

**BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS,
AND GEOLOGISTS**

INITIAL STATEMENT OF REASONS

**Title 16, California Code of Regulations
Sections 416 and 3060 – Substantial Relationship Criteria
Sections 418 and 3061 – Criteria for Rehabilitation**

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

Subject Matter of Proposed Regulations: Substantial Relationship Criteria and Criteria for Rehabilitation

Sections Affected: Sections 416, 418, 3060, and 3061 of Title 16 of the California Code of Regulations (CCR)

Background and Statement of the Problem:

The Board for Professional Engineers, Land Surveyors, and Geologists (Board) enforces the Professional Engineers Act (Business and Professions Code [BPC] section 6700, et seq.), the Geologist and Geophysicist Act (Business and Professions Code section 7800, et seq.), and the Professional Land Surveyors' Act (Business and Professions Code section 8700, et seq.), and regulates licensees and certificate holders under its jurisdiction. The Board currently licenses approximately 106,828 individuals in several disciplines of professional engineering, land surveying, geology, and geophysics. The Board receives an average of 6,400 applications per year and has had zero denials for criminal convictions in the last three fiscal years.

BPC section 141 authorizes the Board to discipline a licensee 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.

In accordance with the statutory amendments implemented by Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018), which become operative on July 1, 2020, BPC section 481 will impose specific requirements on the criteria that the Board uses 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. Furthermore, 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 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, the amendments to BPC section 482, which become operative July 1, 2020, will require the Board to consider whether an applicant or licensee has made a showing of rehabilitation if one of two conditions are met, 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.)

16 CCR 416 and 3060 establish the Board’s criteria for determining when a crime or other misconduct is substantially related to the qualifications, functions, and duties of a licensee. 16 CCR 418 and 3061 establish the criteria for determining rehabilitation of an applicant or licensee when considering denial, suspension, or revocation of a license on the ground of a criminal conviction or other misconduct, as well as when considering a petition for reinstatement of a revoked license.

At the Board’s December 13, 2018, and February 21, 2019, meetings, this regulatory proposal was presented to the Board for its review and approval. (see: Material Relied Upon) At the February meeting, the Board approved the proposed amendments to 16 CCR 416, 418, 3060, and 3061 to conform the regulations to the statutory changes enacted by AB 2138 and directed staff to begin the rulemaking process so that the amendments will become effective on July 1, 2020, when the changes to the statutes become operative, with the understanding that staff will make the changes discussed by the Board during the meeting, as well as any other grammatical or typographical changes, and with the understanding that the proposal will then be submitted to the Department of Consumer Affairs and the Business, Consumer Services and Housing Agency for pre-notice review, and, if there are any substantive changes to the language, it would be returned to the Board for further consideration.

As required under AB 2138, the Board proposes to amend Sections 416, 418, 3060, and 3061 of title 16 of the California Code of Regulations to adhere to these mandates and revise its substantial relationship criteria and criteria for rehabilitation.

SPECIFIC PURPOSE, ANTICIPATED BENEFIT, AND RATIONALE:

Amend Sections 416 and 3060 of, respectively, Article 1 of Division 5, and Article 5 of Division 29, of Title 16 of the CCR (Substantial Relationship Criteria)

Sections 416, subdivision (a), and 3060, subdivision (a)

Purpose: The purpose of amending subdivision (a) of CCR sections 416 and 3060 is to expand the regulations 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 as amended by AB 2138. The subdivisions would be amended to reword and move to subdivision (c) the phrase “[s]uch crimes or acts shall include but not be limited to those involving the following.”

Anticipated Benefit: The proposed revisions to subdivision (a) of 16 CCR 416 and 3060 will 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 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) aware that when disciplining applicants or licensees for a criminal conviction, the Board is required to determine whether the act is substantially related to the practice of professional engineering, land surveying, geology, or geophysics using the listed criteria.

Rationale: The regulations seek to implement, interpret, and make specific BPC sections 141 and 480 by adding their relative provisions to the Board’s substantial relationship criteria regulations. Accordingly, the proposal is necessary to bring uniformity in how the Board evaluates substantially related misconduct 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, and implement the requirements of BPC sections 141 and 480.

Sections 416, subdivision (b), and 3060, subdivision (b)

Purpose: The purpose of adding subdivision (b) to 16 CCR 416 and 3060 is to implement AB 2138, specifically BPC section 481, which requires 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. The amendments to BPC section 481 by AB 2138 will require such criteria to include certain specific, enumerated factors, which by way of

this regulatory proposal, are sought to be included in the Board's regulations regarding its substantial relationship criteria.

