

MEDICAL BOARD STAFF REPORT

DATE REPORT ISSUED: September 22, 2008
 DEPARTMENT: Executive Office
 SUBJECT: Proposed Regulations – Reduction in License Fees
 to Offset Loss of Diversion Program
 STAFF CONTACT: Kevin A. Schunke

REQUESTED ACTION:

Vote to adopt the modifications to the Board's proposed regulatory language, as approved at the July 2008 Board meeting.

STAFF RECOMMENDATION:

To allow for the timely and most-prudent implementation of the reduction of the initial and renewal licensing fees through the regulatory process in an amount commensurate with the decrease in spending authority due to the discontinuation of the Board's Diversion Program, staff recommends the Board move forward with language approved at the July 2008 meeting. (See attached language)

EXECUTIVE SUMMARY:

Section 2435.2 of the Business and Professions Code states that the Board shall reduce license and renewal fees if the Diversion Program is eliminated. At the April 24, 2008, Board meeting, a hearing was held on the proposed regulations to implement this law under the assumption that there would be no urgency legislation to extend the program. However, the time needed for staff to finalize the file and move it forward through the approval process was not adequately estimated.

Assuming the file were to be submitted to the Office of Administrative Law by January 1, 2009 and approved by February 1, 2009, this would allow for the four-month window needed to format changes for the printing and mailing of renewal notices. Further, for accounting purposes, it seems logical that the fee reduction take effect at the beginning of Fiscal Year 09-10, instead of the last month or two of the previous fiscal year. Therefore, at the July 2008 meeting, the Board voted to modify the effective date to be July 1, 2009. If no adverse comments had been received, then the Executive Officer was authorized to adopt and move the file forward.

In an effort to work cooperatively with various interested parties considering legislation to extend the program or use that funding, staff did not strive to aggressively move this file forward promptly. Throughout the legislative session, the parties were actively seeking alternatives to the Board's Diversion Program, which was being sunsetted; the loss of that program was the statutory impetus for this rulemaking. Current law states that, while the fees should be reduced due to the elimination of a Diversion Program, the board "shall not make the reductions . . . if a [new] diversion program is established by statute and requires the board to fund it in whole or in part from licensure fees." With the uncertainty of whether a legislative bill would be successful in securing a new alternative program, and the added uncertainty of what the funding source of such a program might be, staff continued working this rulemaking, but with a concerted effort to have it ready for final submission only at the end of the Legislative session.

During the 15-day public comment period for the modified language, which closed on August 15, 2008, CMA submitted comments (see attached). In summary, CMA contends that the Board was not moving quickly enough to reduce the licensing and renewal fees in view of the elimination of the diversion program. CMA posits that the elimination of the diversion program took effect on July 1, 2008 and any money collected thereafter violates the law. Thus, this then equals an unfair revenue gain for the Board, money which should rightfully belong to licensees.

However, it must be noted that Business and Professions Code Section 2435.2 (the law requiring the reduction in fees if the diversion program is sunsetted) did not include any timeframe during which the fees must be reduced. The law, therefore, must have contemplated the need for a formal rulemaking process, which is well-known to take many months; this is particularly true in light of the fact that the Board could not have known whether or not the original diversion program would actually sunset or another program created in its place, to be funded in whole or in part by the Board's fees. Lastly, the governing statute did not provide for a "penalty" for the failure to promptly reduce the fee.

All monies collected by the Board are deposited into the Board's Contingent Fund. With passage of the 2008-09 budget, the Contingent Fund is left with a balance of 4.3 months of operating expenses.

Since this rulemaking is scheduled to be effective on July 1, 2009, and the argument has been made the Board should have acted sooner, the Board could seek to refund \$22 to each of the approximate 55,000 physicians who paid a license or renewal fee during FY 08-09. This would cover those persons who paid fees after the date the law became effective and before the effective date of the fee reduction. This would represent about \$1.2 million and still would leave a balance in the Contingent Fund for about 4.0 months of operating expenses. (See attached fund condition document)

The process for issuing such a plethora of refunds has not been previously addressed by any of the DCA regulatory boards. DCA is working with the State Controller's Office to identify the most cost-efficient and least labor-intensive process. It is not known if the Board's data can be downloaded into a program which would expedite payment. At present, the only way to accomplish this task would involve preparing 4,500 "refund schedule" forms, and having each form processed individually, a very cumbersome process. The postage for mailing the refunds would be in excess of \$23,000, and the administrative costs to accomplish this task would be high.

