

**DEPARTMENT OF CONSUMER AFFAIRS
BOARD OF BEHAVIORAL SCIENCES
INITIAL STATEMENT OF REASONS**

Hearing Date: September 30, 2019

Subject Matter of Proposed Regulations: Substantial Relationship and Rehabilitation Criteria: This proposal makes updates to the Board of Behavioral Science’s (Board’s) regulations related to its substantial relationship criteria, criteria for rehabilitation when considering denial of a license, and criteria for rehabilitation when considering the suspension or revocation of a license. Amendments to these sections are required by AB 2138 (Chiu, Chapter 995, Statutes of 2018). The proposal also makes technical amendments to the Board’s regulations governing actions against sex offenders, and its “Uniform Standards Related to Substance Abuse and Disciplinary Guidelines (Revised October 2015)” in order to be consistent with AB 2138.

Section(s) Affected: Amend Title 16, California Code of Regulations sections 1812, 1813, 1814, 1888, and 1888.1, and the Board’s “Uniform Standards Related to Substance Abuse and Disciplinary Guidelines (Revised October 2015),” which are incorporated into the Board’s regulations by reference via section 1888.

Introduction and Statement of Problem

The Board is seeking to conform its regulations to changes required by the passage of AB 2138. Beginning July 1, 2020, AB 2138 makes changes to the law regarding when licensing boards can deny, suspend, or revoke a license due to prior convictions or discipline. The bill requires the Board to amend its existing regulations governing substantially related crimes or acts, as well as its rehabilitation criteria.

On July 1, 2020, Business and Professions Code (BPC) section 481 will require the Board to develop criteria, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the professions it regulates. Further, BPC section 493 will require the Board to determine whether a crime is substantially related to the qualifications, functions, or duties of the professions it regulates by using criteria including the nature and gravity of the offense, the number of years elapsed since the date of the offense, and the nature and duties of the profession. The substantial relationship requirement stems from the due process principle that a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 448; *Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.)

In addition, BPC section 482 will require the Board to develop criteria to evaluate the rehabilitation of a person when considering the denial, suspension, or revocation of a license. In the context of professional licensing decisions, the courts have said that, “[r]ehabilitation . . . is a state of mind and the law looks with favor upon rewarding with

the opportunity to serve, one who has achieved reformation and regeneration.” (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058, internal punctuation omitted.) Additionally, the Legislature’s “clear intent” in enacting AB 2138 was “to reduce licensing and employment barriers for people who are rehabilitated.” (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.)

The Board proposes to amend sections 1812, 1813, 1814, 1888, 1888.1, and the disciplinary guidelines to conform to the changes in AB 2138.

Specific Purpose, Rationale, and Anticipated Benefits of each Adoption, Amendment or Repeal:

This proposal seeks to make the regulatory changes required by AB 2138, and updates regulations as needed for consistency with the changes in statute made by AB 2138, as follows:

Amend California Code of Regulations (CCR) Title 16, Section 1812 – Substantial Relationship Criteria

Section 1812, Subdivision (a)

Proposed Change/Purpose: Section 1812(a) is being amended to include discipline under BPC section 141. Section 141 permits boards to discipline a license based on substantially related acts that are the basis for discipline in an out-of-state jurisdiction. This subsection also includes substantially related professional misconduct, because section 480(a)(2) allows such misconduct that results in formal discipline in or outside California to be considered when deciding whether to deny a license.

Factual Basis/Rationale: This amendment is necessary because section 480 now references substantially related professional misconduct as a potential reason for denying a license. Likewise, section 141 authorizes discipline for substantially related acts in out-of-state jurisdictions. It is important for the substantial relationship criteria in regulations to be updated to reflect the change in AB 2138, and to ensure clarity and consistency with statute.

The proposal is necessary to provide the appropriate notice to license applicants and licensees that discipline in an out-of-state jurisdiction, and professional misconduct are grounds for license denial, suspension, or revocation. It is also necessary to consolidate into one place the criteria the Board will apply in evaluating whether a crime or other misconduct is substantially related to the licensed profession.

