

MEDICAL BOARD OF CALIFORNIA

INITIAL STATEMENT OF REASONS

Hearing Date: No hearing has been scheduled for the proposed action.

Subject Matter of Proposed Regulations: Criminal Conviction Substantial Relationship and Rehabilitation Criteria

Sections Affected: Title 16, Division 13, Chapter 1, Article 2, of the California Code of Regulations (CCR) section 1309; Title 16, Division 13, Chapter 2, Article 3, CCR sections 1360, 1360.1, and 1360.2; and Title 16, Division 13, Chapter 4.3, Article 5, CCR sections 1379.68, 1379.70, and 1379.72.

BACKGROUND AND STATEMENT OF THE PROBLEM

The Medical Board of California (Board) licenses and regulates allopathic physicians and surgeons and licensed midwives, and registers and regulates research psychoanalysts, student research psychoanalysts, and polysomnography technologists, technicians, and trainees.

In accordance with the statutory amendments implemented by Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018), by 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 profession it regulates by using specified criteria, including the nature and gravity of the crime, the number of years elapsed since the date of the crime, 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, “[rehabilitation...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, supra*, 29 Cal.App.5th at 1135.)

CCR section 1360 establishes the criteria for determining when a crime is substantially related to the qualifications, functions and duties of an applicant or licensee. CCR sections 1309, 1360.1, and 1360.2 establish the criteria for determining rehabilitation of an applicant, licensee, or petitioner when considering denial, suspension, revocation, or a petition for reinstatement of a license, respectively, on the ground of a criminal conviction. This proposed rulemaking will amend the aforementioned sections.

CCR sections 1379.68, 1379.70, and 1379.72 establish the criteria for determining when a crime is substantially related to the qualifications, functions and duties of a polysomnography registrant, and the criteria for determining rehabilitation of an applicant, registrant, or petitioner when considering denial, suspension, revocation, or a petition for reinstatement of a registration, respectively, on the ground of a criminal conviction. This proposed rulemaking will repeal the aforementioned sections applicable to polysomnography registrants, so that all of the Board's applicants, licensees, and petitioners are governed by the same regulations on these matters.

At the Board's May 9-10, 2019 meeting, this regulatory proposal was presented to the Board for its review and approval. (See Underlying Data, May 9-10, 2019 Meeting Agenda, Meeting Materials, and Meeting Minutes.) The Board approved the proposed language and delegated authority to Board staff to proceed through the rulemaking process and make any non-substantive changes, as necessary.

As required under AB 2138, the Board proposes to amend 16 CCR sections 1309, 1360, 1360.1, and 1360.2. The Board further proposes to repeal 16 CCR sections 1379.68, 1379.70, 1379.72.

SPECIFIC PURPOSE, ANTICIPATED BENEFIT, AND RATIONALE

Amend 16 CCR section 1309 (Rehabilitation Criteria for Denial of Licensure)

Existing law under 16 CCR section 1309 sets forth the rehabilitation criteria the Board shall consider when deciding whether to deny a license.

Section 1309, subdivision (a)

Purpose: The purpose of amending CCR section 1309, subdivision (a) is to comply with the requirements of AB 2138, section 9, and BPC section 482, subdivision (b)(1), which requires the Board to consider whether an applicant has made a showing of rehabilitation if the applicant has completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific list of criteria for the Board to consider for these applicants. The list of criteria is narrow in scope and limited to 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. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria

with other boards under the Department of Consumer Affairs (DCA).

Additionally, the Board intends for CCR section 1309 to apply to all applicants to the Board, including physicians and surgeons, licensed midwives, research psychoanalysts, and polysomnography registrants. Pursuant to BPC section 23.7, “license” means license, certificate, registration, or other means to engage in a business or profession regulated by the code. Accordingly, this proposal strikes extraneous references included within the definition of “license,” and makes other non-substantive changes.

Anticipated Benefit: The proposed revisions to CCR section 1309, subdivision (a) would provide transparency and clarity to license applicants who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria would help applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the deputy attorney general, the administrative law judge, and the applicant’s counsel) in advocating for or against, or deciding upon, applicants who have criminal convictions and completed parole or probation without a violation, by listing rehabilitation criteria applicable to the applicant.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of an applicant when considering denying or disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) A board may not deny an applicant a license based solely on a misdemeanor conviction if the applicant met the applicable requirements of the criteria of rehabilitation that the board developed. (BPC, § 480, sub. (b).)

Operative July 1, 2020, BPC section 480 will prohibit the Board from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or on the basis of the facts underlying a conviction, if the applicant “made a showing of rehabilitation pursuant to Section 482.” (BPC, § 480, sub. (b), as added by AB 2138, § 4.) In deciding whether to deny a license based on a conviction, the Board must consider evidence of the applicant’s rehabilitation, pursuant to the process established in the practice act, or its regulations, and as directed under BPC section 482. (BPC, § 481, sub. (c), as added by AB 2138, § 7; see also BPC, § 493, sub. (b)(2), as added by AB 2138, § 13 [“A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation”].)

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. (BPC, § 482, sub. (a), as added by AB 2138, § 9.) The Board must also decide whether an applicant “made a showing of rehabilitation,” if the applicant completed the criminal sentence at issue without a violation of parole or probation. (BPC, § 482, sub. (b), as added by AB 2138, § 9.)

AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when denying a license. The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR § 1309, sub. (d).) But 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 the 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.

