline or status for those cases. Since so many of the DCA boards and bureaus rely on outdated legacy IT systems that do not necessarily talk to one another, staff at the entities are relied on to cull through those systems to provide us key information and data sets that we believe are critical for us to comprehensively get a sense of the program's operational successes and failures. In the case of bureau review, we receive information in a report from a bureau that may not reflect the same openness and candor that a similar report from a board can present, given that board members can directly weigh in on what may or may not be appropriate to present in a report to the Legislature, while a bureau relies on different levels of approval within the larger Administration.

Some of the most substantive sunset reviews are assisted by a simultaneous report by the California State Auditor or other analyzing body that is able to actually put hands and eyes on the records that we ask boards and bureaus to report to us. As Legislative staff, there is only so far we can to validate the information we are presented which can prove challenging when discrepancies may exist. The Auditor's office, though, can dedicate significant resources in the scope of an audit and findings from that process can assist our staff in verifying information presented to us during sunset review.

The Committee also faces the same political challenges that are present in any governmental reform efforts. While Committee staff may be relied on for institutional expertise and insight about regulatory programs, politics is always present in policy making and often the call for changes, or especially elimination of a licensing program, results in swift attention from stakeholders. Some of these groups may rely on regulation as an almost stamp of approval for their operation in the marketplace which may not necessarily provide public protection. The Committee strives to focus on the regulation of a particular trade or profession that poses a threat of irreparable harm to the public, however this view of licensure is not always shared by professional associations comprised of licensees, or potential licensees in the case of a profession seeking licensure. We are constantly evaluating whether licensure is the best and most necessary form of regulation for a certain profession or whether, particularly in the absence of irreparable harm, we should look into one of the numerous regulatory alternatives to licensing that exist. Our staff explores when the posting of a bond by a service provider is enough to ensure a fund to compensate injured consumers, or when a certification program, which has the effect of disclosing information to consumers about the qualifications of a practitioner and protects the use of a title or a permit program, makes more sense than licensure. However, we may be

hindered by the efforts of professional groups to carve out that “higher place in heaven” for their members, as licensure is often viewed.

Actions the Legislature Has Taken and Plans On Taking To Address The Supreme Court’s Ruling on North Carolina Board of Dental Examiners v. Federal Trade Commission. Staff of our Committee has been closely monitoring the results of *North Carolina State Board of Dental Examiners versus the Federal Trade Commission*. This ruling determined that a state board regulating dentists, which was comprised of primarily of practicing dentists, could not be given the same level of immunity from antitrust lawsuits unless the board is “actively supervised” by the state.

The Court was not specific about what may constitute “active supervision.” However, the Court did say that “active supervision” requires “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy,” and that “the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it.”

In response to the Court decision, State Senator Jerry Hill, the Chair of the Senate Committee on Business, Professions and Economic Development requested opinions from the Office of Legislative Counsel and the Office of the Attorney General to determine implications of this decision on the DCA’s professional regulatory boards.

DCA boards are semiautonomous bodies whose members are appointed by the Governor and the Legislature. There is a public member majority on most of DCA’s non-healing arts professional boards, but the healing arts boards are comprised of a majority of members representing the profession. While the boards operate largely independently, there are various structural and statutory ties to the state. For example, the boards are within the DCA’s jurisdiction, the Legislature provides routine oversight, and the Office of Administrative Law reviews regulations stemming from rulemaking undertaken by the boards.

The Senate Committee on Business, Professions and Economic Development held a hearing in October 2015 to discuss the case and legal opinions, as well as the FTC’s subsequent guidance with the goal of crafting appropriate legislation for 2016. While the specifics of the legislation is still being discussed with stakeholders, certain changes are necessary.