Anticipated Benefits: This amendment would clarify for relevant parties (e.g., licensees, Board members and staff, and the Attorney General's Office) that the substantial relationship criteria must be used for cases when the Board is considering denying, suspending or revoking a license, as applicable, due to professional misconduct or due to disciplinary action based on prior discipline by another jurisdiction. The amendment would also consolidate into one place the criteria the Board applies anytime it evaluates the relationship between a crime or act and the practice of the profession, which will make the Board's decision-making more uniform and predictable.

Section 1812, Subdivision (b)

Proposed Change/Purpose: AB 2138 amends BPC sections 481 and 493 to specify three criteria that the Board must consider when evaluating whether a crime is "substantially related" to the regulated business or profession for purposes of denial, suspension, or revocation of a license. The criteria shall include all of the following: (1) The nature and gravity of the offense; (2) The number of years elapsed since the date of the offense; and (3) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed. 16 CCR section 1812 is the Board's regulation section that defines substantial relationship criteria. Therefore, these three factors need to be added to section 1812 in order to be compliant with the law.

Factual Basis/Rationale: Due to the amendments in BPC sections 481 and 493, these changes are required in order to carry out the provisions of AB 2138 and to consolidate the substantial relationship criteria into one place.

Anticipated Benefits: This amendment ensures that the Board is compliant with this change that is required by law. Not being compliant with the law could result in confusion by relevant parties (e.g., licensees, Board members and staff, and the Attorney General's Office) when attempting to interpret and apply BPC section 481 and 16 CCR section 1812.

Section 1812, Subdivision (c)

Proposed Change/Purpose: This amendment specifies that crimes, professional misconduct, or acts that are substantially related to the qualifications of a Board licensee include violations of the applicable Business and Professions Code provisions that govern the Board's licensees.

Factual Basis/Rationale: The Legislature established the laws that govern each of the Board's licensed professions, and a violation of the governing statutes is directly related to the profession. Thus, the violations identified in subdivision (c)

of this section are relevant to the nature and duties of the practice of the profession of the Board's four license types. Violations of these provisions suggests a lack of fitness to practice psychotherapy with clients.

Anticipated Benefits: The proposed revisions to section 1812(c) would make it clear to applicants, licensees and other interested parties that direct violations of the statutes governing the practice of Board licensees and of BPC Division 2, Chapter 1, Article 6 can be considered substantially related to the professions which the Board licenses, and examined as substantially related for purposes of denying or disciplining a license.

Amend CCR Title 16, Section 1813 – Criteria for Rehabilitation – Denial of Licensure

Section 1813, Subdivision (a)

Proposed Change/Purpose: BPC section 482 will require the Board to consider whether an applicant made a showing of rehabilitation when the applicant completed the criminal sentence at issue without a violation of parole or probation. Subdivision (a) amends the criteria for rehabilitation when the Board is considering denying a license, to include a requirement to consider if the applicant completed the criminal sentence at issue without a violation of parole or probation. Since AB 2138 did not prescribe new rehabilitation criteria, the proposal also outlines the five criteria the Board must consider when determining whether the successful completion of parole or probation indicates rehabilitation. The list of criteria is narrowly-focused on considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of an applicant who completed the criminal sentence without a parole or probation violation.

Factual Basis/Rationale: Existing law (BPC section 482) required the Board to develop criteria to evaluate the rehabilitation of an applicant when considering denying a license or registration based on a conviction. The law required the Board to take into account all competent evidence of rehabilitation provided by the applicant.

Operative July 1, 2020, BPC section 480 will prohibit the Board from denying a license based on the conviction of a crime, or on the basis of facts underlying a conviction, if the applicant has “made a showing of rehabilitation pursuant to Section 482.” (BPC section 480, subd. (b).)

In deciding whether to deny a license based on a conviction, BPC section 481 will require the Board to consider evidence of the applicant's rehabilitation,

pursuant to the process established in the Board's practice act, its regulations, and as directed under section 482.

To implement AB 2138, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny a license based on a criminal conviction. The Board must also decide whether an applicant "made a showing of rehabilitation," if the applicant or licensee completed the criminal sentence at issue without a violation of parole or probation. (BPC section 482.)

