

# BOARD OF OPTOMETRY

## INITIAL STATEMENT OF REASONS

**Hearing Date:** September 22, 2014

**Subject Matter of Proposed Regulations:** Applicant medical evaluations and unprofessional conduct defined.

**Sections Affected:** Amend Section 1516 and add Section 1582 in Division 15 of Title 16 of the California Code of Regulations (CCR).

### **Introduction:**

The Board of Optometry's (Board) highest priority is protection of the public, as mandated by Business and Professions Code (BPC) section 3010.1. To meet this mandate, the Board issues licenses to eligible applicants to practice optometry. The Board also investigates complaints against licenses, disciplines licensees for violation of state law, and monitors licensees placed on probation. BPC section 3025 authorizes the Board to adopt rules and regulations as necessary to administer and enforce the provisions of the chapters of the BPC for which it is responsible.

On February 17, 2010, the Department of Consumer Affairs (Department) introduced Senate Bill 1111(Negrete McLeod) to enact the Consumer Health Protection Enforcement Initiative (CPEI), which was intended to strengthened various provisions affecting the investigation and enforcement of disciplinary actions against licensees of healing arts boards. This bill was a response to various articles in 2009 by the *Los Angeles Times* charging that the Board of Registered Nursing (BRN) often took over three years to act on complaints of egregious misconduct and that during that time, problem nurses continued to practice and provide care to the detriment of patients. The bill failed passage in the Senate Business, Professions and Economic Development Committee in April 2009.

However, as part of its continued efforts to reduce the average enforcement completion timelines from three years or more to between 12 and 18 months, the Department identified nine provisions from Senate Bill 1111 that could be implemented via regulation. Many of these provisions are modeled after laws that are currently in effect for the Medical Board, Dental Board, the Board of Psychology, and Pharmacy Board, to name a few. The Department and the Senate Business, Professions, and Economic Development Committee are strongly encouraging all health arts boards that do not have these provisions to adopt them as soon as possible.

After review of the nine provisions, the Board determined that the following would improve the Board's enforcement processes and voted to implement them as regulations:

- **Provision 5** – Partial adoption. Define the failure to comply with a court order as unprofessional conduct. The non-adopted portion that defined the failure to provide documents as unprofessional conduct is already in BPC section 3110 (x).
- **Provision 6** – Permit the Board to conduct a psychological or physical evaluation on an applicant if deemed necessary.
- **Provision 8** – Define the failure to provide information or cooperate in an investigation as unprofessional conduct.
- **Provision 9** – Partial adoption. Define as unprofessional conduct the failure to report to the Board within 30 days a felony indictment or charge, and any felony or misdemeanor

conviction. The non-adopted portion pertained to including language defining the failure to report an arrest within 30 days as unprofessional conduct.

The remaining provisions were implemented as follows:

- **Provision 1** - Not implemented and will not be considered further. This provision would have given delegation to the Executive Officer regarding stipulated settlements to revoke or surrender a license.
- **Provision 2** – Partial implementation by Senate Bill 305 (Lieu, Chapter 516, Statutes of 2013). Strengthens the Board’s authority to revoke a license for sexual misconduct. The portion not implemented made revocation mandatory for such acts and removed all discretion from the Board and an Administrative Law Judge. That section was considered controversial and will continue to be discussed by the Board in the future for possible adoption.
- **Provision 3** – Implemented by Senate Bill 305 (Lieu, Chapter 516, Statutes of 2013). Requires the Board to deny the application for licensure of a registered sex offender.
- **Provision 4** – Implemented for all healing arts boards by Assembly Bill 2570 (Leno, Chapter 561, Statutes of 2012). Defines participating in gag clauses regarding settlements as unprofessional conduct.
- **Provision 7** - Implemented by Senate Bill 305 (Lieu, Chapter 516, Statutes of 2013). Defines sexual misconduct as unprofessional conduct.

**Specific Purpose of each adoption, amendment, or repeal:**

Amend Section 1516. Application Review and Criteria for Rehabilitation

Problem being addressed: The Board lacks the authority to compel an applicant to submit to a psychological or physical examination when the applicant’s fitness to practice is compromised based on suspected mental or physical illness, or chemical dependency. If the Board could have this authority, it would solidify its ability to protect the public by allowing the Board to use these examinations as a preventative measure when necessary.

