

DENTAL HYGIENE BOARD
FINAL STATEMENT OF REASONS

Effective Date

The Dental Hygiene Board (Board) requests that this regulatory proposal become effective upon filing to align as closely as possible with the statutory implementation date of July 1, 2020, in Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018). AB 2138 changed a policy of automatic denials of licensure for individuals with criminal convictions. These regulations make clear the Board's statutory commitment to providing an opportunity for a "second chance" and explain how the Board will individually examine each licensure, renewal, or reinstatement decision for individuals with a criminal conviction. Further, they clarify to the public how the Board will decide which convictions are substantially related to licensure. These regulations would benefit all Californians, both those given a "second chance" for licensure and those that could employ or receive services from them. Further, allowing for licensure and employment could potentially reduce recidivism as well as provide Californians with greater choices in licensees. Therefore, it would be of public benefit to hasten the effective date of these regulations.

Subject Matter of Proposed Regulations: Substantial Relationship and Rehabilitation Criteria

Section(s) Affected: Sections 1135, 1136, and 1137 of Title 16 of the California Code of Regulations (CCR)

Updated Information

The Informative Digest and Initial Statement of Reasons are included in the rulemaking file and incorporated as though set forth herein.

Board staff noticed the proposed rulemaking on January 17, 2020, with a 45-day comment period ending on March 2, 2020. Staff received a comment on March 2, 2020. The Board gave notice of an extended comment period on April 2, 2020, which concluded on May 18, 2020. Staff received an additional comment on May 18, 2020.

The Board reviewed the comments at its May 29, 2020, meeting. The Board approved the responses to the comments, and advanced the proposed rulemaking.

The Board approved modified text at its May 29, 2020, meeting. The Board provided 15 days' notice of the modified text on June 26, 2020, which concluded on July 15, 2020. The Board received two comments regarding the modified text.

On September 28, 2020, the Office of Administrative Law (OAL) recommended amendments to improve clarity and the Board's Executive Officer adopted them. The

Board provided 15 days' notice of the modified text on October 21, 2020, which concluded on November 6, 2020. At its November 21, 2020, meeting, the Board approved the modified text.

The proposed modified text includes the following changes:

Section 1135

A. Insertion in subdivision (a) of “,” after “141”, and deletion of “or.”

Because the Board is proposing to add the Business and Professions Code (BPC) sections enumerated in B., infra, it proposes to add a comma after “141, and eliminate “or” since the amendment outlined in B. creates an additional list item.

B. Insertion in subdivision (a) of “or Sections 1950, 1950.5, or 1952.”

The cited sections refer to grounds for denial listed in the Board’s practice act for “substantially related” offenses. They are proposed to be added here so that references to substantial relationship are addressed together in one regulation. This amendment will add clarity to this subdivision.

C. Insertion in Note of Reference sections 1950, 1950.5, and 1952.

The Board proposes to add these sections to the Reference section of the regulation because the regulation, as modified, implements, interprets, and/or makes specific these additional BPC sections.

D. Insertion in subdivision (c)(7) of “Assaultive or abusive conduct as defined in Penal Code section 11160, subdivision (d).” and deletion of “Conviction or act involving assault, battery, or other violence.”

OAL recommended the addition of “Assaultive or abusive conduct as defined in Penal Code section 11160, subdivision (d),” after to clarify the type of assaultive or abusive conduct to which the regulation refers.

E. Insertion in subdivision (c)(8) of “criminal” before “conviction” and deletion of “crime.”

OAL recommended the addition of “criminal” before “conviction” and deletion of “crime” to clarify that a crime, in and of itself, is not related to the regulated practice unless someone licensed in that practice is convicted of it.

F. Deletion of “or” before “dangerous drugs.”

OAL recommended this amendment for clarity in the subdivision.

G. The deletion of “493” as an “Authority Cited.”

OAL recommended the deletion of 493 as an authority.

Section 1136

A. Deletion in subdivision (a) of “was” and insertion of “has been.”

The Board proposes to delete “was” and replace it with “has been” because “has been” is used to refer to something which started in the past and is still continued in the present tense. “Was,” on the other hand, is used to refer to some action which was going on at some time in the past. The Board prefers to use “has been” to include the present tense so the relevant time period for a conviction includes up to the present.

B. Deletion in subdivision (a) of “and is presently eligible for a license.”

The Board proposes to delete this phrase from subdivision (a) of section 1136 because “eligible” could be seen as referring to other eligibility requirements for licensure, rather than referring to fitness or suitability for licensure. Deletion of this phrase will clarify the regulation.