Unlike substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria. The extent to which a person complied with the terms of parole or probation is already a factor considered when evaluating rehabilitation. However, courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: "The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense." (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 ["Since persons under direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n]...applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole"].) Nonetheless, under AB 2138, the Board must now consider whether an applicant who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

Therefore, the specified criteria in subsection (a)(1)-(5) are necessary to help guide the Board in determining whether an applicant has been sufficiently rehabilitated by the completion of parole or probation without a violation to receive a license, while at the same time ensuring public safety. In addition, the Department of Consumer Affairs (DCA) advised that boards within DCA should consider adopting a uniform approach in establishing these criteria. This is necessary to provide predictability in the application process and uniformity of rehabilitation criteria across the DCA.

A recommended set of five criteria was developed that allow boards to examine rehabilitation in the context of an applicant that completed parole and probation without a violation. The proposed criteria include the severity of the crime, the amount of parole or probation given and its terms, and any modifications. This is intended to allow boards to examine variations in probation or parole sentences, including differences in county to county sentencing guidelines,

county to county differences in the terms and conditions of probation and parole (including whether the terms included meaningful rehabilitation, such as mandatory counseling for the underlying issues that caused the behavior), and whether parole or probation may have been modified due to external factors. The additional criteria in subdivision (a) allow the Board to make an informed determination as to whether the applicant has truly rehabilitated and is fit to practice.

Since the purpose of evaluating an applicant's rehabilitation is to determine whether the applicant is sufficiently reformed to be licensed, but AB 2138 requires the Board to evaluate rehabilitation in the narrow context of an applicant who completed the criminal sentence without violating parole or probation, each of these criteria are focused in scope and would provide to the Board information specific to the applicant's criminal sentence and terms or conditions of parole or probation.

The Board must consider the nature and gravity of the crime, because this is the offense against which the applicant's rehabilitative efforts will be evaluated. The Board will consider the length of the applicable parole or probation period, because the length of time that the applicant served probation or parole without a violation is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 ["a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice"].)

The Board must consider the extent to which the parole or probation period was shortened or lengthened, and the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the applicant is sufficiently rehabilitated.

The Board must consider the terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation, because the actual parole or probation terms can inform the Board about whether the applicant is rehabilitated. For instance, in cases where an applicant was convicted of a crime involving alcohol, probation terms requiring the applicant to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the applicant's rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368 ["An alcoholic's rehabilitation is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous"].)

The Board must consider the extent to which the terms or conditions of parole or probation were modified and the reason for modification, because this may be relevant to the Board's determination. For instance, if correctional authorities removed terms of parole or probation due to the applicant's good behavior, this would bear on the Board's evaluation of the applicant's rehabilitation and willingness to conform to the rules of licensure.

Anticipated Benefits: The proposed amendments provide transparency and clarity about how the Board will evaluate rehabilitation based on probation or parole being completed. This benefits applicants who are applying for licensure and who have completed parole or probation, because it gives them an idea about how they will be evaluated and may help them in their decision on what information they choose to submit to the Board to attest to their rehabilitation. It also benefits Board members and staff, as it gives them some uniform criteria to apply when making a determination of rehabilitation or when discussing how the process works with stakeholders. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria. This will provide predictability in the application process and uniformity of rehabilitation criteria across the DCA.

Section 1813, Subdivision (b)

Proposed Change/Purpose: Subdivision (b) amends the existing criteria for rehabilitation the Board uses when considering denying a license in circumstances where: (1) the applicant did not complete the criminal sentence at issue without a violation of parole or probation; (2) the Board did not find that the applicant made a sufficient showing of rehabilitation based on the criteria in subdivision (a); and (3) the denial is based on something other than a crime, such as professional misconduct.

Since AB 2138 did not prescribe new rehabilitation criteria, the proposal largely preserves the Board's existing, more comprehensive, rehabilitation criteria, for the Board to consider for these applicants. The criteria are not limited to the applicant's parole or probation. However, the list of criteria incorporates the criteria in subdivision (a) for applicants convicted of a crime, so that similarly-situated applicants have the opportunity to be evaluated by the Board under the same set of criteria. The list of criteria also anticipates that the Board may be evaluating the rehabilitation of an applicant where the ground for denial involves acts of professional misconduct, rather than a conviction. The proposed amendments also make some minor technical clean-up amendments to the language to make it more concise.

