

**TITLE 16. CALIFORNIA ACUPUNCTURE BOARD
DEPARTMENT OF CONSUMER AFFAIRS**

NOTICE IS HEREBY GIVEN that the California Acupuncture Board (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:

**Department of Consumer Affairs
1747 North Market Blvd, 2nd Floor, Sapphire Room
Sacramento, CA 95834
May 31, 2016 at 9am**

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 not later than May 30, 2016 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 Sections 4928.1 and 4933 of the Business and Professions Code, and Section 11400.20 of the Government Code and to implement, interpret or make specific Sections 315, 315.2, 315.4, 4955, 4955.2 and 4960.5 of the Business and Professions Code, and Sections 11400.20 and 11425.50(e) of the Government Code, the Board is considering changes to Division 13.7 of Title 16 of the California Code of Regulations as follows:

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

The Board currently regulates 16,894 licensees who are acupuncturists. The Board’s highest priority is protection of the public when exercising its licensing, regulatory, and disciplinary functions. The Board is authorized to investigate the criminal conviction history of applicants and licensees, subsequent arrests, allegations of unprofessional conduct, and unsafe or incompetent practice by licensees. The Board is authorized to discipline licensees who may jeopardize the health, safety, and welfare of consumers.

Business and Professions Code (hereafter “BPC”) Section 4928.1 states that protection of the public shall be the highest priority for the Board in exercising its licensing, regulatory and disciplinary functions. BPC Section 4933 authorizes the Board to amend

or repeal such rules and regulations as may be reasonably necessary to enable the Board to carry into effect the provisions of the Acupuncture License Act (ALA).

BPC Section 315, established the SACC within the Department and required the SACC to formulate uniform and specific standards in sixteen specified areas for each healing arts board to use in dealing with substance-abusing licensees, whether or not a board chooses to have a formal diversion program.

BPC Section 315.2, specifies that a healing arts board within the Department is required to order a licensee to cease practice if the licensee tests positive for any substance that is prohibited under the terms of the licensee's probation or diversion program. The cease practice order pursuant to this section does not constitute disciplinary action and is not subject to adjudicative hearings.

BPC Section 315.4, authorizes healing arts boards within the Department to order a licensee on probation or in a diversion program to cease practice for major violations and when the board orders a licensee to undergo a clinical diagnostic evaluation pursuant to the uniform and specific standards amended and authorized under Section 315. The cease practice order pursuant to this section does not constitute disciplinary action and is not subject to adjudicative hearings.

Government Code Section 11400.20 authorizes an agency to amend regulations to govern an adjudicative proceeding.

Government Code Section 11425.50(e) specifies that a penalty may not be based on a guideline, criterion, bulletin, manual, instruction, and order standard of general application or other rule unless it has been adopted as a regulation.

California Code of Regulations, Title 16, Section 1399.469 specifies that the Board shall consider the disciplinary guidelines entitled *Acupuncture Board Disciplinary Guidelines 1996* in reaching a decision on a disciplinary action under the Administrative Procedures Act.

California Code of Regulations, Title 16, Section 1399.469 incorporates by reference the Board's 1996 disciplinary guidelines. The disciplinary guidelines are intended to provide guidance to persons setting administrative disciplinary terms and conditions for violation by a licensed acupuncturist of the applicable laws and regulations.

There is not an existing federal regulation or statute comparable to this proposal.

The proposed changes would incorporate by reference revised disciplinary guidelines, Acupuncture Board Disciplinary Guidelines and Conditions of Probation [September 2015], which includes appropriate provisions of the Uniform Standards formulated by the Department of Consumer Affairs Substance Abuse Coordination Committee (SACC) pursuant to BPC section 315. This proposal also sets forth standard language to be

used in disciplinary orders and conditions of probation if the licensee is determined to be a substance-abusing licensee.

The SACC has developed sixteen uniform standards as required by SB 1441 (Ridley-Thomas, Chapter 548, Statutes of 2008). The Board is proposing to implement Uniform Standards 1-12 in its Disciplinary Guidelines through the regulatory process. Uniform Standards 13, 14, and 15 only apply to Boards with diversion programs and are not incorporated in these guidelines because the Acupuncture Board does not have a diversion program. Uniform Standard 16 is also omitted because it is each Board's reporting criteria to the Department.

Therefore, the Board is proposing the following changes:

Incorporate by reference revised Disciplinary Guidelines and create subdivision (a) within Section 1399.469 of Article 6 of Division 13.7 of Title 16 of the California Code of Regulations:

This proposal would amend the *Acupuncture Board Disciplinary Guidelines 1996* to "*Acupuncture Board Disciplinary Guidelines and Conditions of Probation*" [September 2015]. Additionally, this proposal will create a subdivision (a), consisting of what was Section 1399.469 for clarity.

Create subdivision (b) within Section 1399.469 of Article 6 of Chapter 13.7 of Title 16 of the California Code of Regulations. The proposed new subdivision (b) would create a definition of a substance-abusing license for purposes of applying the Uniform Standards. Proposed subdivision (b) will establish that any licensee that has been found to have committed an act or offense involving drugs and/or alcohol shall be presumed to be a substance-abusing licensee. However, language contained in this proposed regulatory action allows for a respondent to rebut the presumption by providing evidence and testimony of his or her behalf. This proposed regulatory action establishes and clarifies that in situations where a licensee or applicant was not successful in refuting the presumption, the Uniform Standards shall apply as written and be used in the order placing the licensee on probation. This proposal would clarify that neither the Board, nor administrative law judge, may impose conditions or terms of probation less restrictive than the Uniform Standards adopted by the Board. Additionally, this proposal provides that the Board is not prohibited from imposing additional terms and conditions of probation that would provide greater public protection.

Amend the Department of Consumer Affairs, Acupuncture Committee Disciplinary Guidelines 1996:

1. The face page the document will be amended to reflect Acupuncture Board Disciplinary Guidelines and Conditions of Probation, contain a statement that copies can be obtained by contacting the Board or from its website, and the revised date of September 2015. This will provide current information regarding the document.