C. Insertion in subdivision (b) of “If the applicant has not completed the criminal sentence at issue without a violation of parole or probation, the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (a), the denial is based on professional misconduct, or the denial is based on Sections 1943 or 1958.1 of the code,” deletion of “If subdivision (a) is inapplicable, or the Board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (a), and deletion of “The Board shall find that the applicant made a showing of rehabilitation and is presently eligible for a license if, after consideration of the following criteria, the Board finds that the applicant is rehabilitated.”

The original text of subdivision (b) was unclear in specifying the circumstances when the regulation would apply. Instead of catch-all language, the Board proposes to delete the former preface to the regulation and enumerate each specific instance of when subdivision (a) would not apply, and proposes to include all of the specified categories.

The Board proposes to cite BPC sections 1943 and 1958.1 since they are in the Board's practice act and authorize the Board to deny a license. This would make the regulation inclusive of all of the instances in which the Board could deny a license.

The Board proposes to delete the final sentence of subdivision (b) for clarity and brevity.

D. Insertion in subdivision (b)(1)-(3) of “professional misconduct.”

The addition of “professional misconduct” to subdivision (b)(1) through (b)(3) is made

necessary by the addition of “professional misconduct” in subdivision (b).

E. Insertion in Note of Reference section 1958.1.

The Board proposes to add this section to the Reference section of the regulation because the regulation, as modified, implements, interprets, and/or makes specific this additional BPC section.

F. Insertion in (b) of “Code,” and deletion of “code.”

The Board has capitalized “code” for consistency throughout the regulations.

G. Insertion in (b)(1) of “gravity” and deletion of “severity” before “of the acts.”

OAL recommended the substitution of “gravity” instead of “severity,” for consistency, since “gravity” is used in sections 1136(a)(1) and 1137(a)(1).

H. Insertion in (b)(2) of “professional misconduct, or crime(s)” before “committed subsequent to the act(s).”

OAL recommended the addition of “professional misconduct, or crime(s)” for clarity that the Board is also concerned with the commission of professional misconduct and crimes.

I. Insertion in (b)(4) of “Whether” and deletion of “The extent to which.”

OAL recommended the replacement of “The extent to which” with “Whether” for clarity.

J. Insertion in (c) of “, as applicable.”

OAL recommended the addition of “as applicable” for clarity that those criteria specified in this section are only those criteria that apply to the situation.

K. The deletion of “480” as an “Authority Cited.”

OAL recommended the deletion of section 480 as an authority.

Section 1137

A. Deletion in subdivision (a) of “and is presently eligible for a license.”

The Board proposes to delete this phrase from subdivision (a) because “eligible” could be seen as referring to other eligibility requirements for licensure, rather than referring to fitness or suitability for licensure. Deletion of this phrase will clarify the regulation.

B. Insertion in subdivision (b) of “If the licensee has not completed the criminal

sentence at issue without a violation of parole or probation, the board determines that the licensee did not make the showing of rehabilitation based on the criteria in subdivision (a), the suspension or revocation is based on a disciplinary action as described in Section 141 of the code, or the suspension or revocation is based on one or more of the grounds specified in Sections 1949, 1950, 1952, 1955, or 1958.1 of the code” and deletion of “If subdivision (a) is inapplicable, or the Board determines that the licensee did not make the showing of rehabilitation based on the criteria in subdivision (a)” and “The Board shall find that the licensee made a showing of rehabilitation and is presently fit for a license if, after considering the following criteria, the Board finds that the licensee is rehabilitated.”

The original text of subdivision (b) was unclear in specifying the circumstances when the regulation would apply. Instead of catch-all language, the Board proposes to delete the former preface to the regulation and enumerate each specific instance of when subdivision (a) would not apply, and now proposes to include all of the specified categories.

The Board proposes to cite BPC sections 1949, 1950, 1952, 1955, and 1958.1 since they are in the Board's practice act and authorize the Board to discipline a license. This would make the regulation inclusive of all of the instances in which the Board could discipline a license.

The Board proposes to delete the final sentence of subdivision (b) for clarity and brevity.

C. Insertion in subdivision (b)(1) and (b)(2) of “disciplinary action(s).”

The addition of “disciplinary action(s)” to subdivision (b)(1) and (b)(2) is made necessary by the addition of “disciplinary action” in subdivision (b).

D. Deletion in subdivision (b)(5) of “-“ and insertion of “through.”

The Board proposes this amendment to lend greater clarity to the subdivision.

E. Insertion in Note of Reference sections 1949, 1950, 1955, and 1958.1.

The Board proposes to add these sections to the Reference section of the regulation because the regulation, as modified, implements, interprets and/or makes specific these additional BPC sections.