There are also non-substantive changes made for clarity purposes to this section such as changing the term “certificate of registration” to “license” which is the preferred term for an optometrist license.

Anticipated benefits: Giving the Board the authority to take preventative measures and compel an applicant to submit to such examinations, if necessary, before a license is issued would diminish the potential harm to public safety. If the examination determined that their fitness to practice was comprised, then the individual would be denied a license.

Add Section 1582. Unprofessional Conduct

Problem being addressed: Currently, the Board has no authority to discipline a licensee who fails to cooperate in an investigation, which results in investigations being delayed, or the Board not receiving much needed information. This also applies when licensees fail or refuse to comply with a court order. Making it unprofessional conduct for a licensee to refuse to cooperate and participate in any Board investigation as specified, or be non-compliant with a court order would greatly assist the Board in compelling a licensee to work with the Board.

Currently, licensees are not required to self-report any felony indictment or charge, or any felony or misdemeanor conviction. They are also not required to self-report any disciplinary action taken against them related to the practice of optometry by another licensing entity in California, the federal government, or the United State military. Likewise, the Board has no authority to discipline licensees who fail to self-report such occurrences. If the Board is not able to obtain this information in a timely manner, then consumers run the risk of being harmed.

Anticipated benefits: Making it unprofessional conduct to refuse to cooperate in an investigation, as specified, or comply with a court order would greatly benefit consumers because the Board could take the appropriate disciplinary action against the offending licensee much faster so he or she could no longer harm the public.

Making it unprofessional conduct for the failure to self-report felonies, misdemeanors, convictions, and disciplinary actions by other entities and including a 30-day time period for compliance will benefit consumers because the Board will be able to take the appropriate action to correct violations or remove a harmful licensee from practice faster.

### **Factual Basis/Rationale:**

#### **Amend section 1516. Application Review and Criteria for Rehabilitation**

Section 1516(a) – Adds the authority for the Board to require an applicant to be examined by one or more physicians and surgeons, or psychologists designated by the Board if it appears that the applicant is unable to practice optometry safely. An examination would be deemed necessary if the applicant appears to have a mental or physical illness that might affect their competency as an optometrist. Completion of the licensure application will be contingent on meeting this requirement at the applicant's cost. If the evaluation determines that the applicant is unsafe to practice, then the Board can deny the application for licensure. A copy of the evaluation would be provided to the applicant.

#### *Factual Basis/Rationale:*

Pursuant to BPC section 820, the Board can compel a licensee to submit to a physical or mental health examination if the licensee's ability to practice in a competent manner may be impaired due to physical or mental illness. The Board is also authorized to deny a license for any act that would warrant discipline if done by a licensee. Rather than license someone, then order a psychological or medical evaluation, this regulation would permit the Board to obtain the evaluation prior to licensure. The authority to complete a psychological or physical examination for an applicant for licensure would augment the Board's ability to protect the public, given the potential harm to public safety presented by a licensee whose competency to practice is impaired due to mental or physical illness.

#### **Adopt section 1582. Unprofessional Conduct.**

Section 1582(a) – Specifies that failure to cooperate and participate in any disciplinary investigation, or furnish information in a timely manner to the Board constitutes unprofessional conduct. An exception is made for licensees unable to provide the information requested within the time specified if good cause exists.

However, adoption of this section would not deprive a licensee of any privilege guaranteed by the Fifth Amendment to the Constitution or other constitutional or

statutory privileges, or require a licensee to cooperate with a request requiring them to waive any constitutional or statutory privilege.

*Factual Basis/Rationale:*

The failure of a licensee to cooperate and participate in any disciplinary investigation, or furnish information in a timely manner delays the Board investigating consumer complaints and taking appropriate action against the licensee, who may cause patient harm. For example, non-cooperation results in significant scheduling problems and delays, countless hours wasted serving and enforcing subpoenas, and delays resulting from refusal to produce documents or answer questions during interviews.

Existing law, BPC section 3110(x) specifies that the failure to refuse to comply with a request for the clinical records of a patient, that is accompanied by that patient's written authorization for release of records to the Board, within 15 days of receiving the request and authorization, unless the licensee is unable to provide the documents within this time period for good cause, is unprofessional conduct.

