

CALIFORNIA ACUPUNCTURE BOARD

INITIAL STATEMENT OF REASONS

Hearing Date: April 14, 2010

Subject Matter of Proposed Regulations: Retroactive Fingerprinting

Sections Affected: Sections 1399.419.1 and 1399.419.2 of Division 13.7 of Title 16 of the California Code of Regulations

Specific Purpose

The main purpose of the proposed language is to establish requirements that a licensee must furnish a full set of fingerprints to the Department of Justice ("DOJ") as a condition of renewal with the Acupuncture Board ("Board") if the licensee was initially licensed prior to 2001 or if an electronic record of the fingerprint submission no longer exists. Generally, this proposal would:

- set requirements and time frames for when the licensee would be required to submit criminal history information and other related records to the Board;
- specify the conditions and the purpose for which a full set of fingerprints would be required;
- establish that the licensee would be responsible for paying the costs associated with furnishing fingerprints and conducting criminal offender record searches;
- require a licensee to certify compliance with the new fingerprinting requirements on his or her renewal form and maintain records of his or her compliance for at least 3 years;
- authorize a waiver of these new fingerprinting requirements for licensees who are inactive or actively serving in the military outside of the country;
- mandate that licensees disclose on the renewal form whether the licensee has been convicted of a crime, as defined, or had any disciplinary actions taken against any other license he or she holds; and,
- specify that failure to comply with these requirements or submit a full set of fingerprints to DOJ renders any application for renewal incomplete and is grounds for discipline by the Board.

Proposed changes, by section, are more specifically identified as follows.

Add Section 1399.419.1. Response to Board Inquiry.

The section would provide that if the Board asks a licensee to provide criminal history information, the licensee must respond to the request within 30 days by making available all documents and other records requested, and specifies that the information provided must be accurate. This section would establish the timeframe for a licensee's compliance to the Board's inquiries and would ensure that accurate information is received from the licensee. This section would protect consumers by assisting the Board's enforcement staff in the gathering of information and the investigative process for determining whether a licensee is in compliance with the Acupuncture Licensure Act.

Section 1399.419.2. Fingerprint and Disclosure Requirements for Renewal of License.

This heading text would inform licensees that the sections that follow relate to fingerprinting and disclosure requirements for the renewal of a license.

Add Section 1399.419.2(a)

This section would establish requirements that a licensee must furnish a full set of fingerprints to the Department of Justice (“DOJ”) as a condition of renewal with the Acupuncture Board (“Board”) if the licensee was initially licensed prior to 2001 or if an electronic record of the fingerprint submission no longer exists. Licensees need to be made aware that certain groups of licensees will be required to be fingerprinted as a condition of license renewal, and this regulation would authorize the Board to require fingerprinting of these licensees. This section would protect consumers by giving the Board access to currently available DOJ information relative to criminal arrests and convictions and would enable the Board to determine if violations of the Acupuncture Licensure Act have occurred.

Add Section 1399.419.2(a)(1)

This section would establish that the cost of fingerprinting and conducting the criminal history record check must be paid by the licensee. This regulation is necessary to authorize assessment of costs to licensees, which is consistent with fingerprinting and record check costs that have been paid by every other licensee or applicant since 2001.

Add Section 1399.419.2(a)(2)

This section would establish that as part of the renewal process, each licensee will be asked to certify on his or her renewal form whether or not they have submitted fingerprints to the Department of Justice as required.

Add Section 1399.419.2(a)(3)

This section would establish an exemption from or waiver of the fingerprinting requirement if the license is on an inactive status or if the licensee is actively serving in the military outside the country.

Add Section 1399.419.2(a)(4)

This section would require affected licensees to retain a receipt, as specified, of compliance with the fingerprinting requirement for a period of at least three years. This requirement is necessary to provide evidence that a licensee has complied with the fingerprinting requirement.

Add Section 1399.419.2(b)

This section would mandate that if a licensee is convicted of any violation of the law during the prior renewal cycle, the licensee must disclose that fact to the Board, with infractions specified that may be omitted. This reporting requirement is necessary for consumer protection and enforcement of the Acupuncture Licensure Act. This information is necessary to determine if disciplinary action is warranted pursuant to the Board’s authority (e.g., Sections 141 and 4955 of the Business and Professions Code).

