

# California State Athletic Commission

## Initial Statement of Reasons

**HEARING DATE:** September 21, 2015

### **SUBJECT MATTER OF PROPOSED REGULATIONS:**

Definitions, Prohibited Substances and Methods, Therapeutic Use Exemptions, Transgender Athletes

### **SECTIONS AFFECTED**

Title 4, California Code of Regulations sections 201.5, 303, 424, 425, 426, 830, 831, 832, 833, 834, 835, 836 and 837.

### **BACKGROUND AND IDENTIFICATION OF PROBLEMS TO BE ADDRESSED:**

The California Athletic Commission (Commission) regulates boxing and mixed martial arts competitions and licenses athletes to compete in regulated events. As part of its regulatory functions, the Commission strives to ensure that athletes compete safely and fairly. This rulemaking package mainly addresses the issues of prohibited substances and Transgender athletes. In particular, the Commission proposes to amend its current regulations to adopt very strict bans on prohibited substances and methods; adopt a new regulation identifying the circumstances under which an athlete, when medically necessary, may receive approval to use a prohibited substance or method; adopt a regulation setting out the rules governing Transgender athletes who apply to compete in Commission-regulated events. This rulemaking package also proposes to make a technical clean-up amendment to one of its definitions, necessitated by the proposed adoption of “Transgender Athletes” regulations.

#### Prohibited Substances, Prohibited Methods (amendments to Rule 303):

It has become evident in recent years that performance enhancing drugs in sports is a serious problem and a threat to athlete's health and safety. The Commission's current Rule 303 (Administration or Use of Drugs) is outdated because it lists only certain substances as being specifically prohibited and it does not reflect the current standards of the medical or sports communities. But as science and technology advance, so too does the number and type of substances and methods that—while not medically necessary—could enhance an athlete's performance to the detriment of other athletes. The Athletic Commission, however, lacks expertise to continually identify substances and methods that should be prohibited from the competitions regulated by the Commission. The entity with this expertise is the “World Anti-Doping Agency,” a nonprofit organization established through a collective initiative led by the International Olympic Committee. Hundreds of sports organizations, including the International Olympic Committee, have adopted WADA's Anti-Doping Code. Each year “WADA” updates the “Prohibited List,” which identifies those substances and methods athletes are prohibited from taking or using. Consequently, the Commission proposes to amend Rule 303 to adopt the WADA Prohibited List.

As currently written, Rule 303 can be excessively prohibitive. For example an otherwise qualified athlete from could be barred from participating in a sport of his or her choice simply because they have an illness which requires them to take a medication that contains a portion of a prohibited substance, even though it does not enhance their performance as an athlete. Currently, athletes with prescribed medications often discontinue taking their medication, thereby risking their health, in order to fight in California.

The amendments to Rule 303 are needed to address the use of prohibited substances and/or methods by athletes who compete in Commission-regulated events; the proposed amendments address this need by adopting WADA's Prohibited List thereby meeting the standards of the world-recognized leader in the fight against improper drug use in sports.

Therapeutic Use Exemptions (adoption of Rules 424-426): Recognizing that athletes may have a legitimate medical need to use a substance or method that would otherwise be a violation of Rule 303 (as proposed to be amended), the Commission proposes to adopt a narrow exception to Rule 303. Such "Therapeutic Use Exemptions," or TUEs, would only be granted where there is an established, documented medical need and may be denied (subject to an appeal) where doing so is in the best interests of athlete safety. In addition, the Commission proposes to prohibit a TUE being granted for any form of Testosterone Replacement Therapy, except as required by law.

Transgender Athletes (adoption of Rules 830-837): Federal and state laws prohibit discrimination on the basis of gender identity/expression. Transgender athletes have the right to participate in licensed sports, and major sports licensing authorities (NCAA, ABC, Olympics, etc.) have policies in place to govern safe and fair participation of transgender athletes. The proposed regulation is needed in order to promote fair participation in Commission-regulated events and prevent discrimination on the basis of gender or gender identity in a manner that will also protect public health and safety for all participants.