Factual Basis/Rationale: Operative July 1, 2020, BPC section 480 will prohibit the Board from denying a license based on the conviction of a crime, or on the basis of facts underlying a conviction, if the applicant has “made a showing of rehabilitation pursuant to Section 482.” (BPC section 480, subd. (b).)

In deciding whether to deny a license based on a conviction, BPC section 481 will require the Board to consider evidence of the applicant’s rehabilitation, pursuant to the process established in the Board’s practice act, its regulations, and as directed under section 482.

AB 2138 requires the Board to develop rehabilitation criteria which will be used to determine whether an applicant made a showing of rehabilitation if either of the following are met (BPC section 482(b)):

1. The applicant has completed the criminal sentence at issue without a violation of parole or probation; or
2. The Board, applying its criteria for rehabilitation, finds that the applicant is rehabilitated.

Subdivision (b) focuses on the second scenario: if subdivision (a) is not applicable—because the applicant violated parole or probation, or the Board’s decision is based on something other than a crime—or if the Board determines rehabilitation criteria are not met under subdivision (a), then the Board must determine, in applying its rehabilitation criteria in (b), whether or not the applicant is rehabilitated.

Most of the criteria listed in subdivision (b) are already part of existing regulations. Minor technical amendments are being made for clarity, consistency, and easier reading.

Paragraph (2) will be amended to add crimes to the types of subsequent events that the Board will consider in evaluating rehabilitation. It is necessary to include crimes among the types of events the Board will consider because such subsequent criminal conduct bears on the Board’s decision regarding whether the applicant is sufficiently rehabilitated to be licensed and conform to the requirements of licensure. This addition is also necessary to make the Board’s evaluation of rehabilitation criteria consistent between sections 1813 and 1814. The Board would omit “which also could be considered as grounds for denial under Section 480 of the Code,” because AB 2138 repealed the Board’s ability to deny a license based on dishonest, fraudulent, or deceitful acts that would be grounds for discipline.

The amendment to paragraph (3) is not substantive and simply clarifies that the Board will consider the passage of time from the original act or crime under consideration, as well as the time elapsed since any subsequent misconduct. It is necessary for the Board to consider the time that elapsed since the commission of prior crimes and misconduct because the passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation.

Under paragraph (4) the Board will consider whether the applicant complied with parole, probation, restitution or other sanctions imposed on the applicant. The Board proposes amending "The extent to which," to "Whether," but does not view this as a substantive change. The change would make this paragraph consistent with section 1814(b)(4) and is necessary to make the Board's regulations uniform. The criterion is otherwise unchanged from existing regulation. The information embraced in this criterion bears on an applicant's rehabilitation in terms of the applicant's willingness to make amends from prior misconduct and willingness to conform to the rules of licensure. Accordingly, it is necessary for the Board to consider these elements to evaluate an applicant's reformation from prior misconduct.

Paragraph (5) is the only entirely-new criteria. It simply loops in the criteria that is already specified in (a), to reiterate that this information must also be considered in conjunction with the other criteria specified in (b). This allows a more complete picture of the crime, parole/probation, and its context to be considered when considering rehabilitation. This is also necessary to ensure that all applicants convicted of a crime have the opportunity to be evaluated by the same set of rehabilitation criteria. For applicants that completed their criminal parole or probation without a violation, the Board would first evaluate their eligibility for licensure under the criteria in subdivision (a). If the applicant did not demonstrate sufficient rehabilitation, the Board would apply the broader set of criteria in subdivision (b). For applicants that did not complete their criminal parole or probation without a violation, the Board would apply the criteria in subdivision (b), which incorporates the criteria from subdivision (a). This way, similarly-situated applicants (those being considered for denial based on a conviction) have the benefit of the same set of criteria.