The proposal specifies the following criteria for the Board to consider when making the determination that the applicant who has successfully completed the criminal sentence has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the length(s) of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. The criteria are necessary to assist the Board in evaluating rehabilitation. The purpose of evaluating an applicant’s rehabilitation is to determine whether the applicant is sufficiently reformed to be licensed. AB 2138, however, requires the Board to evaluate rehabilitation in the narrow context of an applicant who completed the criminal sentence without violating parole or probation. Consequently, each of these criteria are narrow in scope and would provide the Board with information specific to the applicant’s criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the applicant’s rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

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 on 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.

In addition to the substantive amendments, this proposal would make non-substantive changes to this subdivision. Pursuant to BPC section 23.7, "license" means license, certificate, registration, or other means to engage in a business or profession regulated by the code. Accordingly, this proposal strikes extraneous references to certificate and permit, which are included within the definition of "license." This change is necessary to improve clarity and readability.

Moreover, reference to "the division" is struck, because this is an old term. The Board no longer has "divisions," and each use of this term means the Board. (BPC, § 2002.)

Section 1309, subdivision (b)

Purpose: The purpose of amending CCR section 1309, subdivision (b) is to comply with the requirements of AB 2138, section 9, and BPC section 482, subdivision (b)(2), which requires the Board to consider whether an applicant has made a showing of rehabilitation if: (1) the applicant has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the applicant made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (a); or (3) denial is being considered based on something other than a crime, such as professional misconduct. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific, more comprehensive, list of criteria for the Board to consider for these applicants, which is not limited to the applicable parole or probation. The list of criteria incorporates the criteria from 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 considering “act(s)” that are the basis for the denial, since the Board may be evaluating the rehabilitation of an applicant where the ground for denial involves acts of professional misconduct, rather than a conviction. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to CCR section 1309 subdivision (b) would provide transparency and clarity to license applicants who have not completed their criminal sentence without a violation of parole or probation or otherwise do not qualify for consideration under subdivision (a). Providing the list of rehabilitation criteria would help license applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the deputy attorney general, the administrative law judge, and the applicant’s counsel) in advocating for or against, or deciding upon, applicants who do not qualify for consideration under subdivision (a), by listing rehabilitation criteria applicable to the applicant.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of an applicant when considering denying a license based on a conviction, acts of dishonesty, fraud, or deceit, or acts that would be grounds for discipline, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) A board may not deny an applicant a license based solely on a misdemeanor conviction, if the applicant met the applicable requirements of the criteria of rehabilitation that the board developed. (BPC, § 480, sub. (b).)

Operative July 1, 2020, BPC section 480 will prohibit the Board from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or on the basis of the facts underlying a conviction, if the applicant “made a showing of rehabilitation pursuant to Section 482.” (BPC, § 480, sub. (b), as added by AB 2138, § 4.) In deciding whether to deny a license based on a conviction, the Board must consider evidence of the applicant’s rehabilitation, pursuant to the process established in the practice act, or its regulations, and as directed under BPC section 482. (BPC, § 481, sub. (c), as added by AB 2138, § 7; see also BPC, § 493, sub. (b)(2), as added by AB 2138, § 13 [“A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation”].)

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 conviction. (BPC, § 482, sub. (a), as added by AB 2138, § 9.) The Board must also decide whether an applicant or licensee “made a showing of rehabilitation,” if the applicant did not complete the criminal sentence at issue without a violation of parole or probation, or the board finds, in applying its rehabilitation criteria, that the applicant is rehabilitated. (BPC, § 482, sub. (b), as added by AB 2138, § 9.) AB 2138 also authorized the Board to deny a license based on prior disciplinary misconduct.

AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when denying a license. The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR, § 1309, sub. (d).) But 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*, *supra*, 104 Cal.App.3d at 473; see also *In re Gossage*, *supra*, 23 Cal.4th at 1099 [“Since persons under the 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 has complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria. If, however, the applicant did not comply with the terms of parole or probation, the Board would apply its standard rehabilitation criteria, as modified in this proposal.

The proposal uses the existing rehabilitation criteria with the addition of the criteria specified in CCR section 1309, subdivision (a) and makes other minor revisions. Each of these criteria are designed to focus the Board’s evaluation on facts and circumstances relevant to an applicant’s rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the applicant’s rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

The Board will consider the nature and gravity of the crime or act for the same reasons as discussed for subdivision (a). This is the offense or misconduct against which the Board will judge the applicant’s rehabilitation. This is also already an existing regulatory criterion. The Board proposes to amend “severity” to “gravity.” This is not a substantive change and would make the regulation internally consistent.

The Board will also consider evidence of acts or crimes committed after the act or crime that is the basis for denial. Such acts or crimes typically reflect additional misconduct by the applicant and bear on the Board’s decision regarding whether the applicant is sufficiently rehabilitated to be licensed and conform to the requirements of licensure.

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person’s rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation.

The Board will consider whether the applicant complied with parole, probation, restitution or other sanctions imposed on the applicant. This criterion is 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.

The Board will also consider the criteria in subdivision (a). This is necessary to ensure that all applicants convicted of a crime have the opportunity to be evaluated under 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 under the criteria in subdivision (a), the Board would apply the broader 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.

The Board would consider rehabilitation evidence the applicant submitted. There was no change to this criterion, and the Board is required to consider such evidence under BPC section 481 subdivision (c). It is necessary to retain this requirement in order to consolidate the Board's rehabilitation criteria in one place.

Finally, the Board proposes to amend "subsections" to "subdivisions." This is not a substantive change and would apply the correct term. The Board would also make non-substantive, technical changes to reference to lettering and numbering for consistency.

Amend 16 CCR section 1360 (Substantial Relationship Criteria)

Section 1360, subdivision (a)

Purpose: The purpose of amending CCR section 1360, subdivision (a) is to expand the regulation to include discipline under BPC section 141, because the substantially related acts that are the basis for discipline in an out-of-state jurisdiction may be used to discipline a licensee under BPC section 141. This subdivision would also include substantially related "professional misconduct," since the Board may consider such misconduct in denying licenses under BPC section 480.

