

TITLE 16. BOARD OF OPTOMETRY

NOTICE IS HEREBY GIVEN that the Board of Optometry (hereafter "Board") is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments in writing relevant to the action proposed. Written comments, including those sent by mail, facsimile, or e-mail to the addresses listed under Contact Person in this Notice must be received by the Board at its office not later than 5:00 p.m. on December 6, 2011 or must be received by the Board at the hearing.

A hearing in this matter has been scheduled for December 6, 2011 starting at 10:00 a.m., in the Yosemite Room, at 2420 Del Paso Road, Sacramento, California 95834. All interested parties will be heard at that time.

The Board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text with the exception of technical or grammatical changes. The full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as Contact Person and will be mailed to those persons who submit written testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Sections 3025 and 3090 of the Business and Professions Code (BPC), and Sections 11400.20 of the Government Code; and to implement, interpret or make specific Sections 315, 315.2, 315.4, 480, 3090, 3091 and 3110 of said Code, and Sections 11400.20 and 11425.50(e) of the Government Code, the Board is considering changes to Division 15 of Title 16 of the California Code of Regulations (CCR) as follows:

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW:

Amend Title 16, CCR section 1575.

BPC section 3025 authorizes the Board to promulgate rules and regulations governing procedures of the Board and the practice of optometry. BPC section 3010.1 requires that protection of the public is the highest priority for the Board in exercising its licensing, regulatory and disciplinary functions.

Government Code section 11400.20 authorizes an agency, such as this Board, that uses the Administrative Procedure Act (APA) relating to administrative adjudications (Chapter 4 [commencing with section 11370] Part 1 of Title 2 of the Government Code) to adopt regulations to govern an APA adjudicative proceeding.

Under existing law, (Government Code section 11425.50), a penalty proposed by an Administrative Law Judge (ALJ) may not be based on guidelines, manuals, orders, or standards of general application unless it has been adopted as a regulation.

The Optometry Practice Act (BPC 3000 et seq.) provides that proceedings to discipline an optometrist or to deny an applicant for an optometry license are to be conducted in accordance with the APA. The Optometry Practice Act specifies grounds for discipline and sanctions that may be imposed against optometrists that have been determined to have violated the Optometry Practice Act.

Article 3.6 (commencing with section 315) of Chapter 4 of Division 1 of the BPC provided for the establishment of the Substance Abuse Coordination Committee (SACC) in the Department of Consumer Affairs (DCA), whose mandate was to develop uniform and specific standards that a DCA healing arts board must use in dealing with substance-abusing licensees. This section of law also provides for the use of a cease practice order if a licensee tests positive for any substance that is prohibited under the terms of the licensee's probation, if a licensee on probation commits a major violation of his or her probation or when a board orders a licensee to undergo a clinical diagnostic evaluation.

Existing regulations provide that in reaching a decision on a disciplinary action under the APA, the Board shall consider disciplinary guidelines entitled "Disciplinary Guidelines and Model Disciplinary Orders" (DG – 3, 5-99). This regulatory proposal would amend Title 16, CCR section 1575 to reference a revised version of the Board's disciplinary guidelines entitled "Uniform Standards Related to Substance Abuse and Disciplinary Guidelines" (DG – 4, 9-2011), which is hereby incorporated by reference, and require an ALJ to comply with the Uniform Standards Related to Substance Abuse where an applicant or licensee has a substance abuse disorder and consider the disciplinary guidelines for all other disciplinary matters.

The disciplinary guidelines would be revised to update the standard and optional terms of probation in order reflect the current probation environment and increase consumer protection and include the provisions of the Uniform Standards Regarding Substance-Abusing Healing Arts licensees adopted by the DCA's SACC.

FISCAL IMPACT ESTIMATES:

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None

Non-discretionary Cost/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which Government Code Sections 17500-17630 Require Reimbursement: None

Business Impact:

The Board has made an initial determination that the amendment of this regulation may have a significant, statewide adverse economic impact directly affecting business, including the ability 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.
- Businesses that employ licensees of the Board who face disciplinary action.

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 and disciplinary 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, as well as licensees employed by these businesses who are in compliance with the law, will not incur any fiscal impact.

Probationers are responsible for paying all costs during their probation, including, but not limited to the clinical diagnostic evaluations, biological testing, and facilitated group support meetings. The average salary of a practicing optometrist in California is approximately \$82,000 per year.

The Board enforces probation whenever the actions of an optometrist indicate that the licensee may pose an immediate threat to the public. A licensee could be placed on probation at a minimum of 3 years. The chart below shows estimated probationary costs. Probation costs vary depending on the type of violation committed and terms in the probationary order.

