TITLE 16. CEMETERY AND FUNERAL BUREAU
DEPARTMENT OF CONSUMER AFFAIRS

INITIAL STATEMENT OF REASONS

Hearing Date: August 12, 2015

Subject Matter of Proposed Regulations: Issuance of Citations and Fines, Assessment of Fines, Citation Factors, Citation; Extension of Time and Failure to Comply or Pay, Appeal of Citation, Informal Office Conference, Citations; Unlicensed Activity, and Failure to File Annual Report

Section(s) Affected: 2382, 2383, 2384, 2385, 2386, 2386.5, 2387, and 2388 of Division 23 of Title 16 of the California Code of Regulations.

Specific purpose of each adoption, amendment, or repeal:
The Department of Consumer Affairs (Department), Cemetery and Funeral Bureau (Bureau) is proposing to amend regulation Sections 2382, 2383, 2384, 2385, 2386, 2387, and 2388, and add Section 2386.5, for the purpose of updating and modernizing Article 7.5 (Citation and Fines) of Division 23 of Title 16 of the California Code of Regulations. The regulations enforced by the Bureau exist for the protection of California consumers and to inform Bureau licensees of their rights and responsibilities within the scope of practice.

1. Problem being addressed:
   Originally implemented in 1993 and 1996, Sections 2382, 2383, 2384, 2385, 2386, 2387, and 2388, have not had any substantial regulatory changes made. These regulations have been determined, through a series of discussions with stakeholders, to be restrictive. Currently, violations the Bureau may issue citations for are limited to only those specifically contained within Section 2383. Violations are organized into classes A, B, and C with a set administrative fine range associated with each class. This allows the Bureau to implement progressive discipline for those specific violations. Our progressive discipline typically occurs in the following order: a letter of warning; a citation without a fine; a citation with a minimum fine, a citation with an increased fine, a citation with a maximum fine, and finally disciplinary action. Egregious violations may be subject to more severe penalties. For all violations outside of those listed in Section 2383 the Bureau is limited to either a letter of warning or pursing disciplinary action; the Bureau cannot issue a citation. This limits the Bureau's ability to compel compliance when the violation warrants stronger action than a letter of warning but is not egregious enough to pursue disciplinary action against a licensee. An example of common violations that occur and the Bureau is unable to cite for include:

- Business and Professions Code (BPC) section 9723 (Employment of licensed cemetery managers required) which requires every cemetery to designate a cemetery manager who is responsible for exercising direct supervision and control over the operations, employees, and agents of the cemetery to ensure full compliance with all laws and regulations.

- BPC section 9725.1 (Unprofessional conduct as grounds for disciplinary action) which states that unprofessional conduct constitutes grounds for disciplinary action. Unprofessional conduct includes, but is not limited to: violating or attempting to violate, directly or indirectly, or assisting or abetting the violation of this chapter or any regulation governing the disposition of human remains, operation of cemeteries or crematories, the sale of cemetery property, or the sale of crematory services or commodities, and negligence in preforming any act related to the operation of a cemetery or crematory.

- BPC section 9787.2 (Employment of licenses crematory manager required) which requires every crematory to designate a crematory manager who is responsible for exercising direct supervision and control over the operations, employees, and agents of the cemetery to ensure full compliance with all laws and regulations.

- California Code of Regulations Section 2333 (Cemetery Maintenance Standards) which requires all endowment care cemeteries to have cemetery maintenance standards to ensure the property is kept in a condition so as to prevent the cemetery's offensive deterioration.

The omission of these sections limits the Bureau's ability to protect consumers and does not allow us to issue a citation and/or assess a fair and reasonable administrative fine to a licensee in accordance with the Bureau's policy of progressive discipline.

Senate Bill 362 (Figueroa, Chapter 788, Statutes of 2003) amended subsection (b)(3) of section 125.9 of BPC which increased the amount of an administrative fine that a board, bureau, or commission within the Department may charge from a maximum of $2,500 to $5,000. The maximum administrative fine listed under Section 2383 and 2387 has not been updated to reflect the increased statutory authority. Increasing the maximum fine would provide the Bureau a stronger mechanism to compel compliance for violations, minimizing substandard practice and deterring unlicensed practice, and strengthen our ability to protect consumers.

2. <u>Anticipated benefits from this regulatory action:</u>
The proposed regulatory amendments will modernize, clarify, and streamline existing Bureau regulations by making cemetery regulations consistent with funeral regulations. These changes will allow the Bureau to be responsive to

concerns raised by stakeholders while still ensuring consumer protection against both licensed and unlicensed individuals and entities. The Bureau will be able to enforce all statutes and regulations under its jurisdiction equally and assess administrative fines, as appropriate, with greater flexibility and more consistency following current policies and practices of the Department.

Factual Basis/Rationale:
Protection of the public is the highest priority for the Bureau. The Bureau achieves its goal of consumer protection through the following primary methods: issuing and renewing licenses; overseeing funeral and cemetery trust funds; investigating complaints; conducting inspections; and disciplining licensees for violations of its laws and regulations.