F. Insertion in (a) of “under Section 490 of the Code” before “on the ground.”

OAL recommended the inclusion of “under Section 490 of the Code” for clarity.

G. Insertion in (b) of “Code,” and deletion of “code.”

The Board has capitalized “code” for consistency throughout the regulations.

H. Insertion in (b)(1) of “gravity” and deletion of “severity” before “of the acts.”

OAL recommended the substitution of “gravity” instead of “severity,” for consistency, since “gravity” is used in sections 1136(a)(1) and 1137(a)(1).

I. Deletion of “490” in the “Authority Cited”; addition of “141,” and deletion of 1943 and 1957 in Reference.

OAL recommended the deletion of “490” in the “Authority Cited;” and the addition of “141” and deletion of 1943 and 1957 in “Reference.”

Local Mandate

A mandate is not imposed on local agencies or school districts.

Objections or Recommendations/Responses

- A. On March 2, 2020, the Board received a letter from Root and Rebound (Comments) on the Board’s proposed regulations implementing Assembly Bill (AB) 2138. Below are the Board’s responses to the comments made therein.

Comment 1

Comment Summary:

This comment states that the proposed regulations leave some gaps in the regulatory scheme pursuant to the changes effected by Business and Professions Code (BPC) section 480, as modified by AB 2138. The comment states that the proposed regulations fail to meet and implement BPC section 480, and are not complete as written. Additionally, the comment states that the proposed regulations fall short of the intent of the bill, which includes combating discrimination against people with records who have demonstrated rehabilitation and seek to establish themselves professionally.

Response:

The Board rejects this comment.

The purpose of the proposed regulations is to clarify substantial relationship criteria and criteria for rehabilitation, as required by AB 2138 (BPC, § 481). Consistent with the requirements enacted by AB 2138, these regulations would adopt all of the following criteria, which would assist the Board in implementing a balanced approach to evaluating an applicant’s eligibility for licensure:

1. The nature and gravity of the offense.

2. The number of years elapsed since the date of the offense.
3. The nature and duties of a dental hygienist, dental hygienist in alternative practice, or a dental hygienist in extended functions.

Clarifying how to determine whether a crime is substantially related and clarifying the factors that will be considered when evaluating rehabilitation should assist applicants and licensees with demonstrating their rehabilitation.

Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

Comment 2

Comment Summary:

This comment requests the proposed language include a “7-year washout period” for consideration of convictions or discipline which are not statutorily considered serious felonies under the Penal Code. (BPC, § 480, subd. (a)(1), effective July 1, 2020.)

Response:

The Board rejects this comment.

Regulations should not indiscriminately incorporate statutory language. (Gov. Code, § 11349, subd. (f).)

The seven-year period during which a board can deny a license for a conviction or formal discipline is fully described in BPC section 480(a)(1), effective July 1, 2020. As this is already included in statute, adding this provision is duplicative of section 480(a)(1). Therefore, it is not necessary to repeat it in the regulations.

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 3

Comment Summary:

This comment requests the proposed language provide that a denial cannot occur if it is based on an expunged conviction, if the person has provided evidence of rehabilitation, or was granted clemency/pardon or for an arrest that led to a disposition other than a conviction.

Response:

The Board rejects this comment.

Regulations should not indiscriminately incorporate statutory language. (Gov. Code, § 11349, subd. (f).) BPC section 480(c), effective July 1, 2020, already states that a license may not be denied based on a conviction, or on the basis of the underlying acts, if it has been dismissed pursuant to Penal Code sections 1203.4, 1203.4a, 1203.41, 1203.42, or 1203.425, or otherwise dismissed or expunged. In addition, BPC section 480(b), effective July 1, 2020, prohibits license denial if the applicant has obtained a certificate of rehabilitation, was granted clemency or a pardon, or has made a showing of rehabilitation per BPC section 482. BPC section 480(d), effective July 1, 2020, prohibits license denial based on an arrest that resulted in something other than a conviction, such as an infraction, citation, or juvenile adjudication. Since these provisions are already specifically addressed in statute, adding them again in regulation would be duplicative.

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 4

Comment Summary:

This comment states the intent of AB 2138 was not to incorporate mere probation or parole reports into the occupational licensing determinations. This comment recommends the Board consider alternate forms of rehabilitation documentation beyond law enforcement supervision such as reviewing volunteer service, successful employment in a related field, unpaid work in the community, furthered education and other markers of rehabilitation.

Response:

The Board rejects this comment.

BPC section 482, effective July 1, 2020, requires boards to develop criteria to evaluate rehabilitation and to consider whether an applicant or licensee has made a showing of rehabilitation if either the criminal sentence has been completed without violation of probation or parole, or if the board otherwise finds the applicant rehabilitated.