2. Throughout the Disciplinary Guidelines and Conditions of Probation Acupuncture Committee and its abbreviation AC will be replaced with Board to reflect the current name contained in BPC 4927 of Acupuncture Board, not committee.
3. The introduction would be amended to reflect the changed name of the document, indicate that it is designed for use by attorneys, administrative law judges, acupuncturists, others involved in the disciplinary process, and the Board and may be revised and shall be distributed to interested parties upon request. This proposal would amend the Board's 1996 Guidelines, which has been incorporated by reference in Section 1399.469. This amended document includes standard language that must be included in every probationary order for substance-abusing licensees. This standard language includes information regarding BPC Section 315 and the standards established by the SACC. The language specifies that Administrative Law Judges, parties and staff are required to use the standard language which has been developed in accordance with the standards developed by the SACC. The language specifies that the probationary terms and conditions within the incorporated document are to be used in every case where the individual is determined to be a substance-abusing licensee. Any reference to the Board also means staff working for the Board or its designee. The document also specifies that the Board's updated Guidelines should still be used in formulating the penalty and in considering additional terms or conditions of probation appropriate for greater public protection. The conditions contained within this document are required to be used in lieu of any similar standard or optional term or condition within the Board's Disciplinary Guidelines.

Amendments to the 1996 Disciplinary Guidelines:

A. In order to comply with SB 1441, the Board proposes to adopt the following standards, which shall be adhered to in all cases involving a substance-abusing licensee:

1. Clinical Diagnostic Evaluations: Requires that if a licensee is ordered to undergo a clinical diagnostic evaluation, the evaluation must be conducted by a licensed practitioner who holds a valid, unrestricted license to conduct clinical diagnostic evaluations, has three (3) years of experience in providing evaluations of health care professionals with substance abuse disorders and is approved by the Board. The evaluations are to be conducted in accordance with acceptable professional standards for conducting substance abuse clinical diagnostic evaluations. The evaluator is required to prepare a report with an opinion setting forth whether the licensee has a substance abuse problem, whether the licensee is a threat to himself/herself or others, and recommendations for substance abuse treatment, practice restrictions, or other recommendation for rehabilitation and safe practice. The proposed language also specifies if the evaluator determines the licensee is a threat, the evaluator shall notify the Board within 24 hours. Evaluators may not have a financial, personal or business

relationship with the licensee within the last five years and shall provide an objective, unbiased, and independent evaluation. Reports shall be provided within 10 days and within 30 days if the evaluator requests additional information.

2. Removal from Practice Pending Clinical Diagnostic Evaluation: Requires the Board to order the licensee to cease practice during the clinical diagnostic evaluation and until the Board reviews the results of the evaluation. This standard also requires the licensee to be randomly drug tested at least two (2) times per week while awaiting the results of the clinical diagnostic evaluation. Further, the Board proposes to require that Board take into consideration certain factors when determining if the licensee is safe to return to either part-time or full-time practice. These factors include license type, licensee's history, length of sobriety, scope and pattern of substance abuse, treatment history, medical history and current medical condition, nature of substance abuse and whether a licensee is a threat to himself or herself or the public. A licensee shall not be returned to practice until he or she has at least 30 days of negative drug tests.

3. Board Communication with Probationer's Employer: This standard requires the licensee to notify employers, supervisors, contractors or prospective employers and contractors of the Board's Decision and Accusation. The Board must also be provided the contact information of all employers and supervisors, and requires that the licensee consent to allow the Board to communicate with these persons regarding licensee

4. Drug Testing Standards: Requires the Board to randomly test a licensee whose license is placed on probation due to substance abuse randomly 52-104 times per year in the first year of probation, and 36-104 times per year in the second year and each year thereafter up to 5 years. If there are no positive tests in the preceding 5 years of probation, testing is 1 time per month. The Board may increase the number of random tests for any reason, or return to the testing frequency of the first year for a violation of the testing program or a Major Violation pursuant to Uniform Standard 10. The drug testing standard also allows the Board to make exceptions to the testing frequency schedule if certain conditions exist, such as when a licensee is not practicing or has been participating in a treatment program requiring testing.

This standard specifies a set of standards that apply to drug testing, and outlines the following: testing may be required at any time on any day; daily contact to determine if a test is required; vacations, absences or alternative testing sites must be approved by the Board; testing shall be done on a random basis; requirements for specimen collectors and testing locations; collection of specimens must be observed; certification of laboratories by the U.S. Department of Health and Human Services is required; tests must be processed within 7 days; and requiring notification to the Board within one day of a positive result. The Board may also use other testing methods in place of or supplemental to biological fluid testing. The Board may reduce or eliminate the testing standards pursuant to a petition for reinstatement or reduction of penalty filed pursuant to Government Code section 11522 or other statutes regarding reinstatement or reduction of penalty.

The standard provides requirements for the Board to collect and report historical and post implementation data. 5. Participation in Group Support Meetings: Requires the Board to follow criteria to determine the frequency of group meeting attendance and to verify that the meeting facilitator is an experienced, mental health professional. The criteria for determining frequency of meetings include: the recommendation of the clinical diagnostic evaluator; the licensee's history; length of sobriety; scope and pattern of use; treatment history; and nature, duration, and severity of substance abuse. The standard also requires the facilitator of the group support meeting to have certain qualifications, including three years of experience and a license in providing recovery services. The facilitator may not have a relationship with the licensee within the last year, must report unexcused absences, and must provide the Board a signed document showing information related to the licensee's participation and progress.

6. Determining What Treatment is Necessary: Requires the Board to follow criteria to determine whether inpatient, outpatient, or other type of treatment is necessary. The criteria include the recommendation from the clinical diagnostic evaluation, license type, licensee's history, length of sobriety, scope and pattern of substance abuse, licensee's treatment history, licensee's medical history and current medical condition, whether he or she is a threat, and the nature, duration, severity of substance abuse.

