

**TITLE 16
PROFESSIONAL FIDUCIARIES BUREAU
DEPARTMENT OF CONSUMER AFFAIRS**

INITIAL STATEMENT OF REASONS

Hearing date: Friday, June 18, 2021

Subject Matter of Proposed Regulations: **Client Notification**

Sections Affected: This regulatory action adopts Article 7.5 (commencing with section 4550) of Title 16 of the California Code of Regulations.

INTRODUCTION

The Professional Fiduciaries Bureau (Bureau) was created within the Department of Consumer Affairs (Department) by the Professional Fiduciaries Act (Chapter 6 [commencing with section 6500] of Division 3 of the Business and Professions Code) (Act), added by Chapter 491 of the Statutes of 2006 (SB 1550, Figueroa) as part of the Omnibus Conservatorship and Guardianship Reform Act of 2006 (Chs. 490-93, Stats. 2006 [SB 1116, Scott; SB 1550, Figueroa; SB 1716, Bowen; AB 1363, Jones]), to protect the “increasing number of people in the state [who] are unable to provide properly for their personal needs, manage their financial resources, or resist fraud or undue influence as well as fiscal, emotional, and physical harm,” and are therefore vulnerable to neglect or physical, emotional, or financial abuse by professional fiduciaries. (Ch. 491, Stats. 2006, § 2.) The Act defines the “professional fiduciaries” who are subject to its provisions to include guardians, conservators, trustees, personal representatives of a decedent’s estate, and agents under durable power of attorney, with certain exceptions. (Business and Professions Code sections 6501 and 6530 [BPC §§ 6501, 6530].) The Act makes the Bureau responsible for licensing and regulating professional fiduciaries and enforcing licensing requirements. (BPC §§ 6510, 6518.) Professional fiduciaries provide critical services to seniors, persons with disabilities, and children. They manage matters for clients including daily care, housing, and medical needs.

The protection of the public is the Bureau’s highest priority in exercising its licensing, regulatory, and disciplinary functions. (BPC § 6516.) The Bureau protects persons who seek and receive professional fiduciary services by, among other things, ensuring that licenses are issued only to eligible and qualified applicants (BPC §§ 29.5, 144, 480, 494.5, 6518, 6533, 6533.5, 6536, 6538, 6540); ensuring that licensees receive continuing education (BPC §§ 166, 6518, 6538, 6540, 6541); requiring licensees to submit an annual statement and ongoing reports with information confirming their continued fitness for licensure (BPC § 6561; California Code of Regulations, title 16, section 4544 [16 CCR § 4544]); investigating complaints against licensees (BPC §§ 108, 129, 464(c), 6580); disciplining licensees for violations of the Act (BPC §§ 108,

118, 125.9, 141, 490, 6580, 6583, 6584); maintaining a file on each license and making certain information on the license publicly available, such as disciplinary history and license status (BPC §§ 27, 6534, 6580); and informing the public of its functions (BPC § 129(e)). BPC section 6517 gives the Bureau authority to “adopt, amend, or repeal ... regulations necessary to enable the [B]ureau to carry into effect the provisions of law relating to [the Act].”

The proposed regulation would require each licensee of the Bureau to provide specified persons with the following: (1) notice that the licensee is licensed by the Bureau, as provided; and (2) the Bureau’s contact information, as provided. The regulation would impose this requirement in compliance with BPC section 138, which requires every board, bureau, or other specified subdivision or affiliate of the Department, with certain inapplicable exceptions, to initiate the process of adopting regulations that require licensees to notify their “clients or customers” that they are licensed by the state. The final, August 26, 1998, Senate and Assembly Bill Analyses of Senate Bill 2238 (Ch. 872, Stats. 1998), which added BPC section 138 to the Business and Professions Code, state the policy behind this section as being “to streamline and improve state regulatory activity by ... [n]otifying consumers where complaints against [Department] licensees can be filed.”

Due to the nature of professional fiduciary services, which a professional fiduciary may perform for a minor (in the capacity of guardian), a person who lacks decision making ability (in the capacity of conservator or agent under durable power of attorney), or a decedent (in the capacity of trustee or personal representative of a decedent’s estate), the proposed regulation would interpret the term “clients or customers” broadly, to include persons who may not hire or pay a licensee, but who are “clients or customers” in the sense that the licensee stands in the place of a person with whom they have, or had, a personal or professional relationship, and, because of this, are interested in the licensee’s faithful performance of that role. (See Ch. 491, Stats. 2006, § 2(b)-(c).) This inclusive definition of “clients or customers” is consistent with the policy behind BPC section 138 to “streamline and improve state regulatory activity,” as those interested persons will not only be motivated, but will often be in a better position, to identify and notify the Bureau of a licensee’s misconduct.

