

**TITLE 16. DENTAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS**

**INITIAL STATEMENT OF REASONS**

**HEARING DATE:** Monday, April 29, 2013

**SUBJECT MATTER OF PROPOSED REGULATIONS:** Uniform Standards for Substance-Abusing Licensees

**SECTION(S) AFFECTED:** California Code of Regulations, Title 16, Division 10, Sections 1018 and 1018.01

**INTRODUCTION:**

On September 28, 2008, Senate Bill 1441 (Chapter 548, Statutes of 2008) was signed by Governor Arnold Schwarzenegger and established the Substance Abuse Coordination Committee (SACC) comprised of the executive officers of the Department of Consumer Affairs' (Department) healing arts boards, a representative of the California Department of Alcohol and Drug Programs, and chaired by the Director of the Department. The SACC was charged with the task of developing uniform standards in sixteen specific areas for use in dealing with substance abusing licensees, whether or not a healing arts board has a formal diversion program. In April 2010, the SACC developed a document named *Uniform Standards Regarding Substance-Abusing Healing Arts Licensees*, which contained the sixteen uniform standards as required by SB 1441. In April 2011, the SACC made revisions to the April 2010 version and finalized the document.

The Dental Board of California (Board) initiated its first rulemaking file to incorporate the uniform standards developed by the SACC into the Board's Disciplinary Guidelines in March 2011. As the Board moved through the formal rulemaking process during 2011 and early 2012, the Board was advised of varying agencies' concerns regarding how the Board proposed the incorporation of the uniform standards. During that time, the Board received the following opinions on its proposed incorporation of the uniform standards:

- Board Legal Counsel's interpretation relating to the Board's discretion in using the Uniform Standards, as provided at the August 2011 Dental Board meeting;
- A memo, dated April 5, 2012, from Doreathea Johnson, Deputy Director of Legal Affairs, addressed to the healing arts boards with respect to the Department's opinion regarding uniform standards for substance-abusing licensees (SB 1441);
- A letter, dated October 27, 2011, from the Legislative Counsel Bureau addressed to the Honorable Curren D. Price, Jr. with respect to the healing arts boards adoption of uniform standards; and
- A memorandum from Kathleen A. Lynch, Deputy Attorney General from the Government Law Section of the Attorney General's Office, addressed to the Department's Legal Affairs Division regarding uniform standards related to

substance-abusing licensees as provided in Business and Professions Code §§ 315-315.4.

The Board's first rulemaking file expired in March 2012 and the Board was required to initiate a new rulemaking. The Board worked closely with the Department to develop new proposed regulatory language to incorporate the uniform standards developed by the SACC. At its May 18, 2012 meeting, the Board approved new proposed regulatory language and directed staff to initiate a new rulemaking. As the rulemaking documents were being prepared, staff became aware of needed substantive amendments to the proposed language. At its February 28, 2013 meeting, the Board approved revised proposed regulatory language to address the issues raised by staff and directed staff to initiate a new rulemaking.

**SPECIFIC PURPOSE OF EACH ADOPTION OR AMENDMENT:**

The Board currently regulates approximately 73,300 licensees; consisting of 38,000 dentists (DDS), 34,000 registered dental assistants (RDA), and 1,300 registered dental assistants in extended functions (RDAEF). In addition, the Board has the responsibility for setting the duties and functions of approximately 50,000 unlicensed dental assistants. The Board's highest priority is the protection of the public when exercising its licensing, regulatory, and disciplinary functions. The primary methods by which the Board achieves this goal are: issuing licenses to eligible applicants; investigating complaints against licensees and disciplining licensees for violations of the Dental Practice Act (Act); monitoring licensees whose licenses have been placed on probation; and managing the Diversion Program for licensees whose practice may be impaired due to abuse of dangerous drugs or alcohol.

Business and Professions Code (Code) Section 1614 authorizes the Board to adopt, amend, or repeal, such rules and regulations as may be reasonably necessary to enable the Board to carry into effect the provisions of the Dental Practice Act.

Code Section 315, established the SACC within the Department and required the SACC to formulate uniform and specific standards in sixteen specified areas for each healing arts board to use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program.

Code Section 315.2, specifies that a healing arts board within the Department is required to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program. The cease practice order pursuant to this section does not constitute disciplinary action and is not subject to adjudicative hearings.

Code Section 315.4, authorizes healing arts boards within the Department to order a licensee on probation or in a diversion program to cease practice for major violations and when the board orders a licensee to undergo a clinical diagnostic evaluation pursuant to the uniform and specific standards adopted and authorized under Section

315. The cease practice order pursuant to this section does not constitute disciplinary action and is not subject to adjudicative hearings.

Government Code Section 11400.20 authorizes an agency to adopt regulations to govern an adjudicative proceeding.

Government Code Section 11425.50(e) specifies that a penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule unless it has been adopted as a regulation.

California Code of Regulations, Title 16, Section 1018 specifies that the Board shall consider the disciplinary guidelines entitled *Dental Board of California Disciplinary Guidelines With Model Language, Revised 08/30/2010* in reaching a decision on a disciplinary action under the Administrative Procedures Act.

The Board proposes to amend Section 1018 and adopt Section 1018.01 of Article 4.5 of Chapter 1 of Division 10 of Title 16 of the California Code of Regulations. Additionally, the Board proposes adopting the document entitled *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013*, which has been incorporated by reference in the proposed adoption of Section 1018.01. The primary purpose of this proposal is to adopt the uniform standards established by the SACC and adopt standard language for probationary orders to be used by an Administrative Law Judge if an individual is determined to be a substance abuser after a formal adjudicative hearing. The Board will use the *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013* in addition to the Board's *Dental Board of California Disciplinary Guidelines With Model Language, Revised 08/30/2010* (Disciplinary Guidelines) when taking action to suspend, revoke, or place a license on probation when the individual has been determined to be a substance abuser. The proposed language is necessary to aid the Board in the discipline of substance abusers to provide better public protection to the people of California.

Specifically, the Board is proposing the following:

**Amend the title of Article 4.5 of Chapter 1 of Division 10 of Title 16 of the California Code of Regulations (Disciplinary Guidelines and Uniform Standards for Substance-Abusing Licensees):**

This proposal would amend the title of Article 4.5. The title would be changed from "Disciplinary Guidelines" to "Disciplinary Guidelines and Uniform Standards for Substance-Abusing Licensees".

**Amend Section 1018 of Article 4.5 of Chapter 1 of Division 10 of Title 16 of the California Code of Regulations (Disciplinary Guidelines and Exceptions for Uniform Standards Related to Substance-Abusing Licensee):**

This proposal would amend Section 1018 to specify that, although deviation from the Board's Disciplinary Guidelines is appropriate where the Board determines that the facts of a particular case warrant it, the Board shall not deviate from the *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013* when a licensee is determined to be a substance abuser.