Anticipated Benefits: The proposed amendments provide transparency and clarity about how the Board is to evaluate whether an applicant is rehabilitated. This benefits applicants who have past criminal history or disciplinary actions because it gives them an idea about how they will be evaluated and may help them in their decision on what information they may want to submit to the Board to attest to their rehabilitation. It also benefits Board members and staff, as it

gives them some uniform criteria to apply when making a determination of rehabilitation or when discussing how the decision process works with stakeholders. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria. This will provide predictability in the application process and uniformity of rehabilitation criteria across DCA.

Amend CCR Title 16, Section 1814 – Criteria for Rehabilitation – Suspensions or Revocations

The rationale for the changes in this section is similar to the rationale provided above for section 1813. The difference between the two sections is that section 1814 involves the Board's decisions to suspend or revoke a license, and section 1813 involves the Board's decisions to deny a license.

Section 1814, Subdivision (a)

Proposed Change/Purpose: BPC section 482 will require the Board to consider whether a licensee made a showing of rehabilitation when the licensee completed the criminal sentence at issue without a violation of parole or probation. Subdivision (a) amends the criteria for rehabilitation when the Board is considering suspending or revoking a license, to include a requirement to consider if the licensee completed the criminal sentence at issue without a violation of parole or probation. Since AB 2138 did not prescribe new rehabilitation criteria, the proposal also outlines the criteria the Board must consider when determining whether the successful completion of parole or probation indicates rehabilitation. The list of criteria is narrowly-focused on considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of an applicant who completed the criminal sentence without a parole or probation violation.

Factual Basis/Rationale: BPC section 482 will require the Board to consider whether a licensee made a showing of rehabilitation when the licensee completed the criminal sentence at issue without a violation of parole or probation.

To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation evidence between license denials and discipline, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend or revoke a license based on a criminal conviction. The Board must decide whether a licensee "made a showing of rehabilitation," if the licensee completed the criminal sentence at issue without a violation of parole or probation. (BPC section 482.)

Unlike substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria. The extent to which a person complied with the terms of parole or probation is already a factor considered when evaluating rehabilitation. However, as discussed above in the “Factual Basis/Rationale” for section 1813(a), courts historically rejected the view that compliant applicants and licensees are rehabilitated just because they have completed parole or probation. Nonetheless, under AB 2138, the Board must now consider whether a licensee who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

Therefore, the specified criteria in subsection (a)(1)-(5) are necessary to help guide the Board in determining whether a licensee has been sufficiently rehabilitated by the completion of parole or probation without a violation to maintain licensure, while at the same time ensuring public safety. In addition, DCA advised that boards within DCA should consider adopting a uniform approach in these criteria. This is necessary to provide predictability in the disciplinary process and uniformity of rehabilitation criteria across the DCA. A recommended set of five criteria was developed that allow boards to examine rehabilitation in the context of a licensee that completed parole and probation without a violation. The proposed criteria include the severity of the crime, the amount of parole or probation given and its terms, and any modifications. This is intended to allow boards to examine variations in probation or parole sentences, including differences in county to county sentencing guidelines, county to county differences in the terms and conditions of probation and parole (including whether the terms included meaningful rehabilitation, such as mandatory counseling for the underlying issues that caused the behavior), and whether parole or probation may have been modified due to external pressures and factors. The additional criteria in subdivision (a) allow the Board to make an informed determination as to whether the licensee has demonstrated rehabilitation and is fit to practice.

Since the purpose of evaluating a licensee’s rehabilitation is to determine whether the licensee is sufficiently reformed to be licensed, but AB 2138 requires the Board to evaluate rehabilitation in the narrow context of a licensee who completed the criminal sentence without violating parole or probation, each of these criteria are focused in scope and would provide to the Board information specific to the licensee’s criminal sentence and terms or conditions of parole or probation.

As discussed in the context of section 1813(a), the Board must consider the nature and gravity of the crime, because this is the offense against which the

licensee's rehabilitative efforts will be evaluated. The Board will consider the length of the applicable parole or probation period, because the length of time that the licensee served probation or parole without a violation is relevant to whether the licensee is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 ["a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice"].)