Additionally, the Board intends for CCR section 1360 to apply to all applicants and licensees of the Board, including physicians and surgeons, licensed midwives, research psychoanalysts, and polysomnography registrants. Pursuant to BPC section 23.7, "license" means license, certificate, registration, or other means to engage in a business or profession regulated by the code. Accordingly, this proposal strikes extraneous references included within the definition of "license." Moreover, references to the "Medical Practice Act" will be struck, since the Board regulates allied health care professionals, not just physicians and surgeons.

Finally, this proposal clarifies that substantially related crimes or acts include but are not limited to violating, attempting to violate, etc., any provision of state or federal law governing the applicant's or licensee's professional practice.

Anticipated Benefit: The proposed revisions to section 1360, subdivision (a) would provide clarity to license applicants and licensees that the Board is statutorily authorized to deny, suspend, or revoke a license, as applicable, on the basis of professional misconduct and discipline in an out-of-state jurisdiction. The proposal would also make aware relevant parties to any administrative appeal arising from a licensing decision (e.g., the deputy attorney general, the administrative law judge, respondent, and respondent's counsel) that when disciplining applicants or licensees for a criminal conviction, the Board is required to determine whether the act is substantially related to their professional practice using the listed criteria. Additionally the revisions will clarify that this subdivision is applicable to all Board applicants and licensees, not just those governed by the Medical Practice Act.

Rationale: BPC section 141 authorizes the Board to discipline a license on the basis of substantially related out-of-state discipline. BPC section 480 also authorizes the Board to deny a license application on the basis of substantially related formal discipline by a licensing Board in or outside of California. The regulation seeks to implement, interpret, and make specific BPC sections 141 and 480 by adding their relative provisions to the Board's substantial relationship criteria regulation. Accordingly, the proposal is necessary to provide the appropriate notice to applicants and licensees that discipline in an out-of-state jurisdiction and professional misconduct are grounds for license denial, suspension, or revocation, and implement the requirements of BPC sections 141 and 480. The proposal is also necessary to consolidate into one regulation the criteria the Board will apply in evaluating whether a crime or other misconduct is substantially related to the licensed profession.

Additionally, this proposal is necessary to clarify that CCR section 1360 applies to all applicants and licensees of the Board, including physicians and surgeons, licensed midwives, research psychoanalysts, and polysomnography registrants. Pursuant to BPC section 23.7, "license" means license, certificate, registration, or other means to engage in a business or profession regulated by the code. Accordingly, this proposal strikes extraneous references, such as "certificate" and "permit" included within the definition of "license." Moreover, references to the "Medical Practice Act" will be struck, since the Board regulates allied health care professionals not governed by the Medical Practice Act, not just physicians and surgeons.

Finally, this proposal clarifies that substantially related crimes or acts include but are not limited to violating, attempting to violate, etc., any provision of state or federal law governing the applicant's or licensee's professional practice. This change is necessary to provide clarity to applicants and licensees as to what the Board will be considering when determining whether a crime or act is substantially related to their practice.

Section 1360, subdivision (b)

Purpose: The purpose of adding CCR section 1360, subdivision (b) is to implement AB 2138 and BPC section 481, which require each board to develop criteria to aid it, 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 regulated by the boards.

Anticipated Benefit: The proposed language under section 1360, subdivision (b) would provide clarity and transparency to license applicants and licensees by listing the specific criteria the Board must consider when making the substantial relationship determinations applicable to criminal convictions. The proposal would also make aware relevant parties to any administrative appeal arising from a license denial (e.g., the deputy attorney general, the administrative law judge, respondent, and respondent's counsel) of the specific criteria used by the Board to determine whether a criminal conviction is substantially related to the applicant's or licensee's professional practice.

Rationale: BPC section 480 presently authorizes the Board to deny an application for licensure based on a conviction for a crime or act substantially related to the licensed business or profession. (BPC, § 480, sub. (a)(3)(B).) Likewise, section 490 authorizes the Board to suspend or revoke a license on the basis that the licensee was convicted of a crime substantially related to the qualifications, functions, or duties of the business or profession. (BPC, § 490, sub. (a).) BPC section 481 requires the boards to develop criteria to help evaluate whether a crime was substantially related to the regulated business or profession, and the Board established the criteria via regulations.

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, supra*, 29 Cal.App.5th at 1135.) Accordingly, in AB 2138, the Legislature amended BPC section 480 to limit the boards' ability to use prior convictions or acts when denying licenses. Beginning July 1, 2020, boards may not deny a license to an applicant because the applicant was convicted of a crime, or due to the acts underlying the conviction, if the applicant has a certificate of rehabilitation, was granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged. (BPC, § 480, sub. (b) & (c), as added by AB 2138, § 4.)

Absent these circumstances, AB 2138 will permit boards to deny a license when an applicant has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the regulated business or profession, and one of the following conditions exist: 1) the conviction occurred within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of: (a) a serious felony under Penal Code section 1192.7; (b) a registerable offense under Penal Code section 290, subdivision (d)(2) or (3)); or (c) a felony financial crime that is directly and adversely related to the fiduciary qualifications, functions, or duties of a specified business or profession regulated by the Accountancy Board, Professional Fiduciaries Bureau, Contractors State License Board,

Bureau of Security and Investigative Services, and Cemetery and Funeral Bureau; 2) the applicant is presently incarcerated for the crime; or 3) the applicant was released from incarceration for the crime within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of: (a) a serious felony under Penal Code section 1192.7; (b) a registerable offense under Penal Code section 290, subdivision (d)(2) or (3)); or (c) a felony financial crime that is directly and adversely related to the fiduciary qualifications, functions, or duties of specified businesses or professions regulated by the Accountancy Board, Professional Fiduciaries Bureau, Contractors State License Board, Bureau of Security and Investigative Services, and Cemetery and Funeral Bureau.