FISCAL CONSIDERATIONS:

Adoption of the modified rulemaking language, as approved at the July 2008 meeting, is a cost-neutral proposal.

If the Board were to move forward with either of the alternatives listed below (refunding \$22 to each of the approximate 55,000 physicians who paid a license or renewal fee during FY 08-09), this would represent about \$1.2 million. Additionally, the estimated administrative costs of authorizing, issuing, and mailing 55,000 checks would be high.

PREVIOUS MBC AND/OR COMMITTEE ACTION:

A hearing was held at the April 2008 Board meeting to discuss this rulemaking; the Board voted to adopt regulations which would reduce the fee by \$22 beginning November 1, 2008. At the July 2008 meeting, the Board voted to modify the effective date to July 1, 2009.

ALTERNATIVES:

1. The Board could vote to amend the current rulemaking to include language to refund \$22 to each of the approximate 55,000 physicians who paid a license or renewal fee during FY 08-09. The danger of doing this, however, is that if there are any adverse comments to the modified text, then the entire rulemaking would have to be on the agenda at the Board meeting scheduled for the end of January, 2009, potentially compromising the timely completion of the entire file.

Government Code Section 11346.6 provides that a rulemaking must be finalized and submitted to the Office of Administrative Law (OAL) within one year from the date the first hearing was noticed, which in the case of

this rulemaking, was February 29, 2007. An exception is provided for DCA Boards, which must submit the finalized file to the Director of DCA within that one year period and the Director may, at his/her discretion, offer a brief extension so that DCA can review and take action on the file.

2. The Board could vote to amend the current rulemaking to include language that would make the effective date of the regulations earlier than July 1, 2009. The timeframe problems outlined in Alternative 1 would also be problematic for this option. If the Board approved the amendment, there would have to be a 15-day comment period for the new language. If no adverse comments were received, and if the Board agreed, the Executive Director could finalize the rulemaking package and submit it to DCA for approval. It would be difficult to put an exact date as the effective date because DCA would have to review the package and then submit it to OAL for approval. Once the package was approved by OAL, the regulations do not become effective for 30 days. The staff would have to estimate the time for all reviewers and hope that the date staff chooses does not occur prior to final filing by the Secretary of State.

Also, as stated at previous meetings, renewal notices are sent out 100-120 days prior to the expiration date. This would not allow necessary staff time to change the renewal fee on the renewal application. Although separate notices could be mailed to physicians indicating the fee had changed, the DCA cashing unit processes renewals in a batch processing using the renewal form. They could not cashier physicians and surgeons renewals during this time. All renewals would have to be processed through the Medical Board, which would cause an overwhelming workload and would lead to renewals not being processed timely.

3. The concept of a \$22 refund could move forward in a separate rulemaking. If the Board were to vote and direct staff to set such a proposal for hearing, the hearing could be held at the January 2009 Board meeting. If the rulemaking were to move forward without adverse comments, the language might become effective by the end of 2009 and refunds could be issued during the first half of 2010. By that time, the issue of an expedited refund process may be resolved and the administrative costs reduced to a minor impact, plus the \$23,000 postage.

RECOMMENDATIONS:

The Board should follow the staff recommendation of voting to adopt the modifications to the Board's proposed regulatory language, as approved at the July 2008 Board meeting. This action should be taken, as legal counsel believes the fees can not be reduced by administrative action alone; only a rulemaking can accomplish this. There are no drawbacks to this action.

