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SUNSET COMMISSION: HEALTH LICENSING BOARDS SECTION 26 – CRIMINAL BACKGROUND CHECK STUDY AND PROPOSED LEGISLATION

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Attachment: Proposed legislation for HLBs

EXECUTIVE SUMMARY

The national trend in public protection, specifically as it relates to health care, is increased use of criminal background checks and quicker access to timely criminal history data. Several of the Health Licensing Boards have long considered and/or advocated for legislative authority to perform federal-level criminal background checks to support their public protection mission. Many other states have given their health licensing boards statutory authority to conduct federal-level, fingerprint-based criminal background checks.

The Health Licensing Boards and the Minnesota Department of Health have proposed statutory language and a plan for implementation that are designed to efficiently and effectively transition the use of criminal background checks into the Health Licensing Boards' and the Minnesota Department of Health's licensure and complaint resolution processes. The plan for implementation relies heavily on practices and procedures for dealing with criminal history information that the Health Licensing Boards and the Minnesota Department of Health already have in place. These long-established practices and procedures balance the Health Licensing Boards' and the Minnesota Department of Health's public protection mission with individual practitioners' property and due process rights. Moreover, the plan for implementation has, as a goal, the reduction in the number of criminal background checks that a health care worker is required to undergo throughout the course of his or her career in health care, thereby streamlining the public protection process across several state agencies that regulate health care in Minnesota.

The use of criminal background checks would provide the health licensing boards and the Minnesota Department of Health an additional public protection tool that would allow timely and accurate criminal history information to be quickly and efficiently processed by the Health Licensing Boards and the Minnesota Department of Health, thereby providing and promoting greater public protection in Minnesota's health care system.

I. Legislative charge and study parameters

Pursuant to the Sunset Commission legislative mandates, the Health Licensing Boards (“HLBs”) and the Commissioner of Health, as the regulator for occupational therapy practitioners, speech-language pathologists, audiologists, and hearing instrument dispensers, are required to jointly study and submit draft legislation “to establish[] uniform criminal history background check requirements applicable to applicants and regulated individuals under their jurisdiction.”¹ The mandate specifies that the study include (1) procedures for conducting criminal background checks (“CBCs”), (2) payment of costs, (3) circumstances under which CBCs will be conducted, and (4) the standard to be applied to determine whether a criminal record may disqualify an individual from licensure or a regulated occupation.²

The HLBs include the Minnesota Boards of Nursing Home Administrators, Medical Practice, Nursing, Chiropractic Examiners, Optometry, Physical Therapy, Psychology, Social Work, Marriage and Family Therapy, Behavioral Health and Therapy, Dietetics and Nutrition, Dentistry, Pharmacy, Podiatric Medicine, and Veterinary Medicine, as set forth in Minn. Stat. § 214.01, subd. 2 (2012).³

The MDH occupations evaluated in this report are housed in MDH’s Health Occupations Program (“HOP”), which is part of the Compliance Monitoring Division in Policy, Quality and Compliance Bureau. The specific occupations included in this study are hearing instrument dispensers, audiologists, speech language pathologists, and occupational therapists and occupational therapy assistants.⁴

¹ LAWS OF MINNESOTA 2012, CHAPTER 278, Article 2, Section 26 [HEALTH-RELATED LICENSING BOARDS AND COMMISSIONER OF HEALTH BACKGROUND CHECKS].

² Id.

³ Although the Office of Unlicensed Complementary and Alternative Care Practice (“OCAP”) is defined as a health licensing board under Minn. Stat. § 214.01, subd., OCAP was created within MDH as a consumer protection activity. OCAP does not license practitioners and is not a board. OCAP’s regulatory activity includes investigating consumer complaints and serving as an information clearinghouse for consumers and practitioners.

⁴ See LAWS OF MINNESOTA 2012, CHAPTER 278, Article 2, Section 27(a) [HEALTH-RELATED LICENSING BOARDS REPORTING REQUIREMENTS].

The HLBs and HOP have as their primary mission the protection of the public's health and safety by providing reasonable assurance that the individuals who practice are competent, ethical practitioners with the necessary knowledge and skills to successfully fulfill their titles and roles. The licensure and complaint resolution processes are the key components to the success of this mission.

The HLBs and the MDH submit this study and draft legislation with the immediate goal of satisfying their collective duty under the Sunset Commission legislation and with the broader goals of advancing the protection of the public, developing greater consistency in legislation, encouraging transparency in the licensure process, and using the resources of the State of Minnesota efficiently and effectively.

This study is a summary and analysis of data regarding Minnesota legislation, other states' legislation, and anecdotal evidence of practices in Minnesota and other states. The legislation proposed by the HLBs embodies the best practices as discerned from analysis of this data.

II. Federal law governing criminal background checks

Federal-level, fingerprint-based CBCs are the most comprehensive background check currently available to health licensing boards across the country. The federal-level CBC is a national criminal records check facilitated by the FBI. Federal-level background checks are important in many areas of public protection, including law enforcement and health care, because of the increased mobility of health care professionals.

Fingerprint-based background checks have the advantage of a far higher accuracy rate than name, birthdate, and social security number checks. Fingerprint checks accurately identify individuals without concern about aliases, name misspellings, and/or common names and birthdates. Because fingerprint checks have a higher accuracy rate, the background study process is more efficient and minimizes licensure delays.

The federal-level CBC yields an index of an individual's criminal history events, specifying only the arrest, the arrest charge, the disposition of the arrest if known, and the entity, agency or jurisdiction that submitted the

fingerprints to the FBI in connection with the arrest. The requesting agency then conducts an investigation to obtain the underlying data.

