

**INITIAL STATEMENT OF REASONS FOR
PROPOSED FINGERPRINTING AND CRIMINAL RECORD CHECKS
OF THE CALIFORNIA HEALTH BENEFIT EXCHANGE
CALIFORNIA CODE OF REGULATIONS, TITLE 10, CHAPTER 12, ARTICLE 4
ADOPT SECTION 6456**

Government Code Section 100504(a)(6) authorizes the California Health Benefit Exchange/Covered California (the Exchange) Board to adopt rules and regulations, as necessary. The APA requires that an Initial Statement of Reasons be available to the public upon request when a permanent rulemaking action is undertaken. The following information required by the APA pertains to this particular rulemaking action:

SUMMARY OF THE PROPOSED REGULATIONS:

The proposed regulations would make permanent Section 6456, of Title 10 of the California Code of Regulations (C.C.R.) related to the fingerprinting and criminal background check requirements of the Exchange. These proposed regulations implement, interpret, and make specific statutory requirements in Government Code Section 1043 to protect and safeguard consumers and consumer information from the unauthorized and illegal access to, or disclosure of, specific types of sensitive information.

AUTHORITY AND BACKGROUND

In 2013, the legislature enacted Government Code Section 1043 to authorize the Exchange to develop privacy and security standards consistent with federal guidelines in the Minimum Acceptable Risk Standards for State-based Exchanges (MARS-E) and other applicable federal laws or guidance. The statute authorizes the Exchange to conduct fingerprinting and background checks for the access to federal tax information (FTI), personal health information (PHI), and personal identifying information (PII), confidential information, or financial information contained in the information systems and devices of the Exchange, or any other information as required by federal law or guidance. The MARS-E (PS-3 Personnel Screening) requires state-based Exchanges to screen all persons with access to sensitive information. The MARS-E also requires appropriate personnel to obtain a moderate-risk security clearance as defined in the Health and Human Services Personnel Security/Suitability Handbook (HHS Instruction 731-1).

The legislature found that in order to appropriately protect sensitive information and data contained in the information systems and devices of the Exchange, individuals whose duties include or would include access to such information, including employees, prospective employees, vendors, volunteers, contractors, or subcontractors, shall, consistent with the MARS-E and federal law or guidance, submit a full set of fingerprints for the purposes of conducting a criminal history record check through the California Department of Justice (DOJ). Additionally, Government Code Section 1043 also requires that for any services contract, interagency agreement, or public entity agreement entered into with the Exchange after the effective date of the statute, the contract shall contain a provision requiring the contractor to agree to criminal background checks on individuals who will have access to the same sensitive information as those individuals specified above.

These regulations implement, interpret, and make specific statutory requirements in Government Code Section 1043 to protect and safeguard consumers and consumer information from the unauthorized and illegal access to, or disclosure of, specific types of sensitive information. It is the intent of the Exchange that these regulations are consistent with applicable laws and guidance related to the privacy and security standards of the Exchange, are fair to the applicant consistent with applicable laws and guidance related to the consideration of arrest and conviction records in employment decisions, and are appropriately consumer protective to reduce opportunities for identity theft and fraud.

THE PROBLEM

Government Code Section 1043 requires the Exchange to implement a fingerprinting and background check process consistent with applicable federal laws and guidance. These regulations define, interpret, and further clarify the jobs duties and functions that shall be subject to the criminal background check process under Government Code Section 1043. Specifically, these regulations identify that individuals whose duties include or would include the following functions are required to undergo criminal background checks:

- 1) Access to federal tax information.
- 2) Access to personal identifying information
- 3) Access to personal health information
- 4) Access to confidential or sensitive information provided by a member of the public, including but not limited to, a credit account number or social security number.
- 5) Access to cash, checks, or other forms of payment and accountable items.
- 6) Responsibility for the development or maintenance of the CalHEERS system and other critical automated systems of the Exchange.
- 7) Access to information technology systems of the Exchange.

These regulations also specify the grounds for disqualification based on a criminal background check. A crime of moral turpitude that is substantially related to the qualification, functions, or duties of the position shall be justification for a disqualification from a position requiring fingerprinting under the regulations. Additionally, these regulations provide mitigating factors that could be considered in determining whether an offense disqualifies an individual from a position. Additionally, the regulations specify what additional information will be taken into consideration when considering an applicant's criminal history through the use of an individualized assessment process including the nature of the job held or sought, the age, nature and gravity of the offense, and any evidence of rehabilitation including evidence provided the individual including participation in treatment programs. These additional considerations are consistent with federal Equal Employment Opportunity Commission (EEOC) guidelines on the use of criminal background checks in the hiring process.

