

**Board of Vocational Nursing and Psychiatric Technicians  
Department of Consumer Affairs**

**INITIAL STATEMENT OF REASONS**

**HEARING DATE:** May 12, 2009

**SUBJECT MATTER OF PROPOSED REGULATIONS:**

Retroactive Fingerprinting and Disclosure Requirements, Response to Board Inquiries and Fee Changes for the Vocational Nursing (VN) and Psychiatric Technicians (PT) Programs.

**SECTIONS AFFECTED:** Amend Title 16 California Code of Regulations as follows:

- Amend Sections 2504.1 and 2517.5 (Vocational Nursing Program)
- Amend Sections 2564.1 and 2575.5 (Psychiatric Technician Program)
- Amend Sections 2537 and 2540.6; (Vocational Nursing Program)
- Amend Sections 2590 and 2592.6 (Psychiatric Technician Program)

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

Following is a description of each proposed amendment and the factual basis for the action. The majority of the proposed regulatory language was approved by the Office of Administrative Law (OAL) as an emergency regulatory action based on Sections 11346.1 and 11349.6 of the Government Code on 1/9/2009 and will expire on 7/8/2009. The proposed text reflects changes to the existing emergency regulations.

**1. Amend Sections 2504.1 (Vocational Nursing Program) and 2564.1 (Psychiatric Technicians Program)**

**Specific Purpose:** The existing regulation, adopted as an emergency, provides that the board may require a licensee to provide criminal history information and respond to the board within 30 days, provide accurate responses and make available documents and other records requested.

This proposal will amend the emergency regulation to require a licensee to respond to any inquiry made by the Board of Vocational Nursing and Psychiatric Technicians (Board) or its appointed representatives within 30 days, including inquiries regarding a licensee's criminal history. The licensee must provide true and accurate information and responses and must provide all files, working papers and other records requested. The licensee is prohibited by this section from taking actions specifically for the purpose of obstructing the Board's efforts to gather information, investigate, or to hold hearings or other proceedings. Each of the provisions in this section will enable the Board to more effectively carry out the provisions of the Vocational Nursing Practice Act and the Psychiatric Technician Law.

To conduct an investigation on whether a conviction is substantially related to a licensee's scope of practice, the Board must review "certified" police reports, "certified"

court documents and review documentation that substantiates compliance with probationary terms and rehabilitation efforts. Without this information the Board cannot make a final determination as to the appropriate action. In the past, licensees have ignored Board requests for information and purposely delayed the Board's ability to make a final decision. The emergency regulations enable and this proposal would continue to allow the Board to issue a citation and fine for failure to provide the necessary documentation in a timely manner.

The changes to this section from the emergency regulation expand on the scope of those inquires to the entire range of matters within the board's jurisdiction. By the revisions, the Board will be able to more effectively compel the responses and information in any matter within its jurisdiction, including criminal activity, continuing education audits or other types of investigations within its jurisdiction. Preventing a licensee from intentionally obstructing a court proceeding is designed to make the Board's efforts run more smoothly – the Board is better able to protect the public if licensees cooperate with the board. This proposal would enable the Board to issue a citation and fine for failure to follow its provisions, making it more likely that licensees will work with the Board to collect information.

## **2. Amend Sections 2517.5 (Vocational Nursing Program) and 2575.5 (Psychiatric Technicians Program)**

**Specific Purpose:** Business and Professions (B&P) Code Sections 2892 and 4544 provide that a licensee shall apply for renewal and pay a fee for renewal. This regulation will make permanent provisions of the emergency regulations that require, as a condition of renewal for licenses expiring on or after April 1, 2009, a person licensed by the Board prior to January 1, 1998 or for whom an electronic fingerprint record no longer exists, to:

- (a) furnish to the Department of Justice (DOJ) a full set of fingerprints for the purpose of conducting a criminal history record check and to undergo a state and federal criminal offender record information search conducted through the DOJ;
- (b) certify compliance with that requirement at the time of renewal;
- (c) disclose whether he or she has been convicted of any violation of the law in this state or any other state since he or she last applied for renewal;
- (d) disclose whether he or she has had a license denied or had a license disciplined by another licensing authority of California, another state, another agency of the federal government, or of another country.

Not all licensees are currently fingerprinted. The fingerprint requirement will ensure that all Board licensees are fingerprinted, which will assist the board in protecting the public by providing access to each licensee's criminal history information up front and on a recurring basis through DOJ reports to the Board. (See Factual Basis/Rationale for additional information.) Requiring that DOJ has each licensee's fingerprints electronically on the Board's behalf ensures that the Board will obtain the quickest possible notification in the event a licensee participates in criminal activity. With the availability of electronic submission of fingerprints, the impact on the licensees is minimal; yet the benefit to the public is great and necessary.