Pursuant to Public Law 92-544, state agencies are authorized to perform federal-level CBCs when there is U.S. Attorney General approved, state statutory authority to do so and the statutory language (1) requires the submission of fingerprints, (2) expressly states that the FBI or national-level records check will be performed, (3) clearly identifies the category of individuals that will be subject to federal-level CBCs, (4) states that the federal-level CBC is not contrary to public policy, and (5) provides that an authorized governmental agency be the recipient of the results of the CBC. 42 U.S.C. 5119a ("Child Abuse Crime Information and Background Checks" Act); Pub. Law 92-544.

III. Minnesota law governing Health Licensing Boards' and Minnesota Department of Health's authority to conduct criminal background checks

A. Health Licensing Boards

Currently, only two of the HLBs, the Boards of Social Work and Behavioral Health and Therapy, have authority to conduct CBCs, but that authority is limited to state-level CBCs. During the 2012 legislative session, the Boards of Nursing and Dentistry proposed legislation to amend their practice acts to include authority for the boards to conduct federal-level, fingerprint-based CBCs, but the legislation did not pass.

B. Minnesota Department of Health

HOP does not have statutory authority to conduct CBCs on their licensees.

IV. Minnesota law governing Minnesota Department of Human Services' authority to perform background studies

Current Minnesota law requires facilities licensed by MDH or Minnesota Department of Human Services ("DHS") to complete a background study for anyone affiliated with the program who will have direct contact with persons served by the program. Minn. Stat. §§ 144.057; 245C.03 (2012). This

background study includes licensed and non-licensed personnel working in MDH- or DHS-licensed facilities and programs, including hospitals, nursing homes, hospices, treatment centers, and residential care facilities.

The DHS background study consists of a check of state criminal history data and substantiated maltreatment findings, but may also include federal criminal history data when there is information from the Minnesota Bureau of Criminal Apprehension (“BCA”) indicating the individual might be a multistate offender, when the information from the BCA indicates that the multistate offender status is inconclusive, or when the commissioner receives a report from a third party indicating criminal history in a jurisdiction other than Minnesota.

By statute, DHS is the entity responsible for managing the background studies for both DHS and MDH. Minn. Stat. § 245C.03, subd. 5. MDH contracts with DHS to perform the background studies for MDH-licensed facilities. DHS obtains and reviews BCA records, maltreatment records, and, when reasonable cause exists, FBI records to determine whether the study subject should be disqualified from the facility or program requesting the study.

The background study conducted by DHS on behalf of MDH and DHS facilities has no direct impact on an individual’s licensure. DHS uses the background study data to determine eligibility for employment according to their statutorily-mandated criteria; HLBs and HOP are not informed of any criminal history identified by the DHS employment background study.

V. Laws governing criminal background checks by health licensing boards in other states

A. Authority for CBCs

To determine how other states are implementing CBCs, a survey of the 49 other states’ dental, medical, nursing, physical therapy, and psychology boards’ legislation and/or application documents was conducted. Most of the state boards with authority to conduct criminal background checks have authority to perform federal-level CBCs, so this study focuses on federal-level CBC data.

Of the 245 boards surveyed, 127 boards, or slightly more than half, have authority to do federal-level CBCs. Four of the remaining 118 boards have authority to perform state-level checks. Of the states surveyed, medical boards and nursing boards are the most likely to have legislation authorizing federal-level CBCs. Thirty-seven nursing boards and thirty-six medical boards have authority to do federal-level CBCs.

Some boards handle the fingerprinting and background study request process in-house, but other boards, usually boards of dentistry, use outside vendors to perform the background check and credentialing verification process. These vendors obtain primary source verification of credentials and often perform state-level or county-level criminal history background checks.

Most of the boards with CBC authority have the legislative authority to conduct federal-level CBCs on applicants, which includes those applying for initial licensure; those applying for licensure by endorsement, equivalency, residency or credentials (an individual already licensed in another state); and those applying for reinstatement of a license after it has expired or otherwise lapsed. Most of these 127 boards do not have authority to do CBCs on licensees at the time of renewal, with a few exceptions including the following examples:

- The Nevada Board of Nursing does federal-level CBCs at the time of renewal.
- The California Board of Nursing reports that it occasionally does federal-level CBCs on nurses at the time of renewal, but their CBCs include “rap back,”⁵ which provides the Board with subsequent arrest information after an initial CBC is performed.
- All five surveyed boards in New Jersey are authorized to do federal-level CBCs by the same legislation, which authorizes the use of federal-level CBCs on renewal and requires the agency director to devise a plan to have all licensees checked within four years of the legislation’s passage.

A handful of state boards, including all five surveyed Kansas boards, the South Dakota nursing and dental boards, the North Dakota nursing board, and

⁵ “Rap back” is a tracking system whereby the agency requesting the initial check will be notified if the subject of the background study is arrested, charged, or convicted of a crime after the initial background study is complete. “Rap” stands for “records of arrest and prosecution.”

the North Carolina psychology board, have even broader legislation that authorizes federal-level CBCs when a licensee is under investigation.

Although the five surveyed Nebraska boards are included in the 127 boards recorded above, the Nebraska boards' legislation is slightly more limited, authorizing federal-level CBCs only for those health care providers who have prescribing authority.