These regulations also duplicate the language regarding the types of sensitive information found in Government Code Section 1043(a) due to the simultaneous development of the statute and regulations through a process involving significant stakeholder feedback leading to the formation and adoption of both the statute and emergency regulations. Any duplicative language in these regulations is necessary to satisfy the clarity standard of Government Code Section 11349.1 in accordance with 1 C.C.R. Section 12(b). Stakeholder feedback during the development of the statute and emergency regulations indicated the need for a single-source of specific information that would fully inform and clarify the Exchange fingerprinting and background check process for affected individuals.

PURPOSES AND BROAD OBJECTIVES

The broad objectives of this proposed regulatory action are to:

- Provide the Exchange with privacy and security standards consistent with federal guidelines and State and federal laws;
- To implement fingerprinting and background checks of persons whose duties at or for the Exchange include or would include access to federal tax information, personal health information, and personal identifying information, confidential information, or financial information contained in the information systems and devices of the Exchange, or any other information as required by federal law or guidance;
- To specify and clarify which persons are subject to the fingerprinting and background checks authorized by Government Code Section 1043;
- To protect and safeguard consumers and consumer information from the unauthorized and illegal access to, or disclosure of, specific types of sensitive information.
- To be fair to applicants consistent with applicable laws and guidance related to the consideration of arrest and conviction records in employment decisions;
- To make permanent emergency regulations promulgated by the Exchange; and
- To protect California consumers by reducing opportunities for identity theft and fraud.

BENEFITS

Anticipated benefits from this proposed regulatory action are:

- To clarify the Exchange's privacy and security procedures so they are consistent with federal guidelines and State and federal laws;
- To protect and safeguard California consumers from the unauthorized and illegal access to, or disclosure of, their sensitive information such as federal tax information, personal health information, and personal identifying information, confidential information, or financial information contained in the information systems and devices of the Exchange, or any other information as required by federal law or guidance;

- To implement and interpret Government Code Section 1043 so that it is clear to the public which persons are subject to the fingerprinting and background checks authorized by Government Code Section 1043;
- To be fair to applicants consistent with applicable laws and guidance related to the consideration of arrest and conviction records in employment decisions;
- To make permanent emergency regulations promulgated by the Exchange; and
- To protect California consumers by reducing opportunities for identity theft and fraud.

CONSISTENCY AND COMPATIBILITY

The Exchange has evaluated whether the proposed regulations are inconsistent or incompatible with existing State regulations. This evaluation included a review of the laws governing the Exchange and specifically those statutes and regulations related to fingerprinting and criminal background checks. Exchange staff also conducted an internet search of other State agency and department regulations.

These regulations are not the first to implement background check policies for a state agency. In fact, several state agencies in health, education and financial areas also require background checks, for example, the following departments conduct background checks on some or all of their employees or licensees:

- Franchise Tax Board (FTB)
- Department of Motor Vehicles (DMV)
- California State Teacher's Retirement Systems (CalSTRS)
- California State Lottery
- Department of Managed Health Care (DMHC)
- California Department of Insurance (CDI)

In addition, the crimes of moral turpitude standard of potentially disqualifying offenses proposed by these regulations is a standard that is used by other state departments including the Department of Managed Health Care (Government Code Section 1042), and is found in civil service rules as a justification for disciplinary proceedings (Government Code Section 19572(k)).

While no known State regulation addresses precisely the same subject matter as these proposed regulations, i.e. implementation of Government Code Section 1043, the Exchange has determined that Penal Code Section 11105 and Labor Code Section 432.7(a) directly affect the application of these regulations. These regulations have been drafted consistent with the requirements and limitations in Penal Code Section 11105 and Labor Code Section 432.7(a). Therefore, the Exchange has determined that this proposal, if adopted, would not be inconsistent or incompatible with existing State regulations.

DETAILED DISCUSSION OF THE SPECIFIC PURPOSE, RATIONALE AND PROBLEM ADDRESSED FOR EACH REGULATION PROPOSED FOR AMENDMENT, ADOPTION OR REPEAL:

Authority Cited in this Regulatory Proposal: Government Code Section 100504.