Technical Clean-Up (amendment to Rule 201.5): The Commission proposes to amend Rule 201.5(e), which currently provides that "the masculine gender includes the feminine gender" to, instead, specify that all pronouns are gender-neutral unless the context clearly indicates otherwise. This change is necessitated by the proposed adoption of the Transgender Athletes regulations.

## **BENEFITS**

The proposed regulations will further the important goal of ensuring drug-free sports competitions while recognizing that athletes may have a medical need to use a prohibited substance or method. Also, the regulations will prevent discrimination against Transgender athletes who are eligible to compete. These regulations will protect the health and safety of athletes and promote fairness and social equity by allowing eligible, legitimate contenders a full opportunity to compete fairly.

## **FACTUAL BASIS/RATIONALE**

**1. Amend Section 201.5 of Chapter 1 of Article 1 of Division 2 of Title 4 of the California Code of Regulations:** To amend the current definitions to include that all pronouns used in the chapter are gender-neutral unless context clearly indicates otherwise.

**2. Amend Section 303 of Article 6 of Chapter 1 of Division 2 of Title 4 of the California Code of Regulations:** Section 303 concerns the administration and use of drugs by licensed athletes and prohibits the use of any specified drugs described in subdivision (c) either before or during a match. The existing regulation also requires mandatory drug testing. The purpose of this regulation is to ensure fair athletic competition as well as to protect the health and safety of the athletes. It has been several years since section 303 was written and today there are a plethora of performance enhancement drugs and controlled substances sometimes used by athletes in order to gain a competitive edge. The purpose of these amendments is to clarify and further define the administration or use of prohibited substances and prohibited methods

Subdivision (a) is written to expressly clarify the California Athletic Commission's (Commission) intent that is each athlete's personal duty to ensure that no prohibited substance enters his or her body. It also authorizes the Commission to provide random drug testing at any time. This is necessary so that athletes cannot "game" the drug testing schedules and place athletes on notice that they can be tested at any time. This will promote athletes to be clean and drug free.

Subdivision (b) is necessary to define terms that are used in subdivisions (c) and (d). More specifically, the subdivision defines prohibited substances and prohibited methods and incorporates by reference the World Anti-Doping Agency's extensive list of prohibited substances and methods. The World Anti-Doping Agency (WADA) is the international independent organization created in 1999 to promote, coordinate, and monitor the fight against doping in sport in all its forms. WADA was founded with the aim of bringing consistency to anti-doping policies and regulations within sport organizations and governments throughout the world.

Composed and funded equally by the sports movement and governments of the world, WADA coordinated the development and implementation of the World Anti-Doping Code (Code), the document harmonizing anti-doping policies in all sports and all countries. Following the creation of the Code in 2004, WADA was tasked with overseeing activities in a number of key areas that include scientific research, publishing the annual List of Prohibited Substances and Methods, managing laboratory accreditation and other oversight activities.

WADA is responsible for annually preparing and publishing the List of Prohibited Substances and Methods in consultation with panels of experts in the field as well as the stakeholders throughout the world representing numerous types of sports competitions.

Subdivision (c) provides an exemption for use of prohibited substances or prohibited methods for persons with documented medical conditions provided they request a therapeutic use exemption pursuant to the requirement of proposed regulation 424. This is necessary since there are some medical conditions that may require the use of a prohibited substance in limited circumstances.

Subdivision (d) requires mandatory drug testing as a condition of license renewal and also before or after a bout. The subdivision also provides that a violation of this regulation shall subject the athlete to administrative enforcement action. This subdivision is necessary so that the Commission ensure that the prohibitions on performance enhancement drug use are enforced.

**3. Adopt Sections 424, 425 and 426 of Article 12.5 of Chapter 1 of Division 2 of Title 4 of the California Code of Regulations:** To allow athletes a method to request for permission from the commission to use a prohibited substance, when proven necessary and that does not provide an unfair advantage. This regulation also establishes the process for an athlete to obtain an exemption for a therapeutic medical use by requesting permission from the Commission by completing a form, named "Application for Determination of Therapeutic Use Exemption" (form number PA014, Rev. 1/14). This form is incorporated by reference.

