

Osteopathic Medical Board of California

Department of Consumer Affairs

Initial Statement of Reasons

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

Subject Matter of Proposed Regulations: Substantial Relationship Criteria; Rehabilitation Criteria for Denials, Suspensions, or Revocations; and Rehabilitation Criteria for Petitions for Reinstatement or Modification of Penalty.

Sections Affected: Sections 1654, 1655 and 1657 of Article 12 of Division 16 of Title 16 of the California Code of Regulations (CCR).

Specific Purpose of Each Adoption

1. Problem Being Addressed

The Osteopathic Medical Board of California (Board) licenses osteopathic physicians and surgeons, who are licensed health care practitioners that provide health care services. Existing law (Business and Professions Code (BPC) sections 480 and 490) authorizes the Board to deny an application for licensure or discipline a licensee based on a conviction for a crime or act substantially related to the licensed business or profession. BPC section 481 authorizes the Board to develop criteria for determining whether a crime or act is substantially related to the qualifications, functions, or duties of the profession. BPC section 482 requires the Board to develop criteria to evaluate an applicant's or licensee's rehabilitation when considering the denial of a license or discipline of a licensee.

Effective July 1, 2020, under the provisions of Assembly Bill 2138 (Stats. 2018, Ch. 995) (AB 2138), the Board's existing authority to deny an applicant a license based upon a substantially related criminal conviction will significantly change. This proposal seeks to amend existing regulations consistent with this recently enacted legislation and to accurately reflect the Board's authority to consider denials or discipline and petitions for reinstatement or modification of penalty.

Effective July 1, 2020, BPC section 481, subdivision (b) will require the Board to amend its substantial relationship criteria regulations to include all of the following:

- 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 in which the applicant seeks licensure or in which the licensee is licensed.

In addition to adding the foregoing criteria, the proposed regulatory amendments also add references to “professional misconduct,” as this will be a legal basis for denial under BPC section 480. The proposed language adds references to discipline under BPC section 141 because substantially related acts that are the basis for discipline in another jurisdiction may be used to discipline a licensee under that section.

The Board also proposes to add new rehabilitation criteria the Board will consider in deciding whether an applicant or licensee has made a “showing of rehabilitation” consistent with new and existing requirements of AB 2138 (BPC sections 480, 482, as added by AB 2138, sections 4, 9). The proposed regulatory amendments establish how the Board considers rehabilitation evidence when considering denials or discipline and petitions for reinstatement or modification of penalty.

2. Anticipated Benefits from this Regulatory Action

The proposed regulatory amendments would place applicants and licensees on notice that the Board is statutorily authorized to deny, suspend, or revoke a license based on professional misconduct and discipline taken by another licensing board or jurisdiction. The proposal would also make relevant parties (e.g., the Deputy Attorneys General from the Office of the Attorney General (AG), Administrative Law Judges from the Office of Administrative Hearings (OAH), respondents, and respondent’s counsels) aware that when considering denial or discipline and petitions for reinstatement or modification of penalty of applicants or licensees, the Board uses the listed criteria to determine whether the crime, act, or professional misconduct is substantially related to the practice of osteopathic medicine.

AB 2138 was enacted to reduce licensing and employment barriers for people who are rehabilitated. These proposed regulatory amendments further that goal by adopting criteria that emphasizes an applicant’s or licensee’s rehabilitative efforts and makes clear what is necessary to make a showing of rehabilitation. This may lead to fewer denials and an increase in the number of licensed osteopathic physicians and surgeons in the marketplace, allowing for more health care providers to treat increasing numbers of California consumers.

Factual Basis and Rationale

Factual basis and rationale for the determination that each proposed regulatory amendment is reasonably necessary to address the problem for which it is proposed:

BPC section 2018 authorizes the Board to adopt, amend, or repeal, in accordance with the provisions of the Administrative Procedure Act, the regulations necessary to carry into effect the provisions of law relating to the practice of medicine. BPC section 3600-1 authorizes the Board to adopt rules necessary to carry into effect the provisions of the Osteopathic Act (hereafter, Act).

