

**VETERINARY MEDICAL BOARD
INITIAL STATEMENT OF REASONS**

Hearing Date:

The Board has not scheduled a hearing on the proposed changes. However, a hearing will be scheduled upon request by any interested party.

Subject Matter of Proposed Regulations: Civil Penalties for Citation.

Sections Affected: § 2043 of Title 16, Division 20, Article 5.5 of California Code of Regulations.

General Purpose of the Regulatory Proposal:

The Veterinary Medical Board (the “Board”) is proposing the following regulatory action to amend Civil Penalties for Citation in order to better protect animal patients and California consumers. By imposing higher fines and penalties, the amendments should serve as an incentive for both licensed and unlicensed individuals to refrain from violating the Veterinary Medicine Practice Act. Compliance with the laws and regulations governing veterinary medicine serves to protect the public’s animals.

Statutory Authority for Rulemaking: Business and Professions Code §§ 125.9, 148, 4808, 4875.2, and 4875.4.

Background and Introduction:

Created in 1893, the Board licenses and regulates veterinarians, registered veterinary technicians, registered veterinary technician schools and programs, and veterinary premises and hospitals by enforcing the Veterinary Medicine Practice Act (the “Act”). The Act mandates that protection of the public shall be the highest priority of the Board, and protection of the public shall be paramount over any other interests. In furtherance of its mandate, the Board administers a statewide licensing and enforcement program.

The Board enforces the consumer protection provisions as provided for in Title 16, Division 20 of the California Code of Regulations. The Board receives complaints from the public and investigates violations of the Act and associated regulations. When appropriate, cases are referred to the Attorney General’s office or law enforcement authorities for administrative action, civil and/or criminal prosecution.

In order to enforce the Act, Business and Professions Code (the “Code”) § 4875.2 authorizes the Executive Officer of the Veterinary Medical Board to, among other things, issue a

citation to a veterinarian, registered veterinary technician, or unlicensed person, upon completion of an investigation pursuant to which the Executive Officer has probable cause to believe that a veterinarian, registered veterinary technician or unlicensed person has violated the Act.

Code § 125.9 and § 148 authorize the Board to establish a system for the issuance of citations, which may contain an order of abatement or an administrative fine, to licensees who are found to be in violation of the Act or any regulation adopted pursuant to it. Code § 125.9(3) sets the maximum penalty amount that may be assessed for each inspection or each investigation made with respect to the violation at \$5,000.

The proposed regulatory changes would recast the classifications of violations described therein, designated as “class A” through “class C”; add a provision stating that unlicensed activity is a “class C” violation; and increase the maximum fine amounts from \$3,000 for a “class A” violation to \$5,000 for a “class C” violation.

Purpose, Anticipated Benefit, and Rationale for Changes to Regulation:

§2043 in General

This regulation, as amended, will strengthen the Board’s ability to enforce its laws and regulations and provide consumers with additional protection. For the past three years, the Board has issued an average of ninety-two (92) citations per year, with an average fine amount from \$250-\$500. Sixty percent (60%) of the cases that have resulted in citation and fine have involved some form of negligence, misconduct, failure to provide appropriate follow-up care, or record keeping violations, while another thirty percent (30%) involved unlicensed activity. The Board has collected between \$25,000 and \$50,000 in annual revenue for fines levied each year for the past three years against licensed and unlicensed individuals. The proposed regulations would increase the fine amounts for these violations.

§ 2043 Opening Paragraph:

Purpose: The changes to this paragraph clarify that it is when the Executive Officer determines that a violation has occurred that citations may be issued. Previous language referred to citations being issued but not what sets the citation process in motion. In addition, the new language specifies that the citation is issued to a licensee or unlicensed person. The previous language contained no reference to the recipients of citations.

Anticipated Benefit: The new language is more explicit about who issues citations and to whom they are issued. This would make it easier for someone who is

reading this section alone to understand it. Also, the new language uses the active voice and is easier to follow compared to the old language.

Rationale: The proposed language changes are being made for purposes of clarity regarding who issues and receives citations. The new language also utilizes the active voice for further ease of understanding.