Section 424 is necessary in order for the Commission express its intent to identify a very narrow exemption from Regulation 303's prohibition against the administration or use of prohibited substances and methods. For purposes of clarity, subdivisions (b) and (c) define terms and their applicability throughout proposed Article 12.5.

Section 425 is necessary in order to define what types of medical information are necessary for an athlete to submit in order to obtain a Therapeutic Use Exemption (TUE). This section also defines the form that athletes must complete for consideration of the exemption. This section is necessary in order for the Commission to determine when TUE application is considered complete. The section is also necessary to specify that the costs of providing the medical information are the responsibility of the athlete applying for the exemption and are not considered a "special medical evaluation" within the meaning of Business and Professions Code section 18710. This is important because special medical evaluations costs are shared by the Commission and the athlete under section 18710. Section 425 is necessary in order to distinguish that the TUE application and process are not a "special medical evaluation" and the related costs of providing this information shall be paid by the athlete applying for the exemption.

Section 426 is necessary in order to define a process by which a TUE application can be denied. The section is also necessary in order to identify the time and process by which the denial of a TUE may be appealed.

The "Application for Determination of Therapeutic Use Exemption" (form number PA014, Rev. 1/14) requests the following information and the purpose for each:

1. **Name, Address, Telephone Number, Email, Gender and DOB** - This is requested so the Commission can identify and correspond with the applicant for TUE.
2. **Medical Information & Diagnosis/ Medication Details** - This information is requested and required in order to evaluate the TUE request in the context of possible anti-doping rule violations. This information is necessary because the commission must have enough medical documentation to come to the same diagnosis and treatment plan without ever seeing the patient.
3. **Authorization to Release Information** - this is required on all of the commission's application forms - established pursuant to Sections 18640, 18642 and 18643 of the Business and Professions Code.
4. **Applicant Declaration** - this is required on all of the commission's application forms (penalty of perjury statement).
5. **Authorization to Use and Disclose Protected Health Information** - this is required on all of the commission's application forms - HIPAA disclosure.
6. **Examining Physician Declaration** - Name, Medical License Number, Medical Specialty, Address, Telephone Number, email and signature of the physician is requested to determine the treatment is medically appropriate and that the use of the alternative medications not on the prohibited list would be unsatisfactory for the condition. The Commission also needs to identify and correspond with the licensed physician.

**4. Adopt Sections 830 - 837 of Article 1 of Chapter 6 of Division 2 of Title 4 of the California Code of Regulations:** "Transgender" describes an individual whose gender identity does not match the person's sex at birth. Transgender people are not born with physical characteristics that distinguish them from others. Transgender individuals are eligible to apply to participate in Commission-regulated events. Participation in combat sports confers a unique set of health risks as compared to other sports, for example, gender transition may involve hormone therapy and/or surgical interventions that may create specific safety concerns in combat sports, both for the transgender athlete and for their opponents. The proposed regulations are based upon existing sports policies, published research and medical expert consensus.

Transgender policies for the National Collegiate Athletic Association (NCAA), Association of Boxing Commissions (ABC) and the Olympics all require medical documentation by an expert with knowledge and training in the area, appropriate notification of the regulatory body in advance of competition, proper documentation of any treatment and in particular hormonal therapy and monitoring of hormone levels to

ensure no overt health risks to the athlete as well as no competitive advantage. Many of these issues are also outlined in the National Center for Lesbian Rights' report, "On the Team: Equal Opportunity for Transgender Student Athletes." In addition, the Endocrine Society has published clinical guidelines titled "Endocrine Treatment of Transsexual Persons" in the Journal of Clinical Endocrinology and Metabolism (September 2009, 94(9): 3132-3154). This guideline provides time ranges needed to allow for increases in muscle mass/strength (for female to male transitions; 2-5 years) or decreases in muscle mass/strength (for male to female transitions: 1-2 years).

