

DENTAL BOARD OF CALIFORNIA
FINAL STATEMENT OF REASONS

HEARING DATE: November 22, 2011

SUBJECT MATTER OF PROPOSED REGULATIONS: Sponsored Free Health Care Events

SECTION(S) AFFECTED: California Code of Regulations, Title 16, Division 10, Sections 1023.15, 1023.16, 1023.17, 1023.18, and 1023.19.

UPDATED INFORMATION:

The Initial Statement of Reasons is included in the file. The information contained therein is updated as follows:

At its February 25, 2011 meeting, the Dental Board of California (Board) discussed and approved proposed regulatory language relative to sponsored free health care events. The Board directed staff to initiate a rulemaking. The proposed action was published by the Office of Administrative Law (OAL) on October 7, 2011 and was noticed on the Board's web site and mailed to interested parties. The 45-day public comment period began on October 7, 2011 and ended on November 21, 2011. A regulatory hearing was held on November 22, 2011 in Sacramento, and the Board received comments from the California Association of Oral and Maxillofacial Surgeons, the California Dental Association, and the California Academy of General Dentists.

At its February 23, 2012 meeting, the Board considered comments received during the 45-day public comment period. The Board voted to modify the text in response to the comments received and directed staff to notice the modified text for 15-day public comment. Prior to staff noticing the Board's modified text for 15-day public comment, the Department of Consumer Affairs (Department) contacted all healing arts boards that have proposed regulations relevant to sponsored free health care events, advising that boards may need to further clarify the Department's role in receiving and registering sponsoring entities. The Medical Board of California (MBC), Board of Occupational Therapy (BOT), and the Board of Vocational Nursing and Psychiatric Technicians (BVNPT) had all submitted their final rulemaking files to OAL. On March 13, 2012, OAL issued a Decision of Disapproval of MBC's proposed regulations due to failure to comply with clarity and necessity standards, as well as procedural issues.

The Office of Administrative Law's primary clarity concern related to the specific content of MBC's Form 901-A in relation to the content of similar forms proposed by other healing arts boards within the Department. The BVNPT and BOT used similar forms incorporated by reference, and each form contained language similar to MBC's form indicating that only one registration form per event should be completed and submitted to the Department. The Office of Administrative Law was concerned that there was not one common form with a uniform set of regulatory requirements which would, with

certainty, allow for the filing of a “single, common form” that meets the regulatory requirements of the three agencies. The Office of Administrative Law could not easily understand how the “only one form per event” provision on each of the individual board’s forms would work in practice. The differing forms from each board could create the potential for confusion and uncertainty among sponsoring entities legally required to comply with the regulations.

At its April 11, 2012 meeting, the Board voted to adopt a Resolution to formally delegate authority to the Department to receive and process sponsored entity registration forms and to register sponsoring entities for sponsored free health care events that utilize the services of dentists and directed staff to add the adopted Resolution to the Board’s Sponsored Fee Health Care Events rulemaking file.

At its April 11, 2012 meeting, the Board voted to modify the text to incorporate by reference the “Registration of Sponsoring Entity Under Business and Professions Code Section 901,” Form 901-A (DCA/2011) in replacement of the originally proposed “Form DBC-901-A (02/2011)”. Additionally, the Board voted to modify the text for the purpose of technical clean-up and directed staff to take all steps necessary to complete the rulemaking process, including preparing the modified text for a 15-day public comment period, which included the amendments accepted by the Board at the meeting. If after the 15-day public comment period, no adverse comments were received, the Executive Officer was further authorized to make any non-substantive changes to the proposed regulations before completing the rulemaking process, and adopted the proposed amendments as noticed in the modified text.

