

**BOARD OF OPTOMETRY  
INITIAL STATEMENT OF REASONS**

**Hearing Date:** August 11, 2009

**Subject Matter of Proposed Regulations:** Define Requirements for Renewal of an Optometric License, Fingerprint Submission From Licensees Licensed Prior to January 1, 1998 and for a Response to a Board Inquiry Regarding Criminal History.

**Section(s) Affected:** Adopt Sections 1525, 1525.1 and 1525.2 Article 5.1 Licenses, in Division 15 of Title 16 of the California Code of Regulations (CCR).

**Specific Purpose of each adoption:**

1525

Specifically, these regulations would:

- Clarify the requirements for the renewal of a license to practice Optometry.
- Requires the disclosure of any convictions incurred in the previous renewal cycle.
- Requires the disclosure of any disciplinary action taken against a license in the previous renewal cycle.
- Requires the disclosure of the completion of the required continuing education courses within the previous renewal cycle.
- Renders any incomplete application for renewal ineligible for renewal.

1525.1 & 1525.2

Specifically, these regulations would:

- Require all licensees on or after October 1, 2009 who have not previously submitted fingerprints to the Department of Justice (DOJ) or for whom an electronic record of the submission of the fingerprints does not exist with DOJ, to complete a state and federal level criminal offender record information search conducted through the DOJ before his or her license renewal date. The purpose of this provision is to ensure the Board of Optometry (hereafter "Board") receives criminal background and subsequent conviction information on Board licensees in order to protect the public from unprofessional practitioners and fully implement the Board's mandate to enforce the unprofessional conduct statutes of Board licensing law (Business & Professions (B&P) Code section 3110(k)).
- Requires a license that has been revoked to not be reinstated until the licensee has submitted fingerprints for a criminal records search conducted through DOJ. The purpose of this provision is to make certain that all licensees, irrespective of licensure

status, meets the fingerprinting requirements set forth in this regulation before resuming practice with the public.

- Exempt from the requirements of this proposed regulation licensees actively serving in the United States military. The purpose of this provision is to allow those licensees not in active practice to only meet the requirement before returning to active practice with the public.
- Requires licensees to retain for at least three years either a receipt showing that he or she has electronically transmitted his or her fingerprint images to DOJ, or for those licensees who did not use an electronic fingerprinting system, a receipt evidencing that the licensees fingerprints were submitted. The purpose of this provision is to permit the licensee or registrant to demonstrate compliance with the fingerprinting requirement in the event that fingerprint reports are not processed correctly by DOJ.
- Requires licensees to pay, as directed by the Board, the actual cost of compliance with the fingerprinting requirements of this regulation. The purpose of this provision is to make certain that the licensee pays the full cost of the service provided.
- Allows the Board to take disciplinary action against a licensee if he or she fails to comply with the fingerprinting requirements set forth in this regulation. The purpose of this provision is to ensure compliance with this new regulation.
- Require all licensees to respond within 30 days to a request from the Board for information relating to the licensee's criminal history. Failure to do so would constitute grounds for disciplinary action.

### **Factual Basis/Necessity**

#### 1525

A license to practice optometry expires every two years on the last day of the licensee's birth month. In order to renew the license, a licensee must, according to B&P Code section 3146, complete an application for renewal and pay the required renewal form. There is no further clarification in the law regarding what information will be required on the application for renewal. Further, there is no clarification regarding the consequences of providing an incomplete application for renewal.

The proposed regulation would clarify the requirements for the renewal of a license to practice optometry. Specifically, the regulation would clarify the requirement to disclose the completion of the required continuing education courses, and the requirement to disclose disciplinary action taken against any license or any conviction that occurred in the prior renewal cycle.

The proposed regulation also gives the Board the ability to enforce the disclosure requirements by declaring any incomplete application ineligible for renewal.

This regulation was created in order to address the potential of continuing to license practitioners who may have a criminal record. By adding a standardized question on the applications of all healing arts boards/bureaus for license renewal requiring licensees to self-disclose criminal history and/or license discipline as a condition for license renewal, enforcement staff can review each applicant's criminal history and make a determination on a

case-by-case basis of whether or not the conviction is substantially related to the qualifications, functions, or duties of the license. B&P Code section 480 authorizes the Board to deny a license because the applicant has been convicted of a crime. When considering the denial of a license or registration the Board will evaluate any evidence of rehabilitation as identified in CCR section 1516. If the conviction warrants disciplinary action, the applicant is notified that his/her application is denied, and the case is forwarded to the Office of the Attorney General for filing of a Statement of Issues.

The Board does not pre-evaluate criminal convictions, the evaluation is a part of the application process. Since the Board has the responsibility to protect the public, a primary objective of the Board is to ensure registrations or licenses are not issued to applicants who have serious criminal convictions substantially related to the practice of the professional license. For this reason, the Board evaluates all misdemeanor and felony convictions in the same manner for each type of professional license.

