

## **BOARD OF BEHAVIORAL SCIENCES INITIAL STATEMENT OF REASONS**

**Hearing Date:** February 19, 2009

**Subject Matter of Proposed Regulations:** Fingerprint Submission.

**Section(s) Affected:** Adopt Section 1815 and Amend Section 1886.40 in Division 18 of Title 16 of the California Code of Regulations.

**Specific Purpose of each adoption, amendment, or repeal:**

Business and Professions Code (BPC) Section 144 requires an applicant to furnish to specified agencies, including the Board of Behavioral Sciences (Board), a full set of fingerprints for the purpose of conducting criminal history record checks. Additionally, this section allows the Board to obtain and receive criminal history information from the Department of Justice (DOJ) and the United States Federal Bureau of Investigation (FBI).

On April 1, 1992, the Board began requiring Marriage and Family Therapist, Marriage and Family Therapist Intern, Clinical Social Worker, Associate Clinical Social Worker and Educational Psychologist applicants to submit fingerprint cards for the purpose of conducting criminal history background investigations through DOJ and the FBI. The fingerprinting of applicants allows the Board a mechanism to enhance public protection by conducting a more thorough screening of applicants for possible registration or licensure. All trainees, interns, and registrants were required to submit a fingerprint card and processing fee with their applications. Candidates already in the examination cycle were required to submit fingerprints by set dates that were tied to their scheduled licensure examination. Individuals licensed before April 1, 1992 were not required to submit fingerprints to the Board.

Subsequent arrests and/or convictions reports regarding licensees are reported electronically to the Board on individuals fingerprinted with DOJ. Upon receipt of subsequent information, the Board's Enforcement staff follows the same procedures as in the denial process (police and court documents are ordered and the licensee is asked to provide an explanation of the facts and circumstances surrounding the incident). Once all the information is received, the Board's Executive Officer will make a determination of whether the subsequent conviction warrants disciplinary action. The Board evaluates any evidence of rehabilitation as identified in 16 CCR Section 1814. If disciplinary action is warranted, the case will be forwarded to the Office of the Attorney General for filing of an Accusation. The licensee has the right to request an Administrative Hearing.

Business and Professions Code section 4990.16 states that the "protection of the public shall be the highest priority for the board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." The purpose of the proposed regulatory changes is to ensure that the Board holds up its mandate to protect the public in

accordance with section 4990.16. In order to protect the public from incompetent, unethical and unprofessional practitioners, it is necessary for the Board to be informed of past and current criminal convictions that are substantially related to the qualifications, functions, or duties of their professional service for which they are licensed. The unprofessional conduct statutes of Board licensing law (BPC 4982(a), 4989.54(a) and 4992.3(a)) allows the board to deny a license or a registration, or suspend or revoke a license or registration for unprofessional conduct, including the conviction of a crime substantially related to the qualifications, functions or duties of a licensee or registrant. Further, under BPC Section 4996.6, upon renewal, a licensee is required to notify the Board whether he or she has been convicted, as defined in BPC Section 490, of a misdemeanor or a felony. However, for those licensed before the implementation of the Board's fingerprint submission requirement in April 1992, the notification of a criminal conviction relies upon the licensee or registrants self disclosure upon renewal. In order to fully implement the unprofessional conduct statutes that requires the Board to discipline a license or registrant that has been convicted of a crime substantially related to the qualifications, functions, or duties of their professional service, the Board must receive all information related to those criminal convictions.

Specifically this regulation would:

- Require all licensees on or after October 31, 2009 who have not previously submitted fingerprints to the DOJ or for whom an electronic record of the submission of the fingerprints does not exist with DOJ, to complete a state and federal level criminal offender record information search conducted through the DOJ before his or her license renewal date. The purpose of this provision is to ensure the board receives criminal background and subsequent conviction information on Board registrants and licensees in order to protect the public from unprofessional practitioners and fully implement the Board's mandate to enforce the unprofessional conduct statutes of Board licensing law (BPC 4982(a), 4989.54(a) and 4992.3(a)).
- Requires a license or registration that has been revoked to not be reinstated until the licensee or registrant has submitted fingerprints for a criminal records search conducted through DOJ. The purpose of this provision is to make certain that all licensees, irrespective of licensure status, meets the fingerprinting requirements set forth in this regulation before resuming practice with the public.
- Exempts from the requirements of this proposed regulation licensees or registrants actively serving in the United States military. The purpose of this provision is to allow those licensees or registrants not in active practice to only meet the requirement before returning to active practice with the public.
- Requires licensees and registrants to retain for at least three years either a receipt showing that he or she has electronically transmitted his or her fingerprint images to DOJ, or for those licensees or registrants who did not use an electronic fingerprinting system, a receipt evidencing that the licensees or registrants fingerprints were taken. The purpose of this provision is to permit the licensee or registrant to demonstrate compliance with the fingerprinting requirement in the event that fingerprint reports are not processed correctly by DOJ.