The proposed regulation is also necessary to enable the Bureau to carry out its regulatory and oversight responsibilities under its other governing provisions of law, including the following:

- Handling complaints from consumers. Under the Act and provisions of law relating to the Act, the Bureau is responsible for handling and tracking complaints about its licensees. (BPC §§ 129, 6580.) These provisions imply a public that knows where to file a complaint. The proposed regulation would ensure the existence of this necessary predicate to the Bureau’s implementation of these provisions.
- Preventing unqualified persons from performing licensed activities. The Act prohibits any person from “act[ing] or hold[ing] himself or herself out to the public as a professional fiduciary unless that person is licensed as a professional

fiduciary in accordance with the [Act].” (BPC § 6530.) The Act also prohibits a professional fiduciary from “operat[ing] with an expired, suspended, retired, canceled, or revoked license.” (BPC § 6531.) The Bureau cannot adequately protect the public from persons who violate these provisions if members of the public are unaware that professional fiduciaries must have a license, or how to confirm that they have a license that authorizes them to perform professional fiduciary services.

Thus, the Bureau has independent authority to adopt the proposed regulation pursuant to BPC section 6517, authorizing the Bureau to “adopt, amend, or repeal ... regulations necessary to enable the [B]ureau to carry into effect the provisions of law relating to this [Act],” because the proposed regulation is necessary to enable the Bureau to carry into effect the regulatory and oversight responsibilities under the above-cited laws. (See *Oranen v. State Bd. of Chiropractic Examiners* (1999) 77 Cal.App.4th 258, 262-63.)

PROBLEM BEING ADDRESSED AND PURPOSE

Problem being addressed:

As stated in the introduction, the Bureau is responsible for protecting the public from professional fiduciary misconduct by engaging in regulatory, oversight, and enforcement activities. However, the Bureau cannot meaningfully engage in these activities if members of the public who need professional fiduciary services, or are affected by the performance of professional fiduciary services, are unaware of both of the following: (1) how to confirm that a person providing professional fiduciary services is authorized to do so; and (2) where to file complaints about misconduct.

Purpose:

The proposed regulation would ensure an informed public by requiring a licensee to provide notice that the licensee is licensed by the Bureau, and the Bureau’s contact information, to the licensee’s “consumers,” as defined in Bureau’s existing regulations, and specified other persons who have a stake in the licensee’s performance of professional fiduciary services.

NECESSITY OF EACH ADOPTION, AMENDMENT, OR REPEAL

Each provision of the proposed regulation is necessary to carry out the above-described purpose and address the above-described problem for which that purpose is proposed for the reasons stated below.

Definition of “agent” (16 CCR § 4550(a)):

16 CCR section 4550 would define “agent” as “a person authorized to make decisions on the consumer’s behalf regarding professional fiduciary services provided by a licensee, including, but not limited to, the consumer’s guardian or conservator.”

This defined term would be used in 16 CCR section 4551(b)(4)(D) (notice to, among others, “[e]ach consumer or, alternatively, the attorney representing the consumer or the consumer’s agent” [emphasis added]) and the language in 16 CCR section 4552(a), preceding paragraph (1) (notice to, among others, “the consumer, the attorney representing the consumer, if any, and the consumer’s agent, if any” [emphasis added]).

As will be explained in this initial statement of reasons, the proposed regulation will give the option of providing notice to a consumer’s agent in 16 CCR section 4551(b)(4)(D), and require notice to a consumer’s agent, if any, in 16 CCR section 4552(a), because, for purposes of the proposed regulation, notice to a consumer’s agent in each case will have an equivalent effect, and may be preferable, to direct notification of the consumer. (See Civ. Code § 2332.)

The proposed regulation would define “agent” descriptively, as “a person who is legally authorized to make decisions on the consumer’s behalf regarding professional fiduciary services provided by a licensee,” instead of by listing each circumstance in which a person may have that authority, in order to avoid unintentionally excluding one or more persons of that description from the scope of the definition.

Definition of “interested person” (16 CCR § 4550(b)):

Although “interested,” as used in the term “interested person” in the Probate Code, generally means that a person has a property interest (see Prob. Code §§ 48, 17204(b)(3)), the proposed regulation would define “interested person,” for purposes of the ongoing notice requirements in 16 CCR section 4552, to mean a person with any interest in the performance of professional fiduciary services. The proposed regulation would contain this more expansive definition in recognition that having a property interest at stake is one of many reasons why a person may be motivated to identify and notify the Bureau of a licensee’s misconduct. (See Prob.Code § 1861, including “any relative or friend of the conservatee” within the category of “interested person,” and Prob.Code § 4540(k), including various persons listed in the preceding subdivisions of that section within the category of “interested person or friend of the principal.”)

Initial notice requirements—in general (16 CCR § 4551(a)):

The rationale for the language in 16 CCR section 4551(a), regarding initial notice to persons affected by a licensee’s services, is as follows:

- “Before a licensee ... begins performing professional fiduciary services for a consumer.”: This language, regarding timing of the notification, is needed to ensure that notice of licensure and the Bureau’s contact information are provided before, not after, performance of professional fiduciary services. This will protect

recipients by giving them a convenient means of confirming a person's authority as a licensee to perform professional fiduciary services before harm can occur.

