

Board of Vocational Nursing and Psychiatric Technicians

INITIAL STATEMENT OF REASONS

HEARING DATE: August 10, 2011

SUBJECT MATTER OF PROPOSED REGULATIONS:

Sponsored Health Care Events – Requirements for Exemption

SECTIONS AFFECTED: Amend Title 16 California Code of Regulations (CCR) as follows:

Vocational Nursing (VN): Add Article 11, Sections 2557, 2557.1, 2557.2 and 2557.3

Psychiatric Technician (PT): Add Article 10, Sections 2595, 2595.1, 2595.2 and 2595.3

INTRODUCTION:

On September 23, 2010, Governor Arnold Schwarzenegger signed AB 2699 (Bass, Chapter 270, Statutes of 2010), enacting Business and Professions (B&P) Code section 901, which became effective January 1, 2011. This statute provides a regulatory framework for certain health care events at which free care is offered to uninsured or under-insured individuals by volunteer health care practitioners where those practitioners may include individuals who may be licensed in one or more states but are not licensed in California. Prior to this enactment, licensing laws precluded the participation of volunteers licensed outside of California. B&P Code section 901 defines “sponsoring entities,” “sponsored events,” and “health care practitioners,” and sets forth requirements for registration of sponsoring entities and authorization for participation by practitioners licensed in other states by the various boards responsible for licensure and regulation of healing arts.

These proposed regulations would implement, interpret, and make specific the provisions of B&P Code section 901 by specifying procedures and forms to be used by sponsoring entities and out-of-state Licensed Vocational Nurses/Licensed Practical Nurses (LVN/LPN) or licensed Psychiatric Technicians (PTs) who desire to participate in sponsored events. The Board’s highest priority is the protection of the public and these proposed regulations are intended to implement B&P Code section 901 in a manner that will provide the greatest protection for the people of California.

SPECIFIC PURPOSE OF EACH ADOPTION, AMENDMENT, OR REPEAL:

1. Definitions

VN: Add Section 2557

PT: Add Section 2595

This section is needed to clarify the language of the statute. Specifically, the definition of “community-based organization” is necessary because there is no statutory definition. The

definition of “out-of-state practitioner” is needed to clarify which practitioners the proposed regulations are intended to affect.

Factual Basis/Rationale:

“Community-based organization” is listed in the statute as one type of sponsoring entity. There is no definition of such an entity in state statute. The proposed definition of this term therefore is derived from a federal law (Title 20 USCA section 7801 related to education law) that does contain a definition of “community-based organization.” This definition provides much-needed clarity to the term.

The statute defines “health care practitioner” as any person who engages in acts subject to licensure under Division 2 of the B&P Code. The proposed regulations, along with the operative provisions of B&P Code section 901; however, concern specifically health care practitioners licensed to practice vocational or practical nursing or provide psychiatric technician services in other states and territories. Therefore, in order to provide clarity for purposes of the text of the regulations, the definition of “out-of-state practitioner” is proposed. The definition is based upon the criteria set forth in B&P Code section 901(b).

2. Sponsoring Entity Registration

VN: Add Section 2557.1(a)

PT: Add Section 2595.1(a)

This section establishes a timeframe for submission of a sponsoring entity’s registration form and prescribes a registration form to be used.

Factual Basis/Rationale:

Sponsoring entities are required under B&P Code section 901(d) to register with the Board if they will have out-of-state practitioners participating in their sponsored event. Therefore, the proposed regulation implements the statute by providing a form that a sponsoring entity can use to meet this requirement. The form includes space for all of the information required to be submitted under the statute. Also, the proposed regulation requires that sponsoring entities submit their registration forms no later than ninety (90) days prior to the sponsored events.

This is proposed in order to allow for sufficient time for review of the registration information and to have the registration in place prior to receipt of participation authorization requests from out-of-state practitioners.

3. Determination of Completeness of Form

VN: Add Section 2557.1(b)

PT: Add Section 2595.1(b)

This section provides a mechanism for the Board to delegate the receipt and review of the sponsoring entity registration form along with criteria for accepting or rejecting the registration.

Factual Basis/Rationale:

Because sponsoring entities may be required to register with multiple boards under B&P Code section 901 (d), the proposed regulation allows the Board to delegate the authority to receive

and process the registration form to the Department of Consumer Affairs (DCA) or its Executive Officer. Assuming that all applicable boards make this delegation, the sponsoring entity need only file one registration form per event and the DCA will notify the boards that the sponsoring entity submitted a complete form. This proposed regulation also specifies that the registration form needs to be complete in order to be accepted and that all deficiencies must be corrected at least thirty (30) days prior to the commencement of the sponsored event. This requirement is needed in order to ensure the Board that the entity has provided all required information including the correct contact information for the sponsoring entity when the event commences.