§ 2043(a):

Purpose: This paragraph sets forth what a “class A” violation consists of and the penalties therefor. The former language made “class A” violations the most serious of the three categories of citation (A, B, and C). Now, “class A” violations are the least serious, reflecting a belief that as the letters progress, so should the seriousness of the offense increase. It is therefore helpful to compare the proposed language of § 2043(a) with the language of the old § 2043(c). Before, “class C” violations were those that involved a person who, while engaged in the practice of veterinary medicine, had violated a statute or regulation relating to the practice of veterinary medicine and which had not caused either death or bodily injury to a patient and which did not present a substantial probability that death or serious harm to an animal patient would result therefrom. The proposed new language of § 2043(a) substitutes the word “harm” for “bodily injury”, reflecting the fact that there are other types of harm besides bodily injury, such as fraud, deceptive business practices, and improper record-keeping. All these potential types of harm may result from deviating from the applicable standard of care. The penalty amounts given for “class A” violations are now higher than the former “class C” amounts: the amounts are now not less than \$250 and not exceeding \$3,000 for each citation.

Anticipated Benefit: The increased penalties for “class A” citations will act as a greater deterrent to undesirable behavior on the part of licensees than did the former “class C” penalties set forth in the old § 2043(c). As a side effect, the Board may receive greater income in the form of payments of higher fines. The new regulation has substituted the more general term “harm” for “bodily injury”, providing the Board with the authority to impose sanctions for violations of the Act that may result in some form of harm, whether bodily injury or otherwise.

Rationale: Deterrence of undesirable behavior is the rationale for increasing the penalties for the least serious group of violations. It is also felt that the order of the violations covered by § 2043 should go from least serious to most serious. In addition, the new language uses the term “harm” rather than “bodily injury”, because the more general “harm” covers the broader provisions contained in the Act as outlined above.

§ 2043(b):

Purpose: This paragraph sets forth what a “class B” violation consists of and the penalties therefor. The criteria for finding a “class B” violation in the proposed revision are substantially similar to those in the old regulations. However, the new language prescribes a citation for a practitioner who “has caused harm to an animal patient”, without regard for whether the harm is “significant and substantial in nature”. The old regulation made it a “class B” violation if a practitioner “caused bodily injury to an animal which is not significant and substantial in nature.” The proposed language also increases the “lookback” period for prior “class A” citations (formerly “class C” citations), from 24 months to 5 years. In addition, the proposed fines are increased to a minimum of \$1,000 and a maximum of \$4,000. As in § 2043(a), the term “bodily injury” has been replaced by the more general term, “harm” to provide for any violation that may result in harm, including but not limited to fraud, deception, unprofessional conduct, and deviation from the applicable standard of care.

Anticipated Benefit: The increased penalties for “class B” citations will act as a greater deterrent to undesirable behavior on the part of licensees than did the former “class B” penalties set forth in the old § 2043(b). As a side effect, the Board may receive greater income in the form of payments of higher fines. In addition, by eliminating the words “significant and substantial in nature,” the Board will not have to prove that the underlying violation met this nebulous threshold and instead may assess the existence of harm whether or not it is “significant and substantial in nature”. The new regulation has substituted the more general term “harm” for “bodily injury”, giving regulators the ability to impose sanctions for harms not consisting of bodily injury. The extension of the “lookback” period for prior citations to 5 years will also allow regulators to better assess whether the practitioner involved has previously offended and may therefore be more likely to reoffend in the future. Consumers will benefit from the Board’s increased citation and fine authority, as the higher fine amounts and requirements for remediation will encourage compliance with the Act and deter repeat offenses.

Rationale: Deterrence of undesirable behavior is the rationale for increasing the penalties for this second most serious group of violations. In addition, the new language uses the term “harm” rather than “bodily injury”, because the more general “harm” picks up other types of harm besides bodily injury, including but not limited to fraud, deception, faulty record-keeping, unprofessional conduct, and deviation from the applicable standard of care. The elimination of the words “significant and substantial in nature” will also give regulators more leeway to prescribe this class of citation, since they may assess the existence of harm whether or not it is “significant and substantial in

nature”. Finally, the extension of the “lookback” period for prior citations to 5 years will also allow regulators to better assess whether the practitioner involved has previously offended and may therefore be more likely to reoffend in the future. The retention and consideration of citation records for a period of five years is consistent with other health regulatory boards and is a reasonable and prudent timeframe for review and consideration of prior actions. A timeframe beyond five years may be viewed as considering “dated” infractions, while only considering citations from one to four years may result in repeat offenses going undetected where notice and corrective action was current enough to have sufficiently educated the cited party.