7. Worksite Monitor Requirements: Requires the Board to determine if a worksite monitor is necessary for a particular licensee and requires the worksite monitor to meet specified requirements. The monitor may not have a financial, personal, familial, or any other relationship with the licensee that may compromise the ability to render impartial and unbiased reports. The provision that allows the Board to waive this requirement accounts for situation when a licensee only has available a monitor who is their employer; it also restricts an employee from monitoring his or her employer. The monitor must meet specified licensing and practice requirements. The monitor must have face-to-face contact with the licensee in the workplace at least once per week. The monitor is also responsible for reporting to the Board whether patient safety may be at risk and any change in the licensee's behavior that may be cause for suspected substance abuse. The reporting criteria identifies a timeline for reporting to the Board of suspected substance abuse by the licensee, and what information must be included in the monitor report. Monitors also must submit a monthly report to the Board. Also, included in the standard is the language to require the licensee and monitor to sign and submit the required consent forms and agreement for the Board to communicate with the monitor.

8. Procedure for Positive Testing: This standard requires the Board to suspend a licensee's license if he or she tests positive for a banned substance and requires certain notifications as specified.

9. Procedures for a Confirmed Ingested Banned Substance: This standard specifies that if the Board confirms that a positive drug test is evidence of use of a

prohibited substance, the licensee has committed a major violation and the Board shall impose consequences as specified in Standard 10, Major and Minor Violations & Consequences.

10. Major and Minor Violations & Consequences: This standard defines major and minor violations and the consequences for each. If a licensee commits a major violation, the Board is required to automatically suspend the licensee's license and refer the matter for disciplinary action or other action as determined by the Board. If a licensee commits a minor violation, the Board is required to determine what action is appropriate.

11. Petition for Return to Practice: This standard provides a definition of petition and sets out the criteria to be met before submitting the petition to the Board. The criteria are sustained compliance with his or her recovery program, ability to practice safely as evidenced by work site reports, and six (6) months of negative drug tests.

12. Petition for Reinstatement: This condition provides a definition of petition and sets out the criteria to be met before submitting the petition to the Board for an unrestricted license. The criteria are sustained compliance with the terms of the disciplinary order, consistent and sustained participation in activities that support recovery, and continuous sobriety of at least 3 to 5 years.

B. A new category of probation conditions that only pertain to cases involving substance-abusing licensees:

1. Substance-Abusing Condition 1 - Clinical Diagnostic Evaluation: In order to comply with the SB 1441 Uniform Standards, the Board proposes a new condition that requires that the licensee undergo a clinical diagnostic evaluation within 20 days of the effective date of the Board's Decision and at any time upon order of the Board. When licensee is ordered to undergo a clinical diagnostic evaluation, licensee shall cease practice pending the results and review of the results by the Board. During this time, licensee shall submit to random drug testing at least 2 times per week and not be returned to practice until he or she has 30 days of negative drug tests.

Licensee is required to provide the evaluator with the Board's decision prior to the evaluation and cause the evaluator to submit a report to the Board within a specific timeframe. The costs of the evaluation shall be paid by licensee. Additionally, the Board proposes to require compliance with the requirements of Uniform Standard 1 which includes that a Clinical Diagnostic Evaluation report be prepared and contain at least the evaluator's opinion, whether the licensee has a substance abuse problem and recommendations for substance abuse treatment, practice restrictions, or other recommendations. The evaluator must (1) hold a valid, unrestricted license, which includes a scope of practice to conduct a clinical diagnostic evaluation; (2) have three years' experience in providing evaluations of health professionals with substance abuse disorders; and (3) be approved by the Board. The evaluator shall not have a financial,

personal, business, or other relationship with the licensee within the last five years, which would prevent the evaluator from having an unbiased opinion or create a conflict of interest.

It is proposed that the final written report is to be provided to the Board no later than 10 days from the date the evaluation was completed unless the evaluator requests an extension, not to exceed 30 days. If the evaluator determines during the evaluation process that a licensee is a threat to himself/herself or others, the evaluator shall notify the Board within 24 hours of such a determination. Licensee must comply with any restrictions or recommendations made as a result of the clinical diagnostic evaluation. Licensee may return to full time work after at least 30 days of negative drug tests and the Board determines that licensee is safe to practice upon review of the report and specified criteria. The criteria include license type, licensee's history, length of sobriety, scope and pattern of substance abuse, treatment history, medical history and current medical condition, nature of substance abuse, and whether a licensee is a threat to himself or herself or the public.

2. Substance-Abusing Condition 2 – Notice to Employer. In order to comply with SB 1441 Uniform Standards, the Board proposes to add a Notice to Employer condition. The condition specifies that the licensee must provide to the Board contact information related to all employers and supervisors, as well as provide written permission allowing the Board to have continuous contact with the employers for the entire probationary period regarding work status, performance, and monitoring, including conduct that may violate a probationary condition. Licensee is required to provide current and future employers, supervisors, directors or contractors with the Board's Decision and Accusation within 14 calendar days of beginning or changing employers or supervisors. Licensee is required to ensure that the Board receives written confirmation directly from the employer that licensee has complied with the requirement to provide the Board's Decision and Accusation. Optional language is provided indicating that the condition may be waived or modified by the Board upon a written finding by the evaluator that the licensee is not a substance-abusing licensee. A source was added to reference Uniform Standard #3 from which condition is derived.

3. Substance-Abusing Condition 3 -- Abstain from Alcohol, Controlled Substances, and Dangerous Drugs: In order to comply with SB 1441 Uniform Standards, the Board is proposing a new condition that sets forth: the substances licensees are prohibited from using or possessing; the conditions for lawfully prescribed medications; the requirements for a coordinating physician and surgeon in charge of monitoring licensee's prescriptions; and the terms regarding licensee ceasing the practice of acupuncture if there is a positive drug screen for any substance not legally authorized.