The Board must consider the extent to which the parole or probation period was shortened or lengthened, and the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the licensee is sufficiently rehabilitated.

The Board must consider the terms or conditions of parole or probation and the extent to which they bear on the licensee's rehabilitation, because the actual parole or probation terms can inform the Board on whether the licensee is rehabilitated. For instance, in cases where a licensee was convicted of a crime involving alcohol, probation terms requiring the licensee to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the licensee's rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368 ["An alcoholic's rehabilitation is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous"].)

The Board must consider the extent to which the terms or conditions of parole or probation were modified and the reason for modification, because this may be relevant to the Board's determination. For instance, if correctional authorities removed terms of parole or probation due to the licensee's good behavior, this would bear on the Board's evaluation of the licensee's rehabilitation and willingness to conform to the rules of licensure.

Anticipated Benefits: The proposed amendments provide transparency and clarity about how the Board is to evaluate rehabilitation based on probation or parole being completed. This benefits licensees in the enforcement process who have completed parole or probation because it gives them an idea about how they will be evaluated and may help them in their decision on what information to submit to the Board to attest to their rehabilitation. It also benefits Board members and staff, as it gives them some uniform criteria to apply when making a determination about rehabilitation or when discussing how the process works with stakeholders. In addition, to provide uniformity across DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended

rehabilitation criteria. This will provide predictability in the application process and uniformity of rehabilitation criteria across the DCA.

Section 1814, Subdivision (b)

Proposed Change/Purpose: The purpose for amending subdivision (b) is to conform to changes the Board proposes to implement BPC section 482(b), which will require the Board to consider whether an applicant made a showing of rehabilitation if: (1) the applicant did not complete the criminal sentence at issue without a violation of parole or probation; (2) the Board did not find that the applicant made a sufficient showing of rehabilitation based on the criteria in subdivision (a); or (3) the Board's decision is based on something other than a crime.

Since AB 2138 did not prescribe new rehabilitation criteria, the proposal largely preserves the Board's existing, more comprehensive, rehabilitation criteria, for the Board to consider for these licensees. The criteria are not limited to the applicant's parole or probation. However, the list of criteria incorporates the criteria in subdivision (a) for licensees convicted of a crime, so that similarly-situated licensees have the opportunity to be evaluated by the Board under the same set of criteria. The proposed amendments also make some minor non-substantive amendments to the language.

Factual Basis/Rationale: AB 2138 requires the Board to develop rehabilitation criteria to evaluate the rehabilitation of a licensee when considering whether to suspend or revoke a license. (BPC section 482.) To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation between license denials and discipline, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend or revoke a license.

AB 2138 will require the Board to determine whether an applicant or licensee made a showing of rehabilitation if either of the following are met (BPC section 482(b)):

1. The applicant or licensee has completed the criminal sentence at issue without a violation of parole or probation; or
2. The Board, applying its criteria for rehabilitation, finds that the applicant is rehabilitated.

Since AB 2138 will require the Board to specially evaluate licensee rehabilitation in the narrow context of licensees that completed parole or probation without a

violation (i.e., subdivision (a)), subdivision (b) focuses on the instances where subdivision (a) is not applicable—because the applicant violated parole or probation, or the Board’s decision is based on something other than a crime—or where the Board determines rehabilitation criteria are not met under subdivision (a).

Most of the criteria listed in subdivision (b) are already part of existing regulations. Minor technical amendments are being made for clarity, consistency, and easier reading.

Paragraph (2) will be amended to add crimes to the types of subsequent events that the Board will consider in evaluating rehabilitation. It is necessary to include crimes among the types of events the Board will consider because such subsequent criminal conduct bears on the Board’s decision regarding whether the applicant is sufficiently rehabilitated to be licensed and conform to the requirements of licensure. This addition is also necessary to make the Board’s evaluation of rehabilitation criteria consistent between sections 1813 and 1814.

The amendment to paragraph (3) expands the rehabilitation criterion to include the time that elapsed since the original crime or act under consideration as grounds for discipline, plus the time that elapsed since any subsequent crime or act. It is necessary for the Board to consider the time that elapsed since the commission of all prior crimes and misconduct because the passage of time bears on a person’s rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation.