By enacting AB 2138, the Legislature intended to reduce licensing and employment barriers for persons who are rehabilitated. At the Board's May 16, 2019, meeting, members discussed how AB 2138 would create new standards for how the Board could deny an applicant based upon a crime or act substantially related to licensure. Members discussed how existing law authorizes the Board to deny, suspend, or revoke a license or to take disciplinary action against a licensee because the licensee or applicant has been convicted of a substantially related crime. The new laws would authorize the Board to deny a license or discipline a licensee based upon a substantially related crime only if certain criteria are met.

By enacting AB 2138, the Legislature intended 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, beginning July 1, 2020, pursuant to amendments to BPC section 480 made by AB 2138, the Board may not deny a license because the individual was convicted of a crime, or due to the acts underlying the conviction, if the individual has a certificate of rehabilitation, was granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged.

Absent these circumstances, AB 2138 will permit the Board 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 1 192.7;
 - (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.

(BPC section 480, subd. (a)(1), as added by AB 2138.)

At the Board's May 16, 2019, meeting, members discussed and approved regulatory amendments to 16 CCR 1654, 1655, and 1657 to implement criteria to determine whether a crime or act is substantially related to the qualifications, functions, or duties of an osteopathic physician or surgeon, criteria of rehabilitation, and changes to BPC sections 480, 481, and 493. The proposed language incorporates the substantial relationship criteria as set forth in BPC sections 481 and 493, effective July 1, 2020.

The proposed language includes discipline under BPC section 141 because substantially related acts that are the basis for discipline in another jurisdiction may be used to discipline a licensee under this section.

The proposed language also references "professional misconduct" as this may be considered a legal basis for denial under BPC section 480, subdivision (b), effective July 1, 2020, per AB 2138.

This proposal accurately reflects the Board's authority to evaluate rehabilitation evidence for all applicants and licensees where the Board is considering denial or discipline of a license or petitions for reinstatement or modification of penalty.

The Board approved the proposed language and delegated authority to the Executive Director to make any technical, non-substantive changes if necessary.

Amend 16 CCR 1654. Substantial Relationship Criteria.

Specifically, the Board proposes to amend 16 CCR 1654 for the following reasons:

(1) Amend existing text and identify as new subdivision (a), as follows:

(a) For purposes of denial, suspension, or revocation of a certificate pursuant to Section 141 or Code Division 1.5 (commencing with Code Section 475), a crime, professional misconduct, or act shall be considered to be substantially related to the qualifications, functions or duties of a person holding a certificate under the Osteopathic Act, if to a substantial degree, it evidences present or potential unfitness of a person holding the certificate to perform the functions of a physician and surgeon in a manner consistent with the public health, safety, or welfare.

This proposal would reidentify existing language, which is also being amended, as subdivision (a) for better organization and grouping of similar concepts within the regulatory proposal.

Existing law, at BPC section 141, authorizes the Board to discipline a licensee for discipline taken by another state, a federal agency, or a country (“foreign jurisdiction”) for any act “substantially related” to the practice regulated through California licensure. In addition, effective July 1, 2020, BPC section 480 authorizes this Board to deny a license or discipline a licensee on the basis that the individual was subject to formal discipline by a licensing board located in or outside California for “professional misconduct” under specified conditions. (See BPC section 480, subd. (b), as added by AB 2138). This proposal includes references to BPC section 141 (discipline by a foreign jurisdiction) and “professional misconduct” in the Board’s proposed substantial relationship criteria regulation to more accurately reflect the Board’s authority to deny or discipline on these grounds.

Accordingly, the proposed amendments to newly identified subdivision (a) are necessary to provide the 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. The proposal consolidates into one regulation the criteria the Board will apply in evaluating whether a crime or other misconduct is substantially related to the licensed profession.

The existing language of 16 CCR 1654 does not include any distinct subdivisions, despite addressing two distinct ideas. The first part of the existing language defines “substantially related.” The second part of the existing language provides specific examples of what is included in the definition of “substantially related.”