The new condition specifies that licensee shall completely abstain from the use of alcoholic beverages and shall abstain completely from the personal use, possession, injection, consumption by any route, including inhalation, of all controlled substances

and dangerous drugs, and any drugs requiring a prescription. Specifying each route of use or possession covers all methods of abuse so licensee clearly understands that there is no tolerance for any substance use or possession. An absolute prohibition also allows licensee to more effectively distance him or herself from the substance involved in the underlying cause for action.

The condition provides an exception allowing licensees to take prescription drugs that are lawfully prescribed by a licensed practitioner for a bona fide illness. Adding such an exception allows licensees to keep taking any medically necessary prescription drugs and provides transparency between the licensee and the Board so there are no false positive biological fluid tests. Licensee is required to notify the Board in writing within 15 days of receiving a lawful prescription for a controlled substance. A list of current prescribed medication with specified information shall be provided to the Board on a quarterly report. When a licensee is legally prescribed medication, this condition requires that a single coordinating physician and surgeon will coordinate and monitor prescriptions for licensee. The physician and surgeon is also required to report to the Board on a quarterly basis regarding the licensee's compliance with this condition.

The condition outlines that any positive drug screen for a substance not legally authorized will result in the licensee being ordered to cease the practice of acupuncture until notified by the Board. If the Board files a petition to revoke probation or an accusation based upon the positive drug screen, licensee shall be automatically suspended from practice pending the final decision on the petition to revoke probation or accusation. The consequences provided are contained in SB 1441 Uniform Standards and provide more public protection when a violation of probation of such gravity occurs. Optional language is provided indicating that the condition may be waived or modified by the Board upon a written finding by the evaluator that the licensee is not a substance-abusing licensee. A source was added to reference Uniform Standards #4 and #8 from which condition is derived.

4. Substance-Abusing Condition 4 -- Alcohol and Drug Testing: This condition is being added to implement the Uniform Standards applicable to substance-abusing licensees, related to alcohol and drug testing. The condition sets forth that licensee is required to pay for any random and directed biological fluid, hair sample, breath alcohol, or any other mode of testing required by the Board. Licensee must comply with alcohol and drug testing, including the fiscal responsibility of procuring the necessary tests. The condition sets forth the frequency of testing that licensee will be ordered to test on a random basis required by SB 1441's Uniform Standard #4. However, the condition provides a set of criteria allowing the Board to lessen the frequency of ordered tests, which includes: licensee previously underwent testing during the completion of a treatment or monitoring program; the basis for probation or discipline was a single incident or conviction involving drugs or alcohol, or two incidents or convictions involving drugs or alcohol that were at least seven (7) years apart that did not occur at work on the way to or from work; licensee is not employed in any health care field; licensee has demonstrated a period of sobriety and/or non-use; and testing may be suspended

during any period licensee's probationary period is tolled. Licensees are allowed to request modifications to the testing frequency in writing to the Board. There may be certain cases where such a strict testing frequency is not appropriate.

The condition also specifies that the licensee is required to make daily contact as directed by the Board to determine when he or she is required to submit to a drug test. The condition further details the mechanics of how the testing works and how positive results are dealt with. If a licensee tests positive for a banned substance, he or she shall be contacted and instructed to leave work and ordered to cease practice of acupuncture. Practice cannot be resumed until notified by the Board. Lastly, the condition indicates that alternative drug testing sites must be approved by the Board prior to any vacation or travel. Licensee will still be responsible for daily contact and testing even while away from their residence or place of business to ensure sobriety. Optional language is provided indicating that the condition may be waived or modified by the Board upon a written finding by the evaluator that the licensee is not a substance-abusing licensee. A source was added to reference Uniform Standards #4, #8 and #9 from which condition is derived.

5. Substance-Abusing Condition 5 -- Facilitated Support Group Meetings: This condition implements the requirements of the Uniform Standards related to facilitated support group methods. The condition includes a requirement that in determining the type of frequency of meetings the Board will to consider: the licensee's history, length of sobriety, recommendation of the clinical diagnostic evaluator; the scope and pattern of use, licensee's treatment history, and the nature, duration, and severity of substance abuse. The condition also requires licensee to submit the name or names of meeting facilitators for the Board's approval within 15 days of the effective date of the Board's decision and requires that the licensee participate in facilitated group support meetings within 15 days after the Board's approval.

The condition requires the facilitator of the group support meeting to have certain qualifications including three years of experience and a license in providing recovery services. The facilitator may not have a relationship with the licensee within the last year, must report unexcused absences, and must provide the Board a signed document showing information related to the licensee's participation and progress. Verified documentation of attendance is required to be submitted to the Board on a quarterly basis. Optional language is provided indicating that the condition may be waived or modified by the Board upon a written finding by the evaluator that the Licensee is not a substance-abusing licensee. A source was added to reference Uniform Standard #5 from which condition is derived.

6. Substance-Abusing Condition 6 -- Treatment Program for Cases Involving Substance-Abusing Licensees: In order to comply with the SB 1441 Uniform Standards, the Board proposes the following new condition which sets forth the procedures to follow when a licensee is required to enter a treatment program, whether it be inpatient, outpatient or any other type. Additionally, the condition outlines the factors the Board

should consider when determining what type of treatment program the licensee must enter. The factors to consider include the recommendation of the clinical diagnostic evaluation, license type, licensee's history, length of sobriety, scope and pattern of substance abuse, treatment history, medical history, current medical condition, nature, duration, and severity of substance abuse and whether the licensee is a threat to himself or herself or others. These considerations derive from SB 1441's Uniform Standard #6. The condition indicates that the costs associated with the treatment program are the licensee's full responsibility so the Licensee is aware that although the requirement is ordered by the Board, the costs are not covered by the Board.