April 1 was chosen as the start date for the fingerprint requirement in the emergency regulations because that was the soonest the Board could make the necessary changes

to its renewal notices and provide the licensees an opportunity to comply. The January 1, 1998 date was chosen as a cutoff for current licensees because those licensed after that date have both submitted their fingerprints electronically and the fingerprints have cleared both the California DOJ and the Federal Bureau of Identification (FBI) databases.

The emergency regulations and these regulations also provide that failure to provide all required information may render the renewal application incomplete and therefore not eligible for renewal and that failure to do so would constitute a ground for disciplinary action by the Board. These provisions are designed to ensure compliance with the regulations, which will enable the board to protect the public by learning of criminal disciplinary history more timely and on a regular basis.

This regulation will make permanent the provision that a licensee who is, at the time of renewal, in an inactive category or actively serving in the military outside the country, is not required to comply with the fingerprint submission. Neither is currently practicing on the public. By amendment to another section, in order to activate a currently inactive license, that licensee must comply with the fingerprint submission requirement. Military personnel will be captured at their next renewal cycle because the Board anticipates that military employees are being monitored by the respective employing agency and the conviction and disciplinary action questions will still apply. As such, military personnel are thought to pose a lower risk of harm to the public if not fingerprinted immediately by the board. In addition, submitting fingerprints may be more inconvenient for licensees traveling out of the country.

The emergency and these regulations also make the licensee responsible for the cost of doing the fingerprinting and for keeping records indicating that a licensee has complied with the provisions. The three year period for keeping the records was based on a two year renewal cycle plus an additional year for auditing purposes.

Changes were made from the emergency version to make the Boards' regulation easier to follow and clearer to licensees. A change was made from the emergency regulations so that a licensee need NOT disclose infractions that did not involve drugs or alcohol in order to simplify what must be reported. A change also was made to require reporting of convictions and discipline report "from the prior renewal cycle" to report "since the licensee last applied for renewal", in order to capture any information that might have occurred during the time a license was expired, or when the licensee did not timely renew.

### **3. Amend Sections 2537 (Vocational Nursing Program); and 2590 (Psychiatric Technician Program)**

#### VN Program – Section 2537

Existing law, B&P Code, sections 2892.6 and 2895, specify the current fees and fee ranges for the VN Program.

**Specific Purpose:** The Board is proposing to make permanent the fee changes made in the emergency regulation to ensure that sufficient funds are available to implement retroactive fingerprinting. The VN Program is adopting as permanent amendments to

Sections 2537 to reflect the following fee changes:

- Initial License Fees -- From \$120 to \$150
- Biennial License Renewal Fees -- From \$120 to \$150
- Delinquent Renewal Fees -- From \$60 to \$75

All of the other fees will remain the same as they were prior to the emergency regulations. The fee change is needed to ensure the fiscal solvency of the VN Program as it implements retroactive fingerprinting.

#### PT Program – Section 2590

Existing law, B&P Code, Section 4548, specifies the fees and fee ranges for the PT Program. The fee regulations (as they existed prior to the emergency) had been superseded by statutory amendments that set the new fees. Consequently, the fee amounts cited in the prior *regulation* were obsolete as of January 1, 2000.

**Specific Purpose:** The PT Program is making permanent the amendment to regulation Section 2590. The prior fee regulations became obsolete December 31, 1999, when statutory fee amounts were established on January 1, 2000. The Board proposes to adopt as permanent the emergency fee changes to ensure that sufficient funds are available to implement retroactive fingerprinting. The fee changes are:

- Initial License Fees -- From \$200 (statutorily) to \$300
- Biennial License Renewal Fees -- From \$200 (statutorily) to \$300
- Delinquent Renewal Fees -- From \$100 (statutorily) to \$150

All of the other fees established by the current statute will remain the same in this regulatory proposal.

#### **4. Amend Sections 2540.6 (Vocational Nursing Program); and 2592.6 (Psychiatric Technician Program)**

**Specific Purpose:** Prior to the emergency, the existing regulations specified that if a licensee wants to activate an inactive license, the licensee must submit a written request and evidence of 30 hours of approved continuing education taken during the two-year period immediately preceding the request for activation. This proposal would require, in addition to the above-mentioned requirement, that a licensee who was never fingerprinted by the Board or for whom a fingerprint record no longer exists furnish a full set of fingerprints as a condition of activating an inactive license. A change was made from the emergency regulation to make it clearer that a licensee need only comply with the fingerprint requirement once and not each time the license goes from inactive to active.