The Notice of Modified Text and Documents Added to the Rulemaking File, Modified Text, and documents added to the file were noticed on the Board’s web site and mailed on April 23, 2012. The 15-day public comment period began on April 24, 2012 and was noticed to end on May 8, 2012. The following documents were noticed as being added to the rulemaking file:

1. Addendum to the Initial Statement of Reasons
2. Draft Meeting Minutes Re: Agenda Items 3(A) and 3(B) from the February 23, 2012 Dental Board Meeting Relating to Sponsored Free Health Care Events Proposed Regulations
3. Draft Meeting Minutes from the April 11, 2012 Dental Board Meeting
4. Office of Administrative Law Decision of Disapproval of Regulatory Action In Re: Medical Board of California Proposed Regulations to Adopt Cal. Code of Regs., Title 16, Sections 1333, 1333.1, 1333.2, and 1333.3
5. Dental Board of California Resolution: Delegation to Department of Consumer Affairs for the Review and Registration of Sponsoring Entities

6. "Registration of Sponsoring Entity Under Business and Professions Code Section 901," Form 901-A (DCA/2011)
7. TABLE A: Data Supporting Application Fee for Out-of-State Practitioner Authorization to Participate in Sponsored Event
8. Notification from Department of Justice Regarding the Revised Processing Fee for Federal Level Criminal Offender Record Information
9. Economic Impact Analysis

The documents added to the rulemaking file were made available to the public and were posted on the Board's web site.

The proposed modified text noticed on April 23, 2012 contained a technical error on page 2 of the following incorporated document: "Request for Authorization to Practice Without a License at a Registered Free Health Care Event," Form DBC-901-B (New 02/2012). Page 2 of the form inaccurately identified the non-refundable processing fee of \$51 for "Ink on Cards". This processing fee should have been modified to reflect the new fingerprinting fee of \$49. On March 9, 2012 the Department of Justice notified all clients that, effective March 19, 2012, the fingerprinting processing fee would be reduced from \$51 to \$49. This fee is a direct cost to be paid to the Department of Justice for the purpose of conducting a criminal history check. The Dental Board of California does not determine this fee. An updated Notice of Modified Text and Documents Added to the Rulemaking File was noticed on the Board's web site and mailed on April 25, 2012. The 15-day public comment period began on April 26, 2012 and ended on May 10, 2012. The Board did not receive comments in response to the modified text or documents added to the file.

Since there were no adverse comments received in response to the modified text, the Board adopted the final text as noticed in the modified text at its April 11, 2012 teleconference meeting.

LOCAL MANDATE:

A mandate is not imposed on local agencies or school districts.

SMALL BUSINESS IMPACT:

This action will not have a significant adverse economic impact on small businesses. This regulation will impact non-profit organizations sponsoring free health care events and practitioners licensed out-of-state who wish to volunteer at such events.

Implementation Costs for Sponsoring Entities:

Sponsoring entities may incur nominal expenses associated with submitting the registration form to the Department, and complying with recordkeeping requirements, and reporting requirements. Sponsoring entities shall be responsible for submitting the "Registration of Sponsoring Entity Under Business and Professions Code Section 901,"

Form 901-A (DCA/2011) to the Department. Expenses associated with submitting the registration form include printing and mailing; these expenses are minimal and should not have a significant fiscal impact on sponsoring entities. Additionally, sponsoring entities shall be responsible for maintaining copies of all records required by Code Section 901, as well as the copy of the authorization for participation issued by the Board to an out-of-state practitioner at a physical location in California. The records must be maintained for a period of at least five years after the date the sponsored event ended; the records may be kept in electronic or paper form. The sponsoring entity shall also be responsible for maintaining copies of all records required by Code Section 901(g) at the physical location of the sponsored event. Expenses associated with these recordkeeping requirements are nominal and include storage and transportation of the required records; these expenses are minimal and should not have a significant fiscal impact on sponsoring entities. Finally, the sponsoring entity shall be responsible for providing a report to the Board summarizing the details of the sponsored event within fifteen days after the conclusion of such event. The report may be provided to the Board on a form of the sponsoring entity's choosing. Expenses associated with these reporting requirements are nominal and include printing and postage; these expenses are minimal and should not have a significant fiscal impact on sponsoring entities.