Currently CSAC has no specific regulation regarding participation of transgender athletes in combat sports licensed by the Commission. This at best creates an environment that where transgender athlete participation is uncertain and may not be uniformly managed, and at worst creates a possibility for discrimination. Legal protections exist to prevent discrimination based upon gender or gender identity. At the federal level, the Equal Employment Opportunity Commission (EEOC) has held that discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex and, therefore, is covered under Title VII of the Civil Rights Act of 1964. California has enacted non-discrimination laws prohibiting discrimination on the basis of sexual orientation and gender identity [Cal. Penal Code §§ 422.55 and 422.56, Cal. Gov't Code § 12926 et seq. (non-discrimination in employment and housing), Cal. Civ. Code § 51 (public accommodations), H&SC§ 1365.5 (insurance contracts), Cal. Ed. Code § 200 (education and school safety)]. This regulatory effort is initiated in the interest of creating a level playing field for transgender licensees, with equal opportunity but also taking into consideration fairness to all competitors (transgender and not) as well as unique elements and concern for safety.

## **UNDERLYING DATA**

1. 2015 Wada Prohibited List of Substances. "The World Anti-Doping Code, The Prohibited List International Standard (World Anti-Doping Agency)<https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-prohibited-list-en.pdf>
2. IOC Anti-Doping Rules, Applicable to the XXX Olympiad.
3. IOC Anti-Doping Rules, Applicable to the XXII Winter Olympics in Sochi.
4. IOC Summary on TUE Applicable to the XXX Olympiad.
5. IOC Summary on TUE Applicable to the 2010 Youth Olympics.
6. IOC Medical and Scientific Application form 2012 and 2014.
7. USOC Anti-Doping Policies.
8. USOC and USDA TUE policy.
9. USOC and USDA TUE application form.
10. WADA Medical Information to Support TUE for Adrenal Insufficiency.
11. WADA Medical Information to Support TUE for Anaphylaxis.

12. WADA Medical Information to Support TUE for Androgen Deficiency/Male Hypogonadism.
13. WADA Medical Information to Support TUE for Arterial Hypertension.
14. WADA Medical Information to Support TUE for Asthma.
15. WADA Medical Information to Support TUE for Diabetes Mellitus.
16. WADA Medical Information to Support TUE for Growth Hormone Deficiency.
17. WADA Medical Information to Support TUE for Post Infectious Cough.
18. WADA Medical Information to Support TUE for Musculoskeletal Injuries.
19. "Inclusion of Transgender Student-Athletes", Adopted by the NCAA Executive Committee, April 2010,  
[http://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](http://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf)
20. AthletesCAN, the Canadian Centre for Ethics in Sport, and the Canadian Association for the Advancement of Women and Sport and Physical Activity, Promising Practices: "Working With Transitioned/Transitioning Athletes in Sport (2009)".
21. "Including Transitioning and Transitioned Athletes in Sport — Issues, Facts and Perspectives – Summary". Brenda Wagman (February 12, 2009),  
[http://www.caaws.ca/e/resources/pdfs/Summary\\_Transition\\_DiscussionPaper\\_FINAL1%20\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Summary_Transition_DiscussionPaper_FINAL1%20(2).pdf).
22. "Working with Transitioning or Transitioned Athletes in Sport - Emerging Themes". Rachel Corbett (May 26, 2009)  
[http://www.caaws.ca/e/resources/pdfs/Wamsley\\_lit\\_review\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Wamsley_lit_review(2).pdf).
23. Goorin, Louis, and Mathijs Bunck, "Transsexuals and Competitive Sports," European Journal of Endocrinology 151(2004): 425-429,  
<http://www.eje.org/cgi/reprint/151/4/425.pdf>.
24. "Social Science Literature on Sport and Transitioning/Transitioned Athletes" – Literature Review. Kevin B. Wamsley (February 2008), [http://www.caaws.ca/e/resources/pdfs/Wamsley\\_lit\\_review\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Wamsley_lit_review(2).pdf).
25. "Do Transitioned Athletes Compete at an Advantage or Disadvantage" – Literature Review. Michaela C. Devries (May 18, 2008),  
[http://www.caaws.ca/e/resources/pdfs/Devries\\_lit\\_review\(2\).pdf](http://www.caaws.ca/e/resources/pdfs/Devries_lit_review(2).pdf).
26. Steinbach, Paul, "Change Candidates," "Athletic Business" (August 2008),  
<http://www.athleticbusiness.com/articles/article.aspx?articleid=1817&zoneid=3>.
27. "Transgender Student-Athlete" - A 30-minute video presentation sponsored by the NCAA and conducted by Dr. Betsy Crane, Widener University, [http://s3.amazonaws.com/ncaa/web\\_video/diversity\\_inclusion/transge](http://s3.amazonaws.com/ncaa/web_video/diversity_inclusion/transge)