Adoption of this section broadens BPC section 3110(x) by including related situations and will increase public protection by requiring timely cooperation with the Board and delivery of other requested documents, not just clinical records.

Section 1582(b)(1)-(3) and 1582(c) – Further defines as unprofessional conduct the failure of a licensee to report to the Board within 30 days the bringing of an indictment or information charging a felony; a conviction of any felony or misdemeanor; any disciplinary action taken by another licensing entity; or failure or refusal to comply with a court order issued in the enforcement of a subpoena mandating the release of records to the Board.

*Factual Basis/Rationale:*

As part of the licensing process, all applicants for licensure as optometrists are fingerprinted for the purpose of conducting criminal history background checks through the California Department of Justice (DOJ) and the Federal Bureau of Investigations (FBI). In most cases, the Board receives subsequent arrest notifications for licensees convicted of crimes. However, the Board may not always be made aware of convictions or other actions. Additionally, other agencies may not be required to report actions or not be aware the individual has an optometrist license in California.

By requiring licensees to report this information, the Board gains an additional enforcement tool so that a determination may be made to pursue disciplinary action against a licensee, as appropriate.

Also, failure and/or refusal to comply with a court order as described in this proposal delays the investigation process. Defining this as unprofessional conduct will assist the Board in getting licensees to cooperate so disciplinary issues can be resolved quickly and safely for the benefit of consumers.

**Underlying Data:**

1. Department of Consumer Affairs, Consumer Protection Enforcement Initiative (Updated 01-21-10) [http://www.dca.ca.gov/about\\_dca/cpei/index.shtml](http://www.dca.ca.gov/about_dca/cpei/index.shtml). Click the link titled "Read about the initiative here."
2. Department of Consumer Affairs, Senate Bill 1111 (04/12/2010 version) Proposed Changes through Regulations

3. Senate Bill 1111 (Negrete McLeod) from 2009/2010 Legislative Session as Amended in Senate April 12, 2010
4. Senate Bill 1111 (Negrete McLeod) Bill Analysis for April 12, 2010 Version by the Senate Committee on Business, Professions and Economic Development

### **Business Impact:**

These regulations will not have a significant adverse economic impact on businesses. This initial determination is based on the fact that this regulatory proposal affects only licensees of the Board and applicants for licensure who are disciplined by the Board. A business owned by a licensee deemed to be in violation of state law may be affected if the license is revoked, surrendered or suspended. The Board only has authority to take administrative and disciplinary action against a licensee and not a business. The Board estimates that approximately 1-3 of the Board's licensees will be affected by this proposal.

### **Economic Impact Assessment:**

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because only licensees of the Board and applicants for licensure who are disciplined by the Board are affected. A business owned by a licensee deemed to be in violation of state law may be affected if the license is revoked, surrendered, or suspended.
- It will not create new business or eliminate existing businesses within the State of California because only licensees of the Board and applicants for licensure who are disciplined by the Board are affected. A business owned by a licensee deemed to be in violation of state law may be affected if the license is revoked, surrendered, or suspended.
- It will not affect the expansion of businesses currently doing business within the State of California because only licensees of the Board and applicants for licensure who are disciplined by the Board are affected. A business owned by a licensee deemed to be in violation of state law may be affected if the license is revoked, surrendered, or suspended.
- This regulatory proposal benefits the health and welfare of California residents because it will improve the efficiency of the enforcement process, and address weaknesses in current law. Also, the Board would be allowed to more quickly prevent individuals who may be in violation of the law from practicing optometry and causing more patient harm.
- This regulatory proposal does not affect worker safety because the focus of the proposal is to protect consumers from potentially unsafe licensees.
- This regulatory proposal does not affect the state's environment because the focus of this proposal is to protect consumers from potentially unsafe licensees.

### **Specific Technologies or Equipment:**

This regulation does not mandate the use of specific technologies or equipment.

### **Consideration of Alternatives:**

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

- 1) Do not seek regulatory change.

Rejected: The Board's highest priority is protection of the public while exercising its licensing, regulatory, and disciplinary functions. These proposed regulatory changes provide the Board with the means to expedite the enforcement process and provide better public protection. Also, it allows the Board the ability to evaluate and prevent applicants for licensure that may be unable to practice safely due a mental or physical illness from getting a license and causing patient harm.