BPC section 9630 authorizes the Bureau to adopt and enforce reasonably necessary rules and regulations relating to the Cemetery Act. The proposed regulatory changes will enhance the Bureau's cite and fine function through clarity, consistency, and relevance of the regulations, which will strengthen its ability to achieve its public protection mandate. These regulatory changes were determined to be necessary and relevant through discussions with stakeholders (licensees, consumer advocates, and members of the public) about the proposed regulatory amendments at Bureau Advisory Committee meetings.

The Bureau is proposing the following regulatory changes:

Amend Section 2382 of Article 7.5 of Title 16 of the California Code of Regulations:
The proposed amendments to subsection (a) clarify the bureau chief or his or her designee is authorized to issue citations and that a citation containing orders of abatement and assessing administrative fines can be issued for any violation of the statutes and regulations enforced by the Bureau including Part 1 (commencing with section 8100), Part 3 (commencing with section 8250), and Part 5 (commencing with section 9501) of Division 8 of the Health and Safety Code.

The proposed amendments to subsection (b) removes language stating a citation shall be issued whenever any fine is levied or any order of abatement is issued; and clarifies that each citation will contain a statement informing the licensee of the right to contest the citation and request a hearing pursuant to BPC 125.9 and Section 2386 of this article. Citations may contain an assessment of an administrative fine, an order of abatement fixing a reasonable period of time for abatement of the violation, or both, and the citation will be served following the requirements of Government Code (GC) section 11505(c).

The proposed amendments to subsection (c) clarifies that the bureau chief, or his or her designee, shall take into consideration the citation factors identified in Section 2384 of this article, and increases the maximum fine for each inspection or each investigation made with respect to the violation to $5,000 pursuant to the authority of BPC 125.9.

Subsection (d) is added to clarify that payment of any fine does not constitute an admission of the violation charged.

The proposed amendment also removes BPC 148 from the authority and reference citation and adds BPC 9658 to the authority and reference citation.

Amend Section 2383 of Article 7.5 of Title 16 of the California Code of Regulations:
The proposed amendments eliminate the specific classes of violations and associated fine range; sets the minimum administrative fine at $100 and increases the maximum fine to $5,000 for each inspection or each investigation made with respect to the violation.

Amend Section 2384 of Article 7.5 of Title 16 of the California Code of Regulations:
The proposed amendments make technical non-substantive changes, including removing reference to the bureau chief and changing “department’s” to “bureau’s.”

Amend Section 2385 of Article 7.5 of Title 16 of the California Code of Regulations:
The proposed changes amend the title of this section to Citation; Extension of Time and Failure to Comply or Pay.

The proposed amendments to subsection (a) makes technical non-substantive changes, clarifying that if a cited person or entity is unable to complete an order of abatement in the allotted time, the cited person or entity may submit a request for an extension of time in writing to the bureau chief.

The proposed amendments to subsection (b) removes language stating an order of abatement shall either be personally served or mailed by certified mail, return receipt requested (information on serving citations was added to Section 2382 subdivision (b)); and adds language clarifying that the contest provision is applicable to a person or entity who is issued a citation containing an assessment of an administrative fine, as well as to a person or entity who has been issued a citation with an order of abatement. The amendment also establishes a 30 day timeline to contest the citation and clarifies that failure to comply within the specified time may subject the person or entity to disciplinary action. It further makes clear that unpaid fines will be added to the licensee’s renewal and the license will not be renewed until the fine is paid.

Amend Section 2386 of Article 7.5 of Title 16 of the California Code of Regulations:
The proposed changes amend the title of this section to Appeal of Citation.

The proposed amendments to subsection (a) removes language regarding requesting a hearing within 10 days; adds language that a cited person or entity may contest a

citation by submitting a written request for a hearing to the bureau chief within 30 days; clarifies that hearings shall be conducted in accordance with the provisions of Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and sets forth aspects of a citation a cited person or entity may contest.

The proposed amendments to subsection (b) removes language regarding holding an informal office conference within 30 days from the receipt of the request for an appeal and removes the language regarding providing a decision within 10 days of the informal conference (this information is updated and added to Section 2386.5); and adds language that failure to appear for a requested hearing shall constitute a withdrawal of the appeal and makes clear that the citation will be considered a final order.

The proposed amendments remove subsection (c) which includes language stating the right to request a hearing is not waived by requesting an informal office conference, the dismissal of a citation after an informal conference withdraws the request for hearing, and any modification of the citation shall be considered a new citation (this information is updated and added to Section 2386.5).

Add Section 2386.5 to Article 7.5 of Title 16 of the California Code of Regulations:
Section 2386.5 is added to make clear for a cited person or entity the informal office conference process and their right to contest a citation.

The proposed amendments add subsection (a) which states that without waiving the right to contest the citation pursuant to subdivision (b)(4) of BPC 125.9, the cited person or entity may request an informal office conference within 10 days after service of the citation by submitting a written request to the bureau chief.