References Cited in this Regulatory Proposal: Government Code Section 1043; Penal Code Section 11105; and Labor Code Section 432.7.

Section 6456(a). Definitions. This section defines (1) “federal tax information,” (2) “personal identifying information,” and (3) “personal health information” consistent with existing federal law or guidance. Rationale: The federal MARS-E guidance document for state-based Exchanges is the basis for Government Code Section 1043 and likewise these definitions track to any associated federal meanings.

Section 6456(b). Duties and Functions Requiring Fingerprinting. This section lists all duties and functions requiring fingerprinting under these regulations. Rationale: Duplicates in part functions and duties identified in Government Code Section 1043 and provides an exhaustive list of the duties and functions requiring fingerprinting under these regulations for clarity and specificity.

Section 6456(c). Fingerprinting Process. This section duplicates the fingerprinting process required by Government Code Section 1043. Rationale: Duplication of statutory language for clarity under Government Code Section 11349.1 in accordance with 1 C.C.R. 12(b).

Section 6456(d). Exchange Review. This section explains the purpose of the fingerprinting process in subdivision (c) and duplicates language in Government Code Section 1043. Rationale: Duplication of statutory language for clarity under Government Code Section 11349.1 in accordance with 1 C.C.R. Section 12(b).

Section 6456(e). Justification for Disqualification. This section limits potential disqualifying offenses to those involving moral turpitude and bearing a substantial relationship to the job duties and functions specified. Rationale: Consistency with federal laws and guidance.

Section 6456(f). Costs. This section explains that the Exchange will bear associated costs for employees. Rationale: This rulemaking specifies that the Exchange will cover associated costs for employees but not for other individuals identified in Government Code Section 1043 (including contractors, subcontractors, vendors, and the like). Other rulemaking packages may specify that the Exchange will cover additional costs related to fingerprinting requirements in Government Code Section 1043.

Section 6456(g). Grandfather clause. Exempts individuals hired prior to June 27, 2013, from having to meet fingerprinting and background check requirements as specified in these regulations. Rationale: This provision is consistent with civil service agreements between unions and the State of California.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Board relied on the following guidance:

Equal Employment Opportunity Commission (EEOC). Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 et seq., April 25, 2012 (Number 915.002) < http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf>.

U.S. Health and Human Services, Centers for Medicare and Medicaid Services. Minimum Acceptable Risk Standards for Exchanges – Exchange Reference Architecture Supplement, Version 1.0, August 1, 2012 <<http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Minimum-Acceptable-Risk-Standards-for-Exchanges-ERA-Supp-v-1-0-08012012-a.pdf>>.

U.S. Department of the Treasury, Internal Revenue Service. Publication 1075, Tax Information Security Guidelines for Federal, State, and Local Agencies - Safeguards for Protecting Federal Tax Returns and Return Information, Rev. December 2013 <<http://www.irs.gov/pub/irs-pdf/p1075.pdf>>.

Office of Management and Budget. “Memorandum for the Heads of Executive Departments and Agencies, Safeguarding Against and Responding to the Breach of Personally Identifiable Information” (M-07-16), May 22, 2007 <<http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-16.pdf>>.

U.S. Health and Human Services. Personnel Security/Suitability Manual, HHS Instruction 731-1, HHS Transmittal 98-1, January 8, 1998 <http://www.hhs.gov/asa/ohr/manual/files/98_1.doc>.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

According to the Board the estimated cost for an individual criminal background check is approximately \$69 which includes the cost of fingerprinting fees charged by DOJ (\$32), the FBI (\$17), and a “rolling fee” from a LiveScan fingerprint service provider (\$20). Pursuant to these regulations the Exchange shall pay for the costs associated with conducting the fingerprinting and background checks for employees and prospective employees of the Exchange. Costs related to the fingerprinting and background check costs of other individuals identified in Government Code Section 1043, including contractors, subcontractors, vendors, and volunteers will not be paid for by the Exchange. It is the intent of the Exchange by promulgating these regulations that any associated costs of non-employees or non-prospective employees of the Exchange will be the responsibility of those individuals or their affiliated organizations, unless specified elsewhere in Exchange regulations. For example, emergency regulations readopted for enrollment assistance at 10 C.C.R. Section 6658 in January 2014 specify that the Exchange will bear the costs of fingerprinting and background checks for Certified Enrollment Counselors (CECs) for the first year of operation until December 31, 2014.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

Background, Assumptions and Calculations:

As the proposed rulemaking affects Accenture (the contractor working on the CalHEERS system), it is estimated that approximately 100 Accenture employees would be fingerprinted in FY 2013-14, assuming a five percent attrition rate in FY 2014-15. This equates to a cost to

Accenture of \$6,900 (100 x \$69) in FY 2013-14 and \$345 (5 x \$69) in FY 2014-15. This cost, in turn, is collected by and thus becomes a revenue stream for Capital LiveScan that is rendering the fingerprinting service.

