TITLE 16. BOARD OF PSYCHOLOGY

NOTICE IS HEREBY GIVEN that the Board of Psychology (hereinafter "Board") is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at the Radisson Newport Beach, 4545 MacArthur Boulevard, Newport Beach, California, at 9:00 a.m., or as soon as practicable thereafter, on May 21, 2011. 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 no later than 5:00 p.m. on May 16, 2011, or must be received by the Board at the hearing. 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 or oral 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 Section 2930 Business and Professions Code, and to implement, interpret or make specific Sections 2928, 2930, 2960.5, and 2965 Business and Professions Code, and Sections 11415.60 and 11500 of the Government Code, the Board is considering changes to Division 13.1 of Title 16 of the California Code of Regulations (CCR) as follows:

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Business and Professions Code section 2920.1 mandates that protection of the public shall be the highest priority of 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.

This proposal would make specific regulatory changes to enhance the Board's mandate of consumer protection.

This proposal would delegate authority to the Executive Officer to approve settlement agreements for revocation, surrender, or interim suspension of a license or registration.

This proposal would delegate authority to the Executive Officer to order an applicant for licensure to submit to a physical or mental examination if it appears that the applicant may be unable to safely perform the duties and functions of a psychologist, psychological assistant or registered psychologist due to physical or mental illness affecting competency. Additionally, if after receiving the evaluation report the Board determines that the applicant is unable to practice safely, the Board may deny the application.

This proposal would amend the title of Article 7 of Division 13.1 from Restoration of Suspended or Revoked Licenses, to Standards Related to Denial, Discipline, and Reinstatement of Licenses and Registrations to provide clarification of the subject matter of the regulations contained within Article 7.

This proposal would, in addition to conduct described in Business and Professions Code Section 2960, further define "unprofessional conduct" to also prohibit the inclusion of provisions in agreements to settle civil disputes that would forbid another party to the dispute from contacting, cooperating with, or filing a complaint with the Board, or that would require another party to the dispute to attempt to withdraw a complaint the party has filed with the Board.

The definition of "Unprofessional Conduct" would also include failure of the licensee or registrant to provide lawfully requested documents; failure to cooperate with an investigation pending against a licensee or registrant ; failure to report an indictment, charging a felony, arrest, conviction of the licensee or registrant; failure to report any disciplinary action taken by another licensing entity or authority; or failure to comply with a court order issued in the enforcement of a subpoena mandating the release of records to the Board.

FISCAL IMPACT ESTIMATES

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: Minor.

Nondiscretionary Costs/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 proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states because it only affects individual licensees and registrants.

AND

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

Impact on Jobs/New Businesses:

The Committee has determined that this regulatory proposal will not have any 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 because it only affects individual licensees and registrants.

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 the Board are costs associated with a disciplinary order. Costs only affect individuals who are applying for licensure or registration or licensees or registrants being disciplined. These costs may include fees for a physical or mental examination and attorney fees associated with license or registration denial or disciplinary action.

Effect on Housing Costs: None

EFFECT ON SMALL BUSINESS

The Board has determined that the proposed regulations would not affect small businesses because the regulations are applicable only to applicants and licensees or registrants who are disciplined by the Board.

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 and less burdensome to affected private persons than the proposal described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at 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 the 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 2005 Evergreen Street, Suite 1400, Sacramento, California 95815 or on the Board's website at: www.psychboard.ca.gov.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which the proposal is based, may

be obtained at the hearing or prior to the hearing upon request from the Board at 2005 Evergreen Street, Suite 1400, Sacramento, California 95815 or on the Board's website: www.psychboard.ca.gov.

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

All the information upon which the proposed regulations are 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:	Linda Kassis
Address:	2005 Evergreen Street, Suite 1400 Sacramento, CA 95815
Telephone No.:	(916) 263-0712
Fax No.:	(916) 263-2697
E-Mail Address:	Linda.Kassis@dca.ca.gov

The backup contact person is:

Name:	Jeffrey Thomas
Address:	2005 Evergreen Street, Suite 1400 Sacramento, CA 95815
Telephone No.:	(916) 263-1617
Fax No.:	(916) 263-2697
E-Mail Address:	Jeffrey.Thomas@dca.ca.gov

Website Access: Materials regarding this proposal can be found at: www.psychboard.ca.gov.

BOARD OF PSYCHOLOGY
Proposed Language

Proposed changes are shown by underlining for new text and strikethrough for deleted text.