Anticipated Benefit: The proposed revisions to subdivision (b) of CCR sections 416 and 3060 will 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 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) aware of the specific criteria used by the Board to determine whether a criminal conviction is substantially related to the practice of professional engineering, land surveying, geology, or geophysics.

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 regulated profession. (BPC, § 480, subd. (a)(3)(B).) Likewise, BPC 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 regulated profession. (BPC, § 490, subd. (a).) BPC section 481 requires the Boards to develop criteria to help evaluate whether a crime was substantially related to the regulated 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* (2018) 29 Cal.App.5th 1119, 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 in an granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged. (BPC, § 480, subds. (b) & (c), as amended 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 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 specified 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, subd. (b), as amended by AB 2138, § 7; see also BPC, § 493, subd. (b), as amended by AB 2138, § 13.) Accordingly, the proposed regulations list each of these criteria for the Board to consider when making the substantial relationship determination. This proposed addition is necessary to conform the regulations to statute.

Sections 416, subdivision (c), and 3060, subdivision (c)

Purpose: The purpose of amending subdivision (c) of 16 CCR 416 and 3060 is to clarify that crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a Board licensee include, but are not limited to, violating or aiding and abetting any person in the violation of other state or federal laws governing the practice of professional engineering, land surveying, geology, or geophysics or the conviction of a crime arising from or in connection with the practice of geology or geophysics. The proposal also makes make minor technical revisions to this subdivision to accommodate the revisions made to subdivision (a).

Anticipated Benefit: The proposed revisions to subdivision (c) of 16 CCR 416 and 3060 will provide clarity to license applicants and licensees of the specific crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a Board licensee. The proposal would also make 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) aware that substantially related crimes, professional misconduct, and acts include violations of other state or federal laws governing the practice of professional engineering, land surveying, geology, or geophysics.

Rationale: The current regulations provide that crimes or acts that are substantially related to the practice of professional engineering, land surveying, geology, or geophysics

include violating or aiding and abetting any person in the violation of any provisions of the licensing act and, for professional engineers and land surveyors, conviction of a crime arising from or in connection with the practice of professional engineering or land surveying. As reflected in BPC sections 141 and 480, the Board may deny, suspend, or revoke a license, as applicable, on the ground of substantially related out-of-state discipline or professional misconduct. To incorporate and clarify these statutory provisions, the proposal would specify that substantially related crimes, professional misconduct, and acts include violations of other state or federal laws governing the practice of professional engineering, land surveying, geology, or geophysics. All state and federal laws that govern the practices of professional engineering, land surveying, geology, or geophysics are directly related to the respective professions, even if not contained within the specific state acts applicable to each profession. Accordingly, the regulation is expanded to include “other state or federal laws governing” the profession, since there has already been a legislative determination that such laws relate to the professions. This regulatory proposal would also add conviction of a crime arising from or in connection with the practice of geology or geophysics to 16 CCR 3060 as a specific type of crime that is substantially related to the practice of geology or geophysics, to provide consistency with the existing language in 16 CCR 416 relating to professional engineering and land surveying.

Amend Sections 418 and 3061 of, respectively, Article 1 of Division 5, and Article 5 of Division 29, of Title 16 of the CCR (Criteria for Rehabilitation)

Sections 418, subdivision (a), and 3061, subdivision (a)

Purpose: The purpose of amending subdivision (a) of 16 CCR 418 and 3061 is to comply with the requirements of AB 2138, section 9, specifically 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, this regulatory proposal 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.

Anticipated Benefit: The proposed revisions to subdivision (a) of 16 CCR 418 and 3061 will 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 will 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 have criminal convictions and

completed parole or probation without a violation, by listing rehabilitation criteria applicable to the applicant.

Rationale: Existing law requires 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, subd. (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, subd. (b), as amended 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 Board’s practice acts, or its regulations, and as directed under BPC section 482. (BPC, § 481, subd. (c), as amended by AB 2138, § 7; see also BPC, § 493, subd. (b)(2), as amended 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, subd. (a), as amended by AB 2138, § 9.) 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, § 482, subd. (b), as amended by AB 2138, § 9.)

Unlike the substantial relationship criteria, 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 418 and 3061, subd. (a)(4).) 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.

This proposal specifies the following criteria for the Board to consider when making the determination that the applicant who has successfully completed the criminal sentence without a violation of parole or probation 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. 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 narrow in scope and would provide to the Board 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.

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.