The final text for proposed section 1136(a) and (b) articulates a two-step process for evaluating rehabilitation:

1. First, the Board must determine if the completion of the criminal sentence with no violations constitutes rehabilitation. Consistent with the direction in AB 2138, to consider rehabilitation if an applicant completes the criminal sentence at issue without a violation of parole or probation, specific criteria are being added to section 1136(a) and (b) to help the Board determine whether sentence completion demonstrates rehabilitation. Criteria include the nature and gravity of the crime(s)

under consideration, the length(s) of the applicable parole or probation period(s), the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified, the terms or conditions of parole or probation and the extent to which they bear on the applicant's or licensee's rehabilitation, and the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. If the Board finds rehabilitation, no further information needs to be provided.

2. The second step, if rehabilitation is not demonstrated based on sentence completion, requires the Board consider certain other criteria to evaluate rehabilitation. This includes the nature and severity of the act(s), professional misconduct, or crime(s) under consideration as grounds for denial, evidence of any act(s) committed subsequent to the act(s), professional misconduct, or crime(s) under consideration as grounds for denial, the time that has elapsed since commission of the act(s), professional misconduct, or crime(s) referred to in subdivision (b)(1) or (b)(2), the extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant, and evidence, if any, of rehabilitation submitted by the applicant. A general category permitting submission of any rehabilitation evidence allows an applicant to demonstrate volunteer or charity work, furthered education, successful employment, or any other activities that they choose to submit to be considered by the Board. As the Board can and already does give serious consideration to these factors when considering whether an applicant or licensee is rehabilitated, the Board believes that the proposed language is consistent with legislative intent.

Accordingly, the Board will not be listing sample rehabilitation criteria in response to this comment.

Comment 5

Comment Summary:

This comment states that the proposed regulation language does not mention that obtaining a certificate of rehabilitation, dismissal, or having arrest which merely led to an infraction/citation or juvenile adjudication means that a person shall not be denied a license.

Response:

The Board rejects this comment.

As noted in the response to Comment 3 above, BPC section 480(b), (c), and (d) expressly prohibit denial of a license in these circumstances. Stating these facts in the regulation would be duplicative of the statute. (Gov. Code, § 11349, subd. (f).)

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 6

Comment Summary:

This comment states that the proposed regulations fail to state the requirements set forth in BPC section 480(g)(2), effective July 1, 2020, including, that a board retain the number of applicants with a criminal record who received notice of denial or disqualification of licensure, the number of applicants with a criminal record who provided evidence of mitigation or rehabilitation, and the final disposition and demographic information.

Response:

The Board rejects this comment.

These requirements are already set forth in statute. (BPC, § 480, subd. (g)(2), effective July 1, 2020.) Stating them in regulation would be duplicative of the statute. (Gov. Code, § 11349, subd. (f).)

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 7

Comment Summary:

This comment states that proposed section 1311 fails to state that the board shall not require an applicant to disclose any information or documentation regarding the applicant's criminal history.

Response:

The Board rejects this comment. There is no proposed section 1311. The Board has no authority to require disclosures above those authorized by statute. An applicant may disclose evidence of rehabilitation in section 1136 on a voluntary basis. Therefore, the Board is making no changes to the regulations in response to this comment.

Comment 8

Comment Summary:

This comment states that proposed section 1132 maintains a request for an applicant to pay the costs for furnishing the request of disclosure for new conviction providing for an

added burden to individuals who are applying for this license.

Response:

The Board rejects this comment.

There is no proposed section 1132 and there is no request for costs in the proposed regulations. Therefore, the Board is making no changes to the regulations in response to this comment.

Comment 9

Comment Summary:

This comment states that the proposed regulation fails to state that the board shall notify the applicant in writing of denial, disqualifications, procedures in place for the applicant to challenge a decision or request consideration, that the applicant has a right to appeal the board's decision, and the process for requesting a complete conviction history.

Response:

The Board rejects this comment.

BPC sections 480(f)(3), 485 through 487, and the Administrative Procedure Act, at Government Code section 11500, *et seq.*, already contain these requirements, including requirements for providing the legal and factual basis for the denial, service of the denial on the applicant, and notice to the applicant regarding the opportunity to request a hearing to challenge the decision. Restating these requirements would be duplicative of the statutes. (Gov. Code, § 11349, subd. (f).)

