

**TITLE 16. CALIFORNIA BOARD OF NATUROPATHIC MEDICINE
DEPARTMENT OF CONSUMER AFFAIRS**

INITIAL STATEMENT OF REASONS

Hearing Date: No hearing scheduled.

Subject Matter of Proposed Regulations: Delegation of Functions

Section(s) Affected: Adopt section 4201 and title in Article 1 of Division 40 of Title 16 of the California Code of Regulations

Background and Statement of the Problem:

The California Board of Naturopathic Medicine (“Board”) licenses, regulates, and investigates complaints against naturopathic doctors in California, totaling approximately 430 licensees. The Board is a state agency vested with the authority to regulate the practice of naturopathic doctors (Bus. & Prof. Code, § 3612). The Board’s mandate and highest priority is to protect the public (Bus. & Prof. Code, § 3620.1). It is the Board’s duty to enforce and administer the Naturopathic Doctors Act (Chapter 8.2 (commencing with section 3610 of Division 2 of the Business and Professions Code (BPC)) (Act). The Board is authorized to establish necessary rules and regulations for the enforcement of the Act and the laws subject to its jurisdiction. (BPC § 3622.)

Business and Professions Code section BPC section 3621(e) provides:

“The board may appoint a person exempt from civil service who shall be designated as an executive officer and who shall exercise the powers and **perform the duties delegated by the board** and vested in the executive officer by this chapter.”
(Emphasis added.)

The Board has adopted a few regulations in Division 40 of tile 16 of the California Code of Regulations (16 CCR) that specify the Executive Officer’s duties, including: (1) 16 CCR section 4208 (complaint disclosures), (2) 16 CCR section 4242 (issuance of citation and fines), (3) 16 CCR section 4246 (setting fine amounts), (4) 16 CCR section 4250 (contest of citations), (5) 16 CCR section 4252 (granting extensions of time for correction under orders of abatement), and, (6) 16 CCR section 4254 (issuance of citations for unlicensed activity). However, the Board currently does not have a regulation that prescribes the overall day-to-day duties commonly assigned to Executive Officers or Executive Directors in this Department. Other boards within this Department have specified their Executive Officer’s duties in regulation. (See e.g., 16 CCR §§ 1001, 1703, and 1803.)

To address this problem, this proposal would formally delegate the day-to-day duties and functions of the Board’s Executive Officer, as specified, and centralize all delegated

duties in one location through the adoption of 16 CCR section 4201 in Division 40 of the Board's regulations.

Anticipated benefits from this regulatory action:

The objective of this proposal is to ensure that the Board's regulations accurately reflect the duties delegated to the Board's Executive Officer in compliance with the laws related to the Board's jurisdiction in one convenient location. This helps avoid licensee and staff confusion about who is authorized to make decisions on behalf of the Board with respect to Board operations. This helps ensure transparency, legal compliance and accuracy in the Board's operations and a well-informed public.

Specific purpose of, and rationale for, each adoption, amendment, or repeal:

1. Adopt 16 CCR section 4201: new section and title

A. **Purpose:** To add a new section 4201 and title in Article 1 of Division 40 of the CCR entitled "Delegation of Functions."

B. **Rationale:** The Board currently does not have a regulation that specifies what duties have been "delegated by the board" in accordance with BPC section 3621. To resolve that ambiguity, this new title and section would provide that specificity and notice to the regulated community of the duties this Board has delegated to its Executive Officer as well as centralize all delegated duties in one location through the adoption of this section.

2. Adopt 16 CCR section 4201(a)

A. **Purpose:** This proposal would add a new subsection (a) that specifies the general day-to-day duties required of the Board's Executive Officer including:

- (1) Duties delegated pursuant to other sections of this Division,
- (2) The duty to plan, direct and organize the work of the staff,
- (3) The duty to attend California Board of Naturopathic Medicine ("Board") board meetings and hearings;
- (4) The duty to consult with and make recommendations to the Board;
- (5) The duty to dictate correspondence;
- (6) The duty to issue orders compelling an evaluation of a licensee's physical or mental condition in accordance with section 820 of the Business and Professions Code, and,
- (7) The duty to attend meetings of various organizations and associations.

B. **Rationale:** The Board has adopted a few regulations in Division 40 of tile 16 of the California Code of Regulations (16 CCR) that specify the Executive Officer's duties, including: (1) 16 CCR section 4208 (complaint disclosures), (2) 16 CCR section 4242 (issuance of citation and fines), (3) 16 CCR section 4246 (setting fine amounts), (4) 16 CCR section 4250 (contest of citations), (5) 16 CCR section 4252 (granting extensions of time for correction under orders of abatement), and, (6) 16 CCR section 4254 (issuance

of citations for unlicensed activity). This proposal is necessary to list all delegated duties in one convenient location, to avoid confusion over the scope of the Board's delegations to its Executive Officer, and to prescribe the overall day-to-day duties assigned to its Executive Officer. To give proper notice of the duties that have been delegated by the Board and to formally delegate its authority, the Board proposes to adopt this section, including subsection (a), which is intended to contain current delegations authorized by the Board. The list of duties in paragraphs (1)-(7) above (under the heading "Purpose") are duties commonly performed by Executive Officers in this Department, and are consistent with the Executive Officer's purpose, which is to: supervise and manage staff and Board operations (including facilitate meetings), help develop policy and operational recommendations to the Board, enforce policies established by the Board, and serve as a liaison between the Board and stakeholder organizations and associations. To that end, the Board has formally assigned the duties in paragraphs (1)-(5) and (7) noted above to accomplish those objectives.