AB 2138 also specifies three criteria that boards must consider when evaluating whether a crime is “substantially related” to the regulated business or profession. 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.” (BPC, § 481, sub. (b), as added by AB 2138, § 7; see also BPC, § 493, sub. (b), as added by AB 2138, § 13.) Accordingly, the proposed regulation lists each of these criteria for the Board to consider when making the substantial relationship determination, except that the Board uses “crime” instead of “offense” for internal consistency within its regulations. The proposed addition of subdivision (b) is necessary to conform the regulation to statute, and to consolidate the Board’s substantial relationship criteria in one place.

Amend 16 CCR section 1360.1 (Rehabilitation Criteria for Suspensions or Revocations)

Existing law under 16 CCR section 1360.1 sets forth the rehabilitation criteria the Board shall consider when deciding whether to suspend or revoke a license.

Section 1360.1, subdivision (a)

Purpose: The purpose of amending CCR section 1360.1, subdivision (a), is to comply with the requirements of AB 2138, section 9, and BPC section 482, subdivision (b)(1), which requires the Board to consider whether a licensee has made a showing of rehabilitation if the licensee has completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific list of criteria for the Board to consider for these licensees. The list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of a licensee who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under the Department of Consumer Affairs (DCA).

Additionally, the Board intends for CCR section 1309 to apply to all licensees under the Board, including physicians and surgeons, licensed midwives, research psychoanalysts, and polysomnography registrants. Pursuant to BPC section 23.7, “license” means license, certificate, registration, or other means to engage in a business or profession regulated by the code. Accordingly, this proposal strikes extraneous references included within the definition of “license,” and makes other non-substantive changes.

Anticipated Benefit: The proposed revisions to CCR section 1360.1, subdivision (a), would provide transparency and clarity to licensees who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria would help licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license suspension or revocation (e.g., the deputy attorney general, the administrative law judge, and licensee’s counsel) in advocating for or against, or deciding upon, licensees who have criminal convictions and completed parole or probation without a violation, by listing rehabilitation criteria applicable to the licensee.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of a licensee when considering disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) A board may not suspend or revoke a license based solely on a misdemeanor conviction, if the licensee met the applicable requirements of the criteria of rehabilitation that the board developed. (BPC, § 480, sub. (b).)

AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when suspending or revoking a license. It requires the Board to decide whether an applicant or licensee “made a showing of rehabilitation” in two circumstances: (1) the licensee completed the applicable criminal sentence without a violation of parole or probation, or (2) the board finds, after applying its rehabilitation criteria, that the licensee is rehabilitated. (BPC, § 482, as added by AB 2138, § 9.)

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR § 1360.1, sub. (d) But 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*, *supra*, 104 Cal.App.3d at 473; see also *In re Gossage*, *supra*, 23 Cal.4th at 1099 [“Since persons under the 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 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.

The proposal specifies the following criteria for the Board to consider when making the determination that the licensee who has successfully completed the criminal sentence has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the length(s) of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms or conditions of parole or probation and the extent to which they bear on the licensee's rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. The criteria are necessary to assist the Board in evaluating rehabilitation. The purpose of evaluating a licensee's rehabilitation is to determine whether the licensee is sufficiently reformed to be licensed. AB 2138, however, requires the Board to evaluate rehabilitation in the narrow context of a licensee who completed the criminal sentence without violating parole or probation. Accordingly, each of these criteria are narrow in scope and would provide to the Board information specific to the licensee's criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the licensee's rehabilitation. In addition, to provide consistency with how the Board considers rehabilitation criteria, and uniformity with other DCA boards, the proposed criteria was adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

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*, *supra*, 29 Cal.3d at 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*, *supra*, 50 Cal.3d at 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.

Additionally, this proposal is necessary to clarify that CCR section 1360 applies to all applicants and licensees of the Board, including physicians and surgeons, licensed midwives, research psychoanalysts, and polysomnography registrants. References to the “Medical Practice Act” will be struck, since the Board regulates allied health care professionals not governed by the Medical Practice Act, not just physicians and surgeons. Moreover, pursuant to BPC section 23.7, “license” means license, certificate, registration, or other means to engage in a business or profession regulated by the code. Accordingly, this proposal strikes extraneous references, such as “certificate” and “permit” included within the definition of “license.” This change is necessary to improve clarity and readability.

Moreover, reference to “the division” is struck, because this is an old term. The Board no longer has “divisions,” and each use of this term means the Board. (BPC, § 2002.)

Section 1360.1, subdivision (b)

Purpose: The purpose of amending CCR section 1360.1, subdivision (b) is to comply with the requirements of AB 2138, section 9, and BPC section 482, subdivision (b)(2), which requires the Board to consider whether a licensee has made a showing of rehabilitation if: (1) the licensee has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the licensee made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (a); or (3) the Board’s decision is based on something other than a crime. Likewise here, the Board would consider the rehabilitation criteria in subdivision (b) if: (1) a licensee has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the licensee made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (a); or (3) the Board’s decision is based on something other than a crime, such as out-of-state discipline under BPC section 141.