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 10

Comment Summary:

This comment states that the proposed language in section 1135(c) provides a list of presumptive convictions indicating a substantial relationship without the opportunity and true consideration of any evidence which could prove otherwise. The comment states that driving is not a necessary skill for the profession of dental hygiene so section 1135(c)(9) (which states that a conviction for driving under the influence of drugs or alcohol is substantially related to the qualifications, functions or duties of a dental hygienist, dental hygienist in alternative practice, or a dental hygienist in extended functions) should not be included. Additionally, the comment states that each of the

crimes that are not referencing a direct violation of dental practice, such as subdivision (c)(2), should not be included because they are not necessarily related.

Response:

The Board rejects this comment.

As explained below, the inclusion of each of these categories of conduct reflects a Board determination that they evidence the present or potential unfitness of a person holding a license or certificate to perform the functions authorized and/or mandated by the license or certificate. Passage of time does not lessen the qualitative nexus between a crime and a substantial relationship to the functions of a profession. While courts have looked to the type of work performed by a licentiate in determining whether or not a nexus exists, they have not created time limits for when a crime becomes “no longer” related.

Proposed section 1135(c) contains types of crimes or conduct that the Board generally considers to be substantially related to the qualifications, functions or duties of the professions regulated by the Board.

These crimes or conduct include a conviction or act involving fiscal dishonesty, a conviction or act involving child abuse, a conviction requiring a person to register as a sex offender pursuant to Penal Code section 290, a conviction or act involving lewd conduct or sexual impropriety, a conviction or act involving assault, battery, or other violence, any conviction, crime, professional misconduct, or act involving the use, sale, gift, administration, furnishing of narcotics, or dangerous drugs or dangerous devices (Section 4022 of the Code) to an extent or in a manner dangerous to the individual or the public, and a conviction for driving under the influence of drugs or alcohol. (Proposed section 1135, subs. (c)(3)-(c)(9).)

1. Subdivision (c)(3), a conviction of act involving fiscal dishonesty.

Dental hygienists often work in dental offices that receive federal funding and/or deal with insurance companies on a regular basis. Licentiates must accurately report services rendered. Conduct involving fiscal dishonesty erodes trust that the services will be accurately billed to the appropriate parties. To enhance trust in the profession, acts or crimes involving fiscal dishonesty are deemed substantially related to the duties of licensure. For instance, a conviction for tax evasion/income tax fraud was considered related to the practice of medicine in *Windham v. Bd. of Med. Quality Assurance* (1980) 104 Cal. App. 3d 461. Medi-Cal fraud by a dentist was upheld as cause for revocation in *Hanna v. Dental Bd. of California* (2012) 212 Cal. App. 4th 759, which cited a previous medical board action:

Convictions for Medi-Cal fraud are substantially related to a professional's fitness or capacity to practice her profession. (*Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 305–306, 144 Cal.Rptr.

826 (*Matanky*) [“Intentional dishonesty ... demonstrates a lack of moral character and satisfies a finding of unfitness to practice medicine”].) (*Hanna*, 212 Cal. App. 4th 759, 765.)

2. Subdivision (c)(4), a conviction or act involving child abuse.
3. Subdivision (c)(5), a conviction requiring a person to register as a sex offender pursuant to Penal Code section 290.
4. Subdivision (c)(6), a conviction or act involving lewd conduct or sexual impropriety.

The Board has determined that these acts void trust, and licentiates must be trustworthy.

BPC section 726 was amended by AB 179 (Chapter 510, Statutes of 2015), to provide: “(a) The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division or under any initiative act referred to in this division.” Dentistry and Dental Hygiene are chapters of the Healing Arts Division, and so the article on Unprofessional Conduct applies.

In *Green v. Board of Dental Examiners* (1996), 47 Cal.App.4th 786, a dentist’s sexual conduct with patients was substantially related to his functions and duties as dentist and thus warranted disciplinary action:

The disciplinary action against Green was premised on Section 726 which provided that “ ‘[t]he commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer which is substantially related to the qualifications, functions, or duties of the occupation for which a license was issued constitutes unprofessional conduct and grounds for disciplinary action....’ ” (*Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, 594.) “ [S]ection 726, which is a licensing provision, allows the licensing authority to discipline a [dentist] who engages in sexual acts with a patient only if it is “substantially related to the qualifications, functions, or duties of the occupation for which a license was issued....” [Citation.]’ [Citation.]” (*Id.* at p. 597.)

[T]he statute does not bar all sexual relations with a patient—only activity which is ‘substantially related to the qualifications, functions, or duties of the occupation.’ ” (*Gromis* at p. 594, 10 Cal.Rptr.2d 452.) “Of course, nonconsensual sexual advances or touching has been upheld as a ground for discipline. [Citation.] Consensual sexual activity, too, has been found a legitimate basis for discipline when the sexual activity occurred under guise of treatment, as part of a physical examination, during psychiatric treatment or in exchange for drugs.” (*Id.* at p. 595, 10 Cal.Rptr.2d 452.) (*Green*, at pp. 800-801.)