	Monthly Cost	Annual Cost	3 year term	5 year term
Monitoring Fee	\$100	\$1,200	\$3,600	\$6,000
CA Law & Reg Exam		\$23 One Time		
Add'l CE Courses		\$50 - \$2000		
Biological Fluid Test Year 1 = 52-104 Year 2 = 36-104	\$607 *	\$7,280 *	\$21,840 *	\$36,400 *
Clinical Diagnostic Evaluation		\$1,000 - \$4,000 per evaluation		
License Revocation/ Wages Lost	\$6,833	\$82,000	\$246,000	\$410,000
Group Support Meeting (if payment req'd)	\$50-\$100	varies	varies	varies
Cost Recovery AG \$3,500 + OAH \$750 + Evidence/Witness \$750 **		\$5,000 per case on average		
Counseling Program		Varies \$100 - \$2,000		
Mental Health Evaluation		Varies \$100 - \$2,000		
Medical Treatment		Varies \$100 - \$5,000		
Billing Audit		Varies \$100 - \$5,000		
National Boards Exam		Varies \$100 - \$500		

* Assuming the maximum testing amount is used.

** Attorney General (AG); Office of Administrative Hearings (OAH)

Average Biological Fluid Test costs involve a urine analysis at \$45 per test, plus the average collection fee of \$25, for a total average cost of \$70 per urine test. If the 52-104 time per year for the first year, and 36-104 per year for the second year of testing requirements results in a probationer's inability to participate in the testing program, the Board will send the case to the Office of the Attorney General to pursue revocation for the probationer's failure to comply with the Biological Testing term and condition. The same applies all conditions that are violated by the probationer.

The Board anticipates up to four new probationers established each year who will be subject to the new Biological Fluid Testing requirements. The Board anticipates that at least half of the probationers will not be able to afford the cost of the testing frequency and/or will not comply with the terms of their probation, which will result in the Board's pursuit of revocation of the probationer's license. The Board estimates it will incur an estimated annual cost of \$10,000 for the prosecution and hearing costs associated with the revocation of two probationers.

The following reporting, recordkeeping or other compliance requirements are projected to result from the proposed action: None

The Board has not considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit such proposals. Submissions may include the following considerations:

- (A) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
- (B) Consolidation or simplification of compliance and reporting requirement for businesses.
- (C) The use of performance standards rather than prescriptive standards.
- (D) Exemption or partial exemption from the regulatory requirements for businesses.

The rulemaking file includes the facts, evidence, documents, testimony, and/or evidence which supports this determination.

AND

The following studies/relevant data were relied upon in making the above determination: None

Impact on Jobs/New Businesses:

The Board has determined that this regulatory proposal would have an impact on the creation of jobs or new businesses, or the elimination of jobs or existing businesses, or the expansion of businesses in the State of California.

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. Licensees who are in compliance with the law will not incur any fiscal impact.

Cost Impact on Representative Private Person or Business:

The cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action and that are known to Board are: 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 and/or disciplinary 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.

Effect on Housing Costs: None

EFFECT ON SMALL BUSINESS:

The Board has determined that the proposed regulation may affect small businesses.

A license that has been revoked, suspended, reprimanded or placed on probation may cause a significant fiscal impact on the small business where the licensee works depending on the nature and severity of the violation. A small 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 small business; therefore the number or percentage of small businesses that may be impacted cannot be predicted. The Board only has authority to take administrative and/or disciplinary action against a licensee and not a small 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. Small businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

CONSIDERATION OF ALTERNATIVES:

The Board must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome to affected private persons than the proposal described in this notice.

Any interested person may present written statements relevant to the above determinations to the Board at the address referred to below and the above-mentioned hearing.

INITIAL STATEMENT OF REASONS AND INFORMATION:

The Board has prepared an initial statement of the reasons for the proposed action and has available all information upon which the proposal is based. It may be obtained at the hearing or prior to the hearing upon request from the Board at 2450 Del Paso Road, Suite 105, Sacramento, CA, 95834 or on the Board's website at www.optometry.ca.gov.

TEXT OF PROPOSAL:

Copies of the exact language of the proposed regulation, and any document incorporated by reference, of the initial statement of reasons, and all information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Board at 2450 Del Paso Road, Suite 105, Sacramento, CA 95834, or from the Board's website at www.optometry.ca.gov.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE:

All information upon which the proposed regulation is based is contained in the rulemaking file, which is available for public inspection, by contacting the person named below.

You may obtain a copy of the final statement of reasons, once it has been prepared, by making a written request to the contact person named below or by accessing the website listed below.

CONTACT PERSON:

Any inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: Andrea Leiva
Policy Analyst
Address: 2450 Del Paso Road, Suite 105
Sacramento, CA 95834
Telephone Number: (916) 575-7182
Fax Number: (916) 575-7292
E-mail Address: andrea.leiva@dca.ca.gov

The backup contact person is:

Name: Mona Maggio
Executive Officer
Address: 2450 Del Paso Road, Suite 105
Sacramento, CA 95834
Telephone Number: (916) 575-7176
Fax Number: (916) 575-7292
E-mail Address: mona.maggio@dca.ca.gov

Board website access: Information regarding this proposal can be found at www.optometry.ca.gov, click on "Laws and Regulations", then "Proposed Regulations".