

## Dental Board of California

### FINAL STATEMENT OF REASONS

Hearing Date: February 4, 2010

Subject Matter of Proposed Regulations: Retroactive Fingerprinting of Licensees

Section(s) Affected: Title 16, Division 10, California Code of Regulations, Section 1007, 1008, and 1017.2

#### Updated Information:

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

Recommendations and comments received at the February 4, 2010 regulatory hearing were considered at the Board's February 26, 2010 meeting. A number of modifications were made to the Retroactive Fingerprinting regulations based upon comments received from the California Dental Association. Those comments and the Board's responses are detailed under "Objections or Recommendations/Responses".

The modified text was noticed on the board's website and mailed on April 15, 2010 for 15-day public comment. The public comment period began on April 16, 2010 and ended on April 30, 2010. No comments were received during the public comment period.

Fees for fingerprinting are currently \$56.00 total for both Department of Justice (for convictions within California) and FBI (for convictions in other states). An individual licensee would pay \$56.00 plus any fee that a vendor may charge to perform the Livescan service, to comply with this regulation over its lifetime, since it is a one-time requirement. Vendor fees range from no charge up to \$45.00 to provide Livescan services, for an average fee of \$14.00. The estimated average cost to an affected licensee would be \$70.00 over the lifetime of the regulation.

Assuming 46,500 licensees will be required to complete Livescan fingerprinting over two years (by his or her next biennial renewal), at an average cost of \$70.00 to each individual (\$32 for DOJ background check, \$24.00 for FBI background check, and \$14.00 fee to a vendor for the Livescan service), the total estimated cost for all individuals potentially affected over the lifetime of this regulation will be \$3,255,000.

Upon further review, the Board has reevaluated the fiscal impact on public agencies. The Board may be able to absorb additional workload based upon the new positions authorized in the Governor's Budget for FY 2010-11, the expectation that furloughs will end on June 30, 2010, and the fact that the requirements of the proposed regulatory changes would not be effective until January 2011. The additional costs to the Board

associated with this regulation for FY 2010-11 would total \$400,000. The additional costs to the Board associated with this regulation for FY 2011-12 would total \$400,000. The additional costs to the Board associated with this regulation for FY 2012-13 would total \$100,000.

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.

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.

Objections or Recommendations/Responses:

The following recommendations were made regarding the proposed action:

**Original Notice:**

The Board received four comments from the California Dental Association (CDA) dated February 2, 2010.

**CDA Comment Number 1:**

*Reasonable Notification After Effective Date of Regulations*

The proposed regulations do not specify when the fingerprint requirement will go into effect following adoption. Due process considerations require that the Dental Board (Board) provide licensees with sufficient and reasonable notice and time to comply with the new requirements. CDA recommends that the Board provide licensees ninety (90) days notice following adoption of the regulations before any licensee must comply. For purposes of illustration, if the regulations go into effect June 1, 2010, licensees with renewal dates between June 1 and August 31 would not be subject to the requirement until their next renewal period after 2010.

**Board Response to Comment 1:**

The Board accepted CDA's comment and voted unanimously to modify the text to have December 1, 2010 as the beginning date.

**CDA Comment Number 2:**

*Costs for Re-Submission if Record is Lost or Destroyed*

The language proposed in Section 1008(a) requires re-submission for "a licenses...for whom an electronic record of the submission of fingerprints no longer exists..." It is unclear under what circumstances the electronic record would no longer exist. If, for

example, it is because the electronic record is lost by a state or federal agency, but due to no fault of the licensee, the licensee should not have to incur the costs associated with having his or her fingerprints re-submitted to the Department of Justice. CDA recommends the Board add language to section 1008(a)(1) as follows:

The licensee shall pay any costs for furnishing the fingerprints and conducting the searches, *unless the electronic record of a prior submission of fingerprints no longer exists due to being lost, misplaced, misfiled, or destroyed by a state or federal agency. In those instances, costs for re-submission shall be borne by the Dental Board.*

### **Board Response to Comment 2:**

The Board did not accept CDA's recommended language, however the Board did vote unanimously to modify the proposed text to require the electronic submission of fingerprints if a record does not exist. The Board does not have the ability to know if older paper fingerprint records no longer exist. The process of submitting electronic fingerprints was not available when the licensee fingerprinting requirements were enacted. Licensees have the continuing obligation to demonstrate compliance with the law. Applicants are now able to submit fingerprints electronically which enables the Dental Board to better track criminal convictions through both the FBI and the DOJ databases and analyze if a conviction is substantially related to the profession. Because it is the licensee's responsibility to demonstrate continued compliance, the cost for submitting electronic fingerprints through "Live Scan" should be borne by the licensee and not the State if a fingerprint record "does not exist".

### **CDA Comment Number 3:**

#### *Self-Reporting Obligation is Overbroad*

Section 1008(b) requires that a licensee must self-report if "he or she has been convicted of any violation of the law...omitting traffic infractions under \$300 not involving alcohol, dangerous drugs, or controlled substances." This requirement is overbroad. As written, it requires self-reporting of minor violations of the law, without any indication that such violations impose a threat to the public safety. For example, there are many traffic infractions with fines exceeding \$300, such as a red light violation, parking in a bus loading zone, or driving more than 15 miles per hour over the posted speed limit. CDA recognizes that the Board's highest priority is protection of the public. However, that priority is not met by requiring licensees to self-report minor violations of the law. CDA recommends the Board revise this requirement to require reports of misdemeanor convictions and felony arrests or convictions.

### **Board Response to Comment 3:**

The Board rejected CDA's recommendation because some infractions can rise to the level of conduct that would be substantially related to the profession, such as disturbing the peace. The Board voted unanimously to raise the dollar threshold of omitting traffic violations from conviction disclosure from \$300 to \$1000 in section 1008(b).

**CDA Comment Number 4:****Consideration of Mitigating Factors**

The proposed regulations, if adopted, may result in criminal history from background checks that is quite aged. Presumably, the Board will review any information obtained from a background check to determine whether disciplinary action against a licensee is warranted.

CDA urges the Board to ensure all mitigating factors, including the time, duration, and gravity of any criminal situation, are considered by the Board before pursuing discipline against a licensee.

**Board Response to Comment 4:**

The Board rejected CDA's recommendation. The purpose of the regulation is to have licensees fingerprinted who were licensed prior to the fingerprint requirement in 1986. If licensees are not fingerprinted, then there is no way for the Board to connect them to subsequent arrest information. There is a statute of limitations in regards to previous criminal actions: three (3) years after the Board discovers the act, or seven (7) years after the act occurs, whichever is first.

**Modified Notice:**

No comments were received.