#### **FACTUAL BASIS/RATIONALE:**

##### Historical Information

The Board currently maintains and tracks approximately 109,319 active and delinquent Vocational Nurse (VN) licenses and 12,965 active and delinquent Psychiatric

Technician (PT) licenses. The Board began to fingerprint its initial applicants for vocational nurse licensure in 1952 and, when the Board started to regulate PT's in 1959, those initial applicants were also required to submit fingerprints as a requirement for licensure. The requirement was eliminated in 1981 because:

- In 1979-1980, only 0.1% or 8 individuals out of 7,715 fingerprint cards processed required administrative action.
- DOJ was taking too long to provide fingerprint reports.
- Increasing costs paid by the VN & PT applicants for the fingerprint processing.

The fingerprint requirement was reestablished on July 1, 1996 after a 15 year lapse, and all applicants for licensure were required to submit DOJ fingerprints. By that time, DOJ had added the ability to collect fingerprint submissions electronically (using a process known as Live Scan) and the process became more effective at timely providing data to the Board. The Board required all applicants for licensure to submit both DOJ and FBI fingerprints beginning January 1, 1998. The licensee need only provide fingerprints one time -- the applicant submits fingerprints to DOJ, and DOJ obtains criminal history from its records and simultaneously forwards the prints to the FBI for a review of its criminal history information.

When an applicant for initial licensure is fingerprinted, the Board receives a criminal history report informing the Board of the applicant's criminal history. For a licensee who has been fingerprinted, the Board receives subsequent arrest notifications from the Department of Justice (DOJ), which allows the Board to track any pending criminal actions against a licensee. The Board has no fingerprints on record for over 47,785 VN licensees and 7,168 PT licensees who were licensed prior to January 1, 1998 – over 45 percent of its licensees. This means that the Board did **not** receive information on these licensees' criminal histories during their application process for licensure and as such is **not** able to receive reports of current criminal activity. Without this knowledge, the Board is unable to take action unless information about possible criminal activity is received from some other complaint source.

While the Board has been aware that there were licensees who had never been fingerprinted, newspaper articles prior to the emergency regulations identified the significant criminal history of several such licensees, and highlighted the degree of the problem and the potential risk to the public..

VNs and PTs care for the aged in nursing homes and at home; the developmentally disabled in state institutions and community care homes; the mentally disordered in facilities, including prisons; and infants/children in a variety of settings. As high-risk consumers, these patients/clients require the utmost protection, as they cannot defend themselves against sexually and physically abusive, incompetent, or grossly negligent licensees. It is, therefore, imperative that the Board receive current criminal history information regarding these licensees – which comprise over 45% of its licensed population.

#### **UNDERLYING DATA:**

- Newspaper articles appearing in the following papers on the following dates:

- 1) San Luis Obispo - The Tribune  
*"Abuse, threats mark Hanford nurse's history"* dated Sunday, October 12, 2008
  - 2) San Luis Obispo - The Tribune  
*"State lacks participation in national nurse's verification program, medical facilities may not be aware of discipline taken against nurses applying for jobs"*  
dated Monday, October 13, 2008
  - 3) San Luis Obispo - The Tribune  
*"Nurses board agrees to tighten rules"* dated October 24, 2008
  - 4) Los Angeles Times  
*"Board knew of nurses' criminal records but took years to act"*  
dated November 2, 2008
- A memorandum from the DCA Director, Carrie Lopez, regarding retroactive fingerprinting was sent on November 5, 2008.
  - Emergency rulemaking file number 2008-1230-03 E
  - February 19, 2009, notice mailed to all LVNs and PTs licensed prior to January 1, 1998, notifying them of the new renewal requirements.

## **BUSINESS IMPACT**

The regulations will not have a significant adverse economic impact on businesses. There are approximately 750 vendors statewide, including small businesses that provide fingerprinting services. There should be no initial or ongoing cost impact upon the vendors because they are already equipped to provide the service because it will generate additional revenue for those vendors.

## **SPECIFIC TECHNOLOGIES OR EQUIPMENT**

The regulatory proposal indirectly requires the use of Live Scan because DOJ requires it for those submitting prints living in California. Live Scan is a well-established and readily available technology for submission of fingerprints.

## **CONSIDERATION OF ALTERNATIVES**

No reasonable alternative to the regulations 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 regulations.

(3/17/09)