**Adopt Section 1018.01 of Article 4.5 of Chapter 1 of Division 10 of Title 16 of the California Code of Regulations (Uniform Standards for Substance-Abusing Licensees):**

This proposal would adopt Section 1018.01 relative to uniform standards for substance-abusing licensees. The following subsections within 1018.01 are proposed:

Subsection 1018.01(a): This proposal would adopt subsection 1018.01(a). This subsection would adopt the document entitled *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013*, which has been incorporated by reference. This subsection would require the terms and conditions contained in the document entitled *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013*, be used in any probationary order of the Board that affects a licensee determined to be a substance abuser after notice and hearing conducted in accordance with Chapter 5, Part 1, Division 3, Title 2 of the Government Code (commencing with Sections 11500 et seq.).

Subsection 1018.01(b): This proposal would adopt subsection 1018.01(b). This subsection would specify that the proposed provisions contained in Section 1018.01 would not prohibit the Board from imposing additional terms or conditions of probation that are specific to a particular case or that are derived from the Board's Disciplinary Guidelines that would provide greater public protection.

**Adopt the *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013*, that is incorporated by reference in Section 1018.01 of Article 4.5 of Chapter 1 of Division 10 of Title 16 of the California Code of Regulations:**

This proposal would adopt the document entitled *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013*, which has been incorporated by reference in Section 1018.01(a). The proposed adoption of the document includes the following:

Standard Language to be Included in Every Probationary Order for Substance-Abusing Licensees:

This proposed document includes standard language that must be included in every probationary order for substance-abusing licensees. This standard language includes information regarding Code Section 315 and the SACC. The language specifies that Administrative Law Judges, parties and staff are required to use the standard language which has been developed in accordance with the standards developed by the SACC. The language specifies that the probationary terms and conditions within the incorporated document are to be used in every case where the individual is determined to be a substance-abusing licensee. Any reference to the Board also means staff working for the Board or its designee. The document also specifies that the Board’s Disciplinary Guidelines should still be used in formulating the penalty and in considering additional terms or conditions of probation appropriate for greater public protection. The conditions contained within this document are required to be used in lieu of any similar standard or optional term or condition within the Board’s Disciplinary Guidelines. The following table provides a side-by-side comparison of those probationary conditions contained within the document entitled *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013* that will be used in lieu of the terms and conditions contained within the Board’s Disciplinary Guidelines:

<b><i>Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013</i></b>	<b><i>Dental Board of California Disciplinary Guidelines with Model Language, Revised 08/30/10</i></b>
(1) Notification to Employer	(14) Notification
(2) Supervised Practice	(18) Supervised Practice
(3) Drug and Alcohol Testing	(27) Biological Testing
(4) Abstain from Use of Alcohol, Controlled Substances, and Dangerous Drugs	(28) Abstain from Alcohol, Controlled Substances, and Dangerous Drugs
(5) Facilitated Group Support Meetings	(26) Diversion Program
(6) Clinical Diagnostic Evaluation	(26) Diversion Program
(7) Drug or Alcohol Abuse Treatment Program	(26) Diversion Program

Additional Probationary Terms and Conditions:

The Board proposes the following terms and conditions be included in every probationary order for individuals determined to be substance abusers in addition to the terms and conditions imposed as part of the Board’s Disciplinary Guidelines:

### 1. Notification to Employer:

The Board proposes the adoption of an additional probation condition regarding notification to the employer for all individuals determined to be substance-abusers. This probationary condition would be used in lieu of condition number fourteen (14) Notification in the Board's Disciplinary Guidelines. This proposed probationary condition specifies that:

- Substance-abusing licensees on probation (probationer) are required to provide a copy of the Decision or Accusation to their employer, supervisor, contractor, or prospective employer or contractor and at any other facility where the licensee engages in the practice of dentistry before accepting or continuing employment and that the licensee is required to submit proof of compliance within fifteen (15) calendar days;
- The condition applies to any change(s) in place of employment;
- The probationer would be required to provide the Board with the names, physical addresses, mailing addresses, and telephone numbers of all employers and supervisors, or contractors;
- The probationer would be required to inform the Board in writing of the facility or facilities at which the person engages in the practice of dentistry; and
- The probationer would be required to give specific, written consent to the Board and its contractor to authorize the Board to communicate with the employer and supervisor, or contractor regarding the licensee's work status, performance, and monitoring.

This probation condition is derived from Uniform Standard #3 of the SACC's document entitled *Uniform Standards Regarding Substance-Abusing Healing Arts Licensees, revised April 2011*. This condition provides the Board with a mechanism for ensuring that the employer providing dental services is informed of the license status of the probationer so that, if necessary, the work environment can be structured to ensure consumer safety.

### 2. Supervised Practice:

The Board proposes the adoption of an additional probation condition regarding supervised practice for all individuals determined to be substance-abusers. This probationary condition would be used in lieu of condition number eighteen (18) Supervised Practice in the Board's Disciplinary Guidelines. This proposed probationary condition:

- Requires the probationer to submit to the Board, for prior approval, the name and qualifications of one or more proposed supervisors and a plan

for each supervisor by which the licensee's practice would be supervised within sixty (60) days of the effective date of a probationary order;

- Specifies that the Board will advise the probationer within two (2) weeks if the proposed supervisor and plan of supervision are approved;
- Specifies that the probationer is not authorized to practice until the Board provides the licensee notification of approval of the supervisor and plan of supervision;
- Specifies that the probationer is required to complete required consent forms and sign an agreement with the supervisor and the Board regarding the probationer's and the supervisor's requirements and reporting responsibilities;
- Provides that the plan of supervision shall be one of the following:
  - Direct and require the physical presence of the supervising dentist in the dental office during the time dental procedures are performed; or
  - General and not require the physical presence of the supervising dentist during the time dental procedures are performed but does require an occasional random check of the work performed on the patient as well as quarterly monitoring visits at the office or place of practice;
- Specifies that the supervisor shall have full and random access to all patient records of the probationer;
- Specifies that the supervisor may evaluate all aspects of the probationer's practice regardless of the probationer's areas of deficiencies;
- Specifies that each proposed supervisor must be a California licensed dentist who will submit written reports to the Board on a quarterly basis verifying that supervision has taken place and include an evaluation of the probationer's performance, and specifies that it is the probationer's responsibility to ensure timely submission of such reports;
- Requires each supervisor to have been licensed in California for at least five (5) years and not have ever been subject to any disciplinary action by the Board (administrative citations and fine do not constitute discipline and would not be a reason to deny an individual as a supervisor);
- Requires the supervisor to be independent, with no prior business or professional relationship with the probationer and specifies that the supervisor cannot be in a familial relationship with or be an employee, partner or associate of the probationer;