Implementation Costs for Out-of-State Practitioners:

Public comments submitted to the Board, during the 45-day public comment period, raised concern that the \$100 processing fee required for each application to participate in a sponsored free health care event was too high and could serve as an impediment to participation. When the regulations were initially drafted it was unknown how many sponsors of free healthcare events and how many volunteer out-of-state licensees may apply to the Board as a result of these regulations. Initially, the Board estimated that it would receive at least 250 applications per year from out-of-state dentists seeking authorization to provide services at sponsored health care events. In order for the Board to absorb the workload associated with processing the requests for authorization from the out-of-state dentists, the Board would have needed to charge a \$100 non-refundable processing fee to offset the costs associated with staff's processing of the application.

After further evaluation, the estimated number of applications the Board would receive each year from out-of-state practitioners has been determined to be significantly lower. It is now estimated that the Board would receive approximately 75 applications per year from out-of-state dentists seeking authorization to provide services at sponsored free health care events. To absorb the workload associated with processing 75 applications per year, the Board would need to charge a \$30 non-refundable processing fee per application. This fee will offset the costs associated with staff's processing of the application. Tasks associated with processing each request for authorization and corresponding time allocated to each task is illustrated in *Table A: Data Supporting Application Fee for Out-of-State Practitioner Authorization to Participate in Sponsored Event*.

Additionally, applicants will incur costs associated with furnishing fingerprints for the purpose of the Board conducting a criminal history check. As initially proposed, the cost for an out-of-state licensed dentist to get fingerprinted via Live Scan was approximately \$65; of this fee, \$51 would go to the Department of Justice for conducting the background check and providing criminal record reports to the Board; an average of \$14.00 goes to the vendor for fingerprinting the individual. The vendor's fee ranges from \$5.00 to \$45.00 with the average fee being \$14.00. For those out-of-state licensed dentists who are not able to submit fingerprints electronically via Live Scan, the fee for the Board to process "ink on cards" fingerprints was \$51. The fee of \$51 is a fixed fee determined by the Department of Justice. On March 9, 2012, the Department of Justice notified all clients that, effective March 19, 2012, the FBI processing fee would be reduced from \$19 to \$17. The \$32 DOJ processing fee remained unchanged. The fingerprinting fee of \$49 (\$17 FBI + \$32 DOJ) is a direct cost to be paid to the Department of Justice for the purpose of conducting a criminal history check. The Board does not determine this fee.

As amended in the modified text, the cost for an out-of-state licensed dentist to get fingerprinted via Live Scan is approximately \$63.00. Of this fee, \$49.00 goes to the Department of Justice for conducting the background check and providing criminal record reports to the Board; an average of \$14.00 goes to the vendor for fingerprinting the individual. The vendor's fee ranges from \$5.00 to \$45.00 with the average fee being \$14.00. For those who are not able to submit fingerprints electronically via Live Scan, the fee for the Board to process "ink on cards" fingerprints is \$49. The fingerprinting fee of \$49 (\$17 FBI + \$32 DOJ) is a direct cost to be paid to the Department of Justice for the purpose of conducting a criminal history check. The Board does not determine this fee. The requirement to submit fingerprints would only apply to the first application for authorization that is submitted to the board by the applicant. These fees will have to be factored into the cost of the individual's volunteered services. The fees may be covered by sponsoring entities, who will also incur minor costs with respect to maintaining records for their volunteers, reporting to the board after the events and filing a registration. These costs are necessary for the protection of the public and to provide staff time and resources for registration of sponsored events and volunteer out-of-state practitioners in the short timeframes set in the statute.