The condition requires that the program director, psychiatrist, or psychologist confirm licensee's compliance with the requirements of the Board's Decision and he or she is required to notify the Board immediately if he or she believes licensee cannot practice safely. To facilitate the implementation of this responsibility, the condition requires the licensee to sign a release authorizing the treatment program to report all aspects of participation in the treatment program as requested by the Board or its designee, and requires that the licensee is required to enter treatment within 30 days of the effective date of the Board's decision. There is a clause that explains that if licensee fails to comply with the requirements of the treatment program or no longer participates in the program for whatever reason, it is considered a violation of probation and licensee is immediately suspended from the practice of acupuncture. Non-compliance with the treatment program calls for the licensee to cease the practice of acupuncture to ensure public safety. Additionally, the condition states that the licensee's probation is automatically extended if he or she hasn't successfully completed his or her treatment program. Optional language is provided indicating that the condition may be waived or modified by the Board upon a written finding by the evaluator that the licensee is not a substance-abusing licensee. A source was added to reference Uniform Standards #6 from which condition is derived.

7. Substance-Abusing Condition 7 -- Worksite Monitor: The Board proposes a new condition to implement the worksite monitor Uniform Standard. The condition requires the licensee to have a worksite monitor with no current or former financial, personal, familial or other relationship with the licensee that could compromise impartiality. A provision allows the Board to waive this requirement when it is impracticable for anyone other than the employer to serve as monitor. It also prohibits a worksite monitor employed by the licensee.

The monitor is required to be an acupuncturist, or another licensed healthcare professional in certain circumstances, with an active unrestricted license with no disciplinary action in the last 5 years. The licensee is required to submit to the Board the name of the proposed monitor within 20 days of the effective date of the Board's Decision. The monitor must affirm in writing that he or she has reviewed the Board's Decision and agrees to monitor the licensee as set forth by the Board. The licensee must consent in writing that the worksite monitor may communicate with the Board. Once the worksite monitor is approved, the licensee may not practice unless that

person is present at the worksite. The worksite monitor must have frequent face-to-face contact with the licensee at a minimum of once per week, interview staff in the office in regard to the licensee's behavior, and review the licensee's attendance at work.

The monitor is required to verbally report to the Board and the licensee's employer any suspected substance abuse within one business day of the occurrence. A written report of such an occurrence shall be submitted to the Board within 48 hours. The worksite monitor must submit a written report to the Board monthly or as directed. The report shall include: licensee's name, license number, worksite monitor's name and signature, worksite monitor's license number, worksite locations, dates licensee had face-to-face contact with the monitor, staff interviewed, attendance report, any change in behavior or habits, and any indicators that can lead to suspected substance abuse. Optional language is provided indicating that the condition may be waived or modified by the Board upon a written finding by the evaluator that the licensee is not a substance-abusing licensee. A source was added to reference Uniform Standard #7 from which the condition is derived.

8. Substance-Abusing Condition 8 -- Major Violations: The requirements for this condition implements the Uniform Standard related to what are considered major violations by the Board. The condition states that if the licensee commits a major violation, he or she shall immediately cease practice upon notification from the Board. Licensee is prohibited from practicing acupuncture until otherwise notified in writing by the Board. Optional language is provided indicating that the condition may be waived or modified by the Board upon a written finding by the evaluator that the licensee is not a substance-abusing licensee. A source was added to reference Uniform Standards #9 and #10 from which the condition is derived.

C. The following terms and conditions have been re-numbered:

13. Obey All Laws is now Standard 1 (pg. 20)
14. Quarterly Reports is now Standard 2 (pg. 20)
15. Surveillance Program is now Standard 3 (pg. 20)
16. Interview with the Board or Its Designee is now Standard 4 (pg. 20)
17. Changes of Employment is now Standard 5 (pg. 20)
18. Tolling for Out-of-State Practice or Residence is now Standard 6 (pg. 20)
19. Employment and Supervision of Trainees is now Standard 7 (pg. 20)
20. Cost Recovery is now Standard 8 (pg. 21)

21. Violation of Probation is now Standard 9 (pg. 21)

22. Completion of Probation is now Standard 10 (pg. 21)

D. Amended Optional Probation Conditions. Optional 9:

Abstain from Drugs and Alcohol and Submit to Tests and Samples (pg. 19) has been renumbered from #9 to Optional 9. The word “completely” is added to the condition to emphasize total abstention from personal use or possession of controlled substances, and to move the reference to alcohol into the same sentence as controlled substance and prohibit possession, while removing the last sentence referencing only alcohol. An exception allowing respondents to take prescription drugs that are lawfully prescribed by a licensed practitioner as specified.

Policy Statement Overview/Anticipated Benefit:

The proposed changes amend the Disciplinary Guidelines 1996 to add the language required to implement SB 1441 by including the Uniform Standards and substance-abusing terms and conditions of probation imposing to those standards. The anticipated benefit will be to provide maximum protection to California consumers from licensees who may be a danger to, or lack competence to treat, patients due to substance abuse. The proposed adoption of the standards and additional probation conditions will ensure that individuals who have been determined to be substance-abusing licensees will be effectively disciplined in a manner that will protect the public and will provide greater public protection through consistent standards for health care professionals. Additionally, the benefit of defining a substance-abusing licensee will provide greater protection to the public by providing clear direction as to when the standards and conditions apply.

The proposed changes to the guidelines not related to SB 1441 will provide the anticipated benefits of conforming with current law and providing greater clarity within the disciplinary guidelines as to the types of conditions and when they apply. Additionally, further benefit is gained by amending the condition related to alcohol and controlled substances used for non substance-abusing licensees to provide greater clarity and to create an exception for medical prescriptions.

