ECONOMIC AFFAIRS IC
SEPTEMBER 11, 2012
EXHIBIT 16

Memo

To: **Economic Affairs Interim Committee**

From: Dept. of Justice, Assistant Attorney General Kelley Hubbard &
Dept. of Labor & Industry, Special Assistant Attorney General Kevin Maki

Date: September 11, 2012

Re: Joint Proposal Regarding Prosecuting Authority for Consumer Complaints with the Board of Hearing Aid Dispersers (DLI) and the Office of Consumer Protection (DOJ)

SUMMARY OF RECOMMENDATIONS

The Department of Justice (DOJ) through its Office of Consumer Protection, and the Department of Labor and Industry (DLI), through its Business Standards Division (BSD), recommend the Committee consider the following actions regarding the Board of Hearing Aid Dispensers (HAD or the Board), none of which require a legislative transfer of statutes to the Consumer Protection Act:

- Emphasis should remain on protecting elderly consumers and assisting them in getting restitution
- Encourage DOJ and DLI work together to bring consumer claims in district court
- Change the funding mechanism for the Board so that attorney fees and fines recovered from violators fund prosecutions, rather than law-abiding licensees

However, if the Committee determines that the agencies should pursue joint prosecutions, legislative action may be necessary to provide flexibility in Mont. Code Ann. § 37-1-309(1), which contains a requirement that "a notice must be prepared by department legal staff" if reasonable cause is found by the Board's Screening Panel.

CURRENT SITUATION

INVESTIGATIONS AND PROSECUTIONS

DLI and DOJ independently prosecute consumer complaints regarding hearing aid dispensers and products, but the departments have exchanged information and updates on areas of mutual concern and targets of investigations in the past. DOJ, through its Office of

Consumer Protection (OCP), which receives and informally mediates consumer complaints, referred some complaints to DLI, and DLI referred one complaint to OCP.

Since 2007, most of DLI's investigations have involved instances of a returned product, contract disagreement, and deceptive advertising. Other consumer complaints DLI received included complaints about unlicensed practice, personnel issues, and minor physical harm. In the fiscal year 2011, DLI dismissed six complaints, investigated two dispensers for practicing without a license, and took disciplinary action five times (HAD Follow up Review to the Economic Affairs Interim Committee, April 10, 2012). DLI's prosecutions normally result in the consumer getting his or her money back. While DLI frequently seeks fines from violators as well as consumer restitution, often the fines are dropped during negotiation to facilitate a quicker settlement and restitution for the elderly victim.

HAD has helped many Montana consumers get the purchase price refunds that they were entitled to receive. Oftentimes, the dispenser has strictly followed the law and the Screening Panel dismisses these unfounded complaints against licensees. Here are examples of worthy complaints that had successful outcomes.

> In some instances, a consumer's complaint and demand for a refund was settled by the parties in advance of the Screening Panel meeting. Sometimes a settlement has come about when a lawyer representing the licensee reviewed the facts and the law and simply advised his client that a refund was due. In another instance, a consumer negotiated a partial refund that was acceptable to both the consumer and the licensee. In all of these sorts of cases the Screening Panel considered the matter satisfactorily resolved and simply dismissed the complaints without further action.
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> In other cases, a licensee felt justified in refusing a consumer's demand for a refund and held to that position through the Screening Panel meeting. On some occasions, the Screening Panel advised the licensee that there was a defect in the paperwork that favored the consumer's position or a change in the law that favored the consumer. When advised of the circumstances, the licensees accepted an opportunity to pay the refund due. As with the other examples, in these cases the Screening Panel dismissed the complaints without further action.
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> In a few instances, however, the licensees did not agree to refund the consumer's purchase price and additionally the Screening Panel found unprofessional conduct that justified discipline. In these rare instances over the last several years, the Screening Panel initiated disciplinary proceedings and has not lost a case. Two of these cases involved a consumer from the Bitterroot Valley who complained that his hearing aids were ineffective and both the salesman and the salesman's supervisor unjustifiably refused the consumer's timely demand for a refund. The Department proved that under recent statutory changes the consumer was entitled to a refund of nearly $4,700. A third case involved a complaint by a Helena resident who alleged that his hearing