BENEFITS OF THE PROPOSED REGULATION:

The Board's highest priority is the protection of the public when exercising its licensing, regulatory, and disciplinary functions. This proposal is consistent with the Board's priority of protecting the public. This proposal will enable dental care services to be provided at sponsored free health care events to uninsured or under-insured Californians who would otherwise not have the ability to obtain health care. There may also be benefits to private businesses that are not able to provide dental care to employees. Many small businesses are legally required to provide health care, but are not required to provide dental care. Poor oral health can impact the overall health of an individual. These regulations will promote access to dental care in California in

addition to providing public protection through Board's registration of out-of state volunteer dentists.

Additionally, this proposed regulation complies with the provisions of Business and Professions Code Section 901, as it pertains to licensed dentists, including the application and registration requirements, disciplinary actions, recordkeeping requirements and provisions for termination for the exemption of an out-of-state licensed dentist who wishes to participate in a sponsored free health care event. The Board's proposed regulations are intended to implement Section 901 in a manner that will provide the greatest protection for the people of California.

CONSIDERATION OF ALTERNATIVES

No alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board is directed by statute, Business and Professions Code Section 901, to develop a registration and fee process to implement the provisions of the statute. The proposed regulations implement, interpret, and make specific the provisions of Section 901, as it pertains to licensed dentists, including the application and registration requirements, disciplinary actions, recordkeeping requirements and provisions for termination of the exemption of an out-of-state licensed dentists who wishes to participate in a sponsored free health care event. Failure to create a procedure would defeat the purpose of the statute, which intends to provide an opportunity for out-of-state licensed practitioners to participate in certain free health care events. A delay is unreasonable due to the statute's sunset date of January 1, 2014. Because this statute is effective for only three years, the Board must act to implement the required process as soon as possible.

OBJECTIONS OR RECOMMENDATIONS/RESPONSES:

The following recommendations were made regarding the proposed action:

Summary of Comments Received During the 45-Day Comment Period:

Comments Regarding Fingerprinting Requirement:

Both the California Dental Association (CDA) and the California Association of Oral and Maxillofacial Surgeons (CALAOMS) commented that the requirement for out-of-state practitioners to provide fingerprints to the Board seemed excessive and unnecessary. Both organizations commented that the oversight of the sponsoring entities and remaining documentation the practitioner would be required to submit proving licensure and good standing in another state would be sufficient to ensure the professional quality of the practitioner.

The Board voted unanimously to reject these comments. The requirements for out-of-state practitioners to submit fingerprints as part of the application process is reasonably necessary in order for the board to verify that an applicant is “in good standing” as required by Section 901, including the requirement of Section 901(b)(1)(B)(i) that the applicant has “not committed any act or been convicted of a crime constituting grounds for denial of licensure or registration under [Code] Section 480.” Section 480 authorizes a board to deny licensure based on an applicant’s conviction of a substantially-related crime or the commission of an act substantially-related to the qualifications, functions or duties of a licensed dentist. A criminal background check cannot be effectuated if the board does not have the appropriate personal identifying information. Further, the board is authorized to require applicants to furnish fingerprints for criminal background checks under Business and Professions Code Section 144 and to require disclosure of Social Security Numbers for all other applicants under Section 30 of the Business and Professions Code. Further, Section 901(b)(1)(B)(iii) requires a health-care practitioner to agree to comply with all applicable practice requirements set forth in Section 901 and the board’s applicable regulations. This form, with its accompanying attestation provisions, would provide the mechanism to effectuate such an agreement.

Currently, the Dental Board of California requires applicants and licensees, for whom an electronic record of fingerprints does not exist, to provide fingerprints for a background check before issuance of a license. The protection of the public is the Board’s highest priority when exercising its licensing, regulatory, and disciplinary functions; this proposal is consistent with the Board’s priority of protecting the public.

Comments Regarding Continuing Education Requirement:

Both CDA and CALAOMS commented that the requirement for an out-of-state practitioner to provide documentation of 50 hours of continuing education within the previous two years of the date of the application seemed excessive, burdensome, and arbitrary. Most, if not all, states require continuing education as a condition of licensure, which is considered proof that the practitioner’s license is valid and in good standing. The applicant’s valid and current license, in good standing in another state, should be taken as sufficient evidence that the applicant maintains the continuing education necessary to provide competent dental care.