The same applies to continuing education credits. Pursuant to B&P Code section 3059, "It is the intent of the legislature that the public health and safety would be served by requiring all holders of licenses to practice optometry granted under this chapter to continue their education after receiving their licenses. The Board shall adopt regulations that require, as a condition to the renewal thereof, that all holders of licenses submit proof satisfactory to the Board..." If the licensee is not keeping up with developments in the practice of optometry, then it is necessary to deny them a license until they comply. This new language will assist in the Board's goal to continue to protect the public.

#### 1525.1 & 1525.2

Legislation was sponsored in 1997 and the California Legislature gave the Board and other entities under the umbrella of the Department of Consumer Affairs (DCA) the authority under B&P Code section 144, to require a DOJ and FBI criminal history background check on all applicants seeking registration and/or licensure (SB 1346, Chapter 758, Statutes of 1997).

Since 1998, all applicants for licensure have submitted a full set of fingerprints as part of the application process. With limited exceptions, all applicants are required to submit their prints via Live Scan. Traditional fingerprint cards (hard cards) are accepted only in those cases where the applicant is located outside of California, or demonstrates a hardship approved by the DOJ.

Legislation creating B&P Code section 144 in 1998 allowed the Board to require applicants to submit fingerprints for the purpose of conducting criminal history records check. Due to the narrow interpretation of the language of B&P Code section 144, the Board has only required applicants for licensure to meet the fingerprint requirement and therefore, individuals licensed with the Board before 1998 have not met the fingerprint requirement set forth in B&P Code section 144. Those that have not been fingerprinted do not generate a subsequent arrest notification by the DOJ and therefore, the Board is not notified, except by licensee self-disclosure on renewal, of arrests and/or criminal convictions. It is necessary for the Board to have the knowledge of unprofessional conduct, including arrests and criminal convictions, in order to proceed with disciplinary action.

Additionally, this proposed regulation requires those licensees for whom an electronic record does not exist in the DOJ's criminal offender record identification database, to complete a state and federal level criminal offender record information search conducted through DOJ. This provision is necessary to ensure that the Board is notified in a timely manner of arrests and criminal convictions. LiveScan fingerprinting did not become widely available until 1999, and

therefore, those applicants fingerprinted prior to 1999 were most likely fingerprinted using rolled fingerprints on a hard card. These fingerprint records were not entered into the DOJ electronic database. When a notice of arrest is received at DOJ on an individual that is not in the electronic database, the file must be pulled manually and then entered into the electronic database before the arrest is reported to the Board. The process for receiving arrest information from DOJ on individuals that do not have an electronic record takes about six months. This significant delay allows a practitioner to continue practicing without the Board's knowledge of any unprofessional conduct that may be related to the duties, functions and qualifications of the professional license that individual holds.

B&P Code sections 3110(k) allows the Board to deny a license, or suspend or revoke a license for unprofessional conduct, including the conviction of a crime substantially related to the qualifications, functions or duties of a licensee. Further, upon renewal, a licensee is required to notify the Board whether he or she has been convicted, as defined in B&P Code section 490, of a misdemeanor or a felony. However, for those licensed before the implementation of the Board's fingerprint submission requirement in January 1998, the notification of a criminal conviction relies upon the licensee's self-disclosure upon renewal. In order to fully implement the unprofessional conduct statutes that require the Board to discipline a license that has been convicted of a crime substantially related to the qualifications, functions, or duties of their professional service, the Board must receive information related to those criminal convictions in a timely manner. This proposed rulemaking is necessary to ensure that all Board licensees submit fingerprints to DOJ for the purpose of a state and federal criminal records check in order for the Board to implement the unprofessional conduct statutes in place to protect the public from unethical and possibly incompetent practitioners.

Once the Board has received notification of a licensee conviction, either by Subsequent Arrest Notification or by self-disclosure on an application for renewal, the Board must conduct an investigation to determine if the conviction constitutes a substantial enough violation of Board law to warrant disciplinary action. The Board collects evidence to help determine the severity of the violation.

The proposed regulation provides the Board with the authority to take disciplinary action against a licensee who fails to provide requested information relating to a criminal conviction history during the course of a Board investigation. If the Board was unable to collect the necessary evidence, the Board would not be able to prove the severity of the violation of Board law in a conviction case. The Board would be unable to prove the necessity of disciplinary action, and would be unable to properly evaluate the level of disciplinary action that should be taken in a given case.

**Underlying Data:** None

### **Business Impact**

1525

The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts or evidence, documents, testimony:

There would be no costs to businesses to comply with this regulation. The requirements to renew a license to practice Optometry are not changed with this regulation. Licensees would

be able to renew their licenses in the same manner as they are currently renewed. There are no additional costs or requirements for completion of the application for licensure renewal.

#### 1525.1 & 1525.2

The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts or evidence, documents, testimony:

There would be no costs to businesses to comply with this regulation. This proposed regulation would only affect individuals for whom an electronic record of his or her fingerprints does not exist in the DOJ criminal offender record identification database and those licensees that do not comply with the proposed regulation.

There are approximately 750 vendors statewide who provide fingerprinting services. There should be no initial or ongoing cost impact upon the vendors because they are already equipped to provide the service and the fingerprinting requirement will be staggered and extended over the licensees' renewal periods (biennial cycle).

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

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

#### **Consideration of Alternatives**

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.