- “the licensee shall ...”: The proposed regulation would impose this initial notice requirement on licensees because licensees are in the best position to identify and provide notice to those who are most at risk of professional fiduciary misconduct—i.e., persons in need of professional fiduciary services—at the time they seek those services.
- “provide written notice of the licensee’s state licensure”: The proposed regulation would require notice to be provided in writing because the information in the notice—in particular, the Bureau’s phone number and website—will be hard for the recipient to remember without writing down if it is only received verbally. In addition, a licensee providing only verbal notice is more likely to omit information or forget whether information has already been communicated than if the licensee sets the information down in writing and delivers the information to the recipient in person or by another authorized method.
- “to the persons described in the applicable paragraph of subdivision (b)”: This language is needed to clarify that a licensee seeking to perform professional fiduciary services in a given capacity is only required to provide notice to the persons specified in the paragraph of 16 CCR section 4551(b) that pertains to licensees who perform services in that capacity.
- “who are not the licensee.”: This language, consistent with Probate Code section 1201, would exempt a licensee from being required to provide notice to themselves.
- “Persons who come to meet a description in that paragraph or become identifiable or accessible by the licensee only after the licensee begins performing services shall be provided written notice within a 30 calendar days after the licensee becomes aware of their existence or gains access to that person.”: The proposed regulation provides for this alternative because the licensee may not be aware of, or be able to access, a person who would otherwise be required to receive notice under the proposed regulation. In addition, circumstances and relationships change over time, and new persons—such as a new spouse or domestic partner or a new beneficiary—may come to meet the description of a person who is required to receive notice only after the licensee begins performing those services. The licensee would be required to provide notice to these persons within 30 calendar days after becoming aware of their existence in case the event that causes a person to become identifiable or accessible to the licensee imposes separate obligations on the licensee that must be given priority in order to protect the interests of the consumer. Thirty calendar days was chosen as a reasonable amount of time within the business world – two weeks might seem like not enough time for processing, but 60 days is too long since it is necessary for these persons to be notified promptly of the fiduciary’s licensure so as to ensure their own protection.
- “The notice shall include, at a minimum, the statement and information specified in subdivision (d).”: This language is needed at the beginning so that licensees

reading this section know where to find the specific requirements for contents of the notice.

Guardians—specific initial notice requirements (16 CCR § 4551(b)(1)):

Under the proposed regulation, notice of the hearing on the petition for the licensee's appointment as guardian or temporary guardian pursuant to Probate Code section 1511 or 2250 would satisfy the initial notice requirements of 16 CCR section 4551, except as discussed in the following paragraph. Under Probate Code sections 1460.2(b)(5)(D), 1511(a), and 2250(e)(3), notice must be accompanied by the petition for the licensee's appointment as guardian, which is already required to include license information pursuant to Probate Code section 1510(d)(2)(A) and 2250(c)(2)(A). Probate Code section 1460.2(b) requires notice to be provided to the persons described in that section, Probate Code section 1511(b) and (c) require notice to be provided to the persons described in Probate Code section 1510(c), and Probate Code section 2250(e) requires notice to the persons described in that section. The category of persons described in Probate Code section 1460.2(b), 1510(c), and 2250(e), who may have interest in a licensee's appointment, overlaps with the category of persons who are likely to have a stake in the licensee's performance as guardian. Therefore, providing additional notice to those persons would be unnecessary and duplicative.

Because circumstances and relationships may change, the proposed regulation would also make the licensee responsible for providing notice to the following persons if they are not already provided notice under the above-described provisions:

- A person required to be named in a petition for a hearing pursuant to Probate Code section 1510(b) or (c) or Probate Code section 2250(e)(1). This would be consistent with the notice requirements regarding termination of a guardianship set forth in Probate Code sections 1460(b)(5) and 1601.
- A person who files an effective request for special notice pursuant to Probate Code section 2700. Those persons, by requesting special notice, have demonstrated an interest in the guardianship and therefore a likelihood of reporting a licensee's misconduct to the Bureau. This would be consistent with the generally applicable notice requirement set forth in Probate Code section 1460(b)(4).

The proposed regulation would include exemptions for the following persons (16 CCR § 4551(b)(1)(B)):

- Persons exempt from being provided notice of a hearing on a petition for appointment of a guardian pursuant to Probate Code section 1511. Probate Code section 1511(g) includes the following exemptions:
 - An exemption from notice to a proposed ward under 12. (Prob.Code § 1511(b)(1).)
 - An exemption by court order from informing the relatives of the proposed ward who are named in a petition for a hearing on the appointment of a guardian of the estate (as opposed to a guardian of the person). (Prob.Code § 1511(c)(2).)