As the proposal also requires the Exchange's staff in Financial Management Division, CalHEERS, and Service Center to get fingerprinted, this would affect new staff hired on or after July 1, 2013, assuming all positions would be filled in FY 2013-14. An attrition rate of five percent has been included to account for normal staff turnover. Service Center, on the other hand, is assumed to have a 15 percent attrition rate, based on current turnover rate. The fingerprint cost of \$82,000 in FY 2013-14 and \$12,000 each year thereafter would be incurred by the Exchange, and in turn, collected by and thus becomes a revenue stream for Capital LiveScan. Detailed calculations are in Attachment B of the Std 399.

A. Potential Costs to Businesses Resulting from the Proposed Amendment.

Although the proposed action will directly affect a small business, the Exchange concludes that the economic impact, including the ability of California businesses to compete with businesses in other states, will not be significant. As stated in the Background, Assumptions, and Calculations section above, the amount of revenue Capital LiveScan estimates to collect amounts to \$89,000 in FY 2013-14 and \$12,000 each year thereafter.

B. Effect on Small Business.

The proposed regulations will directly affect a small business as indicated in subdivision A above.

C. The creation or elimination of jobs within the State of California.

The proposed regulatory package is not expected to impact the creation or elimination of jobs within the State, as Capital LiveScan is an existing business with an existing employee pool to provide fingerprinting services.

D. The creation of new businesses or the elimination of existing businesses within the State of California.

The proposed regulatory package is not expected to impact the creation or elimination of businesses, as Capital LiveScan is an existing business when the contract was awarded to render fingerprinting services for the Exchange.

E. The expansion of businesses currently doing business within the State of California.

The proposal is not expected to impact the expansion of businesses in California because Capital LiveScan is an existing business when the contract was awarded. In addition, the amount of time for Capital LiveScan to take an individual's fingerprint is very minimal, and does not require any office space expansion or staff augmentation to accommodate the Exchange's workload.

F. The benefits of the regulation to the health and welfare of California residents, worker safety, and the State's environment.

Consumers will benefit from this proposal, as the applicable Exchange's staff and contractor must clear background check to safeguard the handling of sensitive and confidential personal information of the consumers.

REASONABLE ALTERNATIVES TO THE REGULATIONS AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Board considered several alternatives during the emergency rulemaking process which heavily informed the formation of the emergency rules previously adopted and which are now being reintroduced through the permanent rulemaking process. In considering the following alternatives the Board sought to balance its stated objectives for this rulemaking: consistency with applicable laws and guidance related to the privacy and security standards of the Exchange, fairness to the applicant consistent with applicable laws and guidance related to the consideration of arrest and conviction records in employment decisions, and protection of consumer information to reduce opportunities for identity theft and fraud. The alternatives the Exchange considered and the reasons the Exchange rejected these alternatives are below:

1. Positions requiring fingerprinting

Alternative: Further clarify that only those individuals with access to the information systems and devices of the Exchange are required to undergo the fingerprinting process pursuant to these regulations.

Reasoning: Government Code Section 1043 was amended by the Legislature on October 4, 2013, in order to further specify that the MARS-E required the Exchange to screen those individuals with access to the specific types of information contained in the information systems and devices of the Exchange, but not individuals that do not have access to the information systems and devices of the Exchange, including, for example, employees of health plans or health insurance companies who have not been certified by the Exchange to access CalHEERS. With the recommended alternative now specified in statute the alternative has been formally adopted and it would be unnecessary to duplicate the clarification in the regulation.

2. Disqualifying Offenses

Alternative: Adopt a zero-tolerance policy that would exclude all individuals with criminal records for positions requiring fingerprinting pursuant to these regulations.