As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific, more comprehensive, list of criteria for the Board to consider for these licensees, which is not limited to the applicable parole or probation. The list of criteria incorporates the criteria from 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 list of criteria also anticipates that the Board may be considering “act(s)” that are the basis for the denial, since the Board may be evaluating

the rehabilitation of a licensee where the ground for denial involves acts of professional misconduct, rather than a conviction. This proposal is also intended to provide predictability in the disciplinary process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to CCR section 1360.1, subdivision (b) would provide transparency and clarity to licensees who have not completed their criminal sentence without a violation of parole or probation or otherwise do not qualify for consideration under subdivision (a). Providing the list of rehabilitation criteria would help licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a suspension or revocation (e.g., the deputy attorney general, the administrative law judge, and the licensee's counsel) in advocating for or against, or deciding upon, licensees who do not qualify for consideration under subdivision (a), by listing rehabilitation criteria applicable to the licensee.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of a licensee when considering disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 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 based on a conviction. (BPC, § 482, sub. (a), as added by AB 2138, § 9.)

AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when suspending or revoking a license. It requires the Board to decide whether an applicant or licensee "made a showing of rehabilitation" in two circumstances: (1) the licensee completed the applicable criminal sentence without a violation of parole or probation, or (2) the board finds, after applying its rehabilitation criteria, that an applicant is rehabilitated. (BPC, § 482, as added by AB 2138, § 9.)

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR § 1360.1, sub. (d).) But 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*, *supra*, 104 Cal.App.3d at 473; see also *In re Gossage*, *supra*, 23 Cal.4th at 1099 ["Since persons under the 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 has complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other

standard rehabilitation criteria. If, however, the applicant did not comply with the terms of parole or probation, the Board would apply its standard rehabilitation criteria, as modified in this proposal.

The proposal uses the existing rehabilitation criteria with the addition of the criteria specified in CCR section 1360.1, subdivision (b)(5) and makes other minor revisions. Each of these criteria are designed to focus the Board's evaluation on facts and circumstances relevant to a licensee's rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the licensee's rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

The Board will consider the nature and gravity of the crime or act for the same reasons as discussed for subdivision (a). This is the offense or misconduct against which the Board will judge the licensee's rehabilitation. This is also already an existing regulatory criterion. The Board proposes to amend "severity" to "gravity" and "offense" to "crime." These are not substantive changes and would make the regulation internally consistent.

The Board will also consider evidence of the licensee's total criminal record. This is an existing regulatory criterion. It is necessary for the Board to consider the licensee's total criminal record because additional prior or subsequent misconduct by the licensee is relevant to the Board's decision regarding whether the licensee is sufficiently rehabilitated to be licensed and the licensee's willingness to conform to the requirements of licensure.

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation.

The Board will consider whether the licensee complied with parole, probation, restitution or other sanctions imposed on the licensee. This is an existing regulatory criterion. The information embraced in this criterion bears on a licensee's rehabilitation in terms of the licensee's willingness to make amends from prior misconduct and to conform to the rules of licensure. Accordingly, it is necessary for the Board to consider these elements to evaluate a licensee's reformation from prior misconduct.

The Board will also consider the criteria in subdivision (a). This is necessary to ensure that all licensees convicted of a crime have the opportunity to be evaluated under 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 under the criteria in subdivision (a), the Board would apply the broader 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.

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, supra*, 29 Cal.App.5th at 1129, fn.5.)

The Board would consider rehabilitation evidence the licensee submitted. This is an existing regulatory criterion. It is necessary to retain this requirement in order to maintain consistency between the Board's evaluation of rehabilitation in the licensing and discipline context. The Board would strike extraneous references, such as "certificate" and "permit" included within the definition of "license." (BPC, § 23.7.) This change is necessary to improve clarity and readability.

Amend 16 CCR section 1360.2 (Rehabilitation Criteria for Petitions for Reinstatement)

Existing law under 16 CCR section 1360.2 sets forth the rehabilitation criteria the Board shall consider when making a decision on a petition for reinstatement of a license.

Section 1360.2, subdivision (a)

Purpose: The purpose of amending CCR section 1360.2, subdivision (a), is to make this subdivision, which is applicable to evaluating the rehabilitation of those seeking reinstatement of a license, consistent with the regulations setting forth rehabilitation criteria relevant to applicants subject to denial and licensees subject to suspension or revocation. Although rehabilitation criteria for those seeking reinstatement of a license is not specifically referenced in AB 2138, the purpose of these proposed amendments is to comply with the goal of AB 2138 to reduce barriers to licensure for those who can demonstrate rehabilitation.

BPC section 482 requires the Board to consider whether an applicant or licensee has made a showing of rehabilitation if they have completed the criminal sentence at issue without a violation of parole or probation. Under this rulemaking, these provisions will likewise be applied to petitioners for reinstatement. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific list of criteria for the Board to consider for these petitioners. The list of criteria is narrow in scope and limited to 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 or licensee who completed the criminal sentence without a parole or probation violation. This

proposal is also intended to provide predictability in the reinstatement process and uniformity of rehabilitation criteria with other boards under the Department of Consumer Affairs (DCA), and across this Board's own regulations relating to rehabilitation.

Further, pursuant to BPC section 23.7, "license" means license, certificate, registration, or other means to engage in a business or profession regulated by the code. Accordingly, this proposal strikes extraneous references included within the definition of "license." Additional changes are made to clarify that section 1360.2 is applicable to all health care professionals licensed by the Board, including physicians and surgeons, licensed midwives, research psychoanalysts, and polysomnography registrants.

Anticipated Benefit: The proposed revisions to CCR section 1360.2, subdivision (a), would provide transparency and clarity to petitioners seeking reinstatement who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria would help petitioners understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a denial of reinstatement (e.g., the deputy attorney general, the administrative law judge, and the petitioner's counsel) in advocating for or against, or deciding upon, petitioners who have criminal convictions and completed parole or probation without a violation, by listing rehabilitation criteria applicable to the petitioner. Additionally the revisions will clarify that this subdivision is applicable to all individuals regulated by the Board who are seeking reinstatement of their license.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of an applicant when considering denial of a license and licensee when considering suspending or revoking a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) Through its regulations, the Board applies the same criteria to evaluate rehabilitation of a petitioner for reinstatement as it does to evaluate rehabilitation of applicants and licensees. Consequently, the Board is using the rationale for the proposed changes to CCR sections 1309 and 1360.1 as support for the proposed changes to 1360.2.