- An exemption by court order if a person either “cannot with reasonable diligence be given the notice,” or if “giving of the notice would be contrary to the interest of justice.” (Prob.Code § 1511(g)(1)-(2).)
- Persons exempt from being provided notice of a hearing pursuant to Probate Code section 2250(e), relating to notice of hearing on a petition for the appointment of a temporary guardian. Probate Code section 2250(e) includes the following exemptions from notice of hearing on a petition for appointment of a temporary guardian:
 - An exemption by court order for “good cause.” (Prob.Code § 2250(e) [preceding paragraph (1)].)
 - An exemption from notice to a proposed ward under 12. (Prob.Code § 2250(e)(1).)
 - An exemption from notice to a proposed ward whose custodial parent has died, if the petitioner or proposed guardian is the custodial parent’s nominee for guardian. (Prob.Code § 2250(e)(1).)
- Persons exempt from being provided notice of a hearing pursuant to Chapter 3 (commencing with Section 1460) of the Probate Code. That chapter of the Probate Code includes the following exemptions from providing notice under Probate Code section 1460:
 - An exemption by court order for “good cause.” (Prob.Code § 1460(e).)
 - An exemption if a court determines that notice “was properly given to a parent, guardian, or other person having legal custody of the minor, with whom the minor resides.” (Prob.Code § 1460.1(a).)
 - An exemption if a court determines that the “petition is brought by a parent, guardian, or other person having legal custody of the minor, with whom the minor resides” (Prob.Code § 1460.1(b)).
- Exemptions that are consistent with another law, rule of court, or court order providing an exemption from notice relating to the guardianship or an express exemption from the proposed regulation.

The proposed regulation would include the above-described exemptions in recognition that good cause may exist to withhold notice of a proposed guardianship or guardianship to certain persons, because either those persons are not accessible; or, in the case of a child under 12, others may be in a better position to contextualize information and address fears regarding the proceeding; or the interests of justice may prevent notice from being provided to certain persons—for example, persons who may pose a risk to the proposed ward’s safety if they become aware of the proceeding. Because notice of licensure pursuant to the proposed regulation may cause a recipient to become aware of a hearing or other guardianship proceeding, requiring notice of licensure to be provided in such cases would undermine the public policy reasons for exempting those persons from notice of the hearing or proceeding. Therefore, consistent with the Bureau’s priority to protect the public, the proposed regulation would exempt notice of licensure from being provided in those cases.

Conservators—specific initial notice requirements (16 CCR § 4551(b)(2)):

Under the proposed regulation, a citation issued to a proposed conservatee pursuant to Probate Code section 1824, notice of a hearing on a petition for the licensee's appointment as conservator or limited conservator pursuant to Probate Code section 1822 or temporary conservator pursuant to Probate Code section 2250, as applicable, and notice provided pursuant to Probate Code section 1460.2(b)(5)(D) would satisfy the initial notice requirements of 16 CCR section 4551, except as discussed in the following paragraph. Under Probate Code section 1460.2(b)(5)(D), 1822(a), and 1824, a citation or notice must be accompanied by the petition for the licensee's appointment as conservator or limited conservator, which is already required to include license information pursuant to Probate Code section 1821(c)(2)(A). Similarly, under Probate Code section 2250(e)(3), notice must be accompanied by the petition for the licensee's appointment as temporary conservator, which is already required to include license information pursuant to Probate Code section 2250(c)(2)(A). Probate Code section 1824 requires a citation containing information on a proposed conservatorship or temporary conservatorship to be issued to the proposed conservatee; Probate Code section 1822(b) requires notice of a hearing on the appointment of a conservator or limited conservator to be provided to the persons described in Probate Code section 1821(b); Probate Code section 2250(e) requires notice to be provided to the persons described in that section; and Probate Code section 1460.2(b) requires notice to be provided to the persons described in that section. The category of persons described in Probate Code sections 1821(b), 2250(e), and 1460.2(b) who may have interest in a licensee's appointment, overlaps with the category of persons who are likely to have a stake in the licensee's performance as conservator. Therefore, providing additional notice to those persons would be unnecessary and duplicative.

Because circumstances and relationships may change, and some licensees, such as proposed conservators under the Lanterman-Petris-Short Act (Part 1 [commencing with Section 5000] of Division 5 of the Welfare and Institutions Code), may not be required to include license information in a petition for a hearing on their appointment, the proposed regulation would also make the licensee responsible for providing notice to the following persons if they are not already provided notice under the above-described provisions:

- The conservatee or proposed conservatee. This would ensure that the conservatee or proposed conservatee receives notice of the conservatorship in cases in which the conservatee is missing at the time of the licensee's appointment and is later found.
- A person or entity required to be named in a petition for a hearing pursuant to Probate Code section 1821(b). This would be consistent with the notice requirements regarding termination of a conservatorship set forth in Probate Code sections 1460(b)(6) and 1862.
- A person or entity required to be provided notice of a hearing on a petition for appointment of a conservator pursuant to Probate Code section 1460.2(b)(1)-(3). This would ensure that notice of licensure is provided consistent with requirements under the federal Indian Child Welfare Act (25 U.S.C. § 1903).
- Persons who file an effective request for special notice pursuant to Probate Code section 2700. Those persons, by requesting special notice, have demonstrated an interest in the conservatorship and therefore a likelihood of

reporting a licensee's misconduct to the Bureau. This would be consistent with the generally applicable notice requirement set forth in Probate Code section 1460(b)(4).