In *Atienza v. Taub* (1987) 194 Cal.App.3d 388, the appellate court held:

...that a sexual relationship with a patient constitutes professional negligence 'only if the physician engaged in the sexual conduct on the pretext that it was a necessary part of the treatment for which the patient has sought out the physician.' [(*Atienza*, at p. 392, 239 Cal.Rptr. 454.)]" (*Gromis v. Medical Board, supra*, 8 Cal.App.4th at p. 596, 10 Cal.Rptr.2d 452.) (*Green*, at p. 802.)

Dental hygiene services are often performed in a private room, where the consumer is ensconced in a position of semi- or full recline. A hygienist has full movement around the room and over the consumer. A hygienist is trusted to touch the consumer to perform hygiene-related services, such as draping (and removing) x-ray covers over a consumer, adjusting a consumer's head for teeth cleaning, or inserting instruments into a consumer's mouth for dental work. Acts of child abuse or sexual abuse are substantially related to qualifications, functions or duties of a dental hygienist, dental hygienist in alternative practice, or a dental hygienist in extended functions because of these professionals' position of trust and the closeness with which they work with patients.

5. Subdivision (c)(7), a conviction or act involving assault, battery, or other violence.
6. Subdivision (c)(8), citing any conviction, crime, professional misconduct, or act involving the use, sale, gift, administration, furnishing of narcotics, or dangerous drugs or dangerous devices Section 4022 of the Code) to an extent or in a manner dangerous to the individual or the public.

Healing arts are governed in principle by the Hippocratic oath ("Oath") to do no harm. The Board has determined that any conviction or act involving assault, battery, or other violence, or furnishing of dangerous drugs or devices, is substantially related to the covenant not to harm fellow persons. According to *Weissbuch v. Board of Medical Examiners* (1974) 41 Cal.App.3d 924, 929:

...conviction of a doctor for violation of the laws regarding narcotics and dangerous drugs or a doctor's personal non-prescribed use of such substances evidences a sufficient danger to the public that sanctions should be imposed regardless of the availability of evidence that such conduct in fact impaired the doctor's professional skill.

7. Subdivision (c)(9), a conviction for driving under the influence of drugs or alcohol.

The Board has determined that any licensee who drives under the influence of drugs or alcohol is presumed to understand the risk they pose to other members of society and thus violates the Oath.

In *Watson, supra*, 176 Cal.App.4th 1407, the Medical Board of California revoked the license of a physician based on four arrests for DUI. (*Id.* at pp. 1411-1412.)

None of the arrests had resulted in a conviction, although criminal charges related to the most recent arrest were still pending at the time of the administrative hearing. (*Id.* at pp. 1413-1414.) On appeal, the physician asserted section 2239 permitted discipline based on the use of alcohol in a dangerous manner only if there was a separate finding establishing a nexus between such use and the physician's ability to practice medicine safely. (*Id.* at p. 1411.) The court determined the Legislature had made an implied finding that the use of alcohol in a dangerous manner was de facto unprofessional conduct that substantially related to the physician's fitness to practice medicine such that no further finding was required in an individual case, and that it was constitutional for the Legislature to establish the nexus in this manner. (*Id.* at pp. 1418-1424.)

In *Walker v. Physical Therapy Bd. of California* (2017), 16 Cal. App. 5th 1219, a single act (not a conviction) of intemperance formed the basis for discipline of a physical therapist. In *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, the court concluded that a nexus exists, given that driving under the influence “reflect[s] a lack of sound professional and personal judgment,” threatens the safety of the public, and demonstrates both a disregard of the medical knowledge of the effects of alcohol and the legal prohibitions against drinking and driving. (*Id.* at p. 770; see also, *Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195 [a nurse was disciplined for a single incidence of DUI].)

Additionally, registered dental hygienists in alternative practice are authorized to operate mobile dental hygiene clinics (MDHC) registered as a dental hygiene office or facility. (Bus. & Prof. Code, §§ 1926.1 & 1926.2.) The Board is presently developing regulations to govern MDHCs. Licensees operating MDHCs would need to drive to operate such clinics. Accordingly, driving is substantially related to this function of a licensee.

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 11

Comment Summary:

This comment states that the proposed language in section 1136(a)(4)-(5) should clarify that although probation and parole terms are relevant for those who are currently on supervision, this should not take hold of the analysis of the conviction for those who are no longer on supervision.

Response:

The Board rejects this comment.