For clarity and organizational purposes, the proposed text separates the first concept into new subdivision (a) and the latter concepts into new subdivision (c). Also for clarity purposes, new subdivision (c) cross-references new subdivision (a), helping identify the relationship between the two subdivisions. For consistency, since new subdivision (a) references “professional misconduct,” pursuant to BPC section 480, new subdivision (c) also references “professional misconduct” in addition to crimes and acts.

The Board deleted the reference to fiscal dishonesty in subdivision (a) because fiscal dishonesty is substantially related to the qualifications, functions or duties of a person holding a certificate under the Osteopathic Act, which is now clarified in new subdivision (c).

(2) Add new subdivision (b)(1)-(3), as follows:

(b) In making the substantial relationship determination required under subdivision (a) for a crime, the board shall consider the following criteria:

1. The nature and gravity of the offense;
2. The number of years that have elapsed since the date of the offense;
3. How the offense relates to the nature and duties of a physician and surgeon.

Current law specifies that each board shall develop criteria for determining whether a crime is substantially related to a specific business or profession. AB 2138 mandates three criteria 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[s]; (2) The number of years elapsed since the date of the offense[s]; and, (3) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.” (BPC section 481, subd. (b), as added by AB 2138, section 7; see also BPC section 493, subd. (b), as added by AB 2138, section 13.).

Since BPC sections 481 and 493 require the Board to use these three criteria in evaluating whether a crime is substantially related to the qualifications, functions, or duties of the profession, the Board is proposing to adopt a substantial relationship regulation that lists these three items in subdivision (b)(1)-(3). The inclusion of these criteria in proposed 16 CCR 1654, subdivision (b) provides notice to interested parties of the Board’s criteria for evaluating whether a crime is substantially related to the qualifications, functions, or duties of the profession.

(3) Add new subdivision (c)(1)-(2), as follows:

(c) For purposes of subdivision (a), substantially related crimes, professional misconduct, or acts shall include, but are not limited to, the following:

1. Any violation of Article 6, Chapter 1, Division 2 of the Code;
2. Any violation of the provisions of the Osteopathic Act or the Medical Practice Act.

Subdivision (c)(1) clarifies that substantially related crimes, professional misconduct, or acts includes any violation of the Business and Professions Code related to the Department’s healing arts boards. The healing arts statutes, including the Medical Practice Act and the Osteopathic Act, directly relate to the duties, qualifications, and functions of a Board licensee. A violation of these statutes is cause for discipline.

The Board deleted the reference to fiscal dishonesty in subdivision (a) of the existing language because fiscal dishonesty is substantially related to the qualifications, functions or duties of a person holding a certificate under the Osteopathic Act, which is now clarified in new subdivision (c).

Amend 16 CCR 1655. Rehabilitation Criteria for Denial, Suspension or Revocation.

Specifically, the Board proposes to amend of 16 CCR 1655 for the following reasons:

(1) Amend subdivisions (a)(1)-(6):

(a) When considering the denial of a certificate under Section 480 of the Code, or the suspension or revocation of a certificate under Section 490 of the Code, or on the grounds that the person has been convicted of a crime, the board shall consider whether the applicant or licensee made a showing of rehabilitation and is presently fit for a license, if the applicant or licensee completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the board shall consider the following criteria:~~the board in evaluating the rehabilitation of such person and the eligibility for a certificate or permit, will consider the following criteria:~~

- (1) The nature~~Nature~~ and gravity~~severity~~ of the offense(s);
- (2) The length(s) of the applicable parole or probation period(s);~~Total criminal record.~~
- (3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified;~~Time elapsed since commission of the act(s) or offense(s).~~
- (4) The terms or conditions of parole or probation and the extent to which they bear on the applicant's or licensee's rehabilitation;~~Whether the certificate or permit holder has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person.~~
- (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification;~~if applicable, evidence of expungement proceedings pursuant to Penal Code Section 1203.4.~~
- (6) ~~Evidence, if any, of rehabilitation submitted by the certificate or permit holder.~~

The proposed regulatory amendments revise existing subdivision (a) for better organization and grouping of similar concepts within the regulatory proposal.