The proposed regulation would include exemptions for the following persons (16 CCR § 4551(b)(2)(B)):

- For temporary conservatorships:
 - Persons exempt from being provided notice of a hearing or appointment pursuant to Probate Code section 2250(e), providing for an exemption by court order for “good cause.”
 - For a conservatee who is exempt from being provided notice of a hearing or appointment pursuant to Probate Code section 2250.2(c), also providing for an exemption by court order for “good cause.”
- Persons exempt from being provided notice of a hearing or appointment pursuant to Chapter 3 (commencing with Section 1460) of the Probate Code. That chapter of the Probate Code includes the following exemptions from providing notice under Probate Code section 1460:
 - An exemption by court order for “good cause.” (Prob.Code § 1460(e).)
 - An exemption if the proposed conservatee is a minor, and a court determines that notice “was properly given to a parent, guardian, or other person having legal custody of the minor, with whom the minor resides.” (Prob.Code § 1460.1(a).)
 - An exemption if the proposed conservatee is a minor, and a court determines that the “petition is brought by a parent, guardian, or other person having legal custody of the minor, with whom the minor resides” (Prob.Code § 1460.1(b)).
- Persons exempt from being provided notice of a hearing or appointment pursuant to Welfare and Institutions Code section 5350.2. A proposed conservatee under the Lanterman-Petris-Short Act (“LPS conservatee”) “may request that information about the time and place of the conservatorship hearing not be given to family members, in those circumstances where the proposed conservator is not a family member.” (Prob.Code § 5350.2.)
- Exemptions that are consistent with another law, rule of court, or court order providing an exemption from notice regarding the conservatorship or an express exemption from the proposed regulation.

The proposed regulation would include the above-described exemptions in recognition that good cause may exist to withhold notice of a proposed conservatorship or conservatorship to certain persons, because, in the case of a minor, others may be in a better position to contextualize information and address fears regarding the proceeding, or in the case of an LPS conservatee, notification of family members may cause embarrassment, damage the LPS conservatee's reputation, or make the LPS conservatee vulnerable to exploitation. Because notice of licensure pursuant to the proposed regulation may cause a recipient to become aware of a hearing or other conservatorship proceeding, requiring notice of licensure to be provided in such cases would undermine the public policy reasons for exempting those persons from notice of

the hearing or proceeding. Therefore, consistent with the Bureau's priority to protect the public, the proposed regulation would exempt notice of licensure from being provided in those cases.

Personal representatives—specific initial notice requirements (16 CCR § 4551(b)(3)):

The proposed regulation would require a licensee who will perform services in the capacity of the personal representative of a decedent's estate to provide initial notice of the licensee's state licensure to the following persons:

- The petitioner for appointment of the licensee as personal representative.
- The persons required to be provided notice of a hearing under Probate Code section 8110, regarding notice of hearing of a petition for administration of the decedent's estate.
- Any persons who file an effective request for special notice pursuant to Probate Code section 1250.

This requirement is necessary because the Probate Code does not already contain a mechanism to ensure, as with guardians and conservators whose license information is generally required to be included in the petition for their appointment, that those who may have an interest in a licensee's appointment as personal representative, and are therefore likely to have a stake in the licensee's performance, possess information on the licensee's credentials. For consistency with the initial notice requirements pertaining to guardians and conservators, the proposed regulation would require a licensee to provide initial notice to the petitioner for appointment of the licensee; to the persons required to be provided notice of a hearing under Probate Code section 8110; and to any persons who have demonstrated interest in the administration of the estate by filing an effective request for special notice pursuant to Probate Code section 1250.

The proposed regulation would include the following exemptions (16 CCR § 4551(b)(3)(B)):

- For a person who is exempt from being provided notice of a hearing pursuant to Probate Code section 1207. Probate Code section 1207, with a specified exception, exempts notice from being given to a person who may be a beneficiary of the decedent due to "a possible parent-child relationship between a stepchild and a stepparent or between a foster child and a foster parent."
- For a person who is exempt from being provided notice of a hearing pursuant to Probate Code section 1220(c). Probate Code section 1220(c) provides for an exemption by court order for "good cause."
- Exemptions that are consistent with another law, rule of court, or court order providing an exemption from notice regarding the administration of the decedent's estate or an express exemption from the proposed regulation.

The proposed regulation would include the above-described exemptions in recognition that good cause may exist to withhold notice of the appointment of a personal representative due to the sensitive or possibly contentious nature of relationships that the persons who generally receive that notice may have with the decedent or each

other. Because notice of licensure pursuant to the proposed regulation may cause a recipient to become aware of a hearing or other proceeding in the administration of a decedent's estate, requiring notice of licensure to be provided in such cases would undermine the public policy reasons for exempting those persons from notice of the hearing or proceeding. Therefore, consistent with the Bureau's priority to protect the public, the proposed regulation would exempt notice of licensure from being provided in those cases.