A few state boards appear, from their application documents and websites, to not conduct federal-level CBCs even when authorized to do so by statute. For example, the Mississippi Nursing Board and the New Mexico Medical Board have statutory authority to do federal-level CBCs but do not collect fingerprints or other background check data as part of the application process. Additionally, the Washington Medical Board has statutory authority to conduct federal-level CBCs on all applicants but the website for the board indicates that it is only conducting them for out-of-state applicants and for applicants who self-disclose in-state criminal history.

Moreover, the Federation of State Medical Boards, a national non-profit organization representing the state medical and osteopathic licensing boards, recommends that state boards have statutory authority to conduct CBCs on initial licensure and licensure by endorsement.⁶ The National Council of State Boards of Nursing, a national non-profit organization representing the state nursing boards, has recommended since 2005 that state boards secure legislation to perform CBCs on applicants.⁷

B. Location of CBC-authorizing legislation

For most of the boards, the authorization to conduct federal-level CBCs is contained in the profession's practice acts, but a significant minority of the boards, including those in Nebraska, Tennessee, and Utah, have the authority to do the federal-level CBCs included as part of an all-encompassing health-care-licensing or credentialing act. In Virginia, health licensing boards have the authority to do federal-level CBCs as part of the state's criminal justice rehabilitation legislation.

⁶ Federation of State Medical Boards, "Essentials of a State Medical and Osteopathic Practice Act," (13th Ed.), p. 11, 14.

⁷ National Council of State Boards of Nursing, "Criminal Background Checks for Nurse Licensure," p. 1.

C. Statutory allocation of cost for CBC

Without exception, all boards authorized to conduct federal-level CBCs are also authorized by statute to pass the cost of the fingerprinting and background study on to the applicant.

VI. Use of criminal history data

A. The HLB and HOP disciplinary statutes

The HLBs and HOP already consider criminal history, when the information is available to them, in their respective complaint resolution processes as mandated by their respective practice acts. All of the HLBs and HOP have statutory authority to take action on the licenses or certificates of those individuals who have criminal convictions that have a relationship to the ability, capacity or fitness to practice a regulated health profession in Minnesota. For example, the language in the Nurse Practice Act, as set forth Minn. Stat. § 148.261, subd. 1(3) (2012), is as follows:

The board may deny, revoke, suspend, limit, or condition the license and registration of any person to practice professional, advanced practice registered, or practical nursing under sections 148.171 to 148.285, or to otherwise discipline a licensee or applicant as described in section 148.262. The following are grounds for disciplinary action:

...

(3) Conviction of a felony or gross misdemeanor reasonably related to the practice of professional, advanced practice registered, or practical nursing. Conviction as used in this subdivision includes a conviction of an offense that if committed in this state would be considered a felony or gross misdemeanor without regard to its designation elsewhere, or a criminal proceeding where a finding or verdict of guilt is made or returned but the adjudication of guilt is either withheld or not entered.

The other HLBs and HOP have similar statutory authority to refuse a license or to take action on a license or certificate when the applicant or licensee has

been convicted of a crime that is related to the individual's ability to practice with reasonable skill and safety.

Moreover, on applications and during the renewal process, the HLBs require licensees to disclose criminal history or discipline related to their practice. If the applicant or licensee fails to accurately respond to this question, thirteen of the fifteen HLBs have specific statutory or rule authority to take disciplinary action against the licensee or to deny the applicant a license for failure to report criminal convictions or providing false information to the HLB. The remaining two HLBs, Pharmacy and Optometry, have authority to take disciplinary action on a licensee for unprofessional and/or unethical conduct, which may be interpreted to include providing false information to the board. When any of the HLBs receive a report that a practitioner has engaged in criminal activity or has a criminal conviction, the HLBs conduct a follow-up investigation to determine if disciplinary action is warranted.

Practitioners regulated by HOP are also required to self-report criminal history and discipline related to their practice. Like the HLBs, HOP has specific statutory authority to take disciplinary action for failure to report. Minn. Stat. §§ 148.5195, subd. 3; 148.6448, subd. 1; 153A.15, subd. 1. On applications and during the renewal process, HOP includes questions about whether the applicant has been disciplined in another jurisdiction or has been convicted of a crime. HOP Investigation and Enforcement staff conduct follow-up investigations whenever a practitioner discloses criminal activity.

B. Minn. Ch. 364: Criminal Offenders Rehabilitation Act

Since 1974, Minnesota's Criminal Offenders Rehabilitation Act ("MCORA") has operated to prevent state agencies, boards, and commissions from using a criminal history record to automatically disqualify an individual from public employment or licensure. Minn. Stat. § 364.03, subd. 1 (2012). According to the MCORA, the existence of a criminal conviction cannot be the sole basis for denying someone public employment or licensure, unless the crime is directly related to the position of employment sought or the occupation for which the license is sought. *Id.*

To determine whether a criminal conviction relates directly to the employment or the occupation for which licensure is sought, the statute

mandates that the state agencies, boards and commissions look to the following factors: (1) the nature and seriousness of the crime, (2) the relationship of the crime to the purposes of regulating the position of public employment sought or the occupation for which the license is sought, and (3) the relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation. Minn. Stat. § 364.03, subd. 2.

Even when a board, commission, or agency finds that the criminal conviction relates directly to the employment or occupation for which licensure is sought, the statute gives the individual the opportunity to show evidence of rehabilitation, which may include, in addition to the three factors set forth above, (1) release orders, (2) evidence showing more than one year has passed since release from any institution without subsequent convictions or crimes, (3) evidence showing compliance with all terms and conditions of parole or probation, (4) documentation showing completion of probation or parole, (5) the age of the person at the time the crime, (6) any mitigating circumstances or social conditions surrounding the commission of the crime, and (7) any other evidence of rehabilitation, including letters of reference. *Id.*, subd. 3.