CONSISTENCY AND COMPATABILITY WITH EXISTING STATE REGULATIONS

During the process of developing these regulations and amendments, the Acupuncture Board has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

INCORPORATION BY REFERENCE

- Acupuncture Board Disciplinary Guidelines and Conditions of Probation [September 2015]

FISCAL IMPACT ESTIMATES

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None

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

Cost Impacts on Representative Person or Business: The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Business Impact/Significant Statewide Adverse Economic Impact Directly Affecting Business, Including Ability to Compete:

The Board has made an initial determination that the proposed regulation may have a significant, statewide adverse economic impact directly affecting business, including the inability of California businesses to compete with businesses in other states.

The following types of businesses would be affected:

- Businesses owned by licensees of the Board who face disciplinary action due to substance abuse; and
- Businesses that employ licensees of the Board who face disciplinary action due to substance abuse.

A license that has been revoked, suspended, reprimanded, or placed on probation may cause a significant fiscal impact on the business where the licensee worked depending on the nature and severity of the violation. A business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board does not maintain data relating to the number or percentage of licensees who own a business; therefore, the number or percentage of businesses that may be impacted cannot be predicted. The Board only has authority to take administrative action against a licensee and not a business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is the subject of disciplinary action cannot be projected. Businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

Probationers are responsible for paying all costs during their probation, including, but not limited to the clinical diagnostic evaluations, biological testing, treatment program, and facilitated group support meetings. The average salary of a practicing acupuncturist in California is approximately \$35,000 per year.

A licensee on probation (probationer) will not incur any significant fiscal impact associated with paying for costs associated with the following proposed conditions of probation:

Probation Condition (Substance-Abusing 2) Notice to Employer
Probation Condition (Substance-Abusing 3) Abstain from Alcohol, Controlled Substances, and Dangerous Drugs

The costs to the probationer associated with Condition (Substance-Abusing 2) Notice to Employer would be minor and absorbable. Probationers may incur nominal costs associated with providing notification to the employer of the Decision or Accusation. Additionally, the probationer may incur nominal costs associated with providing the names, physical addresses; mailing addresses, and telephone numbers of all employers and supervisors, or contractors, as well as the facility or facilities where the probationer practices. This regulation does not specifically state the manner of how a probationer is to provide the specified information. Licensees may choose from a variety of methods to notify the Board, including email, or mailing a letter. A licensee may incur nominal costs associated with mailing their letter to the Board.

The costs to the probationer associated with Condition (Substance-Abusing 3) Abstain from Alcohol, Controlled Substances, and Dangerous Drugs would be minor and absorbable. There is no cost associated with abstaining from the use of alcohol, drugs, controlled substances, and dangerous drugs. Probationers may incur nominal costs associated with providing the Board with specified information regarding lawful prescription medications lawfully prescribed by a physician and surgeon or nurse practitioner for a bona fide illness or condition. This regulation does not specifically state the manner of how a probationer is to provide the specified information. Licensees may choose from a variety of methods to notify the Board, including email, or mailing a letter. A licensee may incur nominal costs associated with mailing their letter to the Board. The licensee may also incur minimal costs associated with regularly reporting to his or her single coordinating physician and surgeon depending upon their health insurance coverage and the frequency necessitated by their condition. For purposes of this analysis, the Board estimates that if a probationer has a \$15 co-pay for visits with his or her coordinating physician and surgeon and makes monthly visits, then the probationer could incur \$180 in doctor's fees annually.

The probationer will incur significant fiscal impact associated with paying for costs associated with the following proposed conditions of probation:

Probation Condition (Substance-Abusing 1) Clinical Diagnostic Evaluation;

Probation Condition (Substance-Abusing 4) Alcohol and Drug Testing;
Probation Condition (Substance-Abusing 5) Facilitated Support Group Meetings;
Probation Condition (Substance-Abusing 6) Treatment Program for Cases Involving Substance-Abusing Licensees;
Probation Condition (Substance-Abusing 7) Worksite Monitor;
and Probation Condition (Substance-Abusing 8) Major Violations.

Probation Condition (Substance-Abusing 1) Clinical Diagnostic Evaluation specifies that all costs associated with such evaluation shall be paid by the probationer. The costs associated with clinical diagnostic evaluation may vary from \$3,000 to \$10,000 based upon the provider and the extent of the evaluation. There can be a significant difference in cost between a 3-day evaluation and a 10-day evaluation. For the purposes of this analysis, the Board estimates the probationer will incur a cost of \$5,000 per evaluation. Additionally, when a probationer is ordered to undergo a clinical diagnostic evaluation, the probationer is also required to cease practice for a minimum of 30 days. Probationers will incur lost wages as a result of a cease practice order. The Board estimates an Acupuncturist will lose approximately \$2,917 in wages (\$35,000/12 months) for every 30-day cease practice order.

Probation Condition (Substance-Abusing 4) Alcohol and Drug Testing specifies that all costs of the testing shall be paid by the probationer. The rate associated with the drug test and collection fee varies based on the rate charged by the collection company. The Board would contract with a specific drug testing collection agency. The probationer would be required to submit to testing through the Board-contracted agency. The Board estimates that the probationer would be charged an estimated fee of \$100 per drug test. This would include the average fee for urine analysis (\$50) and average collection fee (\$50). The proposed regulation specifies that the probationer would be tested at least 52 times during the first year of probation; at least 36 times during the second through fifth years of probation; and at least once per month after the fifth year as long as there have not been any positive results during the previous five years. The Board estimates the probationer would incur a cost of \$433.33 per month for the first year of probation, \$300 per month for years two through five, and \$100 per month for years six through seven. This would equate to an approximate cost of \$5,200 for the first year, \$3,600 per year for the second through fifth year, and \$1,200 per year for the sixth through seventh year. The probationer would pay approximately \$19,600 to comply with this condition over the course of a 5-year probation term and approximately \$22,000 to comply with this condition over the course of a 7-year probation term.