- Specifies that if the supervisor terminates or is no longer available, the probationer is not authorized to practice until a new supervisor has been approved by the Board;
- Requires all costs of supervision to be paid by the probationer;
- Requires the supervisor to sign an affirmation that he or she has reviewed the terms and conditions of the probationer's probationary order and agrees to supervise the probationer as set forth by the Board;
- Requires the supervisor to have face-to-face contact with the probationer in the work environment on a frequent basis as determined by the Board, but at least once per week;
- Requires the supervisor to interview other staff in the office regarding the probationer's behavior, if applicable;
- Requires the supervisor to review the probationer's work attendance and behavior;
- Requires the supervisor to orally report any suspected substance abuse to the Board and the probationer's employer within one (1) business day of occurrence;
- Specifies that if the occurrence is not during the Board's normal business hours the oral report must be within one (1) hour of the next business day;
- Requires the supervisor to submit a written report to the Board within forty-eight (48) hours of occurrence of any suspected substance abuse;
- Requires the supervisor to complete and submit a written report monthly or as directed by the Board; and
- Requires the report to include the following information:
  - Probationer's name;
  - License number;
  - Supervisor's name and signature;
  - Supervisor's license number;
  - Worksite location(s);
  - Dates probationer had face-to-face contact with supervisor;
  - Worksite staff interviewed, if applicable;
  - Attendance report;
  - Any change in behavior and/or personal habits; and
  - Any indicators that can lead to suspected substance abuse.



This probation condition is derived from Uniform Standard #7 of the SACC's document entitled *Uniform Standards Regarding Substance-Abusing Healing Arts Licensees, revised April 2011*. Currently, the Board utilizes a probationary condition as part of its Disciplinary Guidelines for supervised practice in cases involving incompetence, negligence, and sexual misconduct. The Board proposes use of this probationary condition if the individual is placed on probation because they are determined to be a substance abuser. The supervisor's role is to supervise a probationer who is chemically impaired and to ensure that the probationer is not abusing drugs and/or alcohol. The supervisor is also responsible for reporting to the Board whether patient safety may be at risk and any change in the probationer's behavior that may be cause for suspected substance abuse. The supervisor should not have any financial or personal relationship with the probationer. This will ensure that the supervisor is providing impartial evaluations. Frequent face-to-face contact with the probationer is important in order to assess the probationer's appearance, eye contact, and behavior. The supervisor needs to interview the staff in the office on the probationer's behavior and review the attendance records in order to adequately report to the Board the probationer's overall performance. The reporting criteria would identify a timeline for reporting to the Board of possible substance abuse by the probationer, what information must be included in the supervisor report, and the timeline the report is to be submitted to the Board. Also, included in the standard is language to require the probationer and supervisor to sign and submit the required consent forms and affirmations in order for the Board to communicate with the supervisor.

This condition would allow the Board to monitor the competency of the probationer by use of a fellow practitioner. The type of supervision needs to be clearly defined relative to the necessity for the presence of the supervisor. Direct supervision would require the physical presence of the supervisor during the time dental procedures are performed. General supervision does not require the physical presence of the supervising dentist. The type of required supervision depends on the severity of the violation(s), and the nature, duration, and severity of substance abuse. Implementing this standard would provide (1) ongoing documentation of the probationer's behavior and help ensure the public's safety and (2) immediate notification to the Board if a probationer is suspected of working under the influence of drugs and/or alcohol.

### 3. Drug and Alcohol Testing:

The Board proposes the adoption of an additional probation condition regarding drug and alcohol testing for all individuals determined to be substance-abusers. This probationary condition would be used in lieu of condition number twenty-seven (27) Biological Testing in the Board's Disciplinary Guidelines. This proposed probationary condition:

- Requires the probationer to submit to and pay for any random and directed biological fluid or hair sample, breath alcohol or any other mode of testing required by the Board;
- Specifies that although the frequency of testing will be determined by the Board, and shall be designed to prevent the licensee from anticipating testing dates (either randomized testing or unpredictable dates), the frequency of testing is required to be at least the following: at least fifty-two (52) test dates during the first year of probation; at least thirty-six (36) test dates during the second, third, fourth, and fifth years of probation; and at least one (1) test per month in each year of probation after the fifth so long as there have been no positive test results during the previous five (5) years;
- Specifies that Board may require less frequent testing if any of the following applies:
  - If the probationer has previously participated in a treatment or monitoring program requiring testing, the Board may consider that prior testing record in applying the three-tier testing frequency schedule specified;
  - If the basis for probation or discipline is a single incident or conviction involving alcohol or drugs, or two incidents or convictions involving alcohol or drugs that were at least seven (7) years apart, that did not occur at work or on the way to or from work, the Board may skip the first-year testing frequency requirement(s);
- If the probationer is not employed in any health care field, frequency of testing may be reduced to a minimum of twelve (12) tests per year and if the probationer wishes to return to employment in a health care field, the probationer will be required to test at least once a week for a period of sixty (60) days before commencing employment, and will be required to test at least once a week for a full year after commencing employment, before [he/she] may be reduced to a testing frequency of at least thirty-six (36) tests per year, etc.;
- The probationer's testing requirement may be suspended during any period of tolling of the period of probation;
- If the probationer has a demonstrated period of sobriety and/or non-use, the Board may reduce the testing frequency to no less than twenty-four (24) tests per year;
- Specifies that any detection through testing of alcohol, or of a controlled substance or dangerous drug absent documentation that the detected

substance was taken pursuant to a legitimate prescription and a necessary treatment, may cause the Board to increase the frequency of testing, in addition to any other action including but not limited to further disciplinary action;

- Requires the probationer to have the test performed by a Board-approved laboratory certified and accredited by the U.S. Department of Health and Human Services on the same day that he or she is notified that a test is required to ensure that the test results are sent immediately to the Board;
- Specifies that failure to comply within the time specified shall be considered an admission of a positive drug screen and constitutes a violation of probation;
- Specifies that if a test results in a determination that the urine admission was too diluted for testing, the result shall be considered an admission of a positive urine screen and constitutes a violation of probation;
- Specifies that if an “out of range result” is obtained, the Board may require the probationer to immediately undergo a physical examination and to complete laboratory or diagnostic testing to determine if any underlying physical condition has contributed to the diluted result and requires the probationer to cease practice;
- Specifies that any such examination or laboratory and testing costs shall be paid by the probationer;
- Specifies that an “out of range result” is one in which, based on scientific principles, indicates the probationer attempted to alter the test results in order to either render the test invalid or obtain a negative result when a positive result should have been the outcome;
- Specifies that if it is determined that the probationer altered the test results, the result shall be considered an admission of a positive urine screen and constitutes a violation of probation and the probationer must cease practicing and the probationer shall not resume practice until notified by the Board;
- Specifies that if the probationer tests positive for a banned substance, the probationer will be ordered by the Board to cease any practice, and may not practice unless and until notified by the Board; and
- Requires all alternative drug testing sites due to vacation or travel outside of California must be approved by the Board prior to the vacation or travel.