Notably, two of the HLBs, the Boards of Medical Practice and Chiropractic Examiners, have statutory exemptions from the MCORA for felony-level criminal sexual conduct convictions. Minn. Stat. § 364.09(d), (e) (2012). As a result, the MCORA does not prohibit either of these boards from using these criminal convictions to automatically deny or revoke a license. With all other criminal convictions, however, these two boards apply MCORA.

The only other state agency with an absolute exclusion from the MCORA is the Board of Teaching. Other state agencies, including law enforcement, are allowed limited exclusion from the MCORA for certain types of convictions, including those for criminal sexual conduct, assault, or driving under the influence.

C. DHS use of criminal history data

As discussed above, Minn. Stat. § 245C.03 authorizes DHS to conduct criminal background checks on personnel working in state-licensed facilities and certain programs. DHS uses the criminal history data to determine

whether an individual should be disqualified from having direct contact or access to persons who receive services in DHS facilities. The regulations and criteria used by DHS differ from those applied by the HLBs and serve different purposes. Whereas DHS is using criminal history data to make determinations for eligibility for employment in state-licensed facilities and programs, the HLBs use the data to determine an individual's qualifications for licensure. As the system currently exists, an individual may be disqualified from employment at a DHS or MDH facility or program but still meet qualifications to hold a license. Moreover, under federal law, DHS is prohibited from sharing the CBC results; it forwards to the HLBs only maltreatment reports. Upon receipt of these reports, the HLBs conduct their own investigations and analysis to determine if a licensee's conduct meets the standard for disciplinary action on a license.

Under the DHS system, as set out by statute, a felony will generally result in a 15-year disqualification; a gross misdemeanor will generally result in a 10-year disqualification; and a misdemeanor-level offense will generally result in a 7-year disqualification. Minn. Stat. § 245C.15, subds. 2, 3, 4 (2012). If an individual receives a disqualification notice, he or she may request reconsideration. During the reconsideration process, DHS can rescind the disqualification if the underlying data are incorrect, set aside the disqualification if the individual demonstrates that he or she no longer poses a risk of harm, vary the disqualification to allow the individual to work under certain conditions that minimize the risk of harm, or affirm the disqualification.

The statute also specifies a number of offenses for which the study subject is permanently disqualified with no opportunity for a set aside or variance. These crimes include, for example, murder in the first, second, or third degree; criminal sexual conduct in any degree; prostitution; neglect or maltreatment of a child; and solicitation of children to engage in sexual conduct. Minn. Stat. §245C.15, subd. 1(2012).

D. Other state boards' use of criminal history data

A slight majority of state statutes authorizing federal-level CBCs on health care providers do not include automatic bans on licensing for felony-level convictions. Instead, most states use guidelines similar to those in the MCORA and use criminal history as one consideration in the licensing process.

Most of the states statutes mandate the use of an analysis similar to that set forth in the MCORA, including looking at whether the crime relates to the occupation for which licensure is sought, how much time has elapsed since the crime was committed, the severity of the crime, and any evidence of rehabilitation.

The Delaware legislature set forth a review process similar to that used by DHS, whereby an applicant with a criminal conviction for certain types of offenses would be required to seek a “waiver” from the board in order to become licensed. Other state statutes, including Arkansas, list out certain convictions that operate as an automatic bar to licensure. Some state statutes, including that governing Maine’s licensure of physicians and dentists, have time-limits on conviction bars to licensure, i.e. only convictions within the previous 10 years can be considered as part of the licensure process.

E. RAP-back – the future of CBCs

An important component of an efficient, comprehensive CBC program is incorporation of “rap back” whereby new crimes that an individual commits after an initial check are flagged and reported back to the agency requesting the initial check. Rap-back technology is currently being developed in Minnesota through the use of the Minnesota Predatory Offender Registry and MNCIS, the Minnesota Court Information System, but it is significantly name and date-of-birth dependent and not yet fingerprint based. The FBI estimates it will have nationwide, fingerprint-based rap-back capability by 2014.

When the rap-back system becomes available to licensing boards, an individual would submit his or her fingerprints only one time to the licensing board or agency for both the state and federal-level CBC check. The fingerprints would be stored in either a state or a federal database for the duration of licensure. Using the stored fingerprints, rap-back technology allows a licensing board or agency to receive notification any time an individual licensed by the board or agency has a criminal event, including an arrest, charge, or conviction.

The primary advantage to a rap-back system is early intervention, especially for those health care workers that pose the most significant risk to the public. Early intervention in cases where health care workers are

potentially abusing children, the elderly or the infirm would make significant progress in protecting the public.

A second advantage to the rap-back system is that an applicant/licensee will only have to submit and pay for a CBC one time. Because the fingerprints would be stored, there will be no need to re-supply them with each change in employment or licensing event.

One concern with rap-back technology is that licensing agencies and boards have a different standard of proof than the criminal justice system. The preponderance of the evidence standard used by the licensing boards and agencies is less stringent than the beyond-reasonable-doubt standard used by the criminal justice system. HOP and the HLBs already balance public protection with an individual's due process rights when receiving criminal history data through licensee self-disclosure or other means. The use of CBCs will not change that process, but instead, will help identify more individuals than those who disclose criminal history. As with self-disclosures of criminal history, the HLBs and HOP go through an investigation process to collect the underlying data, may meet with the licensee, and always make an independent decision about whether disciplinary action is warranted.