Existing law, in BPC section 482, requires boards to develop criteria to evaluate the rehabilitation of an applicant or licensee when considering the denial of a license or discipline of a licensee based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC section 482.) Beginning July 1, 2020, BPC section 480 prohibits the Board from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or based on the facts underlying a conviction, if the applicant has "made a showing of rehabilitation pursuant to BPC section 482." (BPC section 480, subd. (b), as added by AB 2138, section 4.) In deciding whether to deny or

discipline 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 Act, or its regulations, and as directed under BPC section 482. (BPC section 481, subd. (c), as added by AB 2138, section 7; see also BPC section 493, subd. (b)(2), as added by AB 2138, section 13 ["A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation"].)

As a result of the foregoing changes in law, the Board amends its regulations establishing criteria for evaluating rehabilitation when deciding whether to deny, suspend, or revoke a license based on a conviction. (BPC section 482, subd. (a), as added by AB 2138, section 9.) Specifically, revisions to BPC section 482 require the Board to consider whether an applicant or licensee "made a showing of rehabilitation," if the applicant or licensee:(a) Completed the criminal sentence at issue without a violation of parole or probation; or,(b) The Board finds, after applying its rehabilitation criteria, that the applicant is rehabilitated. (Section 482, subd. (b), as added by AB 2138, section 9.)

BPC section 482 explicitly requires the Board to consider when an individual completed the criminal sentence at issue without a violation of parole or probation if the applicant has made a showing of rehabilitation for licensing purposes. The Board is including this new requirement from AB 2138 to 16 CCR 1655 to provide adequate notice to applicants that this new requirement must be considered by the Board when considering denial or discipline. The proposed revised section 1655 also allows the Board to clearly distinguish between this criteria and other criteria that the Board may use in considering denials or discipline based upon other grounds, such as denials based on professional misconduct under BPC section 480 or discipline based on BPC section 141. This proposal provides predictability in the application process and uniformity of rehabilitation criteria with other boards under the DCA.

Earlier versions of AB 2138 mandated that the Board "shall find" an applicant had made a showing of rehabilitation if the applicant or licensee had completed his or her criminal sentence without a violation of parole or probation (see AB 2138, as amended in Assembly on April 2, 2018, section 5.) This would have effectively eliminated the Board's discretion to further inquire into rehabilitative efforts after an applicant's release from the criminal justice system. However, the "shall find" language in earlier versions of AB 2138 was struck and later replaced with the words "shall consider" following recommendations by the Senate Business, Professions and Economic Development Committee on June 20, 2018 (see AB 2138, as amended on June 20, 2018, section 5 and Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018, p. 11, 19). As enacted, the Board may exercise its discretion 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. (See BPC section 482, subd. (b), operative July 1, 2020.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when denying or disciplining a license. The extent

to which a person complied with the terms of parole or probation is already a factor the Board considers in evaluating rehabilitation. (16 CCR 2041, subs. (a)(4).) To meet constitutional requirements, courts have found that criminal probation conditions must be reasonably related to the goals of enhancing rehabilitative and deterrence objectives and protecting the victim. (*People v. Jungers* (2005) 127 Cal.App.4th 698, 703.) However, courts typically reject the view that applicants and licensees who comply with the terms of their parole or probation 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 *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”].)

The purpose of the Board’s licensing and enforcement proceedings are to protect the public. As the courts have stated: “The purpose of such a proceeding is not to punish but to afford protection to the public upon the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent.” (*Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 540; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817 [45 Cal.Rptr.2d 486, 490]. To further clarify how the Board will exercise its discretion for the protection of the public, the Board proposes to use five criteria (discussed below) to evaluate whether the applicant has made a “showing of rehabilitation” when the applicant has completed the criminal sentence at issue without a violation of parole or probation. 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 relevant criteria the Board will consider in making a determination as to the applicant’s rehabilitation is known to all.

The proposed amendments also provide predictability in the application process and uniformity of rehabilitation criteria with other boards under the DCA through the new regulation and by adopting the five criteria. The Board amended the language in section 1655 subdivision (a) to make a fair and balanced determination of whether an individual would be safe to practice, with or without restrictions on their license:

- (1) The nature and gravity of the offense(s).