aids were ineffective and the Department charged that the purchase contract was misleading. In addition to sanctions against the licensee, the consumer was awarded over $8,800 in refunded charges. In the case of a consumer from Plentywood, the Department proved that a dispenser misled a consumer, resulting in sanctions against the dispenser and a refund of over $6,250 to the consumer. Notably, every case in this category involved financing through the same third party "credit card" company. Presently, the Department is litigating two more cases where the Department has alleged a dispenser and his supervisor misled consumers with incomprehensible sale prices and employed unlicensed, out-of-state, professional "closers" to pressure Montana seniors into a hearing aid purchase. Those cases are still pending.

Since 2008, OCP has received a variety of complaints, including complaints about harassing phone calls; returning a product, but not receiving a refund; the dispenser's failure to honor a warranty; misrepresentations about Medicare paying for the product; being billed but never receiving the product; being sold two of the most expensive hearing aids, instead of one; being sold an unwanted warranty; deceptive purchase and finance schemes; deceptive advertising; unwanted mailings; a contract dispute; and deceptive pricing. OCP has obtained more than $6,000 in refunds for consumers. To date, none of the complaints have resulted in litigation in district court.

Though the recovery for each victim is usually only a few thousand dollars or less, for elderly citizens on fixed incomes the recovery of any money is important and substantial. Victims have often expressed gratitude and have emphasized the importance, on a personal level, of the work that DLI and OCP have done to recover funds spent on defective hearing aid products.

FUNDING ISSUES

Audiologists are no longer required to be licensed with HAD. Since this change in 2011, the Board has lost approximately 30 licensees and experienced a substantial decrease in its operating budget. Although the Board increased its licensing fee in April 2012 from $450 to $1,000, it still faces the challenge of remaining solvent.

In fiscal year 2012, the Board's expenses paid totaled $83,879, while the Board's revenues received totaled $54,034. In fiscal year 2011, the Board's expenses paid totaled $62,242 and the Board's revenues received totaled $52,900. In fiscal year 2010, a year in which the Board licensed audiologists, the Board spent $40,886 and generated $63,633 in revenue.

The Board spent $31,165 on legal expenses in fiscal year 2012, $15,845 in fiscal year 2011, and $7,828 in fiscal year 2010. The number of HAD licensees decreased with the statutory change removing audiologists from the Board's authority, yet the recent financial statistics indicate this has not resulted in a similar decrease in the Board's legal expenses. Although the Board's legal expenses have varied substantially over the last three fiscal years, enabling DLI to recoup some of the costs and fines associated with legal action would decrease the financial impact of disciplining licensees.

BENEFITS OF RETAINING HAD AUTHORITY TO PROSECUTE

HAD has specific expertise in dealing with hearing aid dispensers and products and has already successfully prosecuted several offenders. OCP does not have specific expertise regarding hearing aids and therefore consumers are better protected with both agencies sharing authority to investigate issues and prosecute claims. The Committee should strive to maintain a connection and communication between the licensing (preventative) function of the Board and prosecution (restitution or resolution *after* the harm) function. The authority to revoke or discipline a license is a powerful tool available in prosecutions; only HAD has authority to exercise this important remedy.

The more tools available to agencies to prosecute offenders, the more able they are to protect consumers, which is especially important for the potentially vulnerable elderly population. The emphasis must be on consumer aid and restitution, not simply on offsetting the legal fees of HAD. The elderly are the ones who stand to lose from removing HAD's authority to prosecute.

POSSIBLE SOLUTIONS

1. JOINT PROSECUTIONS

Joint prosecutions would give the DLI attorney assigned to the Board the discretion of prosecuting a licensee in an administrative hearing as required by statute, or referring the case to OCP and assisting in the prosecution of the licensee in district court. As previously stated, doing so may require amending Mont. Code Ann. § 37-1-309(1) and possibly Mont. Code Ann. § 37-1-307(1)(d) regarding a board's requirements in reviewing complaints and taking disciplinary action against a licensee. DLI and DOJ see the same bad actors repeatedly and could work together to coordinate claims in either administrative hearings or district court.