Because rap-back will, in the relatively near future, become the standard in criminal history background check processes, any legislation should be drafted so as to support the possibility of using this type of technology in the future.

VII. Proposed legislation and procedures for conducting criminal background checks

A. Location of legislation – Minn. Ch. 214 and individual MDH acts

To maintain consistency across the HLBs, it is recommended that the CBC authorizing legislation be added to Minn. Ch. 214, the act that sets forth the overarching health care licensing and complaint resolution processes. All of the HLBs would have the same authorization to do federal-level CBCs.

The CBC-authorizing provisions in the practice acts for the Boards of Behavioral Health and Therapy and Social Work would need to be repealed so as not to conflict with the CBC authorizing legislation in Minn. Ch. 214.

HOP does not have one overarching piece of legislation comparable to the HLBs' chapter 214. As a result, any proposed HOP language will need to be added to each of the four practice acts individually.

B. Frequency and timing of CBCs by statute

It is recommended that legislation authorize the HLBs and HOP to conduct CBCs, much like the legislation in states such as Nevada and Kansas. The HLBs and HOP propose legislation that gives them the authority to conduct federal-level CBCs during the application process for initial licensure, licensure by endorsement, equivalency, reciprocity and/or credentials, and reinstatement of license or re-licensure after a lapse or expiration, and when a licensee is the subject of a board investigation. The HLBs and HOP propose utilizing their experience they gain from performing CBCs for new applicants for licensure to develop a process for implementing CBCs for current practitioners, taking into consideration the background studies currently performed by DHS and the eventual availability of rap back functionality.

C. Classification of CBC data in HLB and MDH possession

Public Law 92-544 does not allow the federal criminal history record information to be shared with health care employers or any entity other than the agency requesting the data. The law mandates that the state agency, not an employer, determine an individual's fitness for licensure. As discussed more fully below, the FBI demands a high level of security for the criminal history information and audits agencies to ensure adequate security for the information.

Moreover, the Minnesota Data Practices Act ("MDPA") specifies that, when state agencies share data, the data retains the same data practices classification in possession of the receiving agency as it did in the possession of the sending agency.

Criminal history data maintained by agencies of the state or in a statewide system is classified as private data according to Minn. Stat. § 13.87, subd 1(b). The BCA's conviction data, which includes the offense, date of the offense, court of conviction, sentence, level of conviction, and probation

agency or place of confinement, is public, but the BCA is only required to provide the public with access to the individual conviction data from a computer in the BCA office. The public does not have the capability to run a search to find, for example, all licensed health professionals who have a criminal conviction. Moreover, to access the BCA's conviction data, a member of the public would need to go to the BCA offices and use the specially-designated BCA computer to run a criminal history search.

Under the MDPA and Public Law 92-544, the criminal history record information received by the HLBs and HOP is private data and cannot be disseminated. However, any action taken as a result of an investigation into CBC information is public data.

D. Administrative challenges to implementing federal-level CBC program

1. Responsibility of licensee/applicant
 - a. Licensee/applicant pays cost

Similar to the other states' health licensing boards' CBC legislation, the HLBs and HOP propose that Minnesota CBC legislation require the applicant or licensee to pay for the direct cost of the CBC. The cost to complete a check is set by the agency performing the check. Currently the BCA charges \$15.00 and the FBI charges \$23.50, with the cost of fingerprinting \$10.00, for a total of \$48.50. The charges associated with CBCs are cost-based and not profit-based.

Although there may be stakeholder objections to the direct costs being passed on to applicants, the reality is that the cost to the individual applicant is relatively low whereas the cumulative cost to the HLBs and HOP would be significantly high. For example, during the biennial period covering 2008-2010, the Minnesota Board of Nursing granted 18,410 new licenses or registrations and the Minnesota Board of Physical Therapy granted 949 new licenses or registrations. Using the \$48.50 cost charge, the Minnesota Board of Nursing would have expended \$892,885 in CBC costs over the 2008-2010 biennial period. Using the \$48.50 cost charge, the Minnesota Board of Physical Therapy would have expended \$46,026.50 in CBC costs over the

2008-2010 biennial period. Both of these figures represent a significant percentage increase in these boards' annual expenditures.

b. Licensure process

The current turnaround time for FBI-based CBCs is very quick, generally within a few minutes. For most individuals, there will be no delay in the licensure process.

Similar to the HLBs' and HOP's current process, licensure is only impacted when an individual has a "hit," a note on the index indicating a criminal history event. Because the HLBs and HOP are not permitted, under federal law and MCORA, to take action based solely on the data in the FBI criminal history information record, the HLBs and HOP may need, depending on the severity of the identified crime and the other factors identified in MCORA, to open an investigation into the criminal history event, possibly meet with the applicant, and then make an independent determination on whether disciplinary action is warranted. This would be an appropriate delay, in order to satisfy the HLBs' and HOP's public protection mission.

2. Responsibility of the HLBs and HOP

a. Electronic collection and storage of fingerprint data

As technology changes, various opportunities are emerging to simplify the process of conducting CBCs. The HLBs and HOP are focusing on implementing systems that would have, either at the onset or shortly after implementation, electronic-based fingerprint collection and storage. Moreover, the HLBs and HOP plan to integrate the electronic-based CBC process into their already-existing application processes.

One option the HLBs and HOP are considering is utilizing the CBC services currently available through DHS. DHS has recently received a \$3 million grant to develop a process in Minnesota for federal-level CBCs for health care workers working in MDH or DHS facilities. In phase one of the process, DHS is doing away with paper fingerprint cards and moving to all electronic-based fingerprinting. DHS expects to have the electronic fingerprinting infrastructure in place and operational by 2015.