This probation condition is derived from Uniform Standards #4 and 8-10 of the SACC's document entitled *Uniform Standards Regarding Substance-Abusing Healing Arts Licensees, revised April 2011* and Section 315.2 of the Business and Professions Code. This probation condition will allow the Board to monitor the probationer in order to ascertain if he/she is substance and/or chemical free. The minimum number of tests provided will help to identify relapse and allow for probationers to be randomly tested. Requiring a probationer to submit a specimen on the same day as directed will eliminate the ability of a probationer to "flush" their system overnight. Further, the established certification of the laboratory will include creatine and pH levels, which can be a sign of a probationer "flushing" their system. Further, the standard is broad enough to allow the Board to determine on a case-by-case basis if a probationer should be required to submit a specimen more quickly, e.g., before 10:00 a.m. or within six (6) hours of notice.

#### 4. Abstain from Use of Alcohol, Controlled Substances, and Dangerous Drugs:

The Board proposes the adoption of an additional probation condition regarding abstention from the use of alcohol, controlled substances, and dangerous drugs for all individuals determined to be substance-abusers. This probationary condition would be used in lieu of condition number twenty-eight (28) Abstain from Alcohol, Controlled Substances, and Dangerous Drugs in the Board's Disciplinary Guidelines. This proposed probationary condition:

- Requires the probationer to completely abstain from the possession, injection, or consumption of any route, including inhalation, of all psychotropic (mood altering) drugs, including alcohol, and including controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drug as defined by Business and Professions Code Section 4022, and any drugs requiring a prescription;
- Specifies that this prohibition does not apply to medications lawfully prescribed by a physician and surgeon, dentist, or nurse practitioner for a bona fide illness or condition, and that the probationer is required to provide written notice to the Board within fifteen (15) calendar days of receiving any lawful prescription medications along with the following information: prescriber's name, address, and telephone number; medication name and strength, issuing pharmacy name, address, and telephone number, and specific medical purpose for medication;
- Requires the probationer to provide a current list of prescribed medication with the prescriber's name, address, and telephone number on each quarterly report submitted;
- Requires the probationer to provide the Board with a signed and dated medical release covering the entire probation period;

- Requires the probationer to identify for the Board's approval a single coordinating physician and surgeon who is aware of the probationer's history of substance abuse and who will coordinate and monitor any prescriptions for the probationer for dangerous drugs, controlled substances, and psychotropic or mood altering drugs;
- Specifies that once a Board-approved physician and surgeon has been identified, the probationer is required to provide a copy of the accusation and decision to the physician and surgeon;
- Requires the coordinating physician and surgeon to report to the Board on a quarterly basis the probationer's compliance with this condition;
- Specifies that if any substances considered addictive have been prescribed, the report is required to identify a program for the time limited use of such substances;
- Specifies that the Board may require that only a physician and surgeon who is a specialist in addictive medicine be approved as the coordinating physician and surgeon;
- Provides that if the probationer has a positive drug screen for any substance not legally authorized, the probationer will be ordered by the Board to cease any practice and may not practice unless and until notified by the Board; and
- Provides that if the Board files a petition to revoke probation or an accusation based upon the positive drug screen, the probationer will be automatically suspended from practice pending the final decision on the petition to revoke probation or accusation and this period of suspension will not apply to the reduction of this probationary period.

This probation condition is derived from Uniform Standard #8 of the SACC's document entitled *Uniform Standards Regarding Substance-Abusing Healing Arts Licensees, revised April 2011* and Section 315.2 of the Code. Abstinence from mood altering substances (alcohol/drugs) is necessary for compliance with the Board's Probation Program and to ensure protection of the public. Abstinence from any psychotropic drug is required to prevent the substitution of one addicting substance with another.

#### 5. Facilitated Group Support Meetings:

The Board proposes the adoption of an additional probation condition regarding facilitated group support meetings for all individuals determined to be substance-abusers. This probationary condition would be used in lieu of condition number

twenty-six (26) Diversion Program in the Board's Disciplinary Guidelines. This proposed probationary condition:

- Requires the probationer to submit to the Board the name of one or more meeting facilitators within fifteen (15) days from the effective date of the probationary order for the Board's prior approval;
- Requires the probationer to participate in facilitated group support meetings within fifteen (15) days after notification of the Board's approval of the meeting facilitator;
- Requires the Board to give consideration to the following when determining the type and frequency of required facilitated group support meeting attendance: (1) the probationer's history, (2) the documented length of sobriety/time that has elapsed since substance abuse, (3) the recommendation of the clinical evaluator, (4) the scope and pattern of use, (5) the probationer's treatment history, and (5) the nature, duration, and severity of substance abuse;
- Requires the probationer to submit verified documentation of attendance with each quarterly report required by the probation order;
- Requires the probationer to continue attendance in facilitated group support meetings for the duration of probation unless notified by the Board that attendance is no longer required;
- Requires all costs associated with facilitated group support meetings to be paid by the probationer; and
- Requires the support group facilitator to meet the following qualifications and requirements:
  - A minimum of three (3) years experience in the treatment and rehabilitation of substance abuse,
  - Licensed or certified by the state or other nationally certified organizations;
  - No financial relationship, personal relationship, or business relationship with the probationer in the last five (5) years.
  - Provide to the Board a signed document showing the probationer's name, the group name, the date and location of the meeting, the probationer's attendance, and the probationer's level of participation and progress.
  - Report any unexcused absence to the Board within twenty-four (24) hours.

This probation condition is derived from Uniform Standard #5 of the SACC's document entitled *Uniform Standards Regarding Substance-Abusing Healing*

*Arts Licensees, revised April 2011.* By specifying the requirements for facilitated group support meetings for the treatment of substance abuse, the probation condition ensures that probationers who have undergone treatment and have made steps towards recovery can safely return to practice.