Sections 418, subdivision (b), and 3061, subdivision (b)

Purpose: The purpose of amending subdivision (b) of 16 CCR 418 and 3061 is to comply with the requirements of AB 2138, section 9, specifically BPC section 482, subdivision (b)(1) and (b)(2), which requires the Board to consider whether an applicant has made a showing of rehabilitation if: (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. AB 2138 does not prescribe specific rehabilitation criteria. Therefore, this regulatory proposal provides two sets of rehabilitation criteria to be used, depending on whether BPC 482(b)(1) or (b)(2) is at issue. The previously described, narrowly tailored set of rehabilitation criteria that apply to applicants who have completed their criminal sentence at issue without a violation of parole or probation are proposed as subdivisions (a)(1)-(5) of sections 418 and 3061. A second, more comprehensive set of rehabilitation criteria, which are not limited to the applicable crime and parole or probation, are proposed at subdivisions (b)(1)-(8) of sections 418 and 3061, for applicants who: did not complete their criminal sentence at issue without a violation of parole or probation; did complete their criminal sentence at issue without a violation of parole or probation, but who did not make a showing of rehabilitation under the rehabilitation criteria listed at subdivisions (a)(1)-(5); and applicants whose licenses were denied based on something other than a crime, such as professional misconduct. The list of rehabilitation criteria at subdivision (b) of sections 418 and 3061 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.

Anticipated Benefit: The proposed revisions to subdivision (b) of 16 CCR 418 and 3061 will 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 will 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 requires 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, subd. (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, subd. (b), as amended 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 Board’s practice acts, or its regulations, and as directed under BPC section 482. (BPC, § 481, subd. (c), as amended by AB 2138, § 7; see also BPC, § 493, subd. (b)(2), as amended 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, subd. (a), as amended 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, subd. (b), as amended by AB 2138, § 9.) AB 2138 also authorized the Board to deny a license based on prior disciplinary misconduct. Accordingly, it is necessary to amend the regulations to account for denials on this ground.

Unlike the substantial relationship criteria, 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 418 and 3061, subd. (a)(4).) 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 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.

This proposal uses the existing rehabilitation criteria with the addition of the criteria specified in subdivision (a) of 16 CCR 418 and 3061 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.

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 and in conformance with the terminology used in statute.

The Board will also consider evidence of acts or crimes committed prior to or subsequent to 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. This is also already an existing regulatory criterion.

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 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 for 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 consider any evidence of rehabilitation submitted by the applicant. There is no change to this criterion, and the Board is required to consider such evidence under BPC section 481(c).

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

Additionally, the Board will consider evidence of whether the conviction has been dismissed or the applicant has obtained a certificate of rehabilitation pursuant to specified

sections of the Penal Code, or a comparable dismissal or expungement. This is already an existing criterion; however, it is necessary to amend the wording to conform to all of the specific sections listed in statute.

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 who 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 who 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.

Sections 418, subdivision (c), and 3061, subdivision (c)

Purpose: The purpose of amending subdivision (c) of 16 CCR 418 and 3061 is to comply with the requirements of AB 2138, section 9, specifically 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 seeks to provide a specific list of criteria for the Board to consider for these licensees. For uniformity purposes, the proposal follows the same approach as subdivision (a). 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.

Anticipated Benefit: The proposed revisions to subdivision (c) of 16 CCR 418 and 3061 are intended to 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 will help licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation. This proposal will also assist relevant parties to any administrative appeal (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 have criminal convictions and have completed parole or probation without a violation, by listing rehabilitation criteria applicable to the licensee.

Rationale: Existing law requires 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 evidence in instances of both license denials and licensee 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, subd. (a), as amended by AB 2138, § 9.)

Unlike the substantial relationship criteria, 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 criminal sentence at issue without a violation of parole or probation; or, (2) the board finds, after applying its rehabilitation criteria, that the applicant is rehabilitated. (BPC, § 482, as amended by AB 2138, § 9.)

The extent to which a person complied with the terms of parole or probation is already a factor boards consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR 418 and 3061, subd. (b)(4).) But courts have 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 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 without a violation of parole or probation 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. 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 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.

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.

Sections 418, subdivision (d), and 3061, subdivision (d)

Purpose: The purpose of amending subdivision (d) of 16 CCR 418 and 3061 is to conform to changes the Board proposes to implement AB 2138, section 9, and BPC section 482, subdivision (b)(2), which require the Board to consider whether an applicant has made a showing of rehabilitation if: (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. Likewise here, the Board would consider the rehabilitation criteria in the proposed subdivision (d) if: (1) a licensee has not completed the criminal sentence at issue without a violation of parole or probation; (2) the licensee did complete the criminal sentence at issue without a violation of parole or probation, but the Board does not find that the licensee made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (c); or, (3) the Board's decision

is based on something other than a crime, such as out-of-state discipline under BPC section 141.

