

**Testimony of Elizabeth M. Imholz,  
Director of Consumers Union’s West Coast Office  
Before the Little Hoover Commission  
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Thank you for this opportunity to provide testimony on important selected issues and opportunities presented by the California Performance Review (CPR), boards, commissions and public accountability.

I have been practicing consumer law and advocating on an array of issues from the consumer perspective since 1980, and at Consumers Union, nonprofit publisher of *Consumer Reports* and *consumereports.org*, for the past ten years. The West Coast Office in San Francisco has been operating in a variety of forums—including before the legislature, administrative agencies, courts, board and commissions—for nearly 30 years. In that time, our mission has been to enhance the functioning of free markets through information and advocacy, and to promote transparency in government.

I, therefore, offer the perspective of an advocate for open government as a key means to ensure accountability to the public and the proper functioning of government. My opinions are informed by Consumers Union’s national policy work, our participation in the policy realm in California for the past 30 years, and our experience sitting on the California Board of Accountancy and various state advisory committees.

My comments will focus on the importance of assuring a public process and the need for assuring independence and checks and balances in regulating professions, and more broadly in making public policy. The issues presented go to the heart of democratic values and raise the fundamental issue of ensuring expertise in policymaking involving particular industries or professions and also ensuring independence to avoid “industry capture” of regulatory bodies. We welcome the opportunity Little Hoover Commission’s bi-partisan approach affords for stepping back, in light of the CPR, and exploring the state’s potential restructuring needs.

In so doing, it is important to keep in mind several caveats. First, we must be mindful of the underlying, long-term implications for our regulatory system of the enormous, structural state funding crisis invoked in part by Proposition 13. For the future of California, this should be put on our collective agenda for serious study and action.

On the smaller scale, as we consider potential governance structure improvements we should also acknowledge the many bright spots in our current regulatory structure and learn from rather than, perhaps unintentionally, dismantle them. In assessing the opportunities for improved efficiency of government structures that have been developed piecemeal over time, I also urge consideration of those areas in which protection of the public—the key function of state regulation of the marketplace—needs to be enhanced, as well as those in which circumstances have shown the public protection function may benefit from being changed. Since it is axiomatic that the questions we ask dictate the answers we get, I suggest that the question we ask in this endeavor is how to best achieve protection of the public.

In the wake of Enron and other corporate scandals, a new philosophy reflected in more open governance structures are warranted to ensure fair, credible markets and to combat pervasive public cynicism about both corporate America and government. Sarbanes-Oxley on the federal level, California's recent Open Meeting initiative, and the trend toward public member majorities on boards are promising efforts to improve transparency in policymaking and accountability to the public that we must translate into reality. Only providing for systematic public input into decision making will ensure the goal of government regulation: protection of the public. This will be essential to reverse the strong public perception, elicited in poll after poll and focus group after focus group, and too often the reality, that government and the regulatory process have been captured by special interests.

Let me first acknowledge that there is no "silver bullet" to ensure that the goal of open and effective governance is met. Under the right circumstances, including strong leadership instilling a culture of public protection, structures other than boards have achieved a reputation for effectiveness and strong consumer protection. The Bureau of Automotive Repair comes to mind as an example due to its active investigative and enforcement functions and historically good oversight of the regulated industry. And at the same time boards have not always resulted in effective public protection. The Medical Board, for example, was placed under review of a monitor precisely due to its longstanding failure to discipline dangerous doctors.

Nonetheless, as a rule the board structure tends to afford the greatest built-in opportunity for openness and independence. Press, public observers and industry members who attend board meetings can get early insight into planned activities, proposed regulations, and concerns under consideration by the board. The opportunity for the public to make comments at board meetings may give the public an earlier opportunity to shape proposals, e.g. regulations, later issued as formal proposed regulations for comment. In contrast to more unilateral decision making by directors of state agencies and departments, usually behind closed doors, multi-member boards are required by the Bagley-Keene Open Meetings Act to publish their agendas in advance, hold public meetings and allow for public comment.

Set forth below are some of the mechanisms and characteristics that seem to yield the best results on openness, accountability to the public, and fair regulation to protect the public:

1. **Diverse public member majorities on boards**, if not totally public membership, to avoid industry insiders dominating the regulatory process. The days of boards comprised solely of industry members or token membership by 1 or 2 public members are gone. Restoring public confidence demands regulators that are truly independent of the profession or industry. Needed expertise can be garnered from staff with specialized expertise and from industry witnesses or advisory bodies.
2. **Clear definitions of "public members" to avoid undue influence**. It is often true that public members have links to the industry to be regulated, e.g. familial or contractual business relationships that might not appear in the public member's affiliation or title but nonetheless can create subterranean bias toward the regulated industry rather than for the public interest.