AB 2138 requires the Board to decide whether an applicant or licensee "made a showing of rehabilitation" in two circumstances: (1) the individual completed the applicable criminal sentence without a violation of parole or probation, or (2) the board finds, after applying its rehabilitation criteria, that the individual is rehabilitated. (BPC, § 482, as added by AB 2138, § 9.) This proposal extends these requirements to the consideration of petitions for reinstatement.

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR § 1360.2 sub. (d).) But courts historically rejected the view that compliant individuals 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, supra*, 104 Cal.App.3d at 473; see also *In re Gossage, supra*, 23 Cal.4th at 1099 [“Since persons under the 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, consistent with AB 2138, the Board will now consider whether a petitioner who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

The proposal specifies the following criteria for the Board to consider when making the determination that the petitioner who has successfully completed the criminal sentence has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the length(s) of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms or conditions of parole or probation and the extent to which they bear on the petitioner’s rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. The criteria are necessary to assist the Board in evaluating rehabilitation.

The purpose of evaluating a petitioner’s rehabilitation is to determine whether the petitioner is sufficiently reformed to be licensed. AB 2138, however, requires the Board to evaluate rehabilitation for applicants and licensees in the narrow context of an individual who completed the criminal sentence without violating parole or probation. Consequently, in applying AB 2138 provisions to petitioners for reinstatement, each of these criteria are narrow in scope and would provide to the Board information specific to the petitioner’s criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the petitioner’s rehabilitation. In addition, to provide consistency with how the Board considers rehabilitation criteria, and uniformity with other DCA boards, the proposed criteria was adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

The Board must consider the nature and gravity of the crime, because this is the offense against which the petitioner’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 petitioner served probation or parole without a violation is relevant to whether the petitioner is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti, supra*, 29 Cal.3d at 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 petitioner is sufficiently rehabilitated.

The Board must consider the terms or conditions of parole or probation and the extent to which they bear on the petitioner's rehabilitation, because the actual parole or probation terms can inform the Board on whether the petitioner is rehabilitated. For instance, in cases where a petitioner was convicted of a crime involving alcohol, probation terms requiring the petitioner to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the petitioner's rehabilitation. (See *In re Billings*, *supra*, 50 Cal.3d at 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 petitioner's good behavior, this would bear on the Board's evaluation of the petitioner's rehabilitation and willingness to conform to the rules of licensure.

Moreover, pursuant to BPC section 23.7, "license" means license, certificate, registration, or other means to engage in a business or profession regulated by the code. Accordingly, this proposal strikes extraneous references, such as "certificate" and "permit holder" included within the definition of "license." This change is necessary to improve clarity and readability.

Additionally, this proposal will add references to BPC sections 2307, 2522, and 3576.1, which set forth requirements for petitioning for reinstatement for physicians and surgeons, licensed midwives and polysomnography registrants, respectively. Research psychoanalysts petitioning for reinstatement are covered under Government Code section 11522, which remains identified in this section. These changes will provide clarity that section 1360.2 applies to all petitioners seeking reinstatement of their license under the Board.

Finally, reference to "the division" is struck, because this is an old term. The Board no longer has "divisions," and each use of this term means the Board. (BPC, § 2002.)

Section 1360.2, subdivision (b)

Purpose: The purpose of amending CCR section 1360.2, subdivision (b) is to extend the requirements of AB 2138, section 9, and BPC section 482, subdivision (b)(2) to consideration of petitioners seeking reinstatement of their license.

BPC section 482, subdivision (b)(2), requires the Board to consider whether an individual has made a showing of rehabilitation if: (1) the individual has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the individual made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (a); or (3) the Board's decision is based on something

other than a crime. Likewise here, the Board would consider the rehabilitation criteria in subdivision (b) if: (1) a petitioner has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the petitioner made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (a); or (3) the Board's decision is based on something other than a crime, such as out-of-state discipline under BPC section 141.

As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific, more comprehensive, list of criteria for the Board to consider for these petitioners, which is not limited to the applicable parole or probation. The list of criteria incorporates the criteria from subdivision (a) for petitioners convicted of a crime, so that similarly-situated petitioners 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 considering "act(s)" that are the basis for the denial of the petition, since the Board may be evaluating the rehabilitation of a petitioner where the ground for denial involves acts of professional misconduct, rather than a conviction. This proposal is also intended to provide predictability in the licensing, disciplinary, and reinstatement process across the Board's regulations, and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to CCR section 1360.2, subdivision (b) would provide transparency and clarity to petitioners who have not completed their criminal sentence without a violation of parole or probation or otherwise do not qualify for consideration under subdivision (a). Providing the list of rehabilitation criteria would help petitioners understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a denial of a petition for reinstatement (e.g., the deputy attorney general, the administrative law judge, and the petitioner's counsel) in advocating for or against, or deciding upon, petitioners who do not qualify for consideration under subdivision (a), by listing rehabilitation criteria applicable to the petitioner.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of an applicant when considering denial of a license and licensee when considering suspending or revoking a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) Through its regulations, the Board applies the same criteria to evaluate rehabilitation of a petitioner for reinstatement as it does to evaluate rehabilitation of applicants and licensees. Consequently, the Board is using the rationale for the proposed changes to CCR sections 1309 and 1360.1 as support for the proposed changes to section 1360.2.

