

DENTAL BOARD OF CALIFORNIA
FINAL STATEMENT OF REASONS

Hearing Date: 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

Updated Information: The Initial Statement of Reasons is included in the file. The information contained therein is accurate and is further updated as follows:

Incorporation by Reference:

The main purpose for this proposal is 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 Dental Board of California (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 the California Code of Regulations (CCR), Title 16, Section 1018.01. This proposal would adopt the uniform standards established by the Substance Abuse Coordination Committee and would 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-abusing licensees to provide better public protection to the people of California.

The incorporation by reference method was used because it would be impractical and cumbersome to publish the "Uniform Standards Related to Substance-Abusing Licensees with Standard Language for Probationary Orders, new February 2013" (herein after referred to as "Uniform Standards") in the California Code of Regulations. The Uniform Standards are intended to assist administrative law judges, attorneys, licensees, and others involved in the disciplinary process. The Uniform Standards were developed to establish consistency and impose the most appropriate penalty in administrative disciplinary actions for similar offenses on a statewide basis. They are extensive and have been printed booklet-style. If the guidelines were incorporated into the CCR, it would increase the size of Division 10 and may cause confusion to the

user. The Uniform Standards were made available to the public and were posted on the Board's website.

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

Small 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 following alternative was proposed to lessen such adverse economic impact on small businesses, and was rejected for the reasons set forth below:

- (1) Do not seek a regulatory change.

Reason for rejection: The Board's highest priority is the protection of the public while exercising its licensing, regulatory, and disciplinary functions. Without this regulatory change, the Board would not be able to take effective disciplinary action against substance-abusing licensees and other licensees who commit other violations to ensure public protection. These proposed changes give the Board the tools to monitor substance-abusing licensees and other licensees that require discipline while protecting the public.

The anticipated benefits from these proposed regulations are:

- 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 (Business and Professions Code section 1601.2).
- Ensure that individuals who have been determined to be substance abusers will be effectively disciplined in a manner that will protect the public.
- Provide the Board with an effective tool to discipline substance abusers who are in violation of the Dental Practice Act.

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 more effective in carrying out the purpose for which it was proposed or 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.

Objections or Recommendations/Responses Received During the 45-Day

Comment Period: The Board received comments from the California Dental Association (CDA) during the 45-day comment period, which are contained in Tab VIII of this rulemaking file, and are summarized below with the responses from the Board.

Comment: CDA commented that they have been a participant in the Board's discussions that have led to the development of these proposed regulations, and that they appreciate the importance of making sure that dangerously impaired health care providers are not allowed to continue practicing and placing their patients' safety at risk. The CDA commented that the Uniform Standards are intended to provide that assurance when providers have been found through the Board's investigation and hearing process to be a substance-abusing provider. The CDA also commented that they support the continued functioning of the Board's Diversion Program, with the belief that an overly punitive approach could have the equally dangerous effect of discouraging providers from self-reporting to diversion before they begin to put patients at risk. The letter from CDA sought clarification regarding the role that the Board's Diversion Program will play in the process if these regulations are adopted as proposed. In particular, the CDA questioned if a licensee would be immediately subject to the Uniform Standards if the licensee self-reports to the Board's Diversion Program, or would the Uniform Standards be activated only in the event of formal disciplinary action.

Response: This comment is accepted. Although the comments from the CDA are not considered adverse, staff has prepared the following recommended response in an effort to provide clarification to questions the CDA have regarding the Board's proposed regulation relating to uniform standards for substance-abusing licensees:

The Board's Uniform Standards Related to Substance-Abusing Licensees would not apply to a licentiate who self-refers to the Board's Diversion Program, unless he or she tests positive for a banned substance, and the Board finds there is evidence that the licentiate is a substance-abusing licensee.

Pursuant to Business and Professions Code section 1695.5, subdivision (b), a licentiate who is not the subject of a current investigation may self-refer to the board's diversion program on a confidential basis, except as provided in subdivision (f). Subdivision (f) provides, in part, that "[i]f a licentiate in a diversion program tests positive for any banned substance, the board's diversion program manager shall immediately notify the board's enforcement program and provide the documentation evidencing the positive test result to the enforcement program. This documentation

may be used in a disciplinary proceeding.” Once the Board is notified of a positive test for a banned substance, the self-referring licentiate would, therefore, lose his or her confidential status, and the Board would be allowed to initiate a disciplinary proceeding. Pursuant to the provisions of the proposed 16 CCR Section 1018.01, the Uniform Standards would apply to such a licentiate only after notice and a hearing has been conducted in accordance with Chapter 5, Part 1, Division 3, Title 2 of the Government Code (commencing with sections 11500 et seq.), and the Board finds that the evidence establishes that the licentiate is a substance-abusing licensee.