§ 2043(c):

Purpose: This paragraph sets forth what a “class C” violation consists of and the penalties therefor. “Class C” violations are the most serious of the classes of violations in the proposed new regulation. It is therefore helpful to compare the proposed language of § 2043(c) with the language of the old § 2043(a). The new language significantly expands the categories of harm that can give rise to a “class C” violation as compared to “class A” violations in the old language. The old language only made it a “class A” violation to commit a violation which meets the criteria for a “class B” violation for a person who has been issued two or more prior citations for a “class B” violation within the 24 month period immediately preceding the act serving as the basis for the citation. The new language has a longer lookback period for “class B” violations, making it a “class C” violation to commit a violation which meets the criteria for a “class B” violation within the 5-year period immediately preceding the act serving as the basis for the citation. The retention and consideration of citation records for a period of five years is consistent with other health regulatory boards and is a reasonable and prudent timeframe for review and consideration of prior actions. In addition, the new language also makes it a “class C” violation to: cause death or serious harm to an animal patient; commit a violation that endangers the health and safety of another person or animal; or commit multiple violations which show a willful disregard for the law. Lastly, the proposed fines are increased to a minimum of \$2,000 and a maximum of \$5,000.

Anticipated Benefit: The increased penalties for “class C” citations will act as a greater deterrent to undesirable behavior on the part of licensees than did the former “class A” penalties set forth in the old § 2043(a). As a side effect, the Board may receive greater income in the form of payments of higher fines. The addition of several new categories of actions that can lead to a “class C” citation as opposed to the one category in the former § 2043(a) will give regulators the ability to impose penalties for actions that warrant censure. Finally, the extension of the “lookback” period for prior citations

to 5 years will allow regulators to better assess whether the practitioner involved has previously offended and may therefore be more likely to reoffend in the future.

Rationale: Deterrence of undesirable behavior is the rationale for increasing the penalties for this most serious group of violations. Several categories of actions deserving of censure have been added because it is desirable from a regulatory standpoint to capture these categories for the issuance of penalties. The rationale of the longer “lookback” period of five years is to more accurately gauge which individuals are more likely to reoffend. The retention and consideration of citation records for a period of five years is consistent with other health regulatory boards and is a reasonable and prudent timeframe for review and consideration of prior actions. A timeframe beyond five years may be viewed as considering “dated” infractions, while only considering citations for one to four years may result in repeat offenses going undetected where notice and corrective action was current enough to have sufficiently educated the cited party.

§ 2043(d):

Purpose: The major change to this provision is to eliminate § 2043(d)(1), which sets forth “The good or bad faith exhibited by the cited person” as a criterion for assessing a civil penalty. The elimination of this sentence is proposed in order to eliminate a standard which is difficult to quantify and redundant in that there is also a criterion which reads, “The extent to which the cited person has cooperated with the board’s investigations” and one which reads, “The extent to which the cited person has mitigated or attempted to mitigate any damage or injury caused by their violation”. It is also redundant with regard to the willfulness specified in § 2042(d)(2). In addition, there is a minor grammatical change, from “his or her” to “their” in § 2043(d)(6) (the proposed § 2043(d)(5)).

Anticipated Benefit: Eliminating “The good or bad faith exhibited by the cited person” will rid the regulator of the task of trying to determine something which by its nature is amorphous and hard to quantify. The two other subsections described above will adequately allow the regulator to assess the individual’s “good or bad faith” without the necessity of a redundant provision.

Rationale: The rationale of eliminating “The good or bad faith exhibited by the cited person” is to eliminate redundancy and relieve the regulator of having to use a standard which is difficult to quantify and apply.

§ 2043(e):

Purpose: Section 2043(e) is a new subsection that deals with unlicensed persons practicing veterinary medicine. In all such situations, the citation shall be a “class C” violation, and the civil penalty shall be no less than \$2,000 and no more than \$5,000. This provision makes it clear that the Board considers the practice of veterinary medicine by an unlicensed person to be a serious offense, deserving of the most severe level of citation and fine.

Anticipated Benefit: Making the practice of veterinary medicine by an unlicensed person a “class C” violation demonstrates that the Board is serious about enforcing the laws and regulations governing the practice of veterinary medicine. The relatively high penalty for the practice of veterinary medicine by an unlicensed person will deter unlicensed persons from engaging in veterinary medicine.