The Board voted unanimously to accept this comment and strike the requirement for an out-of-state practitioner to provide proof of completion of 50 hours of continuing education within two years of the date of his or her application.

Comments Regarding Application Fee for Out-of-State Practitioners:

Both CDA and CALAOMS commented that the proposed \$100 application fee was high and could serve as an impediment to participation. Both organizations recommended that the Board adopt an application fee of \$25, like that of the Medical Board of California. Additionally, CALAOMS commented that the Board should propose a mechanism to further remove impediments by allowing the sponsor of the event to pay the dentist’s fee for authorization.

Board staff recommended acceptance of the comments to lower the fee so as not to impede participation from out-of-state practitioners at sponsored events. When the regulations were initially drafted it was unknown how many sponsors of free healthcare events and how many volunteer out-of-state licensees may apply to the Board as a result of these regulations. Initially, the Board estimated that it would receive at least 250 applications per year from out-of-state dentists seeking authorization to provide services at sponsored health care events. In order for the Board to absorb the workload associated with processing the requests for authorization from the out-of-state dentists, the Board would have needed to charge a \$100 non-refundable processing fee to offset the costs associated with staff's processing of the application. After further evaluation, staff estimated the number of applications the Board would receive each year from out-of-state practitioners would be significantly lower. It is now estimated that the Board would receive approximately 75 applications per year from out-of-state dentists seeking authorization to provide services at sponsored free health care events. To absorb the workload associated with processing 75 applications per year, the Board would need to charge a \$30 non-refundable processing fee per application. Staff recommended modifying the text accordingly. The Board voted unanimously to accept the comments and staff's recommendation to charge a \$30 non-refundable processing fee per application.

It was unnecessary for the Board to include a mechanism that would specify that the sponsor of an event may pay the out-of-state dentist's application processing fees, as the regulatory language does not preclude a sponsoring entity from paying the fee on the behalf of the out-of-state dentist seeking authorization to participate.

Comments Regarding Requirement to Provide Written Notice to Each Patient:

At the regulatory hearing held on November 22, 2011, Mr. Fred Noteware, representing both CDA and CALAOMS, commented that the organizations were concerned with the provisions contained in section 1023.19 regarding written notice to each patient. The organizations felt that the requirement for a separate notice immediately before treatment is burdensome and will be an impediment to efficient care. Mr. Noteware commented that the notice should be part of the general waiver and consent. Currently the waiver and consent will inform the patient that they may be seen by student dentists or student hygienists working under the direct supervision of their instructors; patients are required to sign this waiver and acknowledgement. The names and states of each out of state dentist that may provide care could be added to the waiver and consent. Mr. Noteware stated that an example of the difficulty associated with the DBC proposal would be if a local dentist has difficulty with an extraction and asks an out of state oral surgeon for help. The oral surgeon would have to stop treatment while the patient reads the 'out-of-state' waiver. The waiver would be unenforceable because the patient could later claim it was signed under the duress of the situation. Mr. Noteware commented that it would be much better to get the waiver signed by all potential patients in advance and not patient by patient at the time of service.

The Board voted unanimously to reject this comment. The notice is not considered a waiver. Providing written notification to each patient that the practitioner is licensed