4. Recordkeeping Requirements

VN: Add Section 2557.1(c)

PT: Add Section 2595.1(c)

This section implements and makes specific the recordkeeping requirements of sponsoring entities set forth in B&P Code section 901(g).

Factual Basis/Rationale:

B&P Code section 901(g) specifies certain records that sponsoring entities must maintain and requires entities to furnish these records upon request to the Board. In order to implement these requirements, the proposed regulation specifies that these records must be kept both at the physical premises of the sponsoring event and at a location in California for the statutorily required five (5) year period. Having these records available at the event and, thereafter, at a location in California is necessary in order to provide the Board with access to the records. Further, the proposed regulation specifies that the records may be kept in either paper or electronic form. This provision clarifies that either form of records is acceptable to the Board.

5. Requirement of Prior Board Approval

VN: Add Section 2557.1(d)

PT: Add Section 2595.1(d)

This section clarifies that authorization must be provided before a sponsoring entity may allow an out-of-state practitioner to participate in a sponsored event.

Factual Basis/Rationale:

B&P Code section 901 provides for authorization requirements for out-of-state practitioners and for registration requirements of sponsoring entities. This proposed regulation connects the two (2) requirements by clarifying that a sponsoring entity may not permit an out-of-state practitioner to participate in its event unless and until it receives authorization from the Board.

6. Post-event Report

VN: Add Section 2557.1(e)

PT: Add Section 2595.1(e)

This section specifies the information to be provided in the report required under B&P Code section 901(f)

Factual Basis/Rationale:

B&P Code section 901(f) requires a report to be filed with the Board by a sponsoring entity within fifteen (15) days after a sponsored event and sets forth the minimum information to be included. The statute, however, does not provide any information as to the form of the report. The proposed regulation makes clear the Board will accept a report in whichever form the sponsoring entity chooses. Also, the proposed regulation includes a requirement of each participating out-of-state practitioner that the license number be included in the report. This information is necessary for the Board to identify the participants involved.

7. Request for Authorization to Participate

VN: Add Section 2557.2(a)

PT: Add Section 2595.2(a)

This section provides the mechanism by which an out-of-state practitioner may request authorization to participate in a sponsored event.

Factual Basis/Rationale:

Out-of-state practitioners who desire to participate in a sponsored event must request authorization from the Board in accordance with B&P Code section 901(b). The statute specifically requires the Board to prescribe a form and set a processing fee for this purpose. The proposed regulation implements B&P Code section 901(b) by incorporating proposed Form 901-B (5/5/2011) to be submitted by the out-of-state practitioner to the Board to request authorization to participate. The form provides space for the applicant to include all of the information required by the statute.

The fee of fifty dollars (\$50) for LVNs/LPNs and PTs has been determined by the Board as a reasonable amount to cover the costs to the Board for developing the authorization procedure and processing the authorization.

Additionally, the regulation requires the applicant to submit additional material not specifically listed in the statute. First, the applicant must submit personal identifying information including contact information; the individual's Social Security Number; employer's contact information; and, either a full set of fingerprints or submit to a Live Scan process. These requirements are reasonably necessary in order for the Board to verify the requirement of B&P Code section 901(b)(1)(B)(i) that the applicant has, "Not committed any act or been convicted of a crime constituting grounds for denial of licensure or registration under B&P Code section 480", which authorizes the Board to deny licensure based on an applicant's conviction of a crime.

The Board is also authorized to require applicants to furnish fingerprints for criminal background checks under B&P Code section 144. Once the fingerprints are furnished, the Board will continue to receive from the California Department of Justice (DOJ) follow up reports (i.e., Subsequent Arrest Reports) regarding the applicant until a formal request to cancel is initiated. The Board plans to formally cancel California DOJ follow up reports for these applicants once four years has passed from the last Request for Authorization. Therefore, the Board has determined that the applicant would not need to submit additional fingerprint records as long as no more than four years have passed since the last Request for Authorization was received by the Board. If more than four years have passed, the applicant would be required to resubmit his/her fingerprint records.

8. Response to Request for Authorization to Participate

VN: Add Section 2557.2(b)

PT: Add Section 2595.2(b)

This section sets forth the standard timeframe in which the Board shall grant or deny the authorization request.

Factual Basis/Rationale:

B&P Code section 901(b)(1)(A) provides that the Board shall notify the sponsoring entity or local government entity within twenty (20) days of receiving a request for authorization to participate whether that request is approved or denied. The proposed regulation sets forth this statutory requirement and is necessary in order to restate the standard timeframe for response by the Board within the context of the regulations.

9. Denial of Request to Participate

VN: Add Section 2557.2(c)

PT: Add Section 2595.2(c)

This section sets forth the criteria under which the Board must or may deny a request for authorization to participate.