The proposed amendments add subsection (b) which requires an informal office conference be held within 30 days of receipt of the request; the citation may be affirmed, modified, or dismissed; the cited person or entity will be notified in writing of the outcome within 15 days of the conclusion of the conference; and notification will comply with the requirements of GC section 11505(c).

The proposed amendments add subsection (c) which states the decision from an informal office conference shall affect the cited person or entity's right to a hearing to contest a citation as follows: (1) if the citation is dismissed any request for a hearing will be deemed withdrawn; (2) if the citation is affirmed the cited person or entity has a right to a hearing to contest the affirmed citation pursuant to subdivision (b)(4) of BPC 125.9; (3) if the citation is modified the citation originally issued shall be considered withdrawn and a new citation issued, the cited person or entity has a right to a hearing to contest the newly modified citation in accordance with subdivision (b)(4) of BPC 125.9; and (4) no new informal office conference will be granted for an affirmed or modified citation.

Amend Section 2387 of Article 7.5 of Title 16 of the California Code of Regulations:
The proposed changes amend the title of this section to Citations; Unlicensed Activity.

The proposed amendments clarify the bureau chief or his or her designee is authorized to issue citations containing orders of abatement and assess administrative fines for unlicensed activity; increases the minimum administrative fine from $250 to $1,001 and increases the maximum administrative fine from $2,500 to $5,000; and references that the provisions BPC 125.9 shall apply to the issuance of citations for unlicensed activity.

Amend Section 2388 of Article 7.5 of Title 16 of the California Code of Regulations:
The proposed amendments to subsection (a) and (b) make technical non-substantive changes and clarifies that the bureau chief, or his or her designee, has authority to assess fines.

The proposed amendments to subsection (d) clarifies a cited person or entity may request an informal office conference regarding the violations charged in the citation within 10 days after service of the citation and updates reference to the informal office conference section which is changing to 2386.5.

The proposed amendment also removes BPC 148 from the authority and reference citation.

Underlying Data:

1. Minutes from Advisory Committee Meetings held on July 17, 2014 and November 12, 2014.

2. Department of Consumer Affairs' Annual Report for the Cemetery and Funeral Bureau from fiscal years 2011-12, 2012-13, and 2013-14.

Business Impact:
These regulations will not have a significant adverse economic impact on businesses. This initial determination is based on the following facts or evidence/documents/ testimony:

> As of February 1, 2015, the Bureau licenses approximately 5,702 cemeteries, cemetery managers, cemetery brokers, cemetery salespersons, crematories, crematory managers, and cremated remains disposers, collectively. The Department of Consumer Affairs' Annual Report for the Cemetery and Funeral Bureau from fiscal year 2011-12, 2012-13, and 2013-14 show that the Bureau issued citations to an average of two percent of its licensees.

The proposed regulations would impose additional reporting, recordkeeping, or other compliance requirements as follows:

> If a person or entity cited would like to request an extension of the period of time allowed to correct the violation(s) found, contest a citation, or request a hearing

and/or informal office conference, they would need to submit the request in writing to the Bureau.

Description of alternatives which would lessen any significant adverse impact on business (which includes small business):

Status quo was considered and rejected due to the fact that the current regulations have been determined, through discussions with stakeholders, to be restrictive. The current regulations do not allow the Bureau to issue administrative citations for all of the laws and regulations governing the cemetery industry. This weakens the Bureau's ability to deter substandard practice through our progressive discipline process and impedes our efforts to protect consumers.

Economic Impact Assessment:
In accordance with Government Code section 11346.3(b), the Bureau has made the following assessments regarding this regulatory proposal:

- It will not create or eliminate jobs within the State of California because this proposal only modernizes, clarifies, and streamlines existing regulations.

- It will not create new business or eliminate businesses within the State of California because this proposal only modernizes, clarifies, and streamlines existing regulations.

- It will not affect the expansion of businesses currently doing business within the State of California because this proposal only modernizes, clarifies, and streamlines existing regulations.

- This regulatory proposal does affect the health and welfare of California residents because the Bureau will have greater flexibility to enforce all laws and regulations that govern the cemetery industry allowing us to better protect consumers.

- This regulatory proposal does affect worker safety because the Bureau will have greater flexibility to enforce all laws and regulations that govern the cemetery industry.

- This regulatory proposal does not affect the state's environment because this proposal only modernizes, clarifies, and streamlines existing regulations for the cemetery industry.

Specific Technologies or Equipment:
These regulations do not require the use of any specific technologies or equipment.

Consideration of Alternatives:
No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or

less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected or accepted:

> Alternative 1: Status Quo. This alternative was rejected due to the fact that the current regulations have been determined, through discussions with stakeholders, to be restrictive. The current regulations do not allow the Bureau to issue administrative citations for all of the laws and regulations governing the cemetery industry. This weakens the Bureau's ability to deter substandard practice through our progressive discipline process and impedes our efforts to protect consumers.
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> Alternative 2: Amend the existing regulations. This alternative was accepted as the most efficient option to modernize, clarify, and streamline the regulation of the cemetery industry.