outside of the State of California does not relinquish or surrender the patient's privilege to health care services provided by the out-of-state practitioner. The out-of-state practitioner is only required to provide written notification to each patient, in at least 12-point font and include information regarding licensure, as specified, and a disclosure that the Dental Board of California has only authorized the practitioner to provide services at that particular health care event for a period not to exceed 10 days. The notice may be provided to the patient on a form of the practitioner's choosing. Statutory law makes no provision for notifying the affected public that out-of-state practitioners are not California licensed dentists in good standing. A member of the public would assume, unless this notice is provided, that dentists providing dental services in California would be duly licensed and regulated by the Dental Board. The protection of the public is the Board's highest priority when exercising its licensing, regulatory, and disciplinary functions. This proposal is consistent with the Board's priority of protecting the public. The requirement of written notification provides transparency to the public that individuals performing dentistry at the sponsored event are licensed in good standing by another state, district or territory, the license numbers, effective dates of each license and issuing agency, and the dates that the out-of-state practitioner is authorized to practice by the board. This proposed regulation further specifies a statement of disclosure that the Dental Board has only authorized the practitioner to provide services at the sponsored event and for a period not to exceed 10 days. This proposed section provides disclosure to the public that practitioners are licensed by another governmental agency, provides specific information regarding those licenses, and informs the public that practitioners may only practice pursuant to the specific provisions of Section 901.

Additional Comments in Support of the Proposed Regulation:

At the regulatory hearing, Dr. Guy Acheson, Vice President of the California Academy of General Dentistry, verbally presented a letter from the President of the California Academy of General Dentistry in support of the regulations. Dr. Acheson read the letter aloud and entered the letter into the rulemaking. Dr. Acheson stated that he has participated in events in other states in the past. He specifically pointed out that he had been able to participate in an event at the Louisiana State University School of Dentistry where dental care was provided to underserved residents of New Orleans, LA. The event gathered more than 140 volunteers from around the country to provide care for over 180 patients from New Orleans. Additionally, Dr. Acheson stated that he participated an event at the San Diego Convention Center with approximately 30 other California licensed dentists to provide over \$80,000 in free dentistry work to about 125 veterans in San Diego, CA. He stated that these proposed regulations are important to authorize more volunteers from other states to assist with providing important dental care services at these health care events. The California Academy of General Dentistry wanted to clearly emphasize that the proposed regulations be limited to licensed dentists to volunteer their services in California. The organizations believe that for public health and safety reasons, non-traditional therapists should not be included in the regulations.

The Board did not take action because this comment was not considered adverse and the Board's regulations are only applicable to licensed dentists.

Additional Modifications Recommended by Staff:

Staff recommended the Board include a provision in the proposed regulation that would allow the Board to deny an out-of-state practitioner's request for authorization to participate in a sponsored event if the Board is unable to obtain a timely report of the results of the applicant's criminal history check. Business and Professions Code Section 901(b)(1)(B)(i) requires that the applicant has "not committed any act or been convicted of a crime constituting grounds for denial of licensure or registration under [Code] Section 480." Section 480 authorizes a board to deny licensure based on an applicant's conviction of a substantially-related crime or the commission of an act substantially-related to the qualifications, functions or duties of a licensed dentist. If the Board does not receive a timely report of the results of the applicant's criminal history check then the Board cannot be assured that the applicant has not committed any act or has been convicted of a crime constituting grounds for denial of licensure. Therefore, the Board would be in violation of Business and Professions Code Section 901 and consumers could face potential harm. The Board accepted staff's recommendation.

Summary of Comments Received During the 15-Day Comment Period:

The Board did not receive comments in response to the modified text.

INCORPORATION BY REFERENCE:

The incorporation by reference method was used because it would be impractical and cumbersome to publish the required forms in the California Code of Regulations (CCR).

Form 901-A (DCA/2011) is necessary to create a process for the Board, and its delegate, for review of sponsoring entities, to implement the requirements Business and Professions Code Section 901, and to assist with providing detailed information to sponsoring entity applicants regarding the requirements for seeking and maintaining registration. The certification and disclosure requirements also assist in ensuring accurate, timely and complete information is being provided to the Board, and its delegate, prior to making a decision to grant or deny registration.

Form DBC-901-B (New 02/2012) provides a mechanism by which an out-of-state practitioner may request authorization to participate in a sponsored event, and specifies that authorization must be obtained for each sponsored event in which the applicant seeks to participate.

If the forms were incorporated into the CCR, it would increase the size of Division 10 and may cause confusion to the user. The forms were made available to the public and were posted on the Board's web site.