BPC section 482, effective July 1, 2020, requires boards to develop criteria to evaluate

rehabilitation and to consider whether an applicant or licensee has made a showing of rehabilitation if either the criminal sentence has been completed without violation of probation or parole, or if the board otherwise finds the applicant rehabilitated. The Board has determined that probation and parole terms and conditions are also relevant to those no longer on probation or parole because they are historical evidence of compliance with probation and parole.

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 12

Comment Summary:

This comment states that the Board should provide examples of evidence of mitigating circumstances and rehabilitation efforts to better define rehabilitation.

Response:

The Board rejects this comment.

BPC section 482, effective July 1, 2020, requires boards to develop criteria to evaluate rehabilitation and to consider whether an applicant or licensee has made a showing of rehabilitation if either the criminal sentence has been completed without violation of probation or parole, or if the board otherwise finds the applicant rehabilitated. Sections 1136(b)(5) and 1137(b)(7) are catch-all categories for the licensee to provide evidence of rehabilitation. The Board prefers to articulate broad categories for this evidence, instead of articulating possible forms of such evidence, as listing particular examples or scenarios might be seen as a limitation to those types of evidence listed.

Accordingly, the Board is making no changes to the regulations in response to this comment.

- B. On May 18, 2020, the Board received a joint letter from A New Way of Life Reentry Project, Californians for Safety and Justice, Center for Employment Opportunities, Center for Living and Learning, Community Legal Services in East Palo Alto, Criminal Justice Clinic, UC Irvine School of Law, Drug Policy Alliance, East Bay Community Law Center, Legal Aid at Work, Legal Services for Prisoners with Children, All of Us or None, Los Angeles Regional Reentry Project, National Association of Social Workers, California Chapter, REDF, The Record Clearance Project, San Jose State University, Root and Rebound, Rubicon Programs, and Underground Scholars Initiative on the Board's proposed regulations implementing AB 2138. Below are the Board's responses to the comments made therein.

Comment 1

Comment Summary:

This comment states that the proposed regulations leave some gaps in the regulatory scheme pursuant to the changes to BPC section 480, 481, 482, and 493 as modified by AB 2138. The comment states that the proposed regulations fail to meet and implement these statutes and are not valid. Additionally, the comment states that the proposed regulations fall short of the intent of the bill, which includes combating discrimination against people with records who have demonstrated rehabilitation and seek to establish themselves professionally.

Response:

The Board rejects this comment.

The purpose of the proposed regulations is to clarify substantial relationship criteria and criteria for rehabilitation, as required by AB 2138 (BPC, § 481). Consistent with the requirements enacted by AB 2138, these regulations would adopt all of the following criteria, which would assist the Board in implementing a balanced approach to evaluating an applicant's eligibility for licensure:

1. The nature and gravity of the offense.
2. The number of years elapsed since the date of the offense.
3. The nature and duties of a dental hygienist, dental hygienist in alternative practice, or a dental hygienist in extended functions.

Clarifying how to determine whether a crime is substantially related and clarifying the factors that will be considered when evaluating rehabilitation should assist applicants and licensees with demonstrating their rehabilitation.

Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

Comment 2

Comment Summary:

Section 1135 states that certain violations are substantially related regardless of the time that has passed or the nature and gravity of the offense in contravention of BPC section 481. AB 2138 allows the Board discretion to determine which crimes are substantially related on an individual basis.

Moreover, section 1135 fails to note that criminal history that resulted in the applicant obtaining a certificate of Rehabilitation, pardon, dismissal per Penal Code section

1203.4 et seq., or an arrest that resulted in a disposition other than a conviction shall not result in the denial of a license.

Response:

The Board rejects this comment.

As explained below, the inclusion of each of these categories of conduct reflects a Board determination that they evidence the present or potential unfitness of a person holding a license or certificate to perform the functions authorized and/or mandated by the license or certificate. Passage of time does not lessen the qualitative nexus between a crime and a substantial relationship to the functions of a profession. While courts have looked to the type of work performed by a licensee in determining whether or not a nexus exists, they have not created time limits for when a crime becomes “no longer” related.

Proposed section 1135(c) contains types of crimes or conduct that the Board generally considers to be substantially related to the qualifications, functions or duties of the professions regulated by the Board.

These crimes or conduct include a conviction or act involving fiscal dishonesty, a conviction or act involving child abuse, a conviction requiring a person to register as a sex offender pursuant to Penal Code section 290, a conviction or act involving lewd conduct or sexual impropriety, a conviction or act involving assault, battery, or other violence, any conviction, crime, professional misconduct, or act involving the use, sale, gift, administration, furnishing of narcotics, or dangerous drugs or dangerous devices (Section 4022 of the Code) to an extent or in a manner dangerous to the individual or the public, and a conviction for driving under the influence of drugs or alcohol. (Proposed section 1135, subs. (c)(3)-(c)(9).)