The Board must consider criterion (1) because this is the offense against which the applicant’s or licensee’s rehabilitative efforts will be evaluated. This language is also amended for purposes of clarity and to be more concise.

Amended subdivision (a) in paragraphs (1)-(5) addresses whether an applicant is rehabilitated by completing a criminal sentence without a parole or probation violation as required by AB 2138. Therefore, the previous criteria under subdivision (a)(1)

regarding rehabilitation for purposes of denial of licensure and discipline is deleted and consolidated into the revised subdivision (b)(1).

- (2) The length(s) of the applicable parole or probation period(s).

The Board will consider criterion (2) because it is relevant to whether the applicant or 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 previous criteria under subdivision (a)(2) regarding rehabilitation for purposes of denial of licensure and discipline is deleted and consolidated into the revised subdivision (b)(2).

- (3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.

The Board must consider criterion (3) because such periods can be shortened or lengthened for good or bad conduct, so this bears on whether the applicant is sufficiently rehabilitated. The previous criteria under subdivision (a)(3) regarding rehabilitation for purposes of denial of licensure and discipline is deleted and consolidated into the revised subdivision (b)(3).

- (4) The terms or conditions of parole or probation and the extent to which they bear on the applicant’s or licensee’s rehabilitation.

The Board must consider criterion (4) because it will further assist the Board in determining whether the applicant’s parole or probation adequately remediated the criminal conduct or whether future monitoring or restriction (e.g., probationary license) is necessary for public protection. 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 previous criteria under subdivision (a)(4) regarding rehabilitation for purposes of denial of licensure and discipline is deleted and consolidated into the revised subdivision (b)(4).

- (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

As amended, the Board must consider criterion (5) because the extent to which the terms or conditions of parole or probation were modified and the reason for modification 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. The previous criteria under subdivision (a)(5) regarding rehabilitation for purposes of denial of licensure and discipline is deleted and consolidated into the revised subdivision (b)(6).

Existing subdivision (a)(6) is eliminated as it is not necessary at this step of the Board's consideration. Proposed 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 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., AG, OAH, and the applicant's counsel) in advocating for or against, or deciding upon, applicants who have criminal convictions and have completed parole or probation without a violation, by listing rehabilitation criteria applicable to the applicant.

(2) Add new subdivision (b):

(b) If subdivision (a) is inapplicable, or the board determines that the applicant or certificate holder did not make the showing of rehabilitation based on the criteria in subdivision (a), the board shall apply the following criteria in evaluating the applicant or certificate holder's rehabilitation. The board shall find that the applicant or certificate holder made a showing of rehabilitation and is presently eligible for a license if, after considering the following criteria, the board finds that the applicant or certificate holder is rehabilitated:

In addition to the authority to deny or discipline a license based on criminal convictions, the Board will be authorized to deny or discipline a license based on professional misconduct (BPC, section 480, subd. (b), as added by AB 2138, section 4), out-of-state discipline pursuant to BPC section 141, and unprofessional conduct as defined in BPC section 2234 and other provisions of Article 12 of Chapter 5 of Division 2 of the Business and Professions Code. The Board's rehabilitation criteria must also include consideration of rehabilitation evidence for these other types of conduct that may constitute grounds for denial or discipline.

In addition to considering rehabilitation when an applicant or licensee completes a criminal sentence without a violation of probation or parole, AB 2138 requires the Board to consider whether an applicant made a showing of rehabilitation, if the Board finds, in applying its rehabilitation criteria, that the applicant is rehabilitated. (BPC section 482, subd. (b), operative July 1, 2020.) This proposal would permit the Board to consider a modified version of its standard rehabilitation criteria in evaluating whether an applicant made a showing of rehabilitation when either the grounds for denial or discipline do not involve a crime, or the showing of rehabilitation was not made under subdivision (a) of this Section.