#### 6. Clinical Diagnostic Evaluation:

The Board proposes the adoption of an additional probation condition regarding clinical diagnostic evaluation for all individuals determined to be substance-abusers. This probationary condition would be used in lieu of condition number twenty-six (26) Diversion Program in the Board's Disciplinary Guidelines. This proposed probationary condition:

- Requires the probationer to undergo a clinical diagnostic evaluation upon the order of the Board;
- Requires the Board to select or approve evaluator(s) holding a valid, unrestricted license to practice, with a scope of practice that includes the conduct of clinical diagnostic evaluations and at least three (3) years' experience conducting such evaluations of health professionals with alcohol or substance abuse problems;
- Requires the evaluator(s) not have a financial relationship, personal relationship, or business relationship with probationer within the last five (5) years;
- Requires the evaluator(s) to provide an objective/ unbiased, and independent evaluation of the probationer;
- Requires the probationer to provide the evaluator with a copy of the Board's probationary order prior to the clinical diagnostic evaluation being performed;
- Requires the probationer to cease practice for a minimum of 30 days, if the probationer is ordered to undergo a clinical diagnostic evaluation, pending the results of the clinical diagnostic evaluation and review by the Board, during which time the probationer will be required to submit to random drug testing at least two (2) times per week;
- Requires the probationer to cause the evaluator to submit a written clinical diagnostic evaluation report to the Board within 10 days from the date the evaluation was completed, unless an extension, not to exceed 30 days, is granted to the evaluator by the Board;
- Requires the cost of the clinical diagnostic evaluation to be paid by the probationer;

- Requires the evaluation(s) to be conducted in accordance with acceptable professional standards for alcohol or substance abuse clinical diagnostic evaluations;
- Requires the written report submitted by the evaluator to include, at least, the opinions of the evaluator as to: whether respondent has an alcohol or substance abuse problem; whether respondent is a threat to him/herself or others; and recommendations for alcohol or substance abuse treatment, practice restrictions, or other steps related to respondent's rehabilitation and safe practice;
- If the evaluator determines during the evaluation process that probationer is a threat to him/herself or others, the evaluator is required to notify the board within twenty-four (24) hours;
- Requires the probationer to cease practice until the Board determines that he or she is able to safely practice either full-time or part-time and has had at least 30 days of negative drug test results; and
- Requires the probationer to comply with any restrictions or recommendations made as a result of the clinical diagnostic evaluation.

This probation condition is derived from Uniform Standards # 1 and 2 of the SACC's document entitled *Uniform Standards Regarding Substance-Abusing Healing Arts Licensees, revised April 2011*, and Business and Professions Code Section 315.4. This condition would increase consumer protection by:

- Specifying requirements for a clinical diagnostic evaluation of the probationer, required qualifications for the providers evaluating the probationer, and timeframes for completion of the clinical diagnostic evaluation.
- Ensuring that the Board is notified quickly if the probationer is a threat to himself/herself or the public while allowing for due process.
- Setting forth minimum standards for clinical diagnostic evaluations and ensures evaluations are conducted in accordance with applicable best practices, while allowing the evaluator the discretion to determine and use the most appropriate tool in assessing the probationer.
- Providing the Board with a professional opinion as to whether the probationer has a substance abuse problem, and whether the probationer is a threat to himself/ herself or others.
- Prohibiting personal, financial and business relationships between the evaluator and probationer, thereby ensuring objectivity in assessments.



By specifying that the Board be provided with expert recommendations for treatment and practice restrictions, the standard also ensures that probationers who have undergone treatment and have made steps towards recovery can safely return to practice.

Because of the complexity of an addictive disease, professional substance abuse evaluations are needed to assist the Board in making informed decisions regarding a probationer. An evaluation by a professional, experienced in substance abuse and approved by the Board, can provide valuable information to assist the Board in evaluating a case. The Board needs the opinion of professional evaluators to help it determine the possible basis for the identified behavior. Many individuals who have substance abuse issues also have other mental health problems/diagnoses. The evaluator can present recommendations for a therapeutic plan. Any disciplinary action should be based on the behavior and the resulting harm or risk of harm. Treatment recommendations may be incorporated into a contract or Board order as elements for monitoring or criteria toward re-entry requirements.

The Board has current statutory authority over licensees and a mandate to protect the public; however, the Board's ability to remove licensees immediately from the work place is limited. There are requirements of due process, which require clear and convincing evidence in some cases, the preponderance of evidence, or proof of immediate, imminent danger to the public in others. These requirements are necessary in order for the Board to legitimately, prevent someone from practicing in the livelihood for which they are licensed. In some cases an Interim Suspension Order (ISO or Penal Code 23 (PC 23) is required. The ISO has a tendency to be expensive, labor intensive, and require time to process. These are part of a disciplinary process and are usually temporary until an accusation is filed and a decision rendered. The PC 23 is the result of criminal action taking place and allows for suspension of the license based on criminal filings. In each case, the cause for the suspension must be proven or found, and there must be sufficient evidence to warrant the action. However, after a notice and hearing and a probationary order is issued, the Board lacks the current authority to remove a substance abusing licensee immediately upon a finding of a substance abuse problem.

This proposal is necessary to permit the Board to quickly intervene when a licensee is presented as having a substance abuse issue without resorting to an ISO or PC 23 orders.

#### 7. Drug or Alcohol Abuse Treatment Program:

The Board proposes the adoption of an additional probation condition regarding drug or alcohol treatment programs for all individuals determined to be substance-abusers. This probationary condition would be used in lieu of

condition number twenty-six (26) Diversion Program in the Board's Disciplinary Guidelines. This proposed probationary condition:

- Requires the probationer to successfully complete an fully complete an inpatient, outpatient or any other type of recovery and relapse prevention treatment program as directed by the Board;
- Requires the Board to consider the recommendation of the clinical diagnostic evaluation , license type, probationer's history, length of sobriety, scope and pattern of substance abuse, treatment history, medical history, current medical condition, nature, duration and severity of substance abuse and whether the probationer is a threat to himself or herself or others when determining if the probationer should be required to participate in inpatient, outpatient, or any other type of drug or alcohol treatment; and
- Requires all costs associated with completion of a drug or alcohol abuse treatment program to be paid by the probationer.

This probation condition is derived from Uniform Standard #6 of the SACC's document entitled *Uniform Standards Regarding Substance-Abusing Healing Arts Licensees*, revised April 2011.

**FACTUAL BASIS/RATIONALE:**

Existing law, Code Section 315, established the SACC within the Department and required the SACC to formulate uniform and specific standards in sixteen specified areas for each healing arts board to use in dealing with substance-abusing individuals, whether or not a board chooses to have a formal diversion program.

Existing law, Code Section 315.2, specifies that a healing arts board within the Department is required to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program. The cease practice order pursuant to this section does not constitute disciplinary action and is not subject to adjudicative hearings.

Existing law, Code Section 315.4, authorizes healing arts boards within the Department to order a licensee on probation or in a diversion program to cease practice for major violations and when the board orders a licensee to undergo a clinical diagnostic evaluation pursuant to the uniform and specific standards adopted and authorized under Section 315.

The cease practice order pursuant to this section does not constitute disciplinary action and is not subject to adjudicative hearings.

Existing law, Code Section 1614, authorizes the Board to adopt, amend, or repeal, such rules and regulations as may be reasonably necessary to enable the Board to carry into effect the provisions of the Dental Practice Act.