Trustees—specific initial notice requirements (16 CCR § 4551(b)(4)):

The proposed regulation would require a licensee who will perform services in the capacity of a trustee to provide notice to the following persons:

- Each settlor of the trust.
- If the settlor is deceased, the following:
 - The personal representative of the settlor's probate estate, if different from the licensee and known to the licensee.
 - The deceased settlor's surviving spouse, if any.
- The person appointing the licensee.
- Each cotrustee.
- Each "consumer" (beneficiary) or, alternatively, the attorney representing the consumer or the consumer's agent.
- Any persons who request special notice pursuant to Probate Code section 17204.

This list is based, first, on Probate Code section 15642, which gives standing to any settlor, cotrustee, or beneficiary to petition for removal of a trustee on grounds of the trustee's performance or related circumstances. The category of persons given standing by this section necessarily overlaps with the category of persons who are likely to have a stake in the licensee's performance.

Second, if the settlor is deceased, the proposed regulation would also require notice to the personal representative of the settlor's probate estate, if known to the licensee, and the settlor's surviving spouse, if any, because the personal representative and surviving spouse may have continuing responsibilities regarding payment of claims from the trust property, and therefore an interest in the licensee's administration of the trust. (See Prob.Code § 19000 et seq.)

Finally, the proposed regulation would require a licensee acting in the capacity of a trustee to provide initial notice to creditors who have demonstrated interest in the trust by filing an effective request for special notice pursuant to Probate Code section 17204. (Probate Code section 17204 also authorizes beneficiaries to file a request for special notice, but they would already be covered by the proposed regulation.)

The proposed regulation would include the following exemptions (16 CCR § 4551(b)(4)(B)):

- For beneficiaries of a trust, during the time that a person holding the power to revoke has the rights afforded beneficiaries under the Trust Law (Division 9 (commencing with Section 15000) of the Probate Code). This exemption is necessary for compliance with Probate Code section 15800(a), which provides that during this time, “[t]he person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under [the Trust Law],” and Probate Code section 15802, which requires “a notice that is to be given to a beneficiary [during this time to] be given to the person holding the power to revoke and not to the beneficiary.” Because 16 CCR section 4406(a) defines “consumer,” in the context of a trust, to mean “a beneficiary when the fiduciary is acting as trustee,” 16 CCR section 4551(b)(4)(B) of the proposed regulation would clarify that a licensee is required to treat the person holding the power to revoke as the beneficiary and consumer during this time.
- For a person who is exempt from being provided notice of a hearing pursuant to Probate Code section 1207. Probate Code section 1207, with a specified exception, exempts notice from being given to a person who may be a beneficiary of the decedent due to “a possible parent-child relationship between a stepchild and a stepparent or between a foster child and a foster parent.”
- For a person who is exempt from being provided notice pursuant to Probate Code section 15804. Probate Code section 15804(a) exempts certain beneficiaries from being provided notice if their interest in a trust is contingent on the happening of a future event.
- Exemptions that are consistent with another law, rule of court, or court order providing an exemption from notice regarding the administration of the decedent’s estate or an express exemption from the proposed regulation.

The proposed regulation would include the above-described exemptions in recognition that good cause may exist to withhold notice of the appointment of a trustee due to the sensitive and possibly contentious nature of relationships that the persons who generally receive notice may have with the settlor or each other. Because notice of licensure pursuant to the proposed regulation may cause a recipient to become aware of a hearing or other proceeding regarding the trust, requiring notice of licensure to be provided in such cases would undermine the public policy reasons for exempting those persons from notice of the hearing or proceeding. Therefore, consistent with the Bureau’s priority to protect the public, the proposed regulation would exempt notice of licensure from being provided in those cases.

Agents under durable power of attorney—specific initial notice requirements (16 CCR § 4551(b)(5)):

The proposed regulation would require a licensee who will perform services in the capacity of agent under durable power of attorney to provide notice to the consumer or, alternatively, the attorney representing the consumer or the consumer’s agent.

This initial notice requirement would only require a licensee to provide notice to one person because, unlike a licensee who will be acting in the capacity of guardian,

conservator, personal representative, or trustee, a licensee who will be acting in the capacity of agent under durable power of attorney will not be appointed by a third party to act on behalf of a minor, a person who lacks decision making ability, or a decedent, but will be directly appointed by the consumer (or the consumer's attorney or agent) at a time when the consumer has capacity to contract and therefore to advocate for the consumer's own interests. (See Prob.Code § 4120.)

During any later period of incapacity of the consumer, the licensee would be required to comply with the ongoing notice requirement in 16 CCR section 4552(a)(4), as discussed below, so that notice is provided to those who may be in a better position during that period to identify and notify the Bureau of the licensee's misconduct.