Staff does not recommend Alternatives 1 or 2. Any further delays to the current rulemaking risks a timely completion of the file, potentially delaying submittal of the rulemaking to OAL by the statutory deadline. In addition, if Alternative 2 was chosen, it could lead to renewals not being processed timely. Staff does not offer a recommendation on Alternative 3. While many licensees would appreciate a refund of \$22, to individuals, that amount probably is not of great benefit to most. And it must be noted that the administrative costs of authorizing, issuing, and mailing 55,000 checks could be high.

**Medical Board of California
Specific Language of Proposed Regulations**

**Reduction in Initial License Fee and Renewal Fee to Offset
Elimination of Diversion Program**

MODIFIED TEXT: Additions to the originally proposed language are shown by double underline for new text and deletions to the originally proposed language are shown by a strikeout and single underline.

Amend Section 1351.1 and Section 1352, Title 16, California Code of Regulations to read as follows:

Section 1351.5. Initial License Fee.

~~The initial fee for licensure as a physician and surgeon or for a special faculty permit shall be \$600 for licensing periods beginning on or after January 1, 1994. The initial license fee for licensure as a physician or surgeon or for a special faculty permit shall be \$805 for licensing periods beginning on or after January 1, 2007. The initial license fee shall be \$783 for licensing periods beginning on or after November 1, 2008.~~ The initial license fee shall be \$805 for licensing periods beginning on or after January 1, 2007. The initial license fee shall be \$783 for licensing periods beginning on or after July 1, 2009.

Note: Authority cited: Sections 125.3, 2018, 2168.4 and 2436, Business and Professions Code. Reference: Sections 125.3, 2168.4 and 2435, Business and Professions Code.

Section 1352. Renewal Fee.

~~The biennial renewal fee for licenses or special faculty permits which expire on or after February 28, 1997 shall be \$600. The biennial renewal fee for licenses or special faculty permits which expire on or after January 1, 2007 shall be \$805. The biennial renewal fee for licenses or special faculty permits which expire on or after November 1, 2008 shall be \$783.~~ The biennial renewal fee for licenses or special faculty permits which expire on or after January 1, 2007 shall be \$805. The biennial renewal fee for licenses or special faculty permits which expire on or after July 1, 2009 shall be \$783.

Note: Authority cited: Sections 125.3, 2018, 2168.4 and 2436, Business and Professions Code. Reference: Sections 125.3, 2168.4 and 2435, Business and Professions Code.



California Medical Association
Physicians dedicated to the health of Californians

August 14, 2008

Kevin A. Schunke
Medical Board of California
2005 Evergreen St, Suite 1200
Sacramento, CA 95815

Subject: Comment letter on Fee Reduction to Offset Elimination of Diversion Program

Dear Mr. Schunke:

The California Medical Association (CMA) respectfully submits the following comments for consideration related to the recent modification to existing regulations to reduce the physician license fee from \$805.00 to \$783.00. The modification changes the effective date of the fee reduction from November 1, 2008 to July 1, 2009. The comments are in response to the solicitation for comments in a notice of proposed rulemaking posted on July 30, 2008 containing proposed regulation §1351.5 and 1352 (the "Proposed Regulations").

California Medical Association is an advocacy organization that represents more than 34,000 California physicians. Dedicated to the health of Californians, CMA is active in the legal, legislative, reimbursement and regulatory areas on behalf of California physicians and their patients.

I. Background

At its July 27, 2007 board meeting, the Medical Board of California (MBC) voted to allow the Diversion Program to sunset on July 1, 2008.

Section 2435.2 of the B & P Code states that the Board shall reduce license and renewal fees if the Diversion Program is eliminated. At the April 24, 2008 MBC board meeting, a public hearing was held on the proposed regulations to implement Section 2435.2 and amend those sections which set forth the initial license fee and the biennial renewal fee. The proposed regulations reduced the initial and renewal licensing fees for physicians and surgeons from \$805 to \$783 for licenses and permits expiring on or after November 1, 2008. The MBC voted to adopt the regulation to amend 1351.5 and 1352 of Title 16 to reduce the initial license fee and renewal fee. These regulations will hereinafter be referred to as "Existing Regulations."