In subsection (a) of this section, the Board also proposes to delegate the power to issue orders compelling an evaluation of a licensee's physical or mental condition in accordance with section 820 of the Business and Professions Code to its Executive Officer. BPC section 820 authorizes this Board and other healing arts boards in Division 2 of the Business and Professions Code to order these examinations, as follows:

Whenever it appears that any person holding a license, certificate or permit under this division or under any initiative act referred to in this division may be unable to practice his or her profession safely because the **licentiate's ability to practice is impaired due to mental illness, or physical illness affecting competency, the licensing agency may order the licentiate to be examined by one or more physicians and surgeons or psychologists designated by the agency.** The report of the examiners shall be made available to the licentiate and may be received as direct evidence in proceedings conducted pursuant to Section 822. (Emphasis added.)

However, Section 820 does not specify what agency official would be assigned this duty to order the examination.

The California Administrative Procedure Act (APA) contains an "Administrative Adjudication Bill of Rights," commencing at Section 11425.10 of the Government Code. That bill of rights requires at Section 11425.10(a)(4) that: "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in Section 11425.30." . As the California Supreme Court has explained:

"While the state's administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisors in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals.

California's Administrative Procedure Act (APA) (Gov.Code, § 11340 et seq.), as overhauled in 1995, adopts these precepts by regulating and strictly limiting contacts between an agency's prosecutor and the officers the agency selects to preside over hearings and ultimately decide adjudicative matters". *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 5.

With respect to Section 820 examinations, the California Court of Appeal has noted: "[T]he psychiatric examination is an **investigatory tool**, the results of which may be used by the Board to determine if formal adjudicatory proceedings will be brought." *Alexander D. v. State Bd. of Dental Examiners* (1991) 231 Cal.App.3d 92, 97. (Emphasis added.)

As a result, this function should be delegated to the Executive Officer and not be performed by Board members who also serve as "judges" or "decisionmakers" in the administrative and enforcement cases brought by the Board. As noted above, the APA requires that the investigatory function and the adjudication function be separate and performed by different parties. This proposal is therefore necessary to formally implement the Board's statutory obligation to "separate functions" within the Board by assigning this examination order authority to the official responsible for managing investigations and prosecutions for the Board: its Executive Officer.

3. Adopt 16 CCR Section 4201(b):

A. **Purpose**: This proposal would specify that the following duties be delegated to and conferred upon the Board's Executive Officer:

- (1) The power and discretion conferred by law upon the Board to receive and file accusations; issue notices of hearing, statements to respondent and statements of issues; receive and file notices of defense; determine the time and place of hearings under Section 11508 of the Government Code; set and calendar cases for hearing and perform other functions necessary to the business-like dispatch of the business of the Board in connection with proceedings under the provisions of Sections 11500 through 11528 of the Government Code, prior to the hearing of such proceedings ("prosecutorial and administrative duties");
- (2) the certification and delivery or mailing of copies of decisions under Section 11518 of said code; and,
- (3) make changes to its regulations without regulatory effect pursuant to Title 1, California Code of Regulations Section 100.

B. **Rationale**:

Delegation of prosecutorial and administrative duties

The prosecutorial and administrative duties outlined in paragraph (1) above (under the title "Purpose") reflect the day-to-day duties the Executive Officer performs as the "prosecutor" and overall supervisor of staff and operations for this Board. As noted above, "separation of function" under the APA means that within an administrative

agency, individuals involved in the investigative or prosecutorial aspects of a case should not be the same people making decisions about that case, ensuring fairness and impartiality in the adjudicative process by preventing conflicts of interest.

Government Code sections 11500 through 11508 specify the discretionary and ministerial duties that need to be performed by administrative agencies such as the Board to effect prosecutions of administrative cases under the APA, including:

- (1) requirements for Accusations to revoke, suspend or limit a license (Gov. Code, § 11503),
- (2) requirements for Statements of Issues to grant, issue or deny issuance or renewal of a license (Gov. Code, § 11504),
- (3) service of Accusations and Notices of Defense (Gov. Code, §§ 11505 and 11506),
- (4) requirements for discovery and compelling discovery (Gov. Code, §§ 11507.5., 11507.6, and 11507.7),
- (5) requirements for setting hearing dates and serving notice of the time and place of administrative hearings (Gov. Code, § 11508 and 11509),
- (6) requirements for affidavits, official notice and oaths governing APA proceedings (Gov. Code § 11514, 11515 and 11528).

This proposal would formally document that these prosecutorial and administrative duties and any required responses from the Board to effectuate these APA requirements are performed by the Executive Officer. Essentially, this proposal would confirm and provide evidence that the Board internally “separates” the investigative and advocacy functions assigned to its E.O. and staff from the decision-making functions (made by Board members) within the agency in compliance with the APA.