1. Section 1380.4 is amended to read as follows:

§ 1380.4. Delegation of Functions.
Except for those powers reserved exclusively to the "agency itself" under the Administrative Procedure Act (section 11500 et seq. of the Government Code), the B~~b~~oard delegates and confers upon the executive officer for the B~~b~~oard, or in his or her absence, the assistant executive officer, or in his or her absence, the ~~chairperson~~ president of the B~~b~~oard, or in his or her absence, the vice ~~chairperson~~ president of the B~~b~~oard, all functions necessary to the dispatch of business of the B~~b~~oard in connection with investigative and administrative proceedings under the jurisdiction of the B~~b~~oard, including the authority to order an examination pursuant to section 820 of the Code or section 1381, or to approve a settlement agreement for the revocation, surrender, or interim suspension of a license or registration.

NOTE: Authority cited: Section 2930, Business and Professions Code. Reference: Sections 2928 and 2965, Business and Professions Code; and Sections 11415.60 and 11500, Government Code.

2. The title of Article 7 of Division 13.1 is amended to read as follows:

Article 7. ~~Restoration of Suspended or Revoked~~ Standards Related to Denial, Discipline, and Reinstatement of Licenses or Registrations

3. Section 1397.2 is added to Article 8 of Division 13.1 to read as follows:

§ 1397.2. Other Actions Constituting Unprofessional Conduct.
In addition to the conduct described in Section 2960 of the Code, "unprofessional conduct" also includes but is not limited to the following:
(a) Including or permitting to be included any of the following provisions in an agreement to settle a civil dispute arising from the licensee's or registrant's practice to which the licensee or registrant is or expects to be named as a party, whether the agreement is made before or after the filing of an action:
(1) A provision that prohibits another party to the dispute from contacting, cooperating with, or filing a complaint with the Board.

(2) A provision that requires another party to the dispute to attempt to withdraw a complaint the party has filed with the Board.
(b) Failure to provide to the Board, as directed, lawfully requested certified copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever is later, unless the licensee or registrant is unable to provide the certified documents with this time period for good cause, including but not limited to, physical inability to access the records in the time allowed due to illness or travel. This subsection shall not apply to a licensee or registrant who does not have access to, and control over, medical records.
(c) Failure to cooperate and participate in any Board investigation pending against the licensee or registrant. This subsection shall not be construed to deprive a licensee or registrant of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privilege. This subsection shall not be construed to require a licensee or registrant to cooperate with a request that would require the licensee or registrant to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the licensee's or registrant's practice. Any exercise by a licensee or registrant of any constitutional or statutory privilege shall not be used against the licensee or registrant in a regulatory or disciplinary proceeding against the licensee or registrant.
(d) Failure to report to the Board within 30 days any of the following:
(1) The bringing of an indictment or information charging a felony against the licensee or registrant.
(2) The arrest of the licensee or registrant.
(3) The conviction of the licensee or registrant, including any verdict of guilty, or pleas of guilty or no contest, of any felony or misdemeanor.
(4) Any disciplinary action taken by another licensing entity or authority of this state or of another state or an agency of the federal government or the United States military.

NOTE: Authority cited: Section 2930, Business and Professions Code. Reference: Section 2930, Business and Professions Code.

BOARD OF PSYCHOLOGY
INITIAL STATEMENT OF REASONS

Hearing Date: May 21, 2011

Subject Matter of Proposed Regulations: Delegation of Functions and Unprofessional Conduct

Sections Affected: Title 16, Division 13.1, California Code of Regulation Sections 1380.4, 1397.2, and the title of Article 7

Introduction

During July 2009, a series of articles appeared in the Los Angeles Times newspaper pointing out consumer protection issues and findings of egregious licensee misconduct at a specific healing arts licensing board within the Department of Consumer Affairs (Department). The articles addressed systemic problems with how the board handled complaints, investigations, disciplinary actions, and probation monitoring.

Based on these findings, the Department held a series of meetings to address these findings. The Department also reviewed existing enforcement processes of other Department healing arts boards. The review discovered systematic problems due to legal, procedural, and inadequate resources that limit a board's ability to investigate and act on cases in a timely manner.

The Department worked with the healing arts boards to identify areas that could be improved administratively to better coordinate the Department's enforcement objectives, improve services provided to the boards, and to establish streamlined processes and procedures. The Department recognized the need for all healing arts boards to review their processes and realign consumer protection laws and regulations to ensure that consumer protection is paramount.

In response to this review, the Department launched the Consumer Protection Enforcement Initiative (CPEI) to overhaul the enforcement processes used by healing arts boards within the Department.

Business and Professions Code Section 2920.1 mandates that protection of the public shall be the highest priority of the Board of Psychology 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.