At the July 25, 2008 MBC board meeting, the MBC voted to adopt modifications to the existing regulations that changed the effective date of the fee reduction from November 1, 2008 to July 1, 2009. These proposed changes will hereinafter be referred to as "Proposed Regulations."

II. CMA's Comments

CMA's concerns regarding the existing and proposed regulations are that the Proposed Regulations violate state law. Upon elimination of the diversion program, the MBC must either reduce license fees to equal the board's cost of operating the diversion program or direct funding to a similar program if established by law. Provisions for the termination of the MBC Diversion Program are clearly stated in Section 2435.2 of the Business and Professions Code as follows:

(a) Notwithstanding any other provision of law, if Article 14 (commencing with Section 2340) becomes inoperative or the diversion program described in that article is discontinued, the board shall reduce the amount of the following fees:

(1) The initial license fee, as described in subdivision (c) of Section 2435.

(2) The biennial renewal fee, as described in subdivision (d) of Section 2435.

(3) An increase in the fees established pursuant to subdivision (e) of Section 2435.

(b) The amount of the reductions made pursuant to subdivision (a) shall equal the board's cost of operating the diversion program.

(c) The board shall not make the reductions described in subdivision (a) if a diversion program is established by statute and requires the board to fund it in whole or in part from licensure fees.

The MBC is in violation of the California Business and Professions Code as follows:

1. Violation of Section 2453.2(a) – The initial license fee and biennial renewal fee have not been reduced to reflect the discontinuation of the diversion program.

Pursuant to Business and Professions Code Sections 2340 et seq., the MBC Diversion Program is inoperative effective July 1, 2008. Under existing regulations, the MBC will continue to collect physician and surgeon licensing fees—that include the \$22 surcharge for the diversion program—until November 1, 2008. Under the proposed regulations, the MBC Diversion Program will continue to collect physician and surgeon licensing fees—that include the \$22 surcharge for the diversion program—until July 1, 2009. The Proposed Regulations clearly violate Section 2453.2(a) of the Business and Professions Code.

2. Violation of Section 2453.2(b) – Reductions have not been made which equal the board's cost of operating the diversion program.

Under the proposed regulations, the licensing fee reduction of \$22 will be implemented on July 1, 2009. However, due to the delay in implementation, the board's savings from discontinuing operating the diversion program will be more than the its reduction

revenue, resulting in a net revenue gain for the MBC. The licensing fee reductions will be smaller than what is required to equal the board's cost.

3. Violation of Business and Professions Code Section 2453.2(c) – The MBC has not met the conditions which would allow it to avoid reducing licensing fees.

Section 2435.2 (c) of the Business and Professions Code provides that the MBC shall not make reductions if a diversion program is established by statute and requires the board to fund it in whole or in part from licensure fees. Under current law, no other diversion program has been established to replace the MBC diversion program, so the MBC is in violation of state law by not immediately reducing the licensing fee.

4. Violation of Business and Professions Code Section 2435(h) – The MBC will exceed its maximum reserve if it continues to collect higher licensing fees through July 1, 2009.

Section 2435(h) of the Business and Professions Code states:

(h) It is the intent of the Legislature that, in setting fees pursuant to this section, the board shall seek to maintain a reserve in the Contingent Fund of the Medical Board of California equal to approximately two months' operating expenditures.

We estimate that by not reducing the licensing fee to reflect the discontinuation of the diversion program, the MBC will exceed its maximum reserve in the Contingent Fund by at least \$1.2 million by July 1, 2009. To our knowledge, the MBC has not submitted any budget change proposals to expend the surplus diversion funds in fiscal year 2008-2009.

III. Conclusion

In conclusion, the CMA believes that the Proposed Regulations constitute multiple violations of California state law, including failure to immediately reduce licensing fees to reflect the discontinuation of the diversion program and exceeding the maximum revenue reserve for the Contingent Fund of the Medical Board of California. For these reasons, we urge the MBC to withdraw these proposed regulations and discontinue their efforts to delay the implementation of the licensing fee reduction.