AB 2138 does not prescribe new rehabilitation criteria. Therefore, this regulatory proposal provides two sets of rehabilitation criteria to be used, depending on whether BPC 482(b)(1) or (b)(2) is at issue. The previously described, narrowly tailored set of rehabilitation criteria that apply to licensees who have completed their criminal sentence at issue without a violation of parole or probation are proposed as subdivisions (c)(1)-(5) of sections 418 and 3061. A second, more comprehensive set of rehabilitation criteria, which are not limited to the applicable crime and parole or probation, are proposed at subdivisions (d)(1)-(8) of sections 418 and 3061, for licensees who: did not complete their criminal sentence at issue without a violation of parole or probation; did complete their criminal sentence at issue without a violation of parole or probation, but who did not make a showing of rehabilitation under the rehabilitation criteria listed at subdivisions (c)(1)-(5); and licensees whose licenses were disciplined based on something other than a crime, such as out-of-state discipline under BPC section 141. The list of rehabilitation criteria at the proposed subdivision (d) of sections 418 and 3061 is mostly unchanged from existing regulation, and it anticipates that the Board may be considering “act(s)” that are the basis for discipline, since the Board may, for instance, be evaluating the rehabilitation of a licensee where the ground for discipline involves disciplinary acts in other states. The list of criteria incorporates the criteria from subdivision (c) 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. This proposal is also intended to provide predictability and consistency in the licensing and disciplinary process. Thus, the proposal follows the same approach as subdivision (b).

Anticipated Benefit: The proposed revisions to subdivision (d) of 16 CCR 418 and 3061 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 (c). Providing the list of rehabilitation criteria will help licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation. This proposal will also assist relevant parties to any administrative appeal (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 (c), by listing rehabilitation criteria applicable to the licensee.

Rationale: Existing law requires 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 in instances of both license denials and licensee 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, subd. (a), as amended by AB 2138, § 9.)

Unlike the substantial relationship criteria, 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 amended by AB 2138, § 9.)

The extent to which a person complied with the terms of parole or probation is already a factor boards consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR 418 and 3061, subd. (b)(4).) But courts have 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 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.

This regulatory proposal uses the existing rehabilitation criteria with the addition of the criteria specified in subdivision (c) of 16 CCR 418 and 3061 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.

The Board will consider the nature and gravity of the crime or act for the same reasons as discussed for subdivisions (a), (b) and (c). 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.” This is not a substantive change and would make the regulations internally consistent and in conformance with the terminology used in statute.

The Board will also consider evidence of acts or crimes committed prior to or subsequent to the act or crime that is the basis for disciplinary action. Such acts or crimes typically reflect additional misconduct by the licensee and bear on the Board’s decision regarding whether the licensee is sufficiently rehabilitated to remain licensed and conform to the requirements of licensure. This is also already an existing regulatory criterion. The Board proposes to add the words “or crime(s)” for clarity and to make the regulations internally consistent and in conformance with statute; this is not a substantive change.

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 from existing regulation in 16 CCR 418. The Board proposes to amend "offense" to "crime" in CCR section 3061; however, this is not a substantive change and would make the regulations internally consistent and in conformance with the terminology used in statute.

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 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 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 remain licensed and whether the licensee is willing to conform to the requirements of licensure.

Additionally, the Board will consider evidence of whether the conviction has been dismissed or the applicant has obtained a certificate of rehabilitation pursuant to specified sections of the Penal Code, or a comparable dismissal or expungement. This is already an existing criterion; however, it is necessary to amend the wording to conform to all of the specific sections listed in statute.

The Board will also consider the criteria in subdivision (c). 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 who have completed their criminal parole or probation without a violation, the Board would first evaluate their eligibility for licensure under the criteria in subdivision (c). If the licensee did not demonstrate sufficient rehabilitation under the criteria in subdivision (c), the Board would apply the broader criteria in subdivision (d). For licensees who did not complete their criminal parole or probation without a violation, the Board would apply the criteria in subdivision (d), which incorporates the criteria from subdivision (c). This way, similarly-situated licensees (those being considered for discipline based on a conviction) have the benefit of the same set of criteria.

Sections 418, subdivision (e), and 3061, subdivision (e)

Purpose: The purpose of amending subdivision (e) of 16 CCR 418 and 3061 is to conform to changes made by the other amendments to these sections, as well as to clarify wording.