AB 2138 does not prescribe new rehabilitation criteria for the Board to evaluate when considering a petition for reinstating a license following revocation or surrender. As applied to applicants and licensees, it requires the Board to decide whether an individual "made a showing of rehabilitation" in two circumstances: (1) the individual completed the applicable criminal sentence without a violation of parole or probation, or

(2) the board finds, after applying its rehabilitation criteria, that the individual is rehabilitated. (BPC, § 482, as added by AB 2138, § 9.) This proposal extends these requirements to the consideration of petitions for reinstatement.

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR § 1360.2, sub. (d).) But courts historically rejected the view that compliant individuals 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, supra*, 104 Cal.App.3d at 473; see also *In re Gossage, supra*, 23 Cal.4th at 1099 [“Since persons under the 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 will now consider whether a petitioner who has complied with the terms of parole or probation made a showing of rehabilitation sufficient for reinstatement of their license, even without considering other standard rehabilitation criteria. If, however, the petitioner did not comply with the terms of parole or probation, the Board would apply its standard rehabilitation criteria, as modified in this proposal.

The proposal uses the existing rehabilitation criteria with the addition of the criteria specified in CCR section 1360.2, subdivision (a) and makes other minor revisions. Each of these criteria are designed to focus the Board’s evaluation on facts and circumstances relevant to a petitioner’s rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the petitioner’s rehabilitation. In addition, to provide consistency in the licensing, disciplinary, and reinstatement process across the Board’s regulations and uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

The Board will consider the nature and gravity of the crime or act for the same reasons as discussed for subdivision (a). This is the offense or misconduct against which the Board will judge the petitioner’s rehabilitation. This is also already an existing regulatory criterion. The Board proposes to amend “severity” to “gravity” This is not a substantive change and would make the regulation internally consistent.

The Board will also consider evidence of the petitioner’s total criminal record. This is an existing regulatory criterion. It is necessary for the Board to consider the petitioner’s total criminal record because additional prior or subsequent misconduct by the petitioner is relevant to the Board’s decision regarding whether the petitioner is sufficiently rehabilitated to be reinstated and the petitioner’s willingness to conform to the requirements of licensure.

The Board will consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation, although "subsection" will be corrected to "subdivision," which is a non-substantive change.

The Board will consider the criteria set forth in CCR section 1360.1, subdivisions (b)(2), (b)(4), and (b)(6), which will evaluate whether the petitioner complied with parole, probation, restitution or other sanctions imposed on the petitioner. This is an existing regulatory criterion, with only technical changes proposed. The information embraced in this criterion bears on a petitioner's rehabilitation in terms of the petitioner's willingness to make amends from prior misconduct and to conform to the rules of licensure. Accordingly, it is necessary for the Board to consider these elements to evaluate a petitioner's reformation from prior misconduct.

The Board will also consider the criteria in subdivision (a). This is necessary to ensure that all petitioners convicted of a crime have the opportunity to be evaluated under the same set of rehabilitation criteria. For petitioners 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 petitioner did not demonstrate sufficient rehabilitation under the criteria in subdivision (a), the Board would apply the broader criteria in subdivision (b). For petitioners 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 petitioners (those being considered for discipline based on a conviction) have the benefit of the same set of criteria.

The Board would consider rehabilitation evidence the petitioner submitted. This is an existing regulatory criterion. It is necessary to retain this requirement in order to maintain consistency between the Board's evaluation of rehabilitation in the licensing, discipline, and reinstatement context.

Repeal 16 CCR section 1379.68 (Substantial Relationship Criteria)

Purpose: The purpose for repealing CCR section 1379.68 is to have CCR section 1360, as amended in this rulemaking, be applicable to all Board applicants and licensees, including polysomnography registrants. This will provide interested parties a single place to look in the Board's regulations for substantial relationship criteria.

Anticipated Benefit: The repeal of CCR section 1379.68 will streamline the Board's regulations by having all individuals licensed and regulated by the Board, including polysomnography registrants, covered by the same regulation on substantial relationship criteria. The Board anticipates that this will improve clarity and efficiency for interested parties, including the applicant or petitioner and their counsel, deputy attorney general, administrative law judge, and Board staff.

Rationale: Polysomnography registrants are the only allied health care professionals under the Board with a separate section addressing substantial relationship criteria. This proposed rulemaking will streamline the Board's regulations so that CCR section 1360, as modified, applies to physicians and surgeons and all allied health care professionals licensed and regulated by the Board.

The Board's regulations do not have separate sections establishing substantial relationship criteria for licensed midwives or research psychoanalysts, so it can cause confusion to interested parties to have a separate section on this matter for polysomnography registrants. Consequently, for clarity and efficiency, the Board has proposed modifications to CCR section 1360 to make it applicable to all of the Board's licensees, including polysomnography registrants. With these changes, it is not necessary, and will create confusion and inefficiencies to have a separate section applied to polysomnography registrants. Accordingly, this proposed rulemaking will repeal section 1379.68.

Repeal 16 CCR section 1379.70 (Criteria for Rehabilitation for Denial and Reinstatement)

Purpose: The purpose for repealing section 1379.70 is to have CCR sections 1309 and 1360.2, as amended in this rulemaking, be applicable to all Board applicants and petitioners for reinstatement, including polysomnography registrants. This will provide interested parties a single place to look in the Board's regulations, depending on whether they are looking for rehabilitation criteria for denial of licensure (CCR section 1309) or rehabilitation criteria for petitions for reinstatement (CCR section 1360.2).