Rationale: The practice of veterinary medicine has been deemed by the State of California to be a practice where government oversight and regulation are necessary to protect the public from harm. The Board believes that the practice of veterinary medicine by an unlicensed person is a severe offense, deserving of a severe sanction, since unlicensed individuals have not demonstrated that they meet the minimum educational and clinical standards of that of a licensed practitioner and may not be trained or skilled enough to provide veterinary services to the public. This section makes such unlicensed activity subject to a “class C” citation, the most serious class of citation with the highest fines assessed. Since the citation penalty is the only form of recourse available to the Board for unlicensed practitioners, it is critical that the Board leverage the maximum fine amounts to deter such activity.

§ 2043(f):

Purpose: This new subsection makes it clear that citations issued pursuant to § 2043 are public documents, and therefore subject to inspection by the public. This is a new subsection which makes explicit, where it was not before in this section, that citations are public documents. If a citation is resolved by payment of the civil penalty or compliance with the order of abatement, the citation will remain a public document for five years from the date of resolution and, at the end of the five years, will be purged. If the licensee is subject to formal discipline within the five years following the citation order, the citation will become part of the permanent enforcement record. A citation that has been withdrawn or dismissed shall be purged immediately upon withdrawal or dismissal. By setting forth these policies within § 2043, the Board wishes to provide affected persons with information on how citations may affect disclosure of

information to the public, as citations are a matter of public record and must be provided upon request.

Anticipated Benefit: Persons subject to citations now have a clear idea about how citations affect their public records, in that the record of a citation remains a matter of public record for five years.

Rationale: The rationale behind adding this new subsection is to provide more information to affected persons about the public nature of citations, how long a citation remains on their public records, and the consequences of recidivism during the period that a citation is part of the public record. The policy regarding the record retention period of five years for citation orders is consistent with many other regulatory boards in terms of providing timely and more current transparency of such infractions.

§ 2043(g):

Purpose: This new subsection specifies some of the things an order of abatement may require, and provides that an order of abatement issued pursuant to section 4875.2 of the Code shall fix a reasonable time for abatement of the violation. The order of abatement may require a demonstration of how future compliance with the laws and regulations governing veterinary medicine will be accomplished, which may be done via the submission of a corrective action plan, and the order may also require a person to take a course approved by the Board related to the violation for which the citation was issued. These provisions are meant to add clarity about what “abatement” means and consists of.

Anticipated Benefit: This new provision provides affected persons with a better idea of what is involved in “abatement.” It gives the regulator suggested tools for enforcing an abatement, including requiring a demonstration of how future compliance will be accomplished and requiring that the person receiving a citation take a course related to their violation. It also gives persons receiving citations a good idea of what will be expected of them in order to fulfill an order of abatement. On the consumer protection side, the new provision clearly mandates action plans and continuing education that will lead to more educated and proficient practitioners, who will be better able to serve animals and their owners.

Rationale: The rationale behind adding this new subsection is to provide clarity about what abatement entails and what can be required in an order of abatement. It also provides that an order of abatement shall fix a reasonable amount of time for abatement of the violation, which provides a standard for setting the time frame of an abatement. In addition, by requiring practitioners to correct deficiencies in their

practice or skills and requiring them to obtain education in areas of non-compliance, this subsection increases public protection through rehabilitating and educating practitioners.

Fiscal Impact Analysis in General

The proposed changes to § 2043(a), (b), (c), and (d), and the proposed adoption of § 2043(e), (f), and (g) are an efficient and effective means of implementing the policy decisions enacted in statute or by other provisions of the law in the least burdensome manner. The proposed changes and adoptions increase the penalties for regulatory violations, but the violations themselves are already in place and practitioners of veterinary medicine and unlicensed persons should already be on notice about what penalties for violations of laws and regulations governing veterinary medicine consist of. Likewise, a system for the assessment and collection of penalties is already in place, so there would be no new regulatory structure to create. To the Board's knowledge, there is no vehicle which would as effectively and efficiently provide deterrence for violations of laws and regulations governing the practice of veterinary medicine.