Note that under the Consumer Protection Act, only DOJ may bring claims on behalf of the State. However, DOJ and DLI may jointly bring such claims in district court. Attorney's fees may be granted by a court for the successful prosecution of Consumer Protection Act claims (Mont. Code Ann. § 30-14-131(2)). Under a memorandum of understanding, DLI and DOJ could split attorney's fees and/or any penalties recovered under the Consumer Protection Act through joint prosecutions according to the division of labor of the two departments. This would enable DLI to recover its attorney's fees for these cases tried in district court.

Licensing, and the proceedings to discipline a licensee, must be addressed in an administrative hearing. HAD may investigate an alleged violation pursuant to Mont. Code Ann. §§ 37-1-136 and 37-1-137, which require that *any disciplinary action* taken by a board be conducted as a contested case hearing under MAPA.

2. OTHER SELF-FUNDING SOURCES TO KEEP HAD SOLVENT WHILE PROSECUTING CASES

Currently, DLI may impose sanctions on violators including revocation, suspension, or denial of a professional license, monitoring, probation, and a fine of up to $1,000 per violation. Mont. Code Ann. § 37-1-312.

Statutory changes to increase the risks a licensee faces for violating the law would deter violations and could be a self-funding source to allow HAD to continue prosecuting these cases and achieve solvency. Such changes would deter repeat offenders and bad behavior by creating disincentives for repeatedly going before the Board and would ultimately result in fewer dollars being spent on processing the complaints of repeat offenders. Additionally, if funds recovered were used to fund HAD, the violators would bear the cost of prosecution, rather than trying to fund prosecutions from the limited dollars available from licensing fees. Doing so would shift the burden from law-abiding licensees with good business practices to the violators who are causing DLI to incur extra expenses.

Statutory changes could be modeled on language in the Consumer Protection Act, which allow the court to award reasonable attorney fees to the prevailing party or the state to recover a civil fine of not more than $10,000 for each violation. See Title 30, Chapter 14, Part 1 of the Mont. Code Ann. This would give DLI tools similar to those under Consumer Protection Act. Currently, the law requires that any fines recovered by DLI must be deposited in the state general fund. Mont. Code Ann. § 37-1-312(1)(h). Therefore, in order to be a self-funding mechanism, a statutory change is necessary to require civil fines and penalties or allow attorney fees to be deposited in a state special revenue account for HAD. For example, DLI already has such special revenue accounts used to defray the costs of administering the prescription drug registry or to defray prosecution costs of the Board of Pharmacy. See Mont. Code Ann. §§ 37-7-1513(6) and 37-7-324. Additionally, the Board of Outfitters has a special revenue account used to investigate applicants for licensure and to cover administrative costs. See Mont. Code Ann. §§ 37-47-306(4) and 37-47-318.

3. CHANGE HAD'S PROCEDURE OF INVESTIGATING AND PROSECUTING CASES TO INCENTIVIZE QUICK RESOLUTION

The Board's process of disciplining licensees has been impacted by its recent budget decrease. However, joint prosecution by OCP and DLI may decrease HAD's legal expenses and lessen the financial burden of the Board. Below is an explanation of HAD's current complaint, investigation, and prosecution processes for consumer complaints.

The Board currently meets infrequently, in large part because of its financial deficiencies. Therefore, complaints received by DLI are often held until there is a sufficient number to justify a meeting. When DLI receives a sufficient number of consumer complaints, they are referred to the Board's Screening Panel, in consultation with its attorney, to determine whether there is reasonable cause to support the allegations. If there is not, the Screening Panel dismisses the complaint against the licensee. If reasonable cause exists, the Board provides notice of proposed board action.

The alleged violator may then stipulate the violation and resolve the matter or request an administrative hearing within 20 days of receiving the notice to contest the claim. If the licensee fails to request a hearing within 20 days, DLI may request the Board enter a default decision, pursuant to Mont. Code Ann. § 37-1-309(3). If a case goes to an administrative hearing, the process often takes up to a year to prepare for and try the case before a hearing examiner. Then, the Board must adopt or reject the hearing examiners ruling, triggering the

opportunity for the licensee to file exceptions in the case and seek judicial review. Often, DLI reaches a negotiated resolution with a licensee after the individual requests a hearing.