In the Board's experience, these proposed standards will be useful when considering denials or discipline based upon crimes, unprofessional conduct, professional misconduct committed by an applicant before another licensing board or out-of-state disciplinary acts. These standards are needed to provide the Board with a fair, balanced, and thoughtful approach to evaluating whether sufficient rehabilitative efforts have been made to satisfy the Board that the applicant or licensee is presently eligible for a license. As a result, these proposed changes are necessary to give the Board discretion to analyze rehabilitation evidence using these criteria when considering a denial or discipline, and to give proper notice to those affected applicants and licensees what standards the Board will use in evaluating their rehabilitation.

As AB 2138 does not prescribe new rehabilitation criteria, this proposal provides a specific, 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 16 CCR 1655, subdivision (a) for applicants and licensees convicted of a crime, so that similarly-situated applicants and licensees may 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 or discipline, since the Board may be evaluating the rehabilitation of an applicant or licensee where the ground for denial or discipline involves acts of professional misconduct or out-of-state discipline, rather than a conviction. Through this proposal, the Board also intends to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under the DCA.

(3) Add new subdivision (b)(1):

(1) The nature and gravity of the act(s) or crime(s) under consideration as grounds for denial or discipline;

As amended, the Board will consider criteria of the nature and gravity of the act or crime 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 an already existing regulatory criterion. The Board proposes to amend "severity" to "gravity." This is not a substantive change and would make the regulation internally consistent with subdivision (a) and with the substantial relationship criteria specified by AB 2138.

(4) Add new subdivision (b)(2):

(2) Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial or discipline;

As amended, the Board will also consider evidence of acts or crimes committed after the act or crime that is the basis for denial or discipline. 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.

(5) Add new subdivision (b)(3), as follows:

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2);

As amended, the Board would consider the time elapsed since commission of the prior crimes or misconduct. The passage of time bears upon a person's rehabilitation. The greater number of years that have passed, the more time the Board can take into consideration that the applicant has not committed any acts evincing a disregard for public safety. Additionally, during such time, the applicant may have completed other rehabilitative efforts for the Board's consideration. The ability to maintain rehabilitation over a prolonged period suggests reoffending is less likely. When only a short amount of time has passed, there has been less time for the applicant to make changes that demonstrate rehabilitation. Accordingly, the Board must consider this criterion, which has not changed substantively from existing regulation, in evaluating rehabilitation.

(6) Add new subdivision (b)(4):

(4) Whether the applicant or certificate holder has complied with any terms of probation, parole, restitution, or any other sanctions lawfully imposed against them;

As amended, the Board will consider whether the applicant or licensee complied with parole, probation, restitution or other sanctions imposed on them. This criterion is otherwise unchanged from existing regulation. Also, the extent to which a person has complied with the terms of parole or probation is already a factor boards consider when evaluating rehabilitation. The information embraced in this criterion bears on an applicant's and licensee's rehabilitation in terms of their willingness to make amends from prior misconduct and willingness to conform to the rules of licensure. Accordingly, the Board must consider these elements to evaluate rehabilitation.

(7) Add new subdivision (b)(5):

(5) The criteria in subdivision (a)(1)-(5), as applicable;

As amended, the Board will also consider the criteria in subdivision (a)(1)-(5), as applicable. This is necessary to ensure that all applicants and licensees convicted of a crime have the opportunity to be evaluated under the same set of rehabilitation criteria. For those 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 or licensee did not demonstrate sufficient rehabilitation under the criteria in subdivision (a), the Board then applies the broader criteria in subdivision (b). For

applicants and 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 applicants and licensees (those being considered for denial or discipline based on a conviction) are considered under the same criteria.

(8) Add new subdivision (b)(6):

(6) Evidence, if any, of rehabilitation submitted by the applicant or certificate holder.

As amended, the Board would consider rehabilitation evidence the applicant or licensee submits. There was no change to this criterion, and the Board considers such evidence under BPC section 481(c) and 493(a). The Board must retain this requirement to consolidate the Board's rehabilitation criteria in one place.

Amend 16 CCR 1657. Rehabilitation Criteria for Petition for Reinstatement or Modification of Penalty.