Subdivision (e)(2) is being amended to replace “direction” with “responsible charge” for internal consistency of the regulations (the phrase “responsible charge” is used in the first clause of the sentence), as well as consistency with other regulatory and statutory provisions. (See, for instance, 16 CCR 404.1, 404.2, 411, 424, 425, 426.10, 426.13, 426.51, 463, 3008, 3022, 3022.1, 3022.2, 3042, 3065, and 3066 and BPC 6703, 6734, 6734.1, 6734.2, 6735, 6735.3, 6735.4, 6738, 7805, 8703, 8729, and 8761.)

Subdivision (e)(4) is being amended to use the broader term “license” in a generic sense to correspond with the definition of that term provided in new subdivision (f) (see below for explanation regarding new subdivision (f)).

Subdivision (e)(5) is being amended to conform to the other amendments proposed to be made to these sections; specifically, changing existing subdivision (b) to subdivision (d) and adding an additional subparagraph to that subdivision.

Anticipated Benefit: The proposed revisions to subdivision (e) of 16 CCR 418 and 3061 will provide clarity and consistency by using defined terms of art (“responsible charge”) that are already used in these sections, as well as in other regulatory and statutory sections. They will also provide for ease of reading by using the term “license” in a generic sense and providing an overall definition (in new subdivision (f), see below) of that term as used in these sections; this format is used in other regulatory sections (i.e., 16 CCR 419). Additionally, they will provide for conforming changes necessitated by the previously-described amendments to these sections.

Rationale: These changes will provide for clarity and consistency among the Board’s regulations and statutes and provide for ease of reading.

Sections 418, subdivision (f), and 3061, subdivision (f)

Purpose: The purpose of adding subdivision (f) to 16 CCR 418 and 3061 is to add a definition of the generic word “license” as used in these sections to include all of the types of “licenses” issued by the Board, such as certifications, licenses, specialty licenses, and authority licenses.

Anticipated Benefit: The proposed addition of subdivision (f) of 16 CCR 418 and 3061 will provide for clarity and ease of reading by using the term “license” in a generic sense in these sections and providing an overall definition of that term as used in these sections; this format is used in other regulatory sections (i.e., 16 CCR 419).

Rationale: These changes will provide for clarity and consistency among the Board's regulations and statutes and provide for ease of reading.

Other Nonsubstantive Changes

In Section 3060, subdivision(a), the word "registration" is being replaced with the word "license" as that is the more accurate term that is now used. In addition, grammatical corrections have been made. In the Note to Section 418, the phrase "and Section 1203.4, Penal Code" is being removed, as Section 418 does not implement, interpret, or make specific Section 1203.4 of the Penal Code.

Underlying Data

- AB 2138, Chapter 995, Statutes of 2018
- Board Meeting Meeting Materials, December 13, 2018
- Board Meeting Meeting Materials, February 21, 2019

Business Impact

The Board has made an initial determination that the proposed amendments 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 fact that the Board licenses individuals, not businesses, and the proposed amendments affect only individuals who are applying for licensure or who are already licensed and who have been convicted of a crime or had disciplinary action taken against them in another jurisdiction.

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 license applicants and licensees with criminal histories or licensure 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 license applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- 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 license applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- This regulatory proposal benefits the health and welfare of California residents because it would increase their access to licensed professionals.

- This regulatory proposal does not affect worker safety because it establishes criteria, based upon recent statutory mandates, for licensure following the applicant's or licensee's criminal conviction. It does not involve worker safety.
- This regulatory proposal does not affect the state's environment because it only regulates license applicants and licensees and their qualifications for licensure following a criminal conviction or disciplinary action. It does not involve environmental issues.

The Board has made an initial determination that the number of applications denied based on criminal convictions under these regulatory changes will be negligible and have no economic impact on jobs or businesses.

Specific Technologies or Equipment

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

Consideration of Alternatives

The Board has made an initial determination that no reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the regulation is proposed or would be as effective or less burdensome to affected private persons than the proposed regulation, or equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the laws being implemented or made specific.

Set forth below are the other alternatives to this proposal that were considered, and the reason each alternative was rejected.

- Option 1: To pursue a regulatory change that requires the Board to find rehabilitation if the applicant completed their terms of their criminal probation or parole. Courts give little weight to the fact that an applicant 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, pursuant to AB 2138, the Board is mandated to adopt proposed regulations by July 1, 2020.

Any interested person may submit comments to the Board in writing relevant to the above determinations at 2535 Capitol Oaks Drive, Suite 300, Sacramento, California, 95833.