The HLBs and HOP are also exploring the use of an outside vendor to manage the electronic fingerprinting and transmittal process, in part because these entities are already electronic-fingerprint operational and have expertise in electronically collecting and transmitting fingerprints to the FBI and state law enforcement.

The error and rejection rate for electronic-based fingerprinting is far lower than with paper-based fingerprinting, in part because the electronic fingerprint scanners provide immediate feedback as to whether the fingerprint was successful. Moreover, with an electronic-based process, either through DHS or an outside vendor, the HLBs and HOP would not be required to store fingerprints on-site.

b. Process for storage of criminal history data

In order to comply with federal law and the MDPA, the HLBs and HOP need a process for securing the FBI criminal history record information. The FBI audits state agencies that receive its CBC data, and one of the goals of the audits is determining if the state agencies are appropriately maintaining the security of the FBI information.

Maintaining the security of the FBI information will not be a significant hurdle for the HLBs. Several of the HLBs are experienced in dealing with data that requires the highest level of security. The Boards of Dentistry, Medical Practice, Nursing, and Podiatric Medicine are part of Minnesota's HIV, HBV, and HCV prevention program. Under that program, these boards are authorized to receive and store data on licensees' HIV, HBV, and HCV status and to develop monitoring plans to protect against the spread of those three diseases in the workplace. Under Minn. Stat. §214.25, the data collected by these boards under this program is classified as investigative data, which is confidential under the MDPA. Minn. Stat. §214.25 goes on to provide that the data is only to be disclosed to establish and enforce a monitoring plan, to investigate, to alert individuals who may be threatened by illness, and to control or prevent the spread of HIV, HBV, and HCV.

Similarly, MDH regularly handles private data on certain communicable diseases and cancer, social security numbers, inspections and investigations, and immunizations. MDH has on staff an attorney whose primary

responsibility is coordinating MDH's obligations under the MDPA and other state and federal laws governing protection of private data and accessibility of public information. HOP does not anticipate that maintaining the security of the FBI information will be a significant hurdle.

Moreover, all complaints filed with any of the HLBs and HOP are confidential under the MDPA. As a result, all of the HLBs and HOP are experienced in guarding the confidentiality of investigative data.

c. Need for additional resources to collect and process CBC information

The HLBs and HOP will require an appropriation to cover the indirect costs of implementing and maintaining the CBC program. In order to implement the CBC program, the HLBs and HOP will need an appropriation for one-time start-up costs including, among other items, additional space, staff and board member training, communication costs, legal costs, and equipment and database upgrades.

The HLBs and HOP will also need an appropriation to cover the ongoing costs of maintaining and managing the CBC data, including the costs of additional staff, investigations, complaint resolution processes, and legal counsel. Because several of the CBC "hits" have the potential to result in a referral to the Health Professional Services Program ("HPSP"),⁸ the HLBs and HOP would also see an increase in fees paid to HPSP.

⁸ HPSP is a statutorily-created program whereby practitioners who have a mental, physical, or psychological condition that may affect the ability to practice their health care profession can be monitored by HPSP to ensure ongoing compliance with treatment programs. Minn. Stat. § 214.33, subd. 2 (2012). The HLBs and HOP refer individuals to the HPSP for evaluation and monitoring of chemical dependency, depression, and other mental health conditions. The HLBs and HOP pay a fee to HPSP for each licensee that HPSP monitors on behalf of the HLBs and HOP. With applicants who have criminal history "hits" that reveal chemical dependency and other illnesses, the HLBs and HOP will likely refer them to HPSP when necessary and appropriate, thereby increasing HPSP's caseload.

Without an appropriation, the HLBs and HOP will be fiscally unable to implement the CBC legislation and begin the CBC process. The HLBs and the MDH will prepare fiscal notes addressing the fiscal impact of CBC authority based on the proposed legislation and specific plans for implementation set forth in this study.

V. Federal and state law conflict with Section 24 publication-on-website requirement

Section 24 of the Sunset Commission's legislative mandates requires the HLBs and HOP to publish on their respective websites, among other information, "a conviction of a felony or gross misdemeanor occurring on or after July 1, 2013, in any state or jurisdiction."⁹ If the HLBs and HOP receive conviction information as a result of a CBC, either a federal or state level CBC, the data is private data under the MDPA and Public Law 92-544. The HLBs and HOP will not be able to publish this data on their websites without violating their duties under the MDPA and Public Law 92-544. Section 24 directly conflicts with the statutory scheme set forth in Minnesota and federal law about the use and storage of conviction data.

The HLBs and HOP already publish disciplinary actions on a license. Criminal convictions that are part of the disciplinary action will, by the process already in place for the HLBs and HOP, become public in the disciplinary order and be listed on the websites notwithstanding section 24. The HLBs and HOP are not permitted under federal law and the MDPA to publish conviction data until it is part of a public disciplinary action.

VII. Recommendations for implementation

A. Health Occupations Program

HOP participated in drafting this report and supports the recommendations for implementing the CBC process. However, MDH requests that a decision on mandating CBCs as a prerequisite to licensure for HOP occupations included in Laws 2012, Chapter 278, Article 2, Section 26 be delayed for the following reasons.