Anticipated Benefit: The repeal of section 1379.70 will streamline the Board's regulations by having all individuals licensed and regulated by the Board, including polysomnography registrants, covered by the same regulations on rehabilitation criteria for denial of licensure (CCR section 1309) and rehabilitation criteria for petitions for reinstatement (CCR section 1360.2). The Board anticipates that this will improve clarity and efficiency for interested parties, including the applicant or petitioner and their counsel, deputy attorney general, administrative law judge, and Board staff.

Rationale: Polysomnography registrants are the only allied health care professionals under the Board with a separate section addressing rehabilitation criteria for denial of licensure and reinstatement. This proposed rulemaking will streamline the Board's regulations so that CCR section 1309 (rehabilitation criteria for denial of licensure) and CCR section 1360.2 (rehabilitation criteria for petitions for reinstatement), as modified, applies to physicians and surgeons and all allied health care professionals licensed and regulated by the Board.

The Board's regulations do not have separate sections establishing rehabilitation criteria for denial or reinstatement for licensed midwives or research psychoanalysts, so it can cause confusion to interested parties to have a separate section on these matters for polysomnography registrants. Consequently, for clarity and efficiency, the Board has

proposed modifications to CCR sections 1309 and 1360.2 to make them applicable to all of the Board's applicants and petitioners for reinstatement, including polysomnography registrants. With these changes, it is not necessary, and will create confusion and inefficiencies to have a separate section applied to polysomnography registrants. Accordingly, this proposed rulemaking will repeal section 1379.70.

Repeal 16 CCR section 1379.72 (Criteria for Suspensions and Revocations)

Purpose: The purpose for repealing CCR section 1379.72 is to have CCR section 1360.1, as amended in this rulemaking be applicable to all Board applicants and licensees, including polysomnography registrants. This will provide interested parties a single place to look in the Board's regulations for rehabilitation criteria for suspensions or revocations.

Anticipated Benefit: The repeal of CCR section 1379.72 will streamline the Board's regulations by having all individuals licensed and regulated by the Board, including polysomnography registrants, covered by the same regulation on rehabilitation criteria for suspensions or revocations. The Board anticipates that this will improve clarity and efficiency for interested parties, including the licensee and their counsel, deputy attorney general, administrative law judge, and Board staff.

Rationale: Polysomnography registrants are the only allied health care professionals under the Board with a separate section addressing rehabilitation criteria for suspensions or revocations. This proposed rulemaking will streamline the Board's regulations so that CCR section 1360.1, as modified, applies to physicians and surgeons and all allied health care professionals licensed and regulated by the Board.

The Board's regulations do not have separate sections establishing rehabilitation criteria for suspensions or revocations for licensed midwives or research psychoanalysts, so it can cause confusion to interested parties to have a separate section on this topic for polysomnography registrants. Consequently, for clarity and efficiency, the Board has proposed modifications to CCR section 1360.1 to make it applicable to all of the Board's licensees, including polysomnography registrants. With these changes, it is not necessary, and will create confusion and inefficiencies to have a separate section applied to polysomnography registrants. Accordingly, this proposed rulemaking will repeal section 1379.72.

Underlying Data

- May 9-10, 2019 Board Meeting Agenda; Relevant Meeting Materials; and Meeting Minutes

Business Impact

The proposed regulations will not have a significant adverse economic impact on businesses as the regulations do not directly affect businesses. This initial

determination is based on the purpose of AB 2138, which sought to reduce barriers to licensure for applicants and licensees with criminal histories or licensure discipline. It is also based on the lack of testimony at the Board's meeting that the regulation would impact businesses. The Board anticipates that the proposed regulations will impact businesses to the extent that individuals are able to be licensed, reinstated, or retain licensure under the proposal. The Board does not know how many individuals will gain or retain licensure but does not anticipate the number to significantly impact businesses.

Economic Impact Assessment

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for individuals with criminal histories or professional discipline to obtain and maintain licensure.
- It will not create new businesses or eliminate existing business within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for individuals with criminal histories or professional discipline to obtain and maintain licensure. Few medical professionals will be impacted, and the Board already reviews evidence of rehabilitation in a manner that is similar to the changes provided for in the proposed amendments. Nonetheless, businesses may have a greater pool of licensed professionals to choose from as barriers to licensure are reduced.
- It will not affect the expansion of businesses currently doing business within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for individuals with criminal histories or professional discipline to obtain and maintain licensure. Few medical professionals will be impacted, and the Board already reviews evidence of rehabilitation in a manner that is similar to the changes provided for in the proposed amendments. Nonetheless, businesses may have a greater pool of licensed professionals to choose from as barriers to licensure are reduced.
- This regulatory proposal benefits the health and welfare of California residents because it would increase their access to licensed health care professionals.
- This regulatory proposal does not affect worker safety because it establishes criteria, based upon recent statutory mandates for licensure following an individual's criminal conviction or professional discipline. It does not involve worker safety.
- This regulatory proposal does not affect the state's environment because it only regulates license applicants, petitioners, and licensees and their qualifications for licensure following a criminal conviction or professional discipline. It does not involve environmental issues.

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 that were considered and the reason the alternative was rejected or adopted:

- Option 1: To pursue a regulatory change that requires the Board to find rehabilitation if the applicant, licensee, or petitioner completed the terms of their criminal probation or parole. Courts give little weight to the fact that an individual did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole since they are under the direct supervision of correctional authorities and are required to behave in an exemplary fashion. As such, the Board believes that reviewing each individual on the basis of multiple criteria is the better indicator whether individuals are rehabilitated and not a danger to the public's health, safety, and welfare. For these reasons, the Board rejected this option.
- Option 2: Do nothing, meaning the Board would not adopt the regulations. The Board opted not to pursue this option because per AB 2138, the Board is mandated to adopt proposed regulations by July 1, 2020.