Probation Condition (Substance-Abusing 5) Facilitated Support Group Meetings specifies that all costs incurred are with facilitated meetings and shall be paid by the probationer. The rate associated with support meetings varies based on the support group facilitator and frequency. The charge to attend meetings may vary from \$50 to \$160 per week. For the purposes of this analysis, the Board estimates the probationer will incur a cost of \$100 per week to attend facilitated group support meetings twice a week. This cost would translate to approximately \$433.33 per month or \$5,200 annually.

A probationer would pay approximately \$26,000 over the course of a 5-year probation term, and \$36,400 over the course of a 7-year probation term.

Probation Condition (Substance-Abusing 6) Treatment Program for Cases Involving Substance-Abusing Licensees specifies that all costs associated with the completion of such program shall be paid by the probationer. The costs associated with completing a drug or alcohol abuse treatment program may vary from \$10,000 to \$35,000 depending on the treatment program, facility, insurance, and length of program. However, county facilities and The Salvation Army offer treatment programs on a sliding scale or at no cost. For the purposes of this analysis, the Board estimates the probationer will incur a cost of \$20,000 per treatment.

Probation Condition (Substance-Abusing 7) Worksite Monitor specifies that all costs of supervision shall be paid by the probationer. The fee a supervisor may charge a licensee can vary. The Board estimates a supervisor may charge a probationer a fee of \$0 to \$200 per month for services. For the purposes of this analysis, the Board estimates a probationer will incur a cost of \$100 per month for supervised practice. This cost would translate to \$1,200 annually or \$6,000 over the course of a 5-year probation term, and \$8,400 over the course of a 7-year probation term.

Probation Condition (Substance-Abusing 8) Major Violations specifies that if a licensee commits a major violation, he or she shall immediately cease practice until notified otherwise by the Board. During the time the probationer is not practicing he or she is not earning any income. For the purposes of this analysis, the Board estimates a probationer would be ordered to not practice acupuncture for a period of at least 30 days to undergo another Clinical Diagnostic Evaluation and demonstrate 30 days of negative tests. Based upon an average annual salary of \$35,000 for an acupuncturist, the probationer would lose an estimated \$2,916.67 of income for the year if he or she committed a major violation once during a year of their probation term.

For the purposes of this analysis, the estimated fiscal and economic impact of the proposed conditions of probation will be based on five (5) and seven (7) year terms of probation. The following table (Table: Estimated Costs of Each Proposed Probation Condition Incurred by Probationer) delineates the estimated monthly and annual cost of each condition of probation as well as the average cost over the course of a 5-year probation term and a 7-year probation term:

Table: Estimated Costs of Each Proposed and Amended Probation Condition Incurred By Probationer

	Avg. Monthly Cost	Avg. Annual Cost	Avg. Cost for 5 Yrs Probation	Avg. Cost for 7 Yrs Probation
(Substance-Abusing 1) Clinical Diagnostic Evaluation	Varies Depending on Level of Evaluation Est. \$5,000 per Evaluation			

(Substance-Abusing 2) Notice to Employers	\$0	\$0	\$0	\$0
(Substance-Abusing 3) Abstain from Alcohol, Controlled Substances, and Dangerous Drugs	Varies Est. \$15	\$180	\$900	\$1,260
(Substance-Abusing 4) Alcohol and Drug Testing	Est. \$100 per test Year 1: \$433.33 Year 2-5: \$300 Year 6-7: \$100	Year 1: \$5,200 Year 2-5: \$3,600 Year 6-7: \$1,200	\$19,600	\$22,000
(Substance-Abusing 5) Facilitated Support Group Meetings	Varies Est. \$100 per week Est. \$433.33 per month	\$5,200	\$26,000	\$36,400
(Substance-Abusing 6) Treatment Program for Cases Involving Substance-Abusing Licensees	Varies Depending on Treatment Program, Facility, Insurance, and Length of Treatment --Est. \$20,000 per Treatment *County Facilities and Salvation Army typically have a sliding scale or offer treatment at no cost.			
(Substance-Abusing 7) Worksite Monitor	Varies Est. \$100	Varies Est. \$1,200	Varies Est. \$6,000	Varies Est. \$8,400
(Substance-Abusing 8) Major Violations	Varies depending on whether probationer commits a major violation during his or her probation.			
Total Est. Cost of Probation Conditions	Varies			

*Assumes One Clinical Diagnostic Evaluation Completed During Year 1

Assuming that the probationer is only ordered to undergo one clinical diagnostic evaluation and one drug and alcohol abuse treatment program during the first year or probation, the Board estimated a probationer will pay approximately \$36,600 during the first year of probation, \$10,000 each year for the second through fifth year of probation, and \$7,600 each year for the sixth through seventh year of probation to comply with the terms of probation. This would equate to an approximate total cost to the probationer of \$76,600 to comply with a 5-year probation term and \$91,800 to comply with a 7-year probation term. Over the course of a 5-year probation term an Acupuncturist earning \$35,000 per year would pay approximately 44% of their total income towards the costs of complying with the proposed conditions of probation. Over the course of a 7-year probation term an Acupuncturist earning \$35,000 per year would pay approximately

37% of their total income towards the costs of complying with the proposed conditions of probation.

Acupuncturist \$35,000 Earned Annually x 5 Years = \$175,000
\$76,600 Total Probation Costs / \$175,000 Earned over 5 Years = Approx. 44%

Acupuncturist \$35,000 Earned Annually x 7 Years = \$245,000
\$91,800 Total Probation Costs / \$245,000 Earned over 7 Years = Approx. 37%

Additionally, probationers are required to provide specified information to the Board as required by each term and condition of probation. Probationers may choose from a variety of methods to transmit required information to the Board, including email, or mailing a letter. A probationer may incur nominal costs associated with mailing their letter to the Board.

The Board has made an initial determination that the proposed regulation may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The Board has not considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

- (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
- (ii) Consolidation or simplification of compliance and reporting requirements for businesses.
- (iii) The use of performance standards rather than prescriptive standards.
- (iv) Exemption or partial exemption from the regulatory requirements for businesses.

