



June 29, 2017

The Honorable Evan Low  
Chair, Assembly Business & Professions Committee  
State Capitol, Room 4126  
Sacramento, CA 95814

Re: **SB 716 (Hernandez) - OPPOSE**

Dear Chairman Low:

The California Pharmacists Association (CPhA), California Retailers Association (CRA), and National Association of Chain Drug Stores (NACDS) must **oppose SB 716**, which will add two additional members to the California State Board of Pharmacy.

The California Pharmacists Association (CPhA) was founded in 1869 and is the largest state association representing pharmacists who serve the residents of California. CPhA represents pharmacists, technicians and student pharmacists from all practice settings. The CPhA mission is to advance the practice of pharmacy for the promotion of health.

The California Retailers Association is the only statewide trade association representing all segments of the retail industry, including pharmacy. CRA members currently operate over 418,840 retail establishments with a gross domestic product of \$330 billion annually and employs 3,211,805 people—one fourth of California's total employment. At the end of fiscal year 2014 California collected \$48.5 billion in revenue from retail sales and use taxes, representing more than 25% of the state revenue.

The National Association of Chain Drug Stores advances a pro-patient and pro-pharmacy agenda. For the ultimate benefit of the consumers served by NACDS members, the mission of NACDS is to advance the interests and objectives of the chain community pharmacy industry, by fostering its growth and promoting its role as a provider of healthcare services and consumer products.

Together, our organizations represent the majority of pharmacists and patients served by the profession in the state of California.

While SB 716, as introduced, was simply to add one pharmacy technician to the Board of Pharmacy, recent amendments to the bill by the sponsor move the policy discussion into a direction that we cannot support.

Much of the recent discussion regarding this bill involves background legislation (SB 493, Hernandez), which was signed into law in 2013. That bill recognized pharmacists as health care providers and developed a new classification of pharmacists known as Advanced Practice Pharmacist (APP). This new category gives pharmacists the ability to deliver primary care services in collaboration with physicians, medical homes and other systems of care in which patients receive treatment. This bill was part of efforts to deal with the ever-growing shortage of primary care medical providers.

With pharmacists moving into more clinical care, recent arguments in support of SB 716 have focused on the potential expanded role that pharmacy technicians will play to back-fill some of the duties currently performed by pharmacists. These efficiencies will allow the pharmacists more time to provide direct care to patients as contemplated in SB 493.

What the sponsors fail to recognize however, is that the creation of the Advanced Practice Pharmacist was the result of years of work to ensure the education and training of pharmacists matched the new scope of practice. Pharmacist

education consists of a post graduate doctoral program, which now extensively covers direct patient care, disease prevention and management, and requires clinical rotations in a variety of health care settings. Many graduates also complete a post-doctoral residency or other certificate programs in specialty practices.

Our organizations recognize that the role of pharmacy technicians may expand and we are supportive in concept. However, as with the expansion of duties for pharmacists, patient safety is of utmost concern with the expansion of duties for pharmacy technicians. To date, nothing has been done to enhance the education, training, or qualifications of technicians to take on these new roles. Therefore, the proposal by the sponsors is premature and unnecessary at this time.

CPhA, NACDS and CRA believe that a discussion regarding the role of technicians, including whether it is appropriate for them to be represented on the Board of Pharmacy, should be a part of a comprehensive discussion during the sunset review process, which should include:

- Reviewing the educational requirements of pharmacy technicians.
- Considering an additional licensure category for pharmacy technicians who specialize in specific areas of pharmacy (hospital settings, compounding pharmacies, etc.).
- Reviewing models used by other regulatory boards, specifically boards that have formed committees for licensing and regulating auxiliary staff.
- Pharmacy technician to pharmacist ratios to ensure patient safety and appropriate oversight while allowing technicians to expand their roles.

Last, the sponsors of the measure contend the bill is needed address consumer protection issues raised in the 2015 Supreme Court decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* by changing the composition of Board of Pharmacy to include a pharmacy tech and another public member. However, the April 24<sup>th</sup> Senate Business, Professions and Economic Development Committee analysis of SB 716 noted the following:

“North Carolina Board of Dental Examiners v. Federal Trade Commission.

In 2010, the Federal Trade Commission (FTC) brought an administrative complaint against the North Carolina State Board of Dental Examiners (Board) for excluding non-dentists from the practice of teeth whitening. The FTC alleged that the Board’s decision was an uncompetitive and unfair method of competition under the FTC Act. This opened the Board to lawsuits and substantial damages from affected parties.

The Board was composed of 6 licensed, practicing dentists and 2 public members. The practice of teeth whitening was not addressed in the statutes comprising the Dental Practice Act. Instead of initiating a rulemaking effort to clarify the appropriate practice of teeth whitening, the Board sent cease-and-desist letters to non-dentists in the state offering teeth whitening services. The Board argued that the FTC’s complaint was invalid because the Board was acting as an agent of North Carolina, and according to state-action immunity, one cannot sue the state acting in its sovereign capacity for anticompetitive conduct. A federal appeals court sided with the FTC, and the Board appealed to the United States Supreme Court (Court).

In February 2015, the Court agreed with the FTC and determined that the Board was not acting as a state agent and could be sued for its actions. The Court ruled, “Because a controlling number of the Board’s decision-makers are active participants in the occupation the Board regulates, the Board can invoke state action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met.”

*North Carolina State Board of Dental Examiners v. FTC* placed limitations on the immunity of regulatory boards controlled by active market participants. This is because individuals who are directly affected by their own rulemaking may not be able to detect their biases, purposefully or inadvertently placing their benefit over those of the public. Or, as the Supreme Court stated, “Dual allegiances are not always apparent to an actor.”

***This bill would create a larger majority of professional BOP members, in opposition to FTC's concerns about active market participants." (Emphasis added)***

This disconnect demonstrates the lack of clarity as to whether this bill will address the Board of Pharmacy's vulnerabilities to North Carolina type lawsuits. Further, there are a number of actions California can take to inoculate all regulatory boards from similar legal challenges – steps that we have discussed at great length with the Administration, Department of Consumer Affairs and representatives from both respective policy committees last year during the debate over SB 1195 (Hill). It is our strong preference that any effort to correct statutory deficiencies be dealt with in deliberate and thoughtful manner in which there is clear understanding as to whether the proposed solution satisfies the North Carolina case.

For these reasons, CPhA, CRA and NACDS must oppose SB 716 and respectfully requests your **NO** vote.

If you have any questions, please do not hesitate to contact us.

Sincerely,



Michelle Rivas  
Vice President, Center for Advocacy  
California Pharmacists Association



Angie Manetti  
Director, Government Relations  
California Retailers Association



Mary Staples  
Regional Director  
National Association of Chain Drug Stores

c: The Honorable Dr. Ed Hernandez  
Jimmy Frengen, Consultant, Assembly Business & Professions Committee  
Bill Lewis, Consultant, Assembly Republican Caucus