[nderSA.html](#). Dr. Crane presents a sex educator's expertise on gender awareness and diversity, and provides definition to assist the viewer in understanding best practices for including transgender students in athletics participation.

28. "On the Team: Equal Opportunity for Transgender Student Athletes." National Center for Lesbian Rights (Oct. 2010). <http://www.wiaa.com/ConDocs/Con550/TransgenderStudentAthleteReport.pdf>
29. Comprehensive discussion of state court and administrative decisions applying sex and disability discrimination to transgender plaintiffs, see [www.nclrights.org/site/DocServer/state\\_cases091004.pdf?docID=1203](http://www.nclrights.org/site/DocServer/state_cases091004.pdf?docID=1203).
30. Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.
31. February 10, 2014, CSAC Meeting Minutes.

## **ECONOMIC IMPACT ANALYSIS/ASSESSMENT**

The Commission does not expect a significant economic impact to the transgender athlete applicant or those applying for a TUE, as many of the tests and procedures are required as part of the professional athlete licensing process. At this time, the Commission does expect a substantial number of transgender athlete applications.

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because the proposal will not be of sufficient amount to have the effect of creating or eliminating jobs. This proposal would only impact individuals who desire to compete as a transgender athlete or apply for a TUE.
- It will not create new business or eliminate existing businesses within the State of California because this proposal will not be of a sufficient amount to have the effect of creating or eliminating business.
- It will not affect the expansion of businesses currently doing business within the State of California because this proposal will not be of a sufficient amount to have the effect of limiting or furthering the expansion of businesses.
- This regulatory proposal does not affect worker safety because this proposal is not relative to worker safety.
- This regulatory proposal does not affect the state's environment because this proposal is not relevant to the state's environment.

## **BUSINESS IMPACT**

The Commission has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The proposed changes provide a mechanism to allow athletes an avenue to continue to use specific medications necessary to maintain the athlete's health. The proposed changes also apply to transgender athletes who apply for licensure to compete in a California regulated contest. The number of transgender athlete license applications is expected to be insignificant and no additional requirements are proposed on any existing relationship between a transgender athlete and any small business that services their needs.

## **REQUIREMENTS FOR SPECIFIC TECHNOLOGIES OR EQUIPMENT**

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

## **FISCAL IMPACT ANALYSIS**

Applicants not granted a TUE as specified by this policy would suffer financially by not being allowed to compete. Promoters may also suffer by not being able to promote and showcase an athlete who would qualify and apply for a TUE.

## **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 purpose of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

The alternative is to do nothing and to not allow an otherwise eligible portion of the population equal opportunities to compete in combat sports. However, this proposed regulatory change is necessary to protect the rights of transgender athletes who desire to compete in Commission-regulated events. The Commission recognizes that no individual may be discriminated against on the basis of gender or gender identity, and to ignore such rights, could possibly subject the Commission to litigation.

The Commission could simply not grant a TUE and maintain the status quo. Under this alternative, any athlete with a medical condition requiring a banned substance would not be allowed to compete. This would include but not be limited to athletes with asthma requiring inhalers, athletes that have suffered testicular or ovarian cancer, transgender athletes seeking licensure, and any other rare case. This would disallow a very small number of athletes from competing because of a medical condition requiring treatment to safely compete.

The Commission could grant a TUE using the proposed regulation. Because the standards for receiving this exemption are very difficult to meet, the public could be assured that only athletes with a medical necessity for a TUE are granted one.

Another alternative would be to allow any athlete to fight while under the influence of a prohibited substance. This would require a change in statute and regulation and the Commission would not be supportive of this alternative.