This regulatory proposal is in response to the Department's request to implement regulations to enhance the Board's mandate of consumer protection.

Specific Purpose of each adoption, amendment, or repeal:

Amend Section 1380.4. Delegation of Functions

This proposal would delegate authority to the Executive Officer to approve settlement agreements for revocation, surrender, or interim suspension of a license or registration.

Factual Basis/Rationale:
Existing law requires that the Board, itself, vote to adopt all stipulated settlement agreements proposed to be entered into by the Board's Executive Officer. Government Code Section 11415.60(c) provides for delegation of this function.

Under existing law, the Executive Officer has the authority to pursue administrative action against a licensee or registrant who has violated the law. Ultimately it is the Board that votes on all decisions, including proposed decisions rendered by an Administrative law Judge, and stipulated settlements. This proposal would delegate to the Board's Executive Officer the authority to adopt settlement agreements (stipulated decisions) for revocation, surrender, or interim suspension of a license or registration.

Authorizing the Board's Executive Officer to approve Stipulated Settlements resulting in revocation, surrender of a license or registration, or interim suspension will allow the Board to focus on more pressing disciplinary matters and will shorten the timeline for Stipulated Surrender cases to take effect, thus adding to consumer protection by allowing the orders to become effective in a more timely manner.

This proposal would also clarify the authority of the Executive Officer to order an applicant for licensure or registration or a licensee or registrant to submit to a physical or mental examination if it appears that the applicant, licensee, or registrant may be unable to safely perform the duties and functions of a psychologist, psychological assistant, or registered psychologist due to physical or mental illness affecting competency.

Factual Basis/Rationale:
Existing law, Section 820 of the Code, authorizes the Board to examine licensees and registrants for mental illness or physical illness affecting competency. Pursuant to Business and Professions Code Section 2906.5, the Board may refuse to issue any license or registration whenever it appears that an applicant may be unable to practice his or her profession safely due to mental illness or chemical dependency.

This proposal would clarify the authority of the Executive Officer to compel an applicant for licensure or registration that has physical or mental health issues to submit to physical or mental examinations to assist the Board in determining an applicant's fitness for licensure or registration. The proposal would also clarify the authority of the Executive Officer to deny the application if the applicant is unable to

safely practice, based on the review of the evaluation report.

Amend the title of Article 7 of Division 13.1

This proposal would amend the title of Article 7 of Division 13.1 from Restoration of Suspended or Revoked Licenses, to Standards Related to Denial, Discipline, and Reinstatement of Licenses or Registrations.

Factual Basis/Rationale:
California Code of Regulations contained in Article 7 include provisions for probation monitoring, substantial relationship criteria defined, rehabilitation criteria for denials and reinstatements, and rehabilitation criteria for suspensions or revocations. The title is being amended to provide clarification of the subject matter of the regulations contained within Article 7.

Adopt Section 1397.2:

Section 1397.2(a)(1), (2)

This proposal would, in addition to conduct described in Business and Professions Code Section 2960, further define "Unprofessional Conduct" to also prohibit the inclusion of provisions in agreements to settle civil disputes that would forbid another party to the dispute from contacting, cooperating with, or filing a complaint with the Board, or that would require another party to the dispute to attempt to withdraw a complaint the party has filed with the Board, either before or after the filing of an action to which the licensee or registrant is or expects to be named as a party.

Factual Basis/Rationale:
The increasing use of provisions in civil dispute settlements prohibiting the other party from contacting, cooperating with, or filing complaints with the Board, hereafter, an "agreement not to pursue," denies consumers the right to file complaints and prevents the Board from investigating and disciplining licensees or registrants who present a danger to consumers. These licensees or registrants may continue to practice and harm the public because the Board is not aware of civil dispute settlements. This proposal would prevent licensees or registrants who have violated the law from avoiding disciplinary action against their licenses or registrations.

"Agreements not to pursue" can delay and thwart the Board's effort to investigate possible cases of misconduct, thereby preventing the Board from protecting the public. These clauses delay action by the Board and tarnish the reputation of competent and reputable licensed and registered health care professionals. By allowing repeat offenders who injure patients to hide their legal acts from the Board further prevents the Board from protecting consumers.

It has been argued that a licensee or registrant should not be subject to review by the Board after a civil settlement has been reached. Protection from license or registration

disciplinary action does not attach to civil proceedings or subsequent administering proceedings. Criminal, civil, and administrative proceedings each serve entirely different legal functions. No ordinary citizen can claim immunity from one proceeding because he or she already underwent the other. It necessarily follows that Board licensees and registrants should not enjoy any exception to the rule of legal process.