Delegation of Duty to Serve the Board’s Decisions per Government Code section 11518

Under the APA, the Board is required to serve its decisions on affected parties, as follows:

Copies of the decision shall be delivered to the parties personally or sent to them by registered mail. (Gov. Code, § 11518)

The courts have indicated that “failure to comply with section 11518 renders ineffective a decision taken after the hearing...” *Koons v. Placer Hills Union Sch. Dist.* (1976) 61 Cal.App.3d 484, 490. As a result, to ensure the legal effectiveness of its decisions and the consistent and timely service of these decisions, this proposal would delegate this ministerial act to the Executive Officer.

Make changes to its regulations without regulatory effect pursuant to Title 1, California Code of Regulations Section 100

The Administrative Procedure Act specifies the requirements and process to establish a regulation (Chapter 3.5, commencing with section 11340, Part 1, Division 3, Title 2 of the Government Code). As the body authorized to adopt regulations, the Board must

authorize or delegate the authorization of the adoption of a regulation related to the Naturopathic Doctors Act. Historically, this has been authorized on a case-by-case basis at noticed board meetings. This regulatory proposal would delegate to the Executive Officer, as a rule, the authority to adopt regulation changes that are deemed to be without regulatory effect without requiring additional motion by the Board to vote to approve those changes.

In addition to the traditional rulemaking process, Title 1, CCR section 100 specifies the requirements for non-substantive, regulatory changes, which would include: (1) grammatical corrections, (2) updating, reordering, renumbering or relocating the laws or regulations without substantive changes, and (3) updating the authority and reference citations for regulations when the number of the cited statutes or regulations changes, and other types of changes that do not materially alter any requirement, right, responsibility, condition, or other regulatory element of a regulation. The Section 100 process is significantly shorter than a traditional rulemaking in that the Board neither makes a formal notice of the proposed action nor is an opportunity for public comments required. Title 1, CCR section 100 provides that upon the filing of a Section 100 regulation change, the Office of Administrative Law (OAL) will make a determination within 30 days. A regular rulemaking usually takes about a year to complete after approval by the Board at a publicly noticed meeting.

The objective of this proposal is to enhance the effectiveness of the Board's operations, thus adding to consumer protection. Delegating to the Executive Officer the authority to make changes without regulatory effect will shorten the timeframe for initiation of Section 100 changes, thereby updating sections of the Board's regulations in a more timely and effective manner. In addition, delegating to the Executive Officer this authority will lessen the amount of agenda items needed to be covered during board meetings in the future, freeing the Board to handle other more pressing substantive policy issues. This will not result in any adverse impact to public participation, since these items are not required to be noticed to the public prior to filing and these items will only be approved by OAL if they determine the proposal meets the requirements in 1 CCR section 100 to not "materially alter any requirement, right, responsibility, condition, or other regulatory element of a regulation." Proposed changes that are deemed to be substantive would still be handled through the regular rulemaking process, including being placed on a Board agenda, and acted upon at a publicly noticed Board meeting.

Underlying Data

Technical, theoretical, or empirical studies, reports, or documents relied upon:

Agenda, Relevant Meeting Materials and Minutes from the Board's June 29, 2023 Board meeting.

Business Impact:

The Board has made the initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting businesses

including the inability of California businesses to compete with businesses in other states.

This initial determination is based on the following facts:

The proposed regulatory changes are administrative in nature and ensure transparency, legal compliance, and accuracy in the Board's operations. This proposal conforms the regulation regarding the Executive Officer's duties to current law and Board enforcement-related practices. As a result, the Board does not anticipate that any businesses, including any businesses employing naturopathic doctors, would be impacted by an action to merely formalize delegations to its Executive Officer.

Economic Impact Assessment:

This Board has determined that this regulatory proposal will have the following effects:

It will not create or eliminate jobs within the State of California because the proposed changes are administrative and conform the regulation regarding the Executive Officer's duties to current law and Board enforcement-related practices.

It will not create new business or eliminate existing businesses within the State of California because the proposed changes relate only to Board administrative duties.

It will not affect the expansion of businesses currently doing business within the State of California because the proposed changes are considered to be a "clean-up" of current regulation, ensuring transparency, accuracy, and legal compliance with current law and Board administrative operations.

This regulatory proposal benefits the health and welfare of California by ensuring that the Board's regulations accurately reflect the Executive Officer's duties, eliminating licensee and staff confusion about who is authorized to make decisions on behalf of the Board. This helps ensure transparency, legal compliance, and accuracy in the Board's operations and a well-informed public.

This regulatory proposal does not affect worker safety or the state's environment because it does not involve worker safety or the state's environment.

Specific Technologies or Equipment:

This regulation does not mandate the use of specific technologies or equipment.

Consideration of Alternatives:

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

No such alternatives have been proposed, however, the Board welcomes comments from the public.

Description of reasonable alternatives to the regulation that would lessen any adverse impact on small business:

No such alternatives have been proposed, however, the Board welcomes comments from the public.