



January 19, 2005

The Honorable Michael Alpert, Chair and Commissioners
Milton Marks "Little Hoover Commission" on
California State Government Organization and Economy
925 L Street, Suite 805
Sacramento, CA 95814

RE: Testimony of Elizabeth M. Imholz, Director, Consumers Union's West Coast Office

Dear Commissioner Alpert:

Thank you for inviting me on behalf of Consumers Union, nonprofit publisher of *Consumer Reports*, to provide testimony on the important issues and opportunities presented by Phase 1 of the Governor's Reorganization Plan for "Reforming California's Boards and Commissions."

The state's fiscal crisis and pressing public policy needs call for a bold, comprehensive review of the structure of state government. Because state law requires that the Little Hoover Commission either adopt or reject without amendment reorganization plans submitted by the executive branch, and because for reasons described below Consumers Union cannot support Reorganization Plan 1 ("the Plan") in its entirety, we respectfully recommend that you reject it. At the same time, we stand ready to work with the Governor's Office, the Commission, and the Legislature to continue the dialogue generated by the Plan and the preceding California Performance Review, and to move toward meaningful reforms that will ensure effective functioning of state government infused with principles fundamental to our democracy: public input, transparency and checks and balances.

I have been practicing consumer law and advocating on an array of issues from the consumer perspective since 1980, and at Consumers Union 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, boards and commissions—for nearly 30 years. Consumers Union's mission is to enhance the functioning of free markets through information and advocacy; to redress imbalances in the marketplace between consumer and industry interests; and to prevent and correct market failures through an appropriate role for government oversight. The opinions I express today are informed by Consumers Union's participation in the policy and advocacy realm for several decades and our particular experience sitting from time to time on several bodies including current seats on the Advisory Committee to the Department of Managed Health Care, Technical Advisory Committee to the Office of State Health Planning and Development, and California Board of Accountancy.

We agree that “healing the patient”, the metaphor the Governor used to describe the “State of the State”, requires stepping back and taking a fresh look at how California performs the fundamental governmental function of protecting public health and safety. Such “visioning” requires not only saying what we don’t want—such as a patchwork of boards, commissions, and advisory bodies with varying degrees of effectiveness—but also what we DO want and concretely how we will achieve our vision, including building in mechanisms for public input, oversight and accountability. We have not seen a specific plan or bill language stating what the Governor’s Office proposes as a regulatory and licensing structure if the boards and commissions are, as proposed, eliminated or folded into bureaus. Certainly, some advisory bodies, boards and commissions could be eliminated without harm to the public, and some could be streamlined to improve efficiency. But rather than tailoring restructuring to particular bodies and subject matter needs, the Plan lays out a more standardized “cookie cutter” approach. Such a blanket elimination of avenues for public input should not be undertaken without full public debate and rigorous analysis.

The twin goals of establishing a cohesive regulatory framework, while keeping public input and transparency paramount need not be contradictory. Strong leadership, clear decisionmaking authority and responsibility, and coherence can and should exist side-by-side with broad, multiple opportunities for public participation and observation. How to achieve the proper balance is the key question presented by the Governor’s reorganization plan.

No one structure ensures these goals are met. Boards, commissions and advisory bodies have not always resulted in effective public protection. In the health area, the Medical Board stands out for its longstanding and ongoing failure to discipline dangerous doctors. There is no question but that specially funded boards and commissions can suffer from “industry capture.” In seeking the specialized expertise that such boards can provide, regulated professions or industries can come to dominate the regulatory framework and work against opening up competition essential to healthy functioning markets. Industry dominance is always a danger regardless of regulatory structure, since regulated interests have the resources consumers and the general public do not to follow agency actions closely and to providing informal expertise and influence. This imbalance is exacerbated, however, without some formal structure that allows consumers and the general public to have ongoing input and for open decisionmaking. Neither individual citizens nor most public interest groups have the financial resources to closely follow proposed agency actions nor the access to officials to make their voices meaningfully heard.

On the other hand, with effective leadership and management, multi-member boards and commissions “can be effective mechanisms for serving the public” as this Commission recently noted. *See* Report #176, “Historic Opportunities: Transforming California State Government,” p. 21. Advisory committees as well provide supplemental opportunities for openness and public input. The hallmark of the Bagley-Keene Open Meeting Act, to which boards and advisory committees are subject, is maximizing the public nature of their decisionmaking. A further benefit of these structures is that they allow for development of expertise by public or consumer members to give input-- especially important for public members. Attached is a list of characteristics of boards and commissions that tend to foster openness, accountability to the public, and fair regulation to protect the public. See Attachment 1.