Authorized methods of providing notice; language and format of notice (16 CCR § 4551(c)(1)):

The proposed regulation would prescribe the methods for providing notice. The proposed regulation would prescribe these specific actions or procedures for providing written notice of state licensure for the following reasons:

- To minimize the risk of notice being provided in a nontraditional or informal way that would undermine the importance of the message.
- To ensure that all relevant information is provided at the same time, in one communication, for the recipient's convenience.
- To enable a licensee's clients or customers to confirm whether the licensee has complied with the proposed regulation without having to review every communication, in every form, that they have had with the licensee.
- To provide certainty to licensees as to what constitutes adequate notice to a client or customer.
- To avoid unnecessary deliberation in administrative and judicial proceedings as to whether the notice and its method of delivery are adequate.

The imposition of performance standards would be a less effective way of carrying out the purpose of the proposed regulation because performance standards would be more likely to result in the following:

- Creative interpretation by bad faith actors, who may seek to provide notice in a confusing or misleading way, or in a communication that is likely to be overlooked or discarded by a client or customer.
- Uncertainty among a licensee's clients or customers as to which communications to review to confirm whether the licensee has provided adequate notice.
- Uncertainty among good faith actors as to whether a method of providing notice is adequate, which may lead to their implementation of overly time-consuming or costly measures to be certain of compliance.
- Unnecessary deliberation in administrative and judicial proceedings as to whether a licensee's communications with a client or customer constitute adequate notice, and conflicting determinations arising from those deliberations.

The methods of notice authorized in the proposed regulation are generally consistent with the methods authorized in Probate Code section 1215. However, in order to avoid imposing an unnecessary financial burden on licensees who choose to provide notice by mail, the proposed regulation would not require mail to be certified or registered. In addition, to avoid imposing a time-consuming procedural requirement on licensees who provide notice by email or facsimile, the proposed regulation would not require the recipient to consent to a licensee's use of those electronic methods of delivery.

The proposed regulation would require notice to be provided using direct methods, as opposed to indirect methods such as a public posting in the licensee's reception area or on the licensee's website if applicable, to ensure that clients or customers receive the notice and are able to retain the information provided without having to write it down or remember it.

To avoid subjecting licensees to duplicative requirements, 16 CCR section 4551(c)(1)(E) would make the inclusion of notice in correspondence or a contract with the recipient pursuant to 16 CCR section 4552, discussed under the heading "ongoing notice requirements" below, an authorized method of providing initial notice.

Prohibition on charging the consumer for providing notice (16 CCR § 4551(c)(2)):

The proposed regulation would prohibit a licensee from charging the consumer, either directly or indirectly, for time, materials, or other resources used to provide notice, regardless of method used. This prohibition would be similar to BPC section 6581, which already prohibits a licensee from billing their client, or "impos[ing] a fee on the estate or trust of a client," for the cost of responding to a complaint, and BPC section 6538, which prohibits a licensee from billing a client for the licensee's continuing education. This prohibition is necessary because although the proposed regulation offers many convenient methods of providing notice, authorizing a licensee to charge a consumer for the costs of notice would create an incentive for notice to be provided in a time- or resource-consuming manner in order to increase the consumer's bill, and no incentive to use the least costly method of providing notice, creating a likelihood that consumers, if permitted to be charged for the costs of providing notice, would be overcharged.

Contents and Format of Notice (16 CCR § 4551(d)):

The proposed regulation would require notices to be in at least 12-point bold face type, prominently placed on the page, and with a further requirement to contain specific information. The font size and prominence requirement is to ensure the readability in lieu of "the fine print" that has plagued consumers over time. The State of California recommends a minimum font size of 12 for readability.¹

¹ *Seven Steps to Creating an Accessible Word Document*, Department of Rehabilitation, Disability Access Services, June 2019, page 1.

Proposed subdivision (d) requires a header entitled “Notice to Consumers” and the inclusion of the following text in all notices: “ _____(insert name) is a Professional Fiduciary licensed by the Professional Fiduciaries Bureau with the California Department of Consumer Affairs. Telephone and Website: (916) 574-7340; www.fiduciary.gov.”

First, the Bureau believes the inclusion of a title header on the document will prevent the information from being hidden or obfuscated by other text or included in unrelated documentation. Requiring a separate header will allow the intended recipient – the consumer – to easily identify the document and afford it the contextual importance it deserves.

Second, the requirement that the licensee be named similarly notifies the consumer of the party asserting representation. Being able to identify the fiduciary will assist consumers in evaluating performance, seeking information, and in reporting complaints to the appropriate entities.

Third, the requirement that the notice indicate the licensee is a Professional Fiduciary notifies the consumer that the representative role is one regulated by a California governmental entity. This information will allow the consumer to identify the correct entity to direct complaints or requests for information to.

Fourth, the requirement that the notice contain the contact information of the Professional Fiduciaries Bureau with the California Department of Consumer Affairs will notify the consumer of the exact entity to direct inquiries or complaints to and provides the consumer with the exact information needed to contact the Bureau or the Department. This advantages consumers by providing them with empowering information without forcing the consumer to seek it out for themselves. This will improve accountability for licensees and has the secondary effect of improving trust with the consumer population by ensuring all there is governmental oversight and accountability for the professional fiduciary providing service.