Effect on Housing Costs: None

EFFECT ON SMALL BUSINESS

The Board has determined that the proposed regulation may affect small businesses. The Board only regulates activities that appear to affect small businesses as defined in California Government Code Section 14837. A license that has been revoked, suspended, reprimanded, or placed on probation may cause a significant fiscal impact on the small business where the licensee worked depending on the nature and severity of the violation. A small business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board does not maintain data relating to the number or percentage of licensees who own a small business; therefore, the number or percentage of small businesses that may be impacted cannot be predicted. The Board only has authority to take

administrative action against a licensee and not a small business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is the subject of disciplinary action cannot be projected. Small businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS

This regulatory proposal will have the following effects:

Creation or Elimination of Jobs within the State of California

This proposal may create or eliminate jobs within the State of California because a license that has been revoked, suspended, reprimanded, or placed on probation may cause a licensee to lose their job depending on the nature and severity of the violation. An individual who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board, on average, suspends or revokes, or places practice restrictions on less than 1% of licensees per year.

Creation of New or Elimination of Existing Businesses Within the State of California:

This proposal may not create new business or may eliminate existing businesses within the State of California because a license that has been revoked, suspended, reprimanded, or placed on probation may cause a significant fiscal impact on the business where the licensee worked depending on the nature and severity of the violation. A business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board does not maintain data relating to the number or percentage of licensees who own a business; therefore, the number or percentage of businesses that may be impacted cannot be predicted. The Board only has authority to take administrative action against a licensee and not a business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is the subject of disciplinary action cannot be projected. Businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

Expansion of Businesses or Elimination of Existing Businesses Within the State of California:

This proposal may affect the expansion of businesses currently doing business within the State of California. An individual's license that has been revoked, suspended, reprimanded, or placed on probation may cause a significant fiscal impact on the business where the licensee worked depending on the nature and severity of the violation. A business owned by a licensee who faces disciplinary action may incur a significant fiscal impact depending on the nature and severity of the violation. The Board does not maintain data relating to the number or percentage of licensees who own a business; therefore, the number or percentage of businesses that may be impacted cannot be predicted. The Board only has authority to take administrative action against a licensee and not a business. Accordingly, the initial or ongoing costs for a small business owned by a licensee who is the subject of disciplinary action cannot be

projected. Businesses operated by licensees who are in compliance with the law will not incur any fiscal impact.

Benefits for the Health and Welfare of California Residents:

The Board has determined that this regulatory proposal benefits the health and welfare of California residents by providing maximum protection to the California consumers against licensees who are found to be in violation of the law or who do not demonstrate the competency necessary to perform their duties due to substance abuse. These benefits are a direct result of the Board's statutorily mandated priority (BPC Section 4928.1). The protection of the public is the highest priority of the Board in exercising its licensing, regulatory, and disciplinary functions. The proposed amendments of these additional probation conditions will ensure that individuals who have been determined to be substance-abusing licensees will be effectively disciplined in a manner that will protect the public. Additionally, these probation conditions provide the Board with an effective tool to discipline substance-abusing licensees who are in violation of the Acupuncture License Act.

Benefits for Worker's Safety:

This regulatory proposal benefits worker safety because providing maximum protection to the California consumers against licensees who are found to be in violation of the law or who do not demonstrate the competency necessary to perform their duties due to substance abuse is in the public's interest. These benefits are a direct result of the Board's statutorily mandated priority (BPC Section 4928.1). The protection of the public is the highest priority of the Board in exercising its licensing, regulatory, and disciplinary functions. The proposed amendments of these additional probation conditions will ensure that individuals who have been determined to be substance-abusing licensees will be effectively disciplined in a manner that will protect the public. Additionally, these probation conditions provide the Board with an effective tool to discipline substance-abusing licensees who are in violation of the Acupuncture License Act.

Benefits for the State's Environment:

This regulatory proposal does not affect the state's environment because the focus is on the disciplinary guidelines used for individuals, not the environment.

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 or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed regulations.

One alternative is to not adopt the regulations. This alternative was rejected. The Board is directed by statute to adopt the Uniform Standards. Failure to adopt the regulatory proposal also limits the Board's tools to deal with substance-abusing licensees, does

not add clarity to the guidelines, and does not allow for an exception in other cases for a licensee to use medically prescribed substances.

The alternative to adopt this regulatory proposal was selected by the Board. This regulatory proposal will provide the Board with additional tools, the standards and conditions based on the standards, to discipline and monitor substance-abusing licensees. This also allows for consistent standards to be applied to health care professionals, thus, providing greater public protection. Further, this proposal provides a definition of substance-abusing licensee so that there is a standard for when the Uniform Standards and implementing conditions apply. This definition allows the licensee to rebut the presumption that he or she is a substance-abusing licensee, which ensures that a person is only deemed a substance-abusing licensee when appropriate. The regulatory proposal also provides updated information for clarity in the disciplinary guidelines and allows for a medical exception to the condition related to substance use in non-substance-abusing licensee cases. Adopting this regulatory proposal allows the Board to most effectively fulfill its regulatory mandate of consumer protection.

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.

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 California Acupuncture Board at 1747 N. Market Blvd, Suite 180, Sacramento, CA 95834, or by accessing the Board's website at www.acupuncture.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

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name:	Marc Johnson, Policy Coordinator
Address:	1747 North Market Blvd, Suite 180 Sacramento, CA 95834

Telephone No.: 916-515-5200
Fax No.: 916-928-2204
E-Mail Address: acupuncture@dca.ca.gov

The backup contact person is:

Name: Ben Bodea
Acting Executive Officer
Address: 1747 North Market Blvd, Suite 180
Sacramento, CA 95834
Telephone No.: 916-515-5200
Fax No.: 916-928-2204
E-Mail Address: acupuncture@dca.ca.gov

Website Access: Materials regarding this proposal can be found at
http://www.acupuncture.ca.gov/about_us/dpopp.shtml