Economic Impact Assessment

The proposed changes to § 2043(a), (b), (c), and (d), and the proposed adoption of § 2043(e), (f), and (g) set forth the classification and fine amounts of citations, set forth factors to be considered in assessing citation amounts, make clear that situations involving the unlicensed practice of veterinary medicine shall incur the highest level of citation penalty, clarify the public record and disclosure of citations, and provide clarity about what an abatement may entail. These changes and additions to the regulations will largely affect individuals rather than groups or businesses. The Board has made an initial determination that the proposed regulatory action will have no significant impact on the creation of new jobs or new businesses, the elimination of jobs or existing businesses, or the expansion of business in the State of California. To the extent that there is any impact at all to jobs or businesses, that impact would be as a result of violating the Act. The same would apply for any effects felt by small business, as a large majority of veterinary practices are small businesses where the owner or practice manager may be subject to paying a fine, appealing a citation, or complying with an order of abatement.

In particular, it is predicted that the proposed regulatory changes would have the following effects:

- It will not create or eliminate jobs in the State of California, because it does not mandate the creation or elimination of new programs. Recipients of citations

will still be able to work, so the regulatory changes should not unduly affect their jobs. The proposal also encourages compliance with the law.

- It will not create new business and will not eliminate businesses within the State of California since the effect of the new and revised regulatory provisions will be felt by individuals rather than businesses. It may affect an individual business if a managing licensee is issued a citation, which will be a matter of public record, and patients see that the managing licensee has been cited and therefore avoid patronizing their establishment. However, it is important to note that the receipt of a citation by a managing licensee of a business would be as a result of a violation of the Act. Citations are also currently public documents, so there is no change to this practice.
- It will not affect the expansion of business currently doing business within the State of California because the effect of the new and revised regulatory provisions will be felt by individuals rather than businesses, and because the proposal encourages compliance with the law.
- This regulatory proposal benefits the health and welfare of California residents because it provides a greater means of censuring people who violate the rules and regulations governing the practice of veterinary medicine. This proposal protects both animals and their owners by citing, fining and making public the citation so that the public can be aware that certain practitioners and unlicensed persons have violated the laws and regulations governing veterinary medicine. The public has a right to know this in order to make informed decisions regarding the care of their animals.
- It will not have an impact on worker safety, because it only mandates a schedule of citations and fines for prohibited activities. If anything, it may make veterinarians, registered veterinary technicians, and unregistered persons more concerned with safety in carrying out their practices, because they may believe unsafe practices could lead to citations.
- It will not have any impact on the State's environment. The regulatory proposal deals with fines and other intangible items that would not have any bearing on the quality of the State's air, water, or other environment.

Business Impact

The Board has made the initial determination that the proposed regulatory changes to sections 2043(a), (b), (c), and (d), and the proposed adoption of sections 2043(e), (f), and (g) would have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This

initial determination is based on the fact that citations are largely issued to individuals rather than businesses, and therefore has a negligible effect on businesses in California.

Requirements for Specific Technologies or Equipment

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

Description of Alternatives

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which the regulation was proposed. No reasonable alternative which was considered would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost effective to affected private persons, or would be equally effective in implementing the statutory policy or other provision of law.

The fines set in § 2043(a), (b), and (c) are relatively high, close to the statutory and in some cases at the statutory maximum. As an alternative, it would be possible to make the fine amounts lower. However, the Board feels that the proposed fine levels will best provide a deterrent for violations of veterinary medicine practice rules and regulations.

Under § 2043(e), in all situations involving unlicensed persons practicing veterinary medicine, the citation shall be a “class C” citation (the highest level penalty). It would be possible to subject such unlicensed persons to a less severe level of citation. However, the Board feels that the proposed citation level will best provide a deterrent for unlicensed persons who have practiced or who may be considering practicing veterinary medicine. Since unlicensed persons do not hold a license with the Board, the citation infraction and penalty is the only administrative recourse available to the Board to protect the public. As such, the Board must exercise the maximum fine authority to unlicensed individuals placing the public’s animals at risk.

Under § 2043(f), every citation that is issued pursuant to this regulation is considered a public document. Citations are also currently public documents; § 2043(f) makes this explicit. Keeping citations as public records allows the public to know if a certain practitioner has received a citation. The Board feels that maintaining citations as public documents serves the public by allowing them to know the citation history of any given practitioner. The Board believes that the public has the right to know this information.