Ongoing notice requirements (16 CCR § 4552):

In addition to the initial notice requirements discussed above, the proposed regulation would require a licensee to include the statement and information discussed above in both of the following:

- All written correspondence “to the consumer, the attorney representing the consumer, if any, the consumer’s agent, if any,” and to interested persons regarding the services performed by the licensee.
- All contracts to perform professional fiduciary services. In the case of a contract, the proposed regulation would require notice to be placed immediately above the signature line for the consumer.

This notice requirement is needed to ensure that all interested persons are notified of the licensee's credentials and provided the Bureau's contact information on an ongoing basis.

This ongoing requirement may require certain persons to be provided notice multiple times. However, the requirement is necessary for the following reasons:

- If written notice is provided only once and a client or customer misfiles or loses it, the client or customer will not have another opportunity to receive it from the licensee.
- A client or customer is more likely to pay attention to the information in the notice either at the time of a licensee's appointment or when the client or customer becomes unhappy with the licensee's performance. An ongoing notice requirement will increase the likelihood that notice will be received in closer proximity to the latter date.

Proof of compliance with notice requirements (16 CCR § 4553):

The proposed regulation would require a licensee, until the conclusion of their services in a matter, to retain and present to the Bureau for inspection upon request, a record, log, or copy of each notice provided pursuant to the proposed regulation in connection with that matter. The recordkeeping requirements under this provision are necessary to enable the Bureau to confirm, while a licensee is serving as professional fiduciary in any matter, that a licensee has complied with the applicable notice requirements under the proposed regulation.

The proposed text requires the recipient's name, relationship to the matter necessitating notice, authorized method of providing notice, fax number, delivery address and/or email address if applicable, and date sent or provided because the information will assist in determining whether the notice was sent in good faith. The existence of information consistent with the contact information of the required recipient may imply good faith effort on the part of the licensee to comply with notice requirements; the absence of this information, or the existence of incorrect information may assist the Bureau in determining whether a real attempt at notice was made, or whether the notice was actually delivered.

BUSINESS IMPACT

This regulation would have negligible impact on business, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts or evidence/documents/testimony:

Although all licensees will be required to comply with this regulation, the economic impact of this regulation would be negligible. Licensees would be required to provide initial written notice of their licensure by the Bureau to all clients and customers in person or by mail, email, or facsimile, or by including it in written correspondence or a contract with the client or customer. They would also be required to provide written

notice of their licensure on an ongoing basis, in all written correspondence to clients and contracts for licensed services. The financial cost of providing this notification by mail, email, facsimile, or on written correspondence or contracts, is minimal.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

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

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because it is merely a notice requirement for licensees and has no effect on creating or eliminating jobs.
- It will not create new businesses or eliminate existing businesses within the State of California because it is merely a notice requirement for licensees and has no effect on business creation.
- It will not affect the expansion of businesses currently doing business within the State of California because it is merely a notice requirement for licensees and has no effect on business expansion.
- It will benefit the health and welfare of California residents because clients and customers receiving professional fiduciary services will be aware of the existence and role of the Bureau and the consumer protection services it offers.
- It will not affect worker safety.
- It will not affect the state's environment.

UNDERLYING TECHNICAL, THEORETICAL, AND EMPIRICAL DATA

1) *Seven Steps to Creating an Accessible Word Document*, Department of Rehabilitation, Disability Access Services, June 2019. Available at: <https://www.dor.ca.gov/Content/DorIncludes/documents/DisabilityAccessService/Seven%20Steps%20to%20Creating%20an%20Accessible%20Word%20document%206%202019%20.pdf>; accessed March 22, 2021.

CONSIDERATION OF ALTERNATIVES

Reasonable alternatives:

No reasonable alternative to this regulation would be either more effective than this regulation, or equally effective and less burdensome than this regulation in achieving the purposes of this regulation in a manner that ensures full compliance with BPC

section 138, or more cost-effective to the economy and to affected private persons and equally effective in implementing the policy of BPC section 138. Further, because this regulation would have a negligible impact on business, no reasonable alternative would lessen any adverse impact on small business.

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

#1 – Delaying the promulgation of the proposed regulation. This is not reasonable because BPC section 138 does not give the Bureau the option of delaying the adoption of this regulation. The Bureau must act immediately to implement this statutory requirement.

#2 – Not promulgate the proposed regulation. This is not reasonable because BPC section 138 requires that the Bureau adopt the proposed regulation. The Bureau must act to implement this statutory requirement.

Prescriptive vs. performance standard:

The proposed regulation would prescribe the methods a licensee must use to provide notice to clients and customers, and the language to be included in the notice, and would require the notice to be in at least 12-point type. The imposition of a performance standard in lieu of these prescriptive standards would be a less effective way of carrying out the purpose of the proposed regulation for the reasons stated under the heading “Authorized methods of providing notice; language and format of notice (16 CCR § 4551(c))” in the “Necessity of Each Adoption, Amendment, or Repeal” section, above.