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 formally proposed 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 Meeting Act to publish their agendas in advance, hold public meetings and allow for public comment. The Office of Administrative Law, a venue suggested in the Plan as adequate for public input, does not allow nearly the same opportunity for public input. Workshops suggested in the Governor's Reorganization Plan can be helpful forums, and more of them, with adequate notice, could be beneficial. They should be viewed as supplementary methods for securing public input, however.

Nowhere are avenues for public participation and transparency more important than in the health care realm, an area in which the Plan proposes abolition of several boards and advisory bodies. A bold approach is surely needed to respond to the state's health system approaching "condition critical." California's task is enormous with:

- no state health planning to ensure hospital and other services are there when needed
- ineffective health care quality and safety system
- 6.5 million uninsured residents--the largest number of uninsured in the nation--, declining rates of employer-based health insurance, and double-digit insurance premium increases outpacing inflation
- shocking racial and ethnic disparities in health status, nearly one-third of Latinos in California lacking insurance
- massive numbers of hospital closures threatening loss of vital medical services to California communities—11 closures in 2004 alone
- potential threats of bioterrorism creating even greater need for a cohesive state public health network.

The Little Hoover Commission has wrestled with many of these issues. In 2003, for example, you outlined some of these critical needs in your thoughtful examination of the state public health network. As you concluded, "There is no focused leadership, no coordination of efforts, no informed public process... We need to reclaim the transparency provided by a public process and the discipline provided by a scientific process... While organization matters, people and the technologies in their hands matter more... [T]he core of most problems is funding..." p. ii, "To Protect and Prevent: Rebuilding California's Public Health System," Little Hoover Commission, April 2003.

While the proposed Plan would re-arrange the reporting structure, it would not take care of the underlying structural deficit that plagues our state regulatory framework. Furthermore, despite the assertion that current board and commission structures result in higher costs than the Plan's consolidation, it is not evident that any significant saving would result from the proposed elimination of boards and commissions. Many of the bodies slated for elimination do not provide high salaries for their members—although those that do should be closely examined. The vast majority of the boards, commissions and advisory bodies appear to either not have been funded at all; to carry a \$100 per diem; or to solely reimburse travel expenses. In addition, the Plan would remove the current "checks and balances" between the executive and legislative branches

in the nominating and appointments process to oversee the boards and advisory bodies—a time-honored mechanism for avoiding concentration of power in any one branch of government or official.

By way of example, let me make a few points about three of the health-related bodies slated for elimination:

- A. The Advisory Committee to the Department of Managed Health Care is a diverse body of representatives of health plans, physicians, nurses, philanthropic organizations, labor and consumer groups. Consumers Union sits on this committee which, as the Plan notes, performed the bulk of its work mandated by the reform legislation known as the “Patients’ Bill of Rights” in the first years of existence through task forces including:
- In-depth work on creation of a managed care report card;
 - A comparative study analyzing whether merging HMO and PPO functions in the Department of Managed Health Care was the optimal structure;
 - Recommendations for regulations implementing an HMO grievance and independent review process.

As the press of work in the early stages subsided, the Department simply spaced out meetings to accommodate expected regulatory initiatives rather than disband the committee altogether. This seems a sensible approach that retains learned expertise because of fixed terms, particularly for consumer and other public members, without unnecessary meetings. No salary or per diem attaches to Committee membership. Only travel expenses are reimbursed. Public concern with health plans has not subsided, as implied in the Plan. With insurance rapidly becoming unaffordable for Californians, it is a growing public concern that warrants an ongoing public forum.

- B. The Medical Board has the critically important role of disciplining incompetent and otherwise dangerous doctors. It has been the subject of longstanding, serious enforcement problems warranting ongoing monitoring. There is no evidence, however, that these problems result from its structure as a Board, as opposed to a bureau or department. Budgeting and other issues related to enforcement have been cited as key problems. Reforming this board, such as by mandating a public member majority and clear triggers for clinical review of physician behavior, would seem a wiser course to ensure patient safety, sunshine being the best disinfectant.