⁹ LAWS OF MINNESOTA 2012, CHAPTER 278, Article 2, Section 24 [HEALTH-RELATED LICENSING BOARDS; WEBSITE]

First, although the HLBs underwent sunset review in 2012, MDH will not undergo sunset review until 2014. MDH was neither a party to nor participated in the HLBs' sunset review in 2012. As part of its 2014 sunset review, MDH may undergo statutory and organizational changes that alter the structure of the Compliance Monitoring Division where HOP is housed or that shift responsibility for occupations currently regulated by HOP. Implementing CBCs as a condition of licensing will be a significant undertaking. MDH requests that a decision about such an undertaking be delayed pending any over-arching changes to its regulatory structure.

Second, unlike the HLBs, most occupations in HOP do not have accumulated reserves adequate to cover the costs of implementing CBCs at the time of licensure. With an appropriation, the HLBs have access to funds reserved in the health licensing accounts of the special revenue fund. HOP has no such reserves, so securing funding for HOP's CBC program may be more challenging. Numbers of practitioners in HOP occupations range from fewer than 200 HIDs to nearly 3,200 OTs. Spreading the costs of developing, testing, and implementing this new procedure over the smaller occupational groups could result in fee increases disproportionate to the existing cost of licensure. The delay MDH requests will give HOP the opportunity to study the HLB CBC program after implementation to determine the most cost-effective method of implementation and administration. Furthermore, as noted previously, merging the CBCs currently required for many employment settings and the CBCs recommended in this joint report as a prerequisite to licensure is a goal. The requested delay may allow realization of this goal prior to implementation of CBCs as a prerequisite to HOP licensure/certification.

Moreover, HOP maintains that delaying consideration of its CBC authority does not pose a significant risk to the public. Currently, over 70 percent of the occupational therapists, occupational therapy assistants, and speech-language pathologists undergo criminal background checks as a condition of their employment in a DHS-licensed facility or in a school. The HOP occupations, with the exception of HIDs, generate relatively few complaints warranting investigation and few investigations that lead to enforcement actions. The following table shows, for each occupation from 2008 through 2011, the number of investigations opened, the number of enforcements closed, and the percentage those numbers represent of total practitioners.

Year	Activity (percent of practitioners)	OT	OTA	HID	SLP	AUD
2008	Investigations (percent)	1 (0.04%)	1 (0.12%)	18 (10.11%)	3 (0.80%)	7 (0.59%)
	Enforcements (percent)	11 (0.40%)	3 (0.36%)	1 (0.56%)	5 (1.33%)	1 (0.08%)
2009	Investigations (percent)	0 (0.00%)	2 (0.23%)	16 (8.79%)	3 (0.78%)	8 (0.64%)
	Enforcements (percent)	3 (0.11%)	3 (0.34%)	2 (1.10%)	1 (0.26%)	3 (0.24%)
2010	Investigations (percent)	4 (0.13%)	0 (0.00%)	16 (8.56%)	1 (0.25%)	9 (0.69%)
	Enforcements (percent)	5 (0.17%)	1 (0.11%)	2 (1.07%)	1 (0.25%)	2 (0.15%)
2011	Investigations (percent)	5 (0.16%)	2 (0.21%)	23 (12.17%)	1 (0.25%)	7 (0.51%)
	Enforcements (percent)	1 (0.03%)	0 (0.00%)	3 (1.59%)	2 (0.49%)	0 (0.00%)

For all of the reasons set forth above, HOP asks that a determination on its CBC authority be delayed until after MDH undergoes sunset review in 2014 and HOP has the opportunity to study the HLBs' CBC program.

B. Health Licensing Boards

In contrast to HOP, the HLBs face no potential organizational changes and have already undergone sunset review. Moreover, the HLBs have access, with an appropriation from the legislature, to accumulated reserves in the special revenue fund. As a result, the HLBs are prepared to develop the infrastructure to implement and administer a CBC program.

In implementing the CBC legislation proposed by the HLBs, the HLBs make the follow recommendations and comments:

- The draft legislation and the CBC process itself need to balance public protection with individual licensees' and applicants' due process and property interest in their respective licenses. The goal of the legislation is furthering the HLBs' public protection mission while ensuring that safe and competent practitioners are able to practice their health care professions.
- The draft legislation is conditioned on the HLBs receiving an appropriation to implement the process at the onset and to manage the ongoing influx of CBC data, which will result in additional investigative and complaint processing costs. Without an appropriation for these items, the HLBs will be fiscally unable to implement the legislation.
- Because the CBC process both in Minnesota and on a federal level is undergoing significant technological advances, including the use of an

all-electronic-based fingerprinting system and the use of a nationwide rap-back system, the legislation and the required plan for implementation will account for the possibility of changes in the process. The HLBs may need additional appropriations as these technological advances occur.

- The required plan for implementation will have, as a goal, the reduction of duplicative CBCs for health care providers. The HLBs will work with DHS and MDH to develop a process whereby applicants undergo a CBC by the HLBs upon initial licensure, and then rap-back, as soon as it is available, will be used to keep the HLBs, the MDH, and DHS apprised of changes in criminal history status that may affect licensure and/or employment.
- The required plan for implementation will also have, as a goal, the closure of the gap that currently exists between DHS employment decisions and HLB licensing decisions. The goal is to eliminate the likelihood that an individual could be qualified for licensure but disqualified from employment in any DHS or MDH facility.

The trend in public protection is increased CBC use and quicker access to timely criminal history data. Several health-licensing boards in other states already have legislation authorizing federal-level CBCs, and the FBI will have developed a nationwide rap-back system by 2014. Federal-level CBC authority is important, and becoming more so in light of other states' actions and the increasing mobility of health care workers, to fulfilling the core mission of public protection in health care. Several of the HLBs, including the Boards of Dentistry and Nursing, have long advocated for legislative authority to perform federal-level CBCs. Although the other HLBs are at different stages of readiness, all the HLBs support the report, its conclusions and recommendations, and the proposed legislation.