Existing law, Government Code Section 11400.20, authorizes an agency to adopt regulations to govern an adjudicative proceeding.

Existing law, Government Code Section 11425.50(e), specifies that a penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule unless it has been adopted as a regulation.

As proposed, the California Code of Regulations Section 1018.01 incorporates by reference the “Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013”.

The Board regulates the practice of dentistry and the protection of the public is the highest priority for the Board in exercising its licensing, regulatory, and disciplinary functions. The Board conducts its own inspections and investigations of licensees and applicants and determines when and how a licensee should be disciplined to protect the public. The Uniform Standards are necessary to assist the board, deputy attorney generals and administrative law judges to identify and impose appropriate disciplinary action against a licensee or applicant who violates the laws governing the practice of dentistry and is determined to be a substance abuser.

The “Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013” is referenced in these amendments. It would be cumbersome, unduly expensive and otherwise impractical to publish the documents in the California Code of Regulations. It is available on the Board’s website and from the Board upon request.

**UNDERLYING DATA:**

- (1) Senate Bill 1441 (Chapter 548, Statutes of 2008), authored by Senator Ridley-Thomas
- (2) The Substance Abuse Coordination Committee’s “Uniform Standards Regarding Substance-Abusing Healing Arts Licensees, April 2011”
- (3) Board Legal Counsel’s interpretation relating to the Board’s discretion in using the Uniform Standards, as provided at the August 2011 Dental Board meeting.
- (4) A memo, dated April 5, 2012, from Doreathea Johnson, Deputy Director of Legal Affairs, addressed to the healing arts boards with respect to the Department of Consumer Affairs opinion regarding uniform standards for substance-abusing licensees (SB 1441).
- (5) A letter, dated October 27, 2011, from the Legislative Counsel Bureau addressed to the Honorable Curren D. Price, Jr. with respect to the healing arts boards adoption of uniform standards.
- (6) A memorandum from Kathleen A. Lynch, Deputy Attorney General from the Government Law Section of the Attorney General’s Office, addressed to the Department of Consumer Affairs Legal Affairs Division regarding uniform standards related to substance-abusing licensees as provided in Business and Professions Code §§ 315-315.4.

- (7) Meeting Minutes of the Dental Board of California, May 18, 2012
- (8) Meeting Minutes of the Dental Board of California, February 28, 2013
- (9) Dental Board of California Disciplinary Guidelines with Model Language, Revised 08/30/2010
- (10) "Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013"

**BUSINESS IMPACT:**

The Board has made an initial determination that the proposed regulation may have a significant, statewide adverse economic impact directly affecting business, including the inability of California businesses to compete with businesses in other States.

The following types of businesses would be affected:

- Businesses owned by licensees of the Board who face disciplinary action due to substance abuse.
- Businesses that employ licensees of the Board who face disciplinary action due to substance abuse.

The Board currently regulates approximately 73,300 licensees; consisting of 38,000 DDS's, 34,000 RDA's, and 1,300 RDAEF's. The average salary of a DDS in California is approximately \$150,000 per year and the average salary of a RDA in California is approximately \$35,000 per year.

A license that has been revoked, suspended, reprimanded, or placed on probation may cause a significant fiscal impact on the business where the licensee worked depending on the nature and severity of the violation. A business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board does not maintain data relating to the number or percentage of licensees who own a business; therefore the number or percentage of businesses that may be impacted cannot be predicted. The Board only has authority to take administrative action against a licensee and not a business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is the subject of disciplinary action cannot be projected. Businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

According to the recommended penalties contained within the Board's Disciplinary Guidelines, the Board would recommend the following maximum and minimum penalties for violations of the Dental Practice Act relating to substance abuse:

<b>Violation</b>	<b>Maximum Penalty</b>	<b>Minimum Penalty</b>
1681(a) Substance Abuse, Possession or Control, Alcohol Abuse, or Conviction Related to Controlled Substances	Revocation	Revocation Stayed, Five (5) Years Probation

1681(b) Use of Drugs and/or Alcohol Causing Danger to a Patient	Revocation	Revocation Stayed, Seven (7) Years Probation
1681 (c) Conviction of Violating State Drug Statutes	Revocation	Revocation Stayed, Five (5) Years Probation

For the purposes of this analysis, the estimated fiscal and economic impact of the proposed conditions of probation will be based on five (5) and seven (7) year terms of probation.

The terms and conditions contained in the document entitled *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013* will be used in any probationary order of the Board affecting an individual determined to be a substance abuser as provided by the proposed adoption of Section 1018.01. The probationer is responsible for costs associated with the terms and conditions of their probation.

The costs to the probationer associated with Condition (1) Notification to Employer would be minor and absorbable. Probationers may incur nominal costs associated with providing notification to employer of the Decision or Accusation. Additionally, the probationer may incur nominal costs associated with providing the names, physical addresses, mailing addresses, and telephone numbers of all employers and supervisors, or contractors, as well as the facility or facilities where the probationer practices. This regulation does not specifically state the manner of how a probationer is to provide the specified information. Probationers may choose from a variety of methods to notify the Board, including email, or mailing a letter. A probationer may incur nominal costs associated with mailing their letter to the Board.

The costs to the probationer associated with Condition (4) Abstain from Use of Alcohol, Controlled Substances and Dangerous Drugs would be minor and absorbable. There is no cost associated with abstaining from the use of alcohol, drugs, controlled substances, and dangerous drugs. Probationers may incur nominal costs associated with providing the Board with specified information regarding lawful prescription medications lawfully prescribed by a physician and surgeon, dentists, or nurse practitioner for a bona fide illness or condition. This regulation does not specifically state the manner of how a probationer is to provide the specified information. Probationers may choose from a variety of methods to notify the Board, including email, or mailing a letter. A probationer may incur nominal costs associated with mailing their letter to the Board.

The probationer will incur significant fiscal impact associated with paying for costs associated with the following conditions of probation:

- Probation Condition (2) Supervised Practice;
- Probation Condition (3) Drug and Alcohol Testing;

- Probation Condition (5) Facilitated Group Support Meetings;
- Probation Condition (6) Clinical Diagnostic Evaluation; and
- Probation Condition (7) Drug or Alcohol Abuse Treatment Program.

Probation Condition (2) Supervised Practice specifies that all costs of supervision shall be paid by the probationer. The fee a supervisor may charge a probationer can vary. The Board estimates a supervisor may charge a probationer a fee of \$0 to \$200 per month for services. For the purposes of this analysis, the Board estimates a probationer will incur a cost of \$100 per month for supervised practice. This cost would translate to \$1,200 annually or \$6,000 over the course of a 5-year probation term, and \$8,400 over the course of a 7-year probation term.