- Requires licensees and registrants to pay, as directed by the board, the actual cost of compliance with the fingerprinting requirements of this regulation. The purpose of this provision is to make certain that the licensee or registrant pays the full cost of the service provided.
- Allows the Board to take disciplinary action against a licensee or registrant if he or she fails to comply with the fingerprinting requirements set forth in this regulation. The purpose of this provision is to ensure compliance with this new regulation.
- Makes failure to submit fingerprints to DOJ a citable fine and allows the executive officer of the board to assess fines not to exceed five thousand (\$5,000) for each investigation for the violation. The purpose of this provision is to better ensure compliance and enforceability of this regulation and to further implement the Board's authority under BPC 125.9.
- Deletes obsolete and errant citations in the authority and reference note section following 16 CCR Section 1886.40. The purpose of this change is to update these provisions, which have been re-numbered.

### **Factual Basis/Necessity**

Sometime after implementing the fingerprint process in 1992, information was received by the Department of Consumer Affairs (DCA) that the FBI questioned the authority given to State agencies to conduct fingerprint checks through the FBI. Legislation was sponsored and in 1997, the California Legislature gave the Board and other entities under the umbrella of the DCA the authority under BPC Section 144, to require a DOJ and FBI criminal history background check on all applicants seeking registration and/or licensure (SB 1346, Chapter 758, Statutes of 1997).

Since 1998, all applicants for registration and licensure must submit a full set of fingerprints as part of the application process. With limited exceptions, all applicants are required to submit their prints via Live Scan. Traditional fingerprint cards (hard cards) are accepted only in those cases where the applicant is located outside of California, or demonstrates a hardship approved by the board.

Although the Board implemented a fingerprinting process in 1992, the fingerprint requirement related to candidates already in the examination cycle by set dates that were tied to their scheduled licensure examination. Individuals licensed before April 1, 1992 were not required to submit fingerprints to the Board. Legislation creating BPC 144 in 1998 allowed the Board to require applicants to submit fingerprints for the purpose of conducting criminal history records check. Due to the narrow interpretation of the language of BPC 144, the Board has only required applicants for registration and licensure to meet the fingerprint requirement and therefore, those board registrants in the examine cycle before 1992 or individuals licensed with the Board before 1992 have not met the fingerprint requirement set forth in BPC 144. Those licensees and registrants that have not been fingerprinted do not generate a subsequent arrest notification by the DOJ and therefore, the board is not notified, except by licensee and registrant self-disclosure on renewal, of arrests and/or criminal convictions. It is necessary for the board

to have the knowledge of unprofessional conduct, including arrests and criminal convictions, in order to proceed with disciplinary action.

Additionally, this proposed regulation requires those licensees and registrants for whom an electronic record does not exist in the DOJ's criminal offender record identification database, to complete a state and federal level criminal offender record information search conducted through DOJ. This provision is necessary to ensure that the Board is notified in a timely manner of arrests and criminal convictions. LiveScan fingerprinting did not become widely available until 1999, and therefore, those applicants fingerprinted prior to 1999 were most likely fingerprinted using rolled fingerprints on a hard card. These fingerprint records were not entered into the DOJ electronic database. When a notice of arrest is received at DOJ on an individual that is not in the electronic database, the file must be pulled manually and then entered into the electronic database before the arrest is reported to the Board. The process for receiving arrest information from DOJ on individuals that do not have an electronic record takes about six months. This significant delay allows a practitioner to continue practicing without the Board's knowledge of any unprofessional conduct that may be related to the duties, functions and qualifications of the professional license that individual holds.

BPC sections 4982(a), 4989.54(a) and 4992.3(a) allows the board to deny a license or a registration, or suspend or revoke a license of registration for unprofessional conduct, including the conviction of a crime substantially related to the qualifications, functions or duties of a licensee or registrant. Further, under BPC Section 4996.6, upon renewal, a licensee is required to notify the Board whether he or she has been convicted, as defined in BPC Section 490, of a misdemeanor or a felony. However, for those licensed before the implementation of the Board's fingerprint submission requirement in April 1992, the notification of a criminal conviction relies upon the licensee or registrants self disclosure upon renewal. In order to fully implement the unprofessional conduct statutes that require the board to discipline a license or registrant that has been convicted of a crime substantially related to the qualifications, functions, or duties of their professional service, the Board must receive information related to those criminal convictions in a timely manner. This proposed rulemaking is necessary to ensure that all Board licensees and registrants submit fingerprints to DOJ for the purpose of a state and federal criminal records check in order for the Board to implement the unprofessional conduct statutes in place to protect the public from unethical and possibly incompetent practitioners.

### **Underlying Data**

None

### **Business Impact**

The Board has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts or evidence/documents/testimony:

There would be no costs to businesses to comply with this regulation. This proposed regulation would only affect individuals for whom an electronic record of his or her fingerprints does not exist in the DOJ criminal offender record identification database and those licensees and

registrants that do not comply with the proposed regulation.

There are approximately 750 vendors statewide who provide fingerprinting services. There should be no initial or ongoing cost impact upon the vendors because they already equipped to provide the service and the fingerprinting requirement will be staggered and extended over the licensees' renewal periods (biennial cycle).

**Specific Technologies or Equipment**

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

This regulation mandates the use of specific technologies or equipment. Such mandates or prescriptive standards are required for the following reasons:

**Consideration of Alternatives**

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.