Paragraph (5) is the only entirely-new criteria. It simply loops in the criteria that is already specified in (a), to reiterate that this information must also be considered in conjunction with the other criteria specified in (b). This allows a more complete picture of the crime, parole/probation, and its context to be considered when considering rehabilitation. This is also necessary to ensure that all licensees convicted of a crime have the opportunity to be evaluated by the same set of rehabilitation criteria. For licensees that completed their criminal parole or probation without a violation, the Board would first evaluate their eligibility for licensure under the criteria in subdivision (a). If the licensee did not demonstrate sufficient rehabilitation, the Board would apply the broader set of criteria in subdivision (b). For licensees that did not complete their criminal parole or probation without a violation, the Board would apply the criteria in subdivision (b), which incorporates the criteria from subdivision (a). This way, similarly-situated licensees (those being considered for discipline based on a conviction) have the benefit of the same set of criteria.

Under paragraph (6) the Board would consider evidence that a licensee's conviction was dismissed pursuant to Penal Code section 1203.4. This is an existing regulatory requirement, and it is necessary to consider dismissal proceedings because they are relevant to the Board's evaluation of whether a licensee is rehabilitated. The word "expungement" would be amended to "dismissal," but this is not a substantive change. Dismissal is simply a more accurate description of the proceedings conducted under Penal Code section 1203.4. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1129, fn.5.)

Anticipated Benefits: The proposed amendments provide transparency and clarity about how the Board is to evaluate whether a licensee is rehabilitated. This benefits licensees who have a conviction or disciplinary actions because it gives them an idea about how they will be evaluated and may help them in their decision on what information they may want to submit to the Board to attest to their rehabilitation. It also benefits Board members and staff, as it gives them some uniform criteria to apply when making a determination of rehabilitation or when discussing how the process works with stakeholders. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria. This will provide predictability in the discipline process and uniformity of rehabilitation criteria across DCA.

Amend CCR Title 16, Section 1888 – Uniform Standards Related to Substance Abuse and Disciplinary Guidelines, and the Corresponding Document that is Incorporated by Reference via this section Titled “Uniform Standards Related to Substance Abuse and Disciplinary Guidelines” Dated October 2015

Proposed Change/Purpose: 16 CCR section 1888 incorporates the Board's "Uniform Standards Related to Substance Abuse and Disciplinary Guidelines" (Uniform Standards/Disciplinary Guidelines) into regulation by reference. This document is relied on by Board members, Board staff, the Attorney General's Office, Administrative Law Judges, and other interested parties to set standards and guidelines when disciplining licensees for substance abuse or other violations of the law.

There is a section on page 38 of the Uniform Standards/Disciplinary Guidelines that lists the rehabilitation criteria outlined in section 1814 (it can be found under the heading "Reinstatement/Reduction of Penalty Hearings"). Because AB 2138 required amendments to the rehabilitation criteria in section 1814, the rehabilitation criteria listed on page 38 are out-of-date and need to be updated.

To avoid issues like this if section 1814 changes again in the future, the amendment strikes the language specifically listing the criteria, and instead simply references the criteria outlined in section 1814.

In addition, the last paragraph on page 38 of the Uniform Standards/Disciplinary Guidelines contains an obsolete reference to “Reinstatement or Reduction of Penalty” in BPC section 4982.24. This section no longer exists. This topic is now covered in BPC section 4990.30, so the reference has been changed. In addition, section 4990.30 now uses the terminology “Reinstatement or Modification of the Penalty”, and so the word “Reduction” has been replaced with the word “Modification” for consistency with statute.

Finally, since the Uniform Standards/Guidelines are being updated, the date of the document needs to be revised from October 2015 to the date that OAL determines these regulations become effective. This needs to be done in section 1888, which references the full title of the document with the date, and also on the document’s cover page.

Factual Basis/Rationale: These changes are necessary to ensure that the Uniform Standards/Disciplinary Guidelines are kept up-to-date and are not reflecting outdated or incorrect information.