Section 1397.2(b)

This proposal would also define as "Unprofessional Conduct" failure to provide the Board with lawfully requested copies of documents within 15 days of receipt of the request or within the time specified in the request, whichever occurs later unless the licensee or registrant is unable to comply for good cause. "Good cause" is specified to include physical inability to access the requested records in the time allowed due to an illness or travel.

Factual Basis/Rationale
Failure of a licensee or registrant to provide lawfully requested documents delays the Board's investigation of consumer complaints. The obtaining and inspection of documents is crucial in investigating consumer complaints and taking appropriate action against a licensee or registrant who may cause patient harm.

Patient records can only be obtained under two circumstances: 1) the patient has given written authorization for release of the records to the Board; and 2) pursuant to a subpoena. Under both circumstances penalties would apply if the records are not supplied by those who have both possession and control over the records.

Existing law, California Business and Professions Code (Code) Section 2969(a)(1), specifies that a licensee who fails or refuses to comply with the Board's request for records, within 15 days of receiving the request, is required to pay a civil penalty to the Board of $1000 per day for each day the records are not produced, up to a maximum of $5,000. Existing law, Section 2960 of the Code, specifies that any licensee or registrant may have their license or registration revoked, suspended, reprimanded, or placed on probation by the Board for unprofessional conduct, incompetence, gross negligence, or repeated acts of negligence in their profession. Section 2969(d) of the Code, specifies that failure to comply with a court order issued in the enforcement of a subpoena mandating the release of records to the Board constitutes unprofessional conduct and is grounds for suspension or revocation, however there is no similar language for failure to comply with a request for records that is accompanied by the patients written authorization for the release of records to the Board.

A licensee or registrant who does not provide requested information, or who does not cooperate with the Board, can create a significant delay in an investigation and can endanger patient safety. The proposed regulation identifies the failure of a licensee or registrant to provide requested records as an act of unprofessional conduct, and ultimately authorizes the Board to take disciplinary action against a licensee or registrant who fails to provide records upon request accompanied by written

authorization. This will enable the Board to more quickly investigate the underlying allegations and offenses and act accordingly to provide better consumer protection. If a licensee or registrant is able to demonstrate "good cause" for being unable to comply with a records request, they may contact the Board and may be granted an extension of time to return the records depending on the circumstances.

1397.2(c)

Also defined as "Unprofessional Conduct" is the failure to cooperate and participate in any Board investigation pending against a licensee or registrant.

Factual Basis/Rationale:
Again, failure of the licensee or registrant to cooperate with the Board in an investigation further erodes the Board's mandate of consumer protection. This proposal would not, however, deprive a licensee or registrant of any privilege guaranteed by the Fifth Amendment to the Constitution or other constitutional or statutory privileges. Additionally, this proposal would not require the licensee or registrant to cooperate with a request that would require them to waive any constitutional or statutory privilege.

1397.2(d)

This proposal would further define as "Unprofessional Conduct" the failure of a licensee or registrant to report to the Board within 30 days the bringing of an indictment or information charging a felony, an arrest, conviction of a crime; any disciplinary action taken against another licensing entity; or failure or refusal to comply with a court order issued in the enforcement of a subpoena mandating the release of records to the Board.

As part of the licensing process, all applicants for licensure as a psychologist or registration as a psychologist or psychological assistant are fingerprinted for purposes of conducting criminal history background checks through the California Department of Justice (DOJ) and Federal Bureau of Investigation (FBI). In most cases, the Board receives subsequent arrest notifications for licensees or registrants convicted of crimes. The Board, however, may not always be made aware of convictions or other actions. Additionally, other agencies may not be required to report actions or not be aware that the individual has a psychologist license, psychological assistant registration, or is a registered psychologist in California.

Factual Basis/Rationale:
By requiring licensees and registrants to report this information, the Board gains an additional enforcement tool so that a determination may be made to pursue disciplinary action against the licensee or registrant, as appropriate.

Underlying Data

1. Department of Consumer Affairs, Consumer Protection Enforcement Initiative,

Updated 1/21/10. <http://www.dca.ca.gov/about_dca/cpei/index.shtml>, under read about the initiative here.

2. Department of Consumer Affairs, SB 1111 (4/12/2010 version) Proposed Changes through Regulations

Business Impact

This regulation will not have a significant adverse economic impact on businesses because it only impacts psychologist licensees, registered psychologists, and psychological assistant registrations.

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.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

1. Not adopt the regulations. This alternative was rejected because the Board has identified areas of concern regarding enhanced protection of consumers.
2. Adopt regulations. The Board determined that this alternative is the most feasible because it will assist the Board in its mandate of consumer protection.