Factual Basis/Rationale:

The statute provides that the Board must authorize the participation of out-of-state practitioners in sponsored events, but it does not list specific criteria for denial of authorization other than if a practitioner “Fails to comply with the requirements of this section or for any act that would be grounds for denial of an application for licensure.” Therefore, it is necessary to provide at least some specific detail as to the criteria the Board will use beyond the general authorization to deny an application.

The Board has determined that the failure of an applicant to respond within seven (7) days to a request for additional information will result in an automatic denial of a request. Because the Board only has twenty (20) days in which to grant or deny a request, timing is critical and the Board’s opinion is that failure of an applicant to respond within seven (7) calendar days will sufficiently jeopardize the Board’s ability to effectively review a complete application within the allotted time.

B&P Code section 901(b) provides that applicants seeking authorization to participate must meet the following educational and experience requirements:

LVN/LPN:

- A. Completion of a course of instruction in vocational or practical nursing in a school accredited by the Board or another United States province, provided that the course completed is substantially equivalent to that prescribed by CCR section 2533.
- B. Took the National League for Nursing State Board Test Pool Examination for Practical Nurses or the National Council Licensing Examination for Practical Nurses, and passed

said examination with a score equal to or above the minimum passing score required by the Board for said examination.

PT:

- A. Completion of a course of instruction in a school accredited by the Board or another United States province, provided that the course completed is substantially equivalent to that prescribed by CCR section 2587.
- B. Taken and passed an examination that is substantially equivalent to the Board's Psychiatric Technician licensure examination as prescribed by section 2570 of this chapter.

The proposed regulation also sets forth discretionary reasons for denying a request. The first of these is that the application is not received within twenty (20) days prior to the event. B&P Code section 901(b)(1)(A) provides that the Board shall use reasonable efforts to notify the sponsoring entity within this time. The proposed regulation, however, provides needed clarity to the statute that, in the event that the statutorily required reasonable efforts are insufficient to review the application in advance of the event, the Board may then deny the request. It would be counter to the Board's consumer protection mandate to require it to grant authorization to an individual whose request is submitted in so short a time before the scheduled event that it cannot adequately be reviewed.

The other discretionary reasons for denial are based upon the past actions of the Board with respect to that particular individual. The Board is of the opinion that if an applicant has previously had a request denied or an authorization terminated, this alone may be cause for a subsequent denial. Because the time for review of the authorization is only twenty (20) days, the Board may not have time to revisit the case of an individual who has already been determined by the Board as unfit to participate. The Board feels that it is reasonable, however, to consider this a discretionary decision so that, on a case-by-case basis, the Board can re-evaluate a particular individual's circumstances as appropriate if sufficient time exists to do so without compromising public protection.

Finally, the Board feels that it is reasonable and necessary to include discretionary denial authority in the event that an applicant has participated in three (3) or more sponsored events within the 12 (twelve) month period immediately preceding the current application. The Board feels that, in an effort to maintain the integrity of the State's licensing laws and, thus, protect the public, it should have discretion to deny permission to applicants when the Board recognizes that a particular applicant practices in California without a license on multiple occasions within the span of one year. Such a situation would frustrate the purpose of the "temporary" nature of the exemption from licensure permitted under B&P Code section 901.

10. Appeal of Denial

VN: Add Section 2557.2(d)

PT: Add Section 2595.2(d)

This section provides an appeal procedure for an applicant who has had a request for authorization to participate denied by the Board.

Factual Basis/Rationale:

B&P Code section 901 allows for the denial of a request for authorization to participate, but it does not provide any appeal procedure for the denied individual. In order to ensure some measure of due process, the Board feels that applicants should have access to the same appeal procedure available for an out-of-state practitioner who has had his or her authorization terminated. Therefore, the proposed regulation references the appeal procedure in sections 2557.3 (VN) and 2595.3 (PT) of these proposed regulations, discussed below. This will provide consistency in the two appeal processes.

11. Grounds for Termination of Authorization

VN: Add Section 2557.3(a)

PT: Add Section 2595.3(a)

This section provides the grounds upon which the Board may terminate the authorization to participate previously granted to an out-of-state practitioner.

Factual Basis/Rationale:

The first two (2) grounds for termination listed in the proposed regulation are consistent with B&P Code section 901(j)(1). As an additional ground for termination, this proposed regulation adds the receipt of a credible complaint indicating that the practitioner is unfit to practice or is endangering the public. This provision is necessary in order for the Board to act consistently with its mandate that protection of the public is its highest priority. Because of the permissive and temporary nature of the licensure exemption granted under B&P Code section 901, and the limited time which the Board has to review and verify the qualifications of the out-of-state practitioner, the Board feels that it is essential that it may act immediately to terminate the authorization to participate granted to the non-California licensed individual when a credible complaint of endangerment is received.