C. The California Health Policy and Data Advisory Commission (CHPDAC) to the Office of Statewide Health Planning and Development (OSHPD) deals with complex issues such as which hospital patient data related to mortality rates will be collected by the state and reported to the public for each hospital and what the definitions are that the state uses for ensuring hospitals fulfill their responsibility to provide charity care. It is true, in Consumers Union’s experience and as stated in the Governor’s Reorganization Plan, that public participation in the CHPDAC, proposed for elimination, is minimal. Yet, the subject matters dealt with are vitally important to the health and well being of Californians. These matters are also consistently subject to industry delay and domination due to their technical nature and to industry self-interest. In the past, public participation in work groups organized by CHPDAC shone the light on, for example, potential

manipulation of “charity care” versus “bad debt” definitions. Recommendations emerged that provided OSHPD with new information and support to propose sounder definitions. The vitally important functions of health planning and medical outcome and other data gathering and reporting housed in OSHPD—and the need for greater avenues for consumer input on them--need to be enhanced. Simply eliminating CHPDAC may not support those goals, while a more comprehensive examination could yield a targeted set of solutions that would widen rather than close off a public forum.

In considering such a massive reorganization and consolidation of regulatory authority as that proposed by the Governor’s Reorganization Plan, we should keep in mind the historical moment in which we find ourselves. When Enron and other corporate scandals rocked the marketplace, under public pressure policymakers turned their attention to policy reforms aimed at a new era of transparency and absence of undue influence by monied special interests. Ensuring protection of the public--the fundamental purpose of government regulation—and public confidence requires:

- systematic public input into decisionmaking;
- transparency in decisionmaking;
- checks and balances to minimize special interest influence on the regulatory system; and
- feedback on performance.

Conducting the licensing, regulation and policymaking of this state in public is necessary to ensure effective, credible markets and to combat pervasive public cynicism about both corporate America and government. Sarbanes-Oxley on the federal level and the trend toward public member majorities on boards are promising efforts that should not be abandoned. This will be essential to reverse the strong public perception, elicited in poll after poll and focus group after focus group, that government and regulatory processes have been captured by the regulated special interests. Because the Governor’s Reorganization Plan 1 in our view does not promote these efforts, we respectfully recommend that it be rejected.

As noted above however, we do agree that some individual unfunded or unstaffed boards or advisory bodies could be eliminated; some could be folded into bureaus or agencies; some could be streamlined; and full salary boards closely examined. Consumers Union looks forward to working with the Governor, building on the momentum created by this process, to support meaningful structural changes in state government that will protect public health and safety. As this commission has said in part regarding the state’s public health structure, “We need to reclaim the transparency provided by a public process....” The same holds true for our entire regulatory structure.

Sincerely,



Elizabeth M. Imholz, Director
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ATTACHMENT 1

Board Characteristics Enhancing Openness, Accountability to the Public, and Public Protection

1. **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 more often true than not that public members have links to the industry under consideration, e.g. familial or contractual business relationships that might not appear in their title but nonetheless can create bias in favor of the regulated industry rather than for the public interest.
3. **Full, public disclosure of financial and other interests** of all board members. Recurring problems for example are lawyers sitting as public members on occupational licensing boards for professions with which they have financial consulting or other client-attorney relationships. Sunshine will foster 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
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. Where ad hoc meetings are most appropriate, it still may be important to have a core group of “on-call” members for continuity. This core could be supplemented by specialized members for particular one-shot topics that may arise.
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

dedicated and specialized investigative staff, coordinated with prosecutorial staff, can be very important to develop deep expertise in the regulated industry and winning cases.

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. The start-up efforts of the Department of Managed Health Care are a model of wide outreach, and back-up staffing for all advisory committee meetings and work efforts.
9. **Incentives for public participation.** There can be no doubt that financial resources can make or break the provision of input in policymaking. Industry representatives and their trade associations are always well represented in monitoring agency and board performance. Most individuals and public interest groups 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. There should be no argument that state hiring freezes, however, apply to these bodies. 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 apart 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 otherwise 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—if enforcement was taken, for example, on “bad apples” the public confidence in the integrity of the remaining market would be strengthened. Publication of complaint data would enable consumers to make informed choices in the marketplace.

12. **Focus groups and customer surveys can provide important information on how 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 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. The proposed emphasis on new technologies such as the internet to expand the reach of our government agencies makes sense, of course. But internet notices and opportunities for comment will not substitute for more face-to-face opportunities for public interaction.