Specifically, the Board proposes to amend of 16 CCR 1657 for the following reasons:

(1) Amend subdivisions (1)-(6):

When considering a petition for reinstatement or a petition for modification of penalty, the Board, in evaluating the rehabilitation of the applicant and his or her present eligibility for a certificate or permit, may consider all activities of the petitioner since the disciplinary action was taken and shall also consider the following criteria:

(1) The nature and gravity~~severity~~ of the act(s) or crime(s) for which the petitioner was disciplined;

(2) Evidence of any act(s) or crime(s) committed subsequent to act(s) or crime(s) for which the petitioner was disciplined which also could be considered as grounds for denial under ~~Code~~ Section 480 of the Business and Professions Code;

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2) above;

(4) Whether~~The extent to which~~ the petitioner has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed;

(5) Petitioner’s activity during the time the certificate was in good standing-;

(6) Evidence, if any, of the rehabilitation submitted by the petitioner-;

(7) Petitioner’s professional ability and general reputation for truth.

The purpose of amending 16 CCR 1657, subdivisions (1) through (6), is to make the rehabilitation criteria for reinstatement or modification of penalty consistent with the language used for the rehabilitation criteria for denial, suspension, or revocation pursuant to 16 CCR 1655, subdivision (b). The proposed language also makes other minor revisions, but none of the changes are substantive.

The proposed revisions to 16 CCR 1657 would provide transparency and clarity to applicants petitioning for reinstatement or for modification of penalty. Making the list of rehabilitation criteria consistent between Sections 1655 and 1657 would help applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation.

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.

- Changes to Subdivision (1): The Board proposes to amend “severity” to “gravity.” This is not a substantive change and would make the regulation internally consistent with 16 CCR 1655 subdivisions (a)(1) and (b)(1).
- Changes to Subdivision (2): The Board proposes amending “Code” to “Business and Professions Code”. This proposed amendment clarifies that the Business and Professions Code is the appropriated authority cited in the language. Additionally, the Board proposes to amend a period to a semicolon for consistency.
- Changes to Subdivision (3): This criterion has not changed substantively from existing regulation. The Board proposes to amend a period to a semicolon for consistency.
- Changes to Subdivision (4): The Board proposes amending “The extent to which,” to “Whether,” but does not view this as a substantive change. The Board proposes to amend a period to a semicolon for consistency.
- Changes to Subdivision (5): This criterion has not changed substantively from existing regulation. The Board proposes to amend a period to a semicolon for consistency.

- Changes to Subdivision (6): This criterion has not changed substantively from existing regulation. The Board proposes to amend a period to a semicolon for consistency.

Underlying Data

Documents relied upon:

1. Board's May 16, 2019 meeting agenda,
2. Board's relevant meeting materials (Tab 6) from May 2019 Board meeting,
3. Board's May 16, 2019 approved meeting minutes,
4. Assembly Bill 2138 (as amended in Assembly April 2, 2018),
5. Assembly Bill 2138 (as amended in Senate June 20, 2018),
6. Assembly Bill 2138 (chapter 995, Statutes of 2018),
7. Senate Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018, and
8. Assembly Floor Analysis dated August 24, 2018.

Business Impact

This regulation will not have a significant statewide adverse economic impact directly affecting businesses. This initial determination is based on the following facts:

The Board has approximately 11,234 licensees as of November 2019. During the 2016/2017 fiscal year the Board issued 910 licenses and denied 0, in fiscal year 2017/2018 the Board issued 891 licenses and denied 2, and in fiscal year 2018/2019 the Board issued 773 licenses and denied 0. Therefore, the Board has denied fewer than 1% of all applicants.

Since the Board has denied fewer than 1% of all applicants this proposal will not have an adverse economic impact. AB 2138 was enacted to reduce licensing and employment barriers for people who have been convicted of a crime or due to acts underlying the conviction, who have a certificate of rehabilitation, were granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged. These proposed amendments will further assist in that effort through adoption of standards designed to implement new substantial relationship and rehabilitation criteria. As a result, the Board anticipates that there may be fewer denials or disciplinary actions based upon criminal convictions and, therefore, no significant or statewide adverse economic impacts.