Probation Condition (3) Drug and Alcohol Testing specifies that all costs of the testing shall be paid by the probationer. The rate associated with the drug test and collection fee varies based on the rate charged by the collection company. The Board would contract with a specific drug testing collection agency. The probationer would be required to submit to testing through the Board-contracted agency. The Board estimates that the probationer would be charged an estimated fee of \$100 per drug test. This would include the average fee for urine analysis (\$50) and average collection fee (\$50). The proposed regulation specifies that the probationer would be tested at least fifty-two (52) times during the first year of probation; at least thirty-six (36) times during the second through fifth years of probation; and at least once (1) per month after the fifth year as long as there have not been any positive results during the previous five (5) years. The Board estimates the probationer would incur a cost of \$433.33 per month for the first year of probation, \$300 per month for years two through five, and \$100 per month for years six through seven. This would equate to an approximate cost of \$5,200 for the first year, \$3,600 per year for the second through fifth year, and \$1,200 per year for the six through seventh year. The probationer would pay approximately \$19,600 to comply with this condition over the course of a 5-year probation term and approximately \$22,000 to comply with this condition over the course of a 7-year probation term.

Probation Condition (5) Facilitated Group Support Meetings specifies that all costs associated with facilitated group support meetings shall be paid by the probationer. The rate associated with support meetings varies based on the support group facilitator and frequency. The charge to attend meetings may vary from \$50 to \$160 per week. For the purposes of this analysis, the Board estimates the probationer will incur a cost of \$100 per week to attend facilitated group support meetings twice a week. This cost would translate to approximately \$433.33 per month or \$5,200 annually. A probationer would pay approximately \$26,000 over the course of a 5-year probation term, and \$36,400 over the course of a 7-year probation term.

Probation Condition (6) Clinical Diagnostic Evaluation specifies that all costs associated with such evaluation shall be paid by the probationer. The costs associated with clinical diagnostic evaluation may vary from \$3,000 to \$10,000 based upon the provider and how extensive the evaluation. There can be a significant difference in cost between a 3-day evaluation and a 10-day evaluation. For the purposes of this analysis, the Board

estimates the probationer will incur a cost of \$5,000 per evaluation. Additionally, when a probationer is ordered to undergo a clinical diagnostic evaluation, the probationer is also required to cease practice for a minimum of thirty (30) days. Probationers will incur lost wages as a result of a cease practice order. The Board estimates a DDS probationer will lose approximately \$12,500 in wages (\$150,000/12 months) for every 30-day cease practice order. The Board estimates a RDA probationer will lose approximately \$2,917 in wages (\$35,000/12 months) for every 30-day cease practice order.

Probation Condition (7) Drug or Alcohol Abuse Treatment Program specifies that all costs associated with the completion of such program shall be paid by the probationer. The costs associated with completing a drug or alcohol abuse treatment program may vary from \$10,000 to \$35,000 depending on the treatment program, facility, insurance, and length of program. However, county facilities and The Salvation Army offer treatment programs on a sliding scale or at no cost. For the purposes of this analysis, the Board estimates the probationer will incur a cost of \$20,000 per treatment.

The following table (Table: Estimated Costs of Each Condition of Probation Incurred by Probationer) delineates the estimated monthly and annual cost of each condition of probation as well as the average cost over the course of a 5-year probation term and a 7-year probation term:

**Table: Estimated Costs of Each Condition Of Probation Incurred By Probationer**

<b>Condition of Probation</b>	<b>Avg. Monthly Cost</b>	<b>Avg. Annual Cost</b>	<b>Avg. Cost for 5 Yrs Probation</b>	<b>Avg. Cost for 7 Yrs Probation</b>
(1) Notification to Employer	\$0	\$0	\$0	\$0
(2) Supervised Practice	Varies Est. \$100	Varies Est. \$1,200	Varies Est. \$6,000	Varies Est. \$8,400
(3) Drug & Alcohol Testing	Est. \$100 per test Year 1: \$433.33 Year 2-5: \$300 Year 6-7: \$100	Year 1: \$5,200 Year 2-5: \$3,600 Year 6-7: \$1,200	\$19,600	\$22,000
(4) Abstain from Use of Alcohol, Controlled Substances, and Dangerous Drugs	\$0.00	\$0.00	\$0.00	\$0.00
(5) Facilitated Group Support Meetings	Varies Est. \$100 per week Est. \$433.33 per month	\$5,200	\$26,000	\$36,400
(6) Clinical Diagnostic Evaluation	Varies Depending on Level of Evaluation Est. \$5,000 per Evaluation			
(7) Drug or Alcohol Abuse Treatment Program	Varies Depending on Treatment Program, Facility, Insurance, and Length of Treatment Est. \$20,000 per Treatment *County Facilities and Salvation Army typically have a sliding scale or offer treatment at no cost.			
<b>Total Est. Cost of Probation Conditions</b>	<b>Year 1: \$967 Year 2-5: \$833 Year 6-7: \$633</b>	<b>Year 1*: \$36,600 Year 2-5: \$10,000 Year 6-7: \$7,600</b>	<b>\$76,600</b>	<b>\$91,800</b>
Cease Practice Order (Wages Lost)	DDS: \$12,500 per 30 days RDA: \$2,917 per 30 days			

\*Assumes One Clinical Diagnostic Evaluation & Treatment Program Completed During Year 1



Assuming that the probationer is only ordered to undergo one (1) clinical diagnostic evaluation and one (1) drug and alcohol abuse treatment program during the first year or probation, the Board estimated a probationer will pay approximately \$36,600 during the first year of probation, \$10,000 each year for the second through fifth year of probation, and \$7,600 each year for the sixth through seventh year of probation to comply with the terms of probation. This would equate to an approximate total cost to the probationer of \$76,600 to comply with a 5-year probation term and \$91,800 to comply with a 7-year probation term. Over the course of a 5-year probation term a DDS earning \$150,000 per year would pay approximately 10% of their total income towards the costs of complying with the proposed conditions of probation; and, a RDA earning \$35,000 per year would pay approximately 44% of their total income towards the costs of complying with the proposed conditions of probation. Over the course of a 7-year probation term a DDS earning \$150,000 per year would pay approximately 9% of their total income towards the costs of complying with the proposed conditions of probation; and, a RDA earning \$35,000 per year would pay approximately 37% of their total income towards the costs of complying with the proposed conditions of probation.