Anticipated Benefits: Keeping the Uniform Standards/Disciplinary Guidelines current benefits all stakeholders who participate in the Board’s enforcement process, because it ensures clarity and avoids confusion that would be caused if the Uniform Standards/Disciplinary Guidelines are not consistent with corresponding statutes and regulations.

Amend CCR Title 16, Section 1888.1 – Required Actions Against Registered Sex Offenders

Proposed Change/Purpose: AB 2138 amends BPC section 480 and the conditions under which a board may deny a license. It now states that one of the reasons a board may deny a license is if “The applicant was convicted of ... a crime for which registration is required pursuant to paragraph (2) or (3) of subdivision (d) of Section 290 of the Penal Code.” (BPC section 480(a)(1)(A))

Regulation section 1888.1 discusses the denial of a license if an individual is required to register as a sex offender pursuant to Penal Code section 290. However, BPC section 480(a)(1)(A) only permits such denial if registration is required under Penal Code section 290(d)(2) or (3). Therefore, section 1888.1(a)(1) is being amended to state an application must be denied *if the crime meets the conditions for denial specified in BPC section 480.*

Factual Basis/Rationale: This amendment is necessary because it ensures that the denial required by regulation is consistent with the requirements of BPC section 480.

Anticipated Benefits: This amendment benefits all interested parties (Board members, staff, applicants who may be affected by this section, attorneys, etc.) by ensuring that the regulations are clear and do not conflict with the law, which could cause confusion.

Underlying Data

1. AB 2138 (Chapter 995, Statutes of 2018)

Business Impact The proposed regulation will not have a significant adverse economic impact on businesses as the regulations do not directly affect businesses. This initial determination is because this regulation is based on the requirements of AB 2138. The purpose of AB 2138 is to reduce barriers for licensure for applicants and licensees with criminal histories or license discipline if they can demonstrate evidence of rehabilitation; it does not impose more rigorous requirements on the licensure process. The bill and corresponding regulations could increase the pool of potential employees to businesses who are seeking to hire a Board licensee.

Economic Impact Assessment

This regulatory proposal will have the following effects:

- It may create and will not eliminate jobs within the State of California because the proposed regulation seeks to reduce barriers to licensure for applicants with criminal or disciplinary history; therefore, it seeks to promote increased ability to become licensed, which could lead to increased job opportunities for some.
- It will not eliminate existing businesses within the State of California because the proposed regulation does not directly affect those hiring the Board's licensees. However, it may create some new businesses if a person who was previously unable to obtain licensure due to past convictions or discipline is now able to become licensed and decides to go into business for themselves.
- It may affect the expansion of businesses currently doing business within the State of California because the proposed regulatory action seeks to broaden the ability of those with a past criminal or disciplinary history to obtain licensure. If more individuals are able to be licensed, businesses will be able to hire more licensees if they desire.
- This regulatory proposal benefits the health and welfare of California residents, because it may increase the ability of some individuals to obtain a Board license

where they previously could not, thereby increasing the supply of, and therefore access to, licensed mental health professionals.

- This regulatory proposal does not affect worker safety because it seeks to increase the ability of some individuals to obtain a Board license with past convictions or discipline if they meet certain criteria and show evidence of rehabilitation. It does not require boards to issue a license to those with recent substantially related convictions (as defined by the proposed regulations) or serious felony convictions (as defined by Penal Code section 1192.7).
- This regulatory proposal does not benefit the State's environment because the proposed regulatory action does not involve any topic that induces harm or benefit to the environment in the State.

Specific Technologies or Equipment

This regulation does not mandate the use of 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:

1. Option 1: Pursue a regulatory change that requires the Board to find rehabilitation if the applicant or licensee completed the terms of their criminal probation or parole. Courts historically rejected the view that compliant individuals are rehabilitated. "The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense." (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal App.3d 461, 473) Therefore, this alternative was rejected, because the Board believes that reviewing each individual on the basis of multiple criteria better indicates rehabilitation and ensures no danger to the public's health, safety, and welfare.
2. Option 2: Not adopt the regulations. This alternative was rejected because AB 2138 requires the Board to adopt regulations for its implementation.