Similarly, the informal mediation process that OCP uses is frequently a months-long process. When OCP receives a complaint, it communicates with the business and invites the business to either provide an explanation refuting the complaint or to provide appropriate restitution to the consumer to resolve the complaint. If the business refutes the complaint, the file may be closed or referred to the Office of the Attorney General for legal review. If there is a pattern and practice of unfair or deceptive business practices, which generally requires multiple consumer complaints against the business, and depending on resources available, an enforcement action or legal action may be taken against the business. Enforcement or legal action often results in a negotiated settlement without final adjudication.

Usually a board, or district court on appeal, is reluctant to revoke a violator's license without a history of repeated violations and instead prefer a graduated approach to discipline. Therefore, prosecutors must continue bringing cases against the most egregious violators in order to develop a record of bad behavior that requires license revocation or other more drastic sanctions such as large fines. Once more serious sanctions are imposed, it will likely prove to be a strong deterrent to other violators.

Two statutes have a bearing on the way DLI processes complaints. As previously noted, any disciplinary action taken by a board, specifically actions regarding the termination, suspension, or denial of a license or probation period for a licensee, must be conducted as a contested case hearing under MAPA. Mont. Code Ann. § 37-1-136(2) and -137(2). However, Mont. Code Ann. § 37-16-202(1)(b) requires HAD to "establish a procedure to initiate or receive, investigate, and process complaints from any source concerning the activities of persons licensed under this chapter." This may allow DLI to make a preliminary determination whether the complaint should proceed to the Board's Screening Panel or referred to OCP for joint prosecution.

Currently, there is no written procedure in the rules, so the Board has an opportunity to create a different or more flexible procedure regarding consumer complaints in its rules. Perhaps DLI could develop a mediation program, or something similar, to be handled at the staff or staff attorney level, without Board action, to quickly and efficiently resolve claims.

Given the prospect that elderly victims may become incapacitated or even pass away during the period of time it takes to review and process complaints, it gives new meaning to the adage that justice delayed is justice denied.

SUMMARY

Regardless of the action of this committee, DOJ and its Office of Consumer Protection will continue to accept, investigate, and prosecute consumer claims about hearing aids, just as it has always done. However, in our estimation, it would be detrimental to consumers to insist that OCP be the only entity with the authority to receive, investigate, and prosecute complaints in this area by limiting or stripping DLI of its authority to also process these claims. Even if DLI cannot handle these prosecutions now and defers all of these cases to DOJ, the Committee should not strip them of the statutory authority to do so later if resources or opportunities present themselves.

Opportunities exist to address the problem of funding for HAD while maintaining its ability to exert its substantial expertise in the field to receive complaints and prosecute claims

to protect elderly consumers. Potential solutions include engaging in joint prosecutions with DOJ, providing HAD with self-funding mechanisms to achieve solvency, such as recovery of attorney fees or the imposition of substantial fines or penalties on violators, and streamlining the complaint process to avoid delay, provide speedy resolutions where appropriate, and accommodate joint prosecutions.

Finally, because DOJ already has the authority to receive these kinds of consumer complaints, there is no need to "move" the Mont. Code Ann. § 37-16-304 (Right to cancel – return of hearing aid or related device – notice – refund – dispensing fee rules) into the Consumer Protection Act. Moving the authority would not save any money or solve any problems. Moreover, Mont. Code Ann. § 37-16-304 is not about the complaint process or about HAD prosecution of consumer claims. The section merely gives consumers the right to cancel their contract within 30 days and to return the product for refund.

However, if the Committee does "move" the HAD statutes to the Consumer Protection Act, two important considerations should be given in the statutory change. First, HAD should retain licensing authority. DOJ is not equipped to handle any licensing issues or the unlicensed practice of dispensing hearing aids. Second, DOJ should be given rulemaking authority, as HAD has under its statute.