- DDS \$150,000 Earned Annually x 5 Years = \$750,000  
\$76,600 Total Probation Costs / \$750,000 Earned over 5 Years = Approx. 10%
- RDA \$35,000 Earned Annually x 5 Years = \$175,000  
\$76,600 Total Probation Costs / \$175,000 Earned over 5 Years = Approx. 44%
- DDS \$150,000 Earned Annually x 7 Years = \$1,050,000  
\$91,800 Total Probation Costs / \$1,050,000 Earned over 7 Years = Approx. 9%
- RDA \$35,000 Earned Annually x 7 Years = \$245,000  
\$91,800 Total Probation Costs / \$245,000 Earned over 7 Years = Approx. 37%

The Board anticipates that an average of fifteen (15) new probationers will be established each year as a result of being determined to be substance abusers. Of the fifteen (15) individuals determined to be substance abusers, the Board estimates an average of ten (10) will be RDA's and an average of five (5) will be DDS's. The Board estimates that 80% or greater of the RDA probationer population may not be able to comply with the proposed conditions of probation due to costs and time commitment in comparison to their salary. The Board estimates that 10% of the DDS population may not be able to comply with the proposed conditions of probation due to costs and time commitments in comparison to their salary. The Board has experienced this with DDS probationers who live in rural areas with few drug testing facilities within close proximity. This will result in the Board's pursuit of revocation or surrender of license for non-compliance.

Every case for revocation or surrender of license referred to the Attorney General's Office costs the Board an average of \$5,000 (\$3,500 Attorney General's (AG's) Expenses + \$750 Office of Administrative Hearing (OAH) Expenses + \$750 Evidence/Witness Expenses). Beginning in Fiscal Year 2014-2015, the Board estimates

it will incur an estimated ongoing annual cost of \$42,500 for the revocation or surrender of licenses referred to the Attorney General's Office for failure to comply with conditions of probation.

- 15 New Probationers Annually = 10 RDA + 5 DDS
- 10 RDA x 80% Non-Compliance Rate = 8 Probationers in Non-Compliance Annually
- 5 DDS x 10% Non-Compliance Rate = 0.5 Probationer in Non-Compliance Annually
- \$5,000 Avg. Per Case Cost to Board to Pursue Disciplinary Action = \$3,500 AG's Expenses + \$750 OAH Expenses + \$750 Evidence/Witness Expenses
- 8.5 Probationers in Non-Compliance Annually x \$5,000 Per Case = \$42,500 Ongoing Annual Cost to the Board to pursue revocation or surrender of license

#### **ECONOMIC IMPACT ASSESSMENT:**

This regulatory proposal will impact the creation or elimination jobs, the creation of new business or elimination existing businesses, and the expansion of businesses currently doing business within the State of California because a license that has been revoked, suspended, reprimanded, or placed on probation may cause a significant fiscal impact on the business where the licensee worked depending on the nature and severity of the violation. A business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board does not maintain data relating to the number or percentage of licensees who own a business; therefore, the number or percentage of businesses that may be impacted cannot be predicted. The Board only has authority to take administrative action against a licensee and not a business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is the subject of disciplinary action cannot be projected. Businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

The benefit from these proposed regulations will be to provide maximum protection to the California consumers against licensees who are found to be in violation of the law or who do not demonstrate the competency necessary to perform their duties due to substance abuse. These benefits are a direct result of the Board's statutorily mandated priority (Code Section 1601.2). The protection of the public is the highest priority of the Board in exercising licensing, regulatory, and disciplinary functions. The proposed adoption of these additional probation conditions will ensure that individuals who have been determined to be substance abusers will be effectively disciplined in a manner that will protect the public. Additionally, these probation conditions provide the Board with an effective tool to discipline substance abusers who are in violation of the Act.

### **SPECIFIC TECHNOLOGIES OR EQUIPMENT:**

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

### **CONSIDERATION OF ALTERNATIVES:**

No reasonable alternative to the regulation 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 or would be more cost effective to affected private persons and equally effective in implementing the statutory requirement or other provision of law.

The statutory requirement does not allow for any other alternative but to implement the uniform standards developed pursuant to Code Section 315(c). As it relates to the determination whether a licensee is a substance abuser to whom the uniform standards should apply, three options were approved by the Department for the Board's consideration. The Board voted unanimously to accept Option 3 which is currently part of this proposed rulemaking. Options 1 and 2 were rejected for the reasons set forth below:

#### **Option 1 - Rejected:**

The first option provides that if the conduct found to be in violation of the Act involves drugs and/or alcohol, the licensee shall be presumed to be a substance abuser for purposes of Section 315 of the Code. If the licensee does not rebut that presumption, then the terms and conditions contained in the document entitled *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013* are required to be used in any probation order of the Board affecting that licensee.

The application of this option was considered to be overly broad and could adversely impact the Board's enforcement budget. If a licensee committed an isolated violation that involved drugs or alcohol, such as a DUI, that was not substantially related to the practice of dentistry, the Board would presume the licensee to be a substance abuser and would be required to move forward with administrative action. In most cases, the Board would not prevail with meaningful discipline in such cases and would not be able to recover the Attorney General's Office costs associated with the administrative action. Therefore, this option has the potential to adversely impact the Board's enforcement budget.

#### **Option 2 - Rejected:**

The second option provides that a clinical diagnostic evaluation must be conducted first in cases involving drugs and/or alcohol to determine if a licensee is a substance abuser. If the clinical diagnostic evaluator's report determines that the licensee is a substance abuser then the terms and conditions contained in the document entitled *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013* are required to be used in any probation order of the Board affecting that licensee. This option would provide for an expert opinion to verify the licensee has a substance abusing condition. However, a clinical

diagnostic evaluation would require the licensee to cease practice for thirty (30) days. The licensee would not be able to appeal the 30 day cease practice order as it is part of a condition of a clinical diagnostic evaluation.

This option could be burdensome to the licensee for the following reasons:

- The licensee would be responsible for paying the costs for the clinical diagnostic evaluation before being determined to be a substance abuser.
- To ensure due process, it could take multiple clinical diagnostic evaluations in order for the Board to make a determination that a licensee is a substance abuser. In some cases only one clinical diagnostic evaluation may not provide sufficient evidence to determine a licensee as a substance abuser.
- The licensee would have a loss of income due to the 30 day cease practice provision required during each clinical diagnostic evaluation before being determined to be a substance abuser.

#### Option 3 - Accepted:

The third option provides that if after a formal administrative hearing in accordance with Chapter 5, Part 1, Division 3, Title 2 of the Government Code, the Board finds evidence that establishes a licensee as a substance abuser then the terms and conditions contained within the document entitled *Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, New February 28, 2013* are required to be used in any probation order of the Board affecting that individual. This option places the burden of proof upon the Board's Executive Officer to determine which cases to plead as substance-abusing violations. The Executive Officer must provide affirmative evidence that the licensee is a substance abuser in order for the probation terms and conditions to be triggered. This option requires more factual analysis prior to the administrative hearing; however, it is more legally defensible. This option provides the individual with the opportunity to defend him or herself before the individual is determined to be a substance abuser and the terms and conditions are applied.