Add Section 1399.419.2(c)

This section would mandate that since the licensee last applied for renewal, whether he or she has been denied a license or had any disciplinary action against another license that the licensee may hold must be reported. This reporting requirement is necessary for consumer protection and enforcement of the Acupuncture Licensure Act. Many licensees hold other licenses either in California or in other states. This language would assist the Board in obtaining information relative to discipline taken by other corresponding state or government licensing entities. This information is necessary to determine if disciplinary action is warranted pursuant to the Board’s authority (e.g., Sections 141 and 4955 of the Business and Professions Code).

Add Section 1399.419.2(d)

This section would establish that failure to comply with these requirements would result in non-renewal of the license until the licensee complies with all of the requirements of this section (e.g., fingerprinting, disclosure or record-keeping requirements). This requirement is needed to ensure compliance with the unprofessional conduct statutes of the Acupuncture Licensure Act and prevents possible renewal of a license for a licensee who has violated the law.

Add Section 1399.419.2(e)

This section would provide that failure to furnish a full set of fingerprints as required is grounds for discipline by the Board. The Board must have the ability to enforce the requirements of the section by disciplining the license of a licensee who refuses to comply with the requirements for fingerprinting. The licensee could be in violation of the law or potentially cause patient harm if the Board does not have the ability to verify the criminal history of its licensees through the DOJ or take action for non-compliance.

Add Section 1399.419.2(f)

This section would require that licensees, as a condition of restoring their license from inactive to active status, would be required to submit a full set of fingerprints to the DOJ according to the provisions of Section 1399.419.2. This provision is necessary to ensure that criminal offender record information continues to be transmitted to the Board upon reactivation of a license.

Factual Basis

Proposed Adoption of Section 1399.419.1 of Division 13.7 of Title 16 of the California Code of Regulations

This proposed regulation would require a licensee to provide timely and accurate responses to inquiries from the Board relative to criminal history information and provide necessary documents needed by the Acupuncture Board to investigate and take appropriate action against a licensee convicted of a criminal offense that is substantially related to the practice of a licensed acupuncturist.

To conduct an investigation on whether a conviction is substantially related to the practice of a licensed acupuncturist, 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. This proposed language would enable the Board to issue a citation and fine for failure to provide the necessary documentation in a timely manner. Due to the volume of conviction documents that must be obtained from the various courts throughout California and other states, it is critical that the licensee provide accurate court and case number information to the Board. This proposal would assist in ensuring that such information is provided.

Proposed Adoption of Section 1399.419.2 of Division 13.7 of Title 16 of the California Code of Regulations

Business and Professions Code Section 4965 provides that in order to renew an acupuncturist’s license, the licensee must complete an application for renewal and pay the required fee. As a condition of renewal, this proposal would also require a licensee whose fingerprints did not undergo both a state and federal level criminal offender record information search or for whom a fingerprint record no longer exists to (a) furnish to the DOJ, as directed by the Acupuncture Board, 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) disclose on the renewal form whether he or she has had any disciplinary action taken against any license or has been convicted of any violation of the law in this state or any other state that occurred in the prior renewal cycle; and (c) failure to provide all required information may render the renewal application incomplete and therefore not eligible for renewal.

Since the board began licensing in 1976, applicants for licensure were required to submit rolled fingerprints on paper cards for the purpose of conducting criminal history background checks through the DOJ. In 1995, the Board began to also require that fingerprints undergo a federal criminal offender record information search. Since 2001, with limited exceptions, all applicants for licensure as an acupuncturist have been 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.

Those applicants fingerprinted prior to 2001 were fingerprinted using the rolled fingerprints on a hard card and they 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 located and 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. It is necessary for the board to have subsequent arrest notices in order to protect the public by taking disciplinary action as may be appropriate.

This proposed rulemaking is necessary to ensure that all of the board's licensees have fingerprints entered into the DOJ electronic database so that the board is assured of receiving subsequent arrest notifications on a timely basis in order to protect the public.

Underlying Data

1. January 16, 2009 memorandum from DCA Deputy Director of Legal Affairs, Doreathea Johnson, regarding retroactive fingerprinting.
2. February 19, 2009 Board Meeting Minutes

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. There are approximately 750 vendors statewide, including small businesses that provide fingerprinting services. There should be no initial or ongoing cost impact upon vendors because they are already equipped to provide the service and the fingerprinting of the approximate 5,000 licensees will be extended over a two-year period.

Specific Technologies or Equipment

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

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.