Economic Impact Assessment

This regulatory proposal will have the following effects:

- It may result in the creation of new jobs within California because it implements AB 2138, legislation designed to reduce licensing and employment barriers for people who have been convicted of a crime who have a certificate of rehabilitation, were granted clemency, made a showing of rehabilitation, or their conviction was dismissed or expunged. This proposal will amend regulations for substantial relationship criteria and rehabilitation criteria to emphasize an applicant's or licensee's rehabilitative efforts, which may result in having fewer license denials or disciplinary actions based on substantially related crimes, acts or professional misconduct. However, the Board does not have data to project the number of jobs that may be created because of these efforts.
- It will not create new business or eliminate existing businesses within California because the proposal is not of sufficient magnitude to create or eliminate businesses. Historically, the Board denied less than 1% of applicants. Even assuming the number of denials or discipline would decrease because of these adoptions, the Board believes that this data demonstrates that these adoptions are not significant enough to create or eliminate businesses who hire licensees.
- It will not affect the expansion of businesses currently doing business within the California because the proposal is not of sufficient magnitude to expand businesses. Historically, the Board denied less than 1% of applicants. Even assuming the number of denials or discipline would decrease because of these adoptions, the Board believes that this data demonstrates that it would not be significant enough to expand businesses who hire licensees.
- This regulatory proposal will benefit the health and welfare of California residents because by implementing criteria that emphasize rehabilitative efforts, it will create an opportunity for employment for people who have been convicted of a crime and are able to make a showing of rehabilitation. This may lead to an increase in licensees in the marketplace, allowing for more health care providers to treat increasing numbers of California consumers.
- This regulatory proposal will not affect worker safety because the proposal does not involve worker safety.
- This regulatory proposal will not affect the state's environment because it does not involve environmental issues.

Specific Technologies or Equipment

This regulatory proposal 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 regulation is proposed or would be as effective or less burdensome to affected private persons than the proposed regulations, or equally effective in achieving the purposes of the regulations in a manner that ensures full compliance with the law being implemented or made specific.

The following are the alternatives considered and the reason the alternative was rejected or adopted:

1. **Not adopt the regulations:** This alternative was rejected because the Board is required to establish by regulation (BPC sections 481, 482, 493, and AB 2138) the criteria for denial, suspension or revocation of a license based on the conviction of a crime or professional misconduct that is substantially related to the qualifications, functions, or duties of osteopathic physicians and surgeons.

The foregoing provisions require the Board to establish substantial relationship criteria and criteria to evaluate a showing of rehabilitation for an applicant or licensee, which is not currently addressed in Board regulations.

2. **Adopt regulations:** This option was selected. The Board determined that amending 16 CCR 1654, 1655, and 1657 would allow the Board the ability to set criteria for how to consistently process petitions for reinstatement or modification of penalty and the denial, suspension, or revocation of a license. AB 2138 requires the Board to include new substantial relationship criteria in its regulations and consider how to evaluate a showing of rehabilitation for an applicant or licensee.

a. **Amendments to Substantial Relationship Criteria for 16 CCR 1654:** Exercising this option also incorporated the AB 2138 substantial relationship criteria and the section was expanded to include discipline under BPC section 141 because substantially related acts that are the basis for discipline in another jurisdiction may be used to discipline a licensee under this section. The proposed language also includes “professional misconduct,” as this may be considered for denial under BPC section 480.

b. **Amendments to Rehabilitation Criteria for 16 CCR 1655:** Exercising this option permitted the Board to evaluate an applicant’s or licensee’s rehabilitative efforts using five criteria designed to examine whether the applicant’s or licensee’s parole or probation was of sufficient duration and magnitude to address the possibility of

recurrence of the misconduct. The Board elected to use greater discretion and resources to evaluate rehabilitative efforts using this option.

c. Amendments to Rehabilitation Criteria for 16 CCR 1657 Related to Petitions for Reinstatement and Modification of Penalty: Exercising this option makes the rehabilitation criteria for reinstatement or modification of penalty consistent with the language used for the rehabilitation criteria for denial, suspension, or revocation pursuant to 16 CCR 1655, subdivision (b).

Submitting Comments

Any interested person may submit comments to the Board in writing relevant to the above determinations at 1300 National Drive, Suite 150, Sacramento, California 95834.