3. **Full, public disclosure of financial and other interests** of all board members. A recurring problem, for example, is lawyers sitting as public members on occupational licensing boards for professions with which they have financial consulting or other client-attorney relationships. Sunshine fosters public confidence and the very fact of required disclosure may weed out biased nominees or at least document the need for recusal.
4. **Training all board members on their public role as regulators**. Public members may never have fulfilled this role and will need support and education to carry out their functions effectively. Similarly, professional members may need to be trained on the differences between the regulatory role and the work done in or through a trade association.
5. **Fixed board member terms that overlap administrations**. The term length feature, plus appointments of board members by multiple elected officials, can add diversity of viewpoints and insulation from political pressures that might be exercised if the decisions were made by a single state agency rather than by a board. Inclusion of legislative appointments can help ensure buy-in for regulatory proposals that emerge.
6. Where board membership is comprised of less than all public members, community **advisory committees** (standing or ad hoc) to afford input and an opportunity for outside public oversight. This model has been used in other contexts, e.g. in the philanthropic world, with some good results. On the flip side, when board membership is exclusively public members, an advisory group that contains industry experts will be important.
7. **Solid staffing** for board members and the Board's executive officer, rather than pulling enforcement staff on a case-by-case basis. In specialized professional inquiries, having a dedicated and specialized investigative staff, coordinated with prosecutorial staff, can be very important to develop deep expertise in the regulated industry.
8. **Concerted, funded outreach to consumer groups and the public to encourage input**. Requiring disclosure to the public of the regulator's existence and how to complain or otherwise participate in regulator's policymaking function is essential to engage the community. Allocating an adequate budget for this purpose and careful planning are key to make such outreach successful. Good lessons in this regard can be learned from the start-up efforts of the Department of Managed Health Care.
9. **Incentives for public participation**. There can be no doubt that financial resources can make or break the opportunity to provide input in policymaking. Industry representatives and their trade associations are always well represented in monitoring agency and board performance. Individuals and public interest groups most often simply do not have the time, resources, dedicated staff, and expertise to monitor regulations and regulatory processes, no less to advance a proactive consumer and public agenda. Incentives such as intervenor funding have been successful in enabling these interests to be represented. The Department of Insurance and California Public Utilities Commission have had intervenor funding in place for some time. More recently, the Legislature also created an intervenor funding program for the Department of Managed Health Care. Compensation for those

that make “substantial contributions” to policymaking or policy change provides an effective incentive for the public to generate meaningful input.

10. **Adequate budgets for implementation and enforcement.** The best consumer protection statute in the world will be rendered meaningless unless the regulator also has sufficient resources to implement and enforce the law. Even within tight budgets, an adequate proportion of the regulator’s budget needs to be allocated to enforcement. In special fee-funded bodies, scarce resources for this purpose may result from pressure from the regulated industry to otherwise attribute funds, e.g. for licensing, or to limit fee assessments. To avert these unique pressures on special funded bodies, a general pool for consumer education, enforcement, and outreach could be established with allocations then made to particular regulated occupations or industries free from industry pressure.
11. **Annual reports widely disseminated to the public on the board or agency’s activities regarding the regulated industry** to inform the public and instill public confidence. Such reports, formatted in a consumer friendly way and presented in plain-language, could be picked up by the media and build public awareness of the body and the industry. This would inure to the benefit of the industry regulated—enforcement taken, for example, on “bad apples” builds public confidence in the integrity of the remaining market. Similarly, publication of complaint data enables consumers to make informed choices in the marketplace.
12. **Focus groups and customer surveys can provide critically important information for targeted purposes such as determining how to best to reach the public.** At *Consumer Reports*, we regularly survey our readers via an annual questionnaire and through more frequent means in order to better understand their experiences in the marketplace and their concerns and expectations of us. The Office of the Patient Advocate also recently embarked on focus group testing to learn more about whether the public is aware of its report card on plans and provider groups and, if so, how consumers use it. The results can be surprising and can provide real-world, real-time feedback to enable regulators to target their budgets and services to the public’s needs.

In summary, in any re-writing of California’s regulatory scheme to come I urge you to consider making explicit the public protection function implicit in government oversight-- whether by a board, commission, agency or department of the state. In addition, the notion that those in a given profession or industry should be the primary governing authority, with a purely advisory role for the public, has been and should be up-ended. The capacity to step “outside the box” of specialized expertise has particular value looking through the lens of promoting the public interest. Public member majorities of boards, for example, with diverse sets of advisors would ensure expert input while keeping the decision making power independent of special interests. To make such a structure open and credible will require a clear definition of “public members” that truly makes them free from financial conflicts of interest and instills public trust. In addition, establishing a training and support function for board members would help build a foundation for a strong regulatory framework..