12. Notice of Termination

VN: Add Section 2557.3(b)

PT: Add Section 2595.3(b)

This section specifies written notice of a termination may be given during a sponsored event.

Factual Basis/Rationale:

The statute provides that written notice of a termination shall be given to both the sponsoring entity or the local government entity administering the sponsored event, and the out-of-state practitioner. This proposed regulation is necessary to clarify that in the event a termination is issued during the course of a sponsored event, the Board may provide the written termination notice to any representative of the sponsoring entity on the premises of the event. The most expeditious way to notify the entity is at the event itself so that the practitioner will be instructed to cease practice immediately.

13. Consequences of Termination

VN: Add Section 2557.3(c)

PT: Add Section 2595.3(c)

This section sets forth the consequences of a termination of an authorization to participate and how the Board will report the fact of the termination.

Factual Basis/Rationale:

B&P Code section 901(j)(3) provides that out-of-state practitioners shall not provide services under this statute following a termination of authorization. The proposed regulation specifies that the practitioner shall “immediately” cease their participation in the event. The Board feels that this clarification is necessary in the event that a termination is issued during the course of an event. In case there is any confusion as to when the termination becomes effective, this proposed provision would be necessary to remove any doubt that the practitioner must immediately desist from participation as soon as the termination notice is received.

The proposed regulation also provides that the Board will consider a termination of authorization a disciplinary measure that is reportable to the national practitioner data banks and the individual’s out-of-state licensing authority(ies). The Board views these provisions as reasonably necessary and logical in order to protect the public. The grounds for termination are criteria that the Board itself would consider as disciplinary measures for its own licensees. Therefore, because the Board does not have licensing authority over the out-of-state practitioner, its only disciplinary remedy is to report the conduct to the individual’s home jurisdiction and applicable national practitioner data bases. If the conduct is such that it would lead to action against the practitioner’s out-of-state license, then the Board would have that information available to it in the event that the individual applied for either a subsequent authorization to participate in a future sponsored event or a license to practice in California.

14. Appeal of Termination

VN: Add Section 2557.3(d)

PT: Add Section 2595.3(d)

This section provides the procedure for appealing denials of authorization and terminations of authorizations to participate.

Factual Basis/Rationale:

The statute allows for an out-of-state practitioner who has had his or her authorization to participate terminated by the Board to file a written appeal to the Board within thirty (30) days of receipt of the termination notice. The proposed regulation specifies that this request for appeal shall be considered a request for an informal hearing under the Administrative Procedure Act (APA). This is potentially a less costly system than the formal hearing procedure and is warranted for removal of this type of authorization.

15. Informal Conference Option

VN: Add Section 2557.3(e)

PT: Add Section 2595.3(e)

This section provides an alternative to a hearing under the APA for appeals submitted by out-of-state practitioners.

Factual Basis/Rationale:

B&P Code section 901(j) allows for the filing of an appeal by an out-of-state practitioner. In addition to the APA procedure set forth in proposed section 2557.3 (e) for LVNs and 2595 (e) for PTs above, this proposed regulation also offers the appealing out-of-state practitioner the option of an informal conference with the Board's Executive Officer to try and resolve the appeal. This proposed regulation is consistent with the Board's practice for its own licensees who have been issued a citation as set forth in CCR section 2523 (e) for LVNs and 2579.2 (e) for PTs and provides an inexpensive option to ensure the efficient resolution of appeals when possible. The informal conference option proposed does not affect the appellant's right to a hearing under the APA.

UNDERLYING DATA:

- Assembly Bill 2699

BUSINESS IMPACT

This regulation will not have a significant adverse economic impact on businesses. This initial determination is based on the following facts or evidence/documents/testimony:

The regulation only impacts nonprofit organizations sponsoring free health care events and practitioners from other states volunteering in California. There is some impact to the out-of-state volunteers in that they will be required to submit the processing fee to receive authorization to participate. This fee will have to be factored into the cost of that individual's volunteerism. The fee may be covered by sponsoring entities, who will also incur minor costs with respect to maintaining records of their volunteers, reporting to boards after events and filing a registration as appropriate. Those costs are imposed by the statute and not by these regulations.

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. The Board is directed by statute to develop these regulations and there is, thus, no other method of developing the forms and

procedure for registering sponsoring entities and granting authorization for requests by out-of-state practitioners to participate in sponsored events.

One possible alternative is to delay or refrain from promulgating any regulations – i.e., maintain the status quo. This is not reasonable because the statute contemplates a registration and fee process to be developed by the Board to implement the statute. By not creating a procedure, the Board would frustrate the purpose of the statute, which is intended to provide an opportunity for out-of-state licensed volunteers to participate in certain free health care events. Also, it is not reasonable to delay because the statute has a sunset date of January 1, 2014. Because the statute is only effective for three years, it is incumbent on the Board to implement the required processes as soon as possible.

(6/9/2011)