Sincerely,

Yvonne Choong
Associate Director, Center for Medical and Regulatory Policy
California Medical Association
1201 J Street, Suite 200
Sacramento, CA 95814

Cc: Don Moulds, CMA Vice-President, Center for Medical and Regulatory Policy
Francisco Silva, CMA Legal Counsel

0758 - Medical Board Analysis of Fund Condition

(Dollars in Thousands)

	Actual 2007-08	2008-09	2009-10	2010-11	2011-12
BEGINNING BALANCE	\$ 18,467	\$ 23,866	\$ 19,325	\$ 19,793	\$ 20,750
Prior Year Adjustment	\$ 152	\$ -	\$ -	\$ -	\$ -
Adjusted Beginning Balance	\$ 18,619	\$ 23,866	\$ 19,325	\$ 19,793	\$ 20,750
REVENUES AND TRANSFERS					
Revenues:					
125600 Other regulatory fees	\$ 354	\$ 383	\$ 387	\$ 387	\$ 387
125700 Other regulatory licenses and permits	\$ 5,596	\$ 5,745	\$ 5,737	\$ 5,737	\$ 5,737
125800 Renewal fees	\$ 44,917	\$ 44,459	\$ 44,866	\$ 45,264	\$ 45,670
125900 Delinquent fees	\$ 102	\$ 102	\$ 100	\$ 100	\$ 100
141200 Sales of documents	\$ -	\$ -	\$ -	\$ -	\$ -
142500 Miscellaneous services to the public	\$ 20	\$ 20	\$ 20	\$ 20	\$ 20
150300 Income from surplus money investments	\$ 1,079	\$ 1,163	\$ 900	\$ 945	\$ 827
160400 Sale of fixed assets	\$ -	\$ -	\$ -	\$ -	\$ -
161000 Escheat of unclaimed checks and warrants	\$ 22	\$ -	\$ -	\$ -	\$ -
161400 Miscellaneous revenues	\$ 1	\$ 5	\$ 5	\$ 5	\$ 5
164300 Penalty assessments - Probation Monitoring	\$ -	\$ 900	\$ 900	\$ 900	\$ 900
Totals, Revenues	\$ 52,091	\$ 52,777	\$ 52,915	\$ 53,358	\$ 53,646
Transfers:					
Loan:					
General Fund Loan per May Revise		\$ (6,000)			
Totals, Revenues and Transfers	\$ 52,091	\$ 46,777	\$ 52,915	\$ 53,358	\$ 53,646
Totals, Resources	\$ 70,710	\$ 70,643	\$ 72,240	\$ 73,151	\$ 74,396
EXPENDITURES					
Disbursements:					
0840 State Controller (State Operations)	\$ 39	\$ 36	\$ -	\$ -	\$ -
<u>Budget Act of 2007</u>					
1110 Program Expenditures (State Operations) - Galley 3	\$ 46,805	\$ 51,282	\$ 51,282	\$ 51,282	\$ 51,282
2009-10 BCPs: Program					
Enforcement Staff			\$ -	\$ -	\$ 1,191
Probation Staff -(Via redirection)			\$ -	\$ -	\$ -
MBC CRIMS Project			\$ -	\$ -	\$ 2,531
2009-10 BCPs: Divisions					
DCA - Public Affairs			\$ 128	\$ 101	\$ 101
DCA - AISD (Incl. OIS)			\$ 185	\$ 166	\$ 166
BL 08-18 price increase			\$ 852	\$ 852	\$ 852
Total Disbursements	\$ 46,844	\$ 51,318	\$ 52,447	\$ 52,401	\$ 56,123
FUND BALANCE					
Reserve for economic uncertainties	\$ 23,866	\$ 19,325	\$ 19,793	\$ 20,750	\$ 18,273
Months in Reserve	5.6	4.4	4.5	4.4	4.0

NOTES:

A. ASSUMES WORKLOAD AND REVENUE PROJECTIONS ARE REALIZED FOR 2008-09 AND BEYOND.

B. INTEREST ON FUND ESTIMATED AT 5%.