Reasoning: Adopting a zero-tolerance blanket exclusion for all individuals with criminal records, regardless of the offense, would violate EEOC guidelines regarding the permissible use of criminal records in hiring decisions and the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964. Instead, the Exchange proposes to adopt the individualized assessment process promulgated in these regulations, in line with EEOC guidance.

Alternative: Exclude all individuals with a felony record.

Reasoning: The same reasoning stated above would apply if the Exchange proposed a blanket exclusion of all individuals with a felony record.

Alternative: Adopt the disqualification standards for licensed insurance agents used by the California Department of Insurance at Insurance Code Section 2183.2 “Substantial Relationship Criteria for Crimes or Wrongful Acts.”

Reasoning: CDI utilizes a “substantially related” standard to evaluate potentially disqualifying offenses. Unlike the Exchange, however, CDI defines “substantially related” broadly to mean “any felony conviction” and various “crimes or acts” which may or may not have resulted in a conviction. Labor Code Section 432.7 prohibits the Exchange from utilizing “as a factor in determining any condition of employment including hiring, promotion, termination, ..., any record of arrest or detention that did not result in conviction....” Accordingly, the Exchange disqualification standards proposed in these regulations do not consider records of arrest or detention that did not result in conviction as potential disqualifiers. Furthermore, by proposing an individualized assessment to determine if an offense, including a felony, is disqualifying the Exchange has aligned its process with federal law and EEOC guidelines.

Alternative: Remove the standard of crimes of moral turpitude because it has historically been used in a discriminatory manner.

Reasoning: The standard of crimes of moral turpitude is a judicially created standard and has evolved over time. The historical discriminatory application of the crimes of moral turpitude standard is no longer constitutionally permissible. In modern jurisprudence the standard of crimes of moral turpitude includes two categories of crimes which the Exchange believes are substantially related to the job duties and functions requiring fingerprinting pursuant to these regulations:

- (a) Crimes that necessarily involve intent to defraud or intentional dishonesty for the purpose of personal gain.
- (b) Crimes that offend the most fundamental moral values of society, including serious, violent crimes such as murder and other egregious offenses.

Furthermore, the standard of crimes of moral turpitude is utilized by other state agencies including the Department of Managed Health Care (Government Code Section 1042), Department of Justice (Government Code Section 27935(a)), and the State Bar of California (Business and Professions Code Section 6101), and is cause for disciplinary action under state civil service rules (Government Code Section 19572). Removing the standard of crimes of moral turpitude would leave the regulations overly broad and inconsistent with state civil service rules.

Alternative: Limit what shall be considered a conviction for purposes of this rulemaking to a verdict resulting in conviction.

Reasoning: Penal Code Section 110105(p) indicates that the Exchange shall receive “every conviction rendered against the applicant.” These regulations specify that the Exchange shall consider a plea of guilty or no contest, a verdict resulting in a conviction, or finding of guilt

regardless of whether sentence is imposed by the court, as a conviction pursuant to Government Code Section 1043. This definition is identical to the definition of conviction pursuant to Labor Code Section 432.7(a). However, only those convictions which meet the standards for a crime of moral turpitude and deemed substantially related to the duties of the job sought will be considered potentially disqualifying offenses per these regulations.

3. Appeal Process

Alternative: Develop an appeal process for employees and prospective employees disqualified from obtaining a position that requires fingerprinting pursuant to these regulations.

Reasoning: These regulations do not create a separate appeal process for employees or prospective employees to state civil service positions requiring fingerprinting pursuant to these regulations. Instead, it is the intent of the Exchange to allow for state civil service applicants and employees disqualified from a position requiring fingerprinting under these regulations to utilize any appeal process for civil service employees or prospective employees currently available including those through the State Personnel Board (SPB) for merit disqualifications or disciplinary actions related to convictions involving crimes of moral turpitude. See e.g., Government Code Section 19572(k).

4. Cost provisions

Alternative: The Exchange shall pay for all costs associated with fingerprinting and background checks pursuant to these regulations.

Reasoning: It would be untenable for the Exchange to cover the costs of all individuals required or potentially required to undergo background checks pursuant to this section. To arrive at a balance, the Exchange proposed to cover the costs of Certified Enrollment Counselors until December 31, 2014 in an accompanying emergency regulations package for enrollment assistance. After this date, and pursuant to these proposed regulations, the Exchange will not be covering associated costs for individuals other than employees or prospective employees.