CRIMINAL HISTORY RECORD CHECKS – Health Licensing Boards

Subdivision 1. **Policy.** The legislature declares that it is the policy of the state of Minnesota to maintain high standards of public protection in health care licensing by requiring individuals who are applicants for licensure or individuals who are licensed by the health licensing boards, as defined in Minn. Stat. § 214.01, subd. 2, to undergo federal-level, fingerprint-based criminal background checks to determine qualification for initial or ongoing licensure. The legislature further declares that it is the policy of the state of Minnesota, in accordance with Minn. Ch. 364, to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship, including licensure by a health licensing board when the criminal offender is able to provide competent evidence of sufficient rehabilitation and present fitness to perform the occupation for which the license is sought and to otherwise meet all other qualifications for licensure. The use of federal-level, fingerprint-based criminal background checks for applicants and licensees is consistent with the public policy of the state of Minnesota.

Subdivision 2. **Applications.** (a) The health licensing boards shall require, no later than 2018, an applicant for initial licensure, licensure by endorsement, or reinstatement or other re-licensure after a lapse in licensure, as defined by the health licensing boards, to submit to a criminal history records check of state data completed by the Minnesota Bureau of Criminal Apprehension (“BCA”) and a national criminal history records check to include a search of the records of the Federal Bureau of Investigation (“FBI”). (b) An applicant shall be required to complete a criminal background check if more than one year has elapsed since the applicant last submitted a background check to the board.

Subdivision 3. **Investigations.** If a health licensing board has reasonable cause to believe a licensee has been charged with or convicted of a crime in this or any other jurisdiction, the health licensing board may require the licensee to submit to a criminal history records check of state data completed by the BCA and a national criminal history records check to include a search of the records of the FBI.

Subdivision 4. **Consent Form, Fees and Fingerprints.** To effectuate the federal-level, fingerprint-based criminal background check, the applicant and/or licensee must submit a completed criminal history records check consent form and a full set of fingerprints to its licensing board or the board’s designee in the manner and form specified by the board. The applicant and/or licensee is responsible for all fees associated with preparation of the fingerprints, the criminal records check consent form, and the

criminal background check. The fees for the criminal record background check are set by the BCA and the FBI and are not refundable.

Subdivision 5. **Refusal to consent.** (a) The health licensing boards shall not issue a license to any applicant who refuses to consent to a criminal background check or fails to submit fingerprints within 90 days after submission of an application for licensure. Any fees paid by the applicant to the board shall be forfeited if the applicant refuses to consent to the criminal background check or fails to submit the required fingerprints. (b) The failure of a licensee to submit to a criminal background check as provided in subdivision 3 is grounds for disciplinary action under the respective health licensing board's disciplinary statutes and/or rules requiring cooperation with board investigations.

Subdivision 6. **Submission of fingerprints to the Minnesota BCA.** The board or its designee shall submit applicant or licensee fingerprints to the Minnesota BCA. The BCA shall perform a check for state criminal justice information and shall forward the applicant's or licensee's fingerprints to the FBI to perform a check for national criminal justice information regarding the applicant or licensee. The BCA shall report to the board the results of the state and national criminal justice information checks.

Subdivision 7. **Alternatives to fingerprint-based criminal background checks.** The board may require an alternative method of criminal history check for an applicant or licensee who has submitted at least three sets of fingerprints under this section that the BCA or FBI have been unable to read.

Subdivision 8. **Data practices.** All state or national criminal history record information obtained by the board from the BCA or the FBI is private data on individuals under section 13.02, subdivision 12, and restricted to the exclusive use of the board, its members, offices, investigative staff, agents, and attorneys for the purpose of evaluating an applicant's or licensee's eligibility and/or fitness for initial or ongoing licensure.

Subdivision 9. **Opportunity to challenge accuracy of report.** Prior to taking disciplinary action against an applicant or a licensee based on a criminal conviction, the health licensing board shall provide the applicant or the licensee an opportunity to complete or challenge the accuracy of the criminal history information reported to the board. The applicant or licensee shall have 30 calendar days following notice from the board of the intent to deny licensure or to take disciplinary action on the license to request an opportunity to correct or complete the record prior to the board taking disciplinary action based on the information reported to the board. The board shall

provide the applicant up to 180 days to challenge the accuracy or completeness of the report with the agency responsible for the record.

Subdivision 10. **Instructions to the board; plans.** The health licensing boards shall collaborate with the Minnesota Department of Human Services and the BCA to establish a plan for completing criminal background checks of all licensees who were licensed before the effective date of this section. The plan should seek to minimize duplication of requirements for background checks of licensed health professionals. The plan for background checks of current licensees shall be developed no later than 2017 and may be contingent upon the BCA's and/or the FBI's implementation of a system in which any new crimes that an applicant or licensee commits after an initial background check are flagged in the BCA's or FBI's database and reported back to the board. The plan shall include recommendations for any necessary statutory changes.

Subdivision 11. **Appropriation; effective date.** The sum of _____, or so much thereof as may be necessary, is appropriated from the special revenue fund to the Health Licensing Boards, for the period commencing on July 1, 2013, to be administered and disbursed by the Administrative Services Unit, as defined in Minn. Stat. § 214.107, to fund the implementation of a criminal background check program and to fund the plan set forth in subdivision 10.