1. Subdivision (c)(3), a conviction of act involving fiscal dishonesty.

Dental hygienists often work in dental offices that receive federal funding and/or deal with insurance companies on a regular basis. Licensees must accurately report services rendered. Conduct involving fiscal dishonesty erodes trust that the services will be accurately billed to the appropriate parties. To enhance trust in the profession, acts or crimes involving fiscal dishonesty are deemed substantially related to the duties of licensure. For instance, a conviction for tax evasion/income tax fraud was considered related to the practice of medicine in *Windham v. Bd. of Med. Quality Assurance* (1980) 104 Cal. App. 3d 461. Medi-Cal fraud by a dentist was upheld as cause for revocation in *Hanna v. Dental Bd. of California* (2012) 212 Cal. App. 4th 759, which cited a previous medical board action:

Convictions for Medi-Cal fraud are substantially related to a professional's fitness or capacity to practice her profession. (*Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 305–306, 144 Cal.Rptr.

826 (*Matanky*) [“Intentional dishonesty ... demonstrates a lack of moral character and satisfies a finding of unfitness to practice medicine”].) (*Hanna*, 212 Cal. App. 4th 759, 765.)

2. Subdivision (c)(4), a conviction or act involving child abuse.
3. Subdivision (c)(5), a conviction requiring a person to register as a sex offender pursuant to Penal Code section 290.
4. Subdivision (c)(6), a conviction or act involving lewd conduct or sexual impropriety.

The Board has determined that these acts void trust, and licentiates must be trustworthy.

BPC section 726 was amended by AB 179 (Chapter 510, Statutes of 2015), to provide: “(a) The commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division or under any initiative act referred to in this division.” Dentistry and Dental Hygiene are chapters of the Healing Arts Division, and so the article on Unprofessional Conduct applies.

In *Green v. Board of Dental Examiners* (1996), 47 Cal.App.4th 786, a dentist’s sexual conduct with patients was substantially related to his functions and duties as dentist and thus warranted disciplinary action:

The disciplinary action against Green was premised on Section 726 which provided that “ ‘[t]he commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer which is substantially related to the qualifications, functions, or duties of the occupation for which a license was issued constitutes unprofessional conduct and grounds for disciplinary action....’ ” (*Gromis v. Medical Board* (1992) 8 Cal.App.4th 589, 594.) “ [S]ection 726, which is a licensing provision, allows the licensing authority to discipline a [dentist] who engages in sexual acts with a patient only if it is “substantially related to the qualifications, functions, or duties of the occupation for which a license was issued....” [Citation.]’ [Citation.]” (*Id.* at p. 597.)

[T]he statute does not bar all sexual relations with a patient—only activity which is ‘substantially related to the qualifications, functions, or duties of the occupation.’ ” (*Gromis* at p. 594, 10 Cal.Rptr.2d 452.) “Of course, nonconsensual sexual advances or touching has been upheld as a ground for discipline. [Citation.] Consensual sexual activity, too, has been found a legitimate basis for discipline when the sexual activity occurred under guise of treatment, as part of a physical examination, during psychiatric treatment or in exchange for drugs.” (*Id.* at p. 595, 10 Cal.Rptr.2d 452.) (*Green*, at pp. 800-801.)

In *Atienza v. Taub* (1987) 194 Cal.App.3d 388, the appellate court held:

...that a sexual relationship with a patient constitutes professional negligence 'only if the physician engaged in the sexual conduct on the pretext that it was a necessary part of the treatment for which the patient has sought out the physician.' [(*Atienza*, at p. 392, 239 Cal.Rptr. 454.)]" (*Gromis v. Medical Board, supra*, 8 Cal.App.4th at p. 596, 10 Cal.Rptr.2d 452.) (*Green*, at p. 802.)

Dental hygiene services are often performed in a private room, where the consumer is ensconced in a position of semi- or full recline. A hygienist has full movement around the room and over the consumer. A hygienist is trusted to touch the consumer to perform hygiene-related services, such as draping (and removing) x-ray covers over a consumer, adjusting a consumer's head for teeth cleaning, or inserting instruments into a consumer's mouth for dental work. Acts of child abuse or sexual abuse are substantially related to qualifications, functions or duties of a dental hygienist, dental hygienist in alternative practice, or a dental hygienist in extended functions because of these professionals' position of trust and the closeness with which they work with patients.

5. Subdivision (c)(7), a conviction or act involving assault, battery, or other violence.¹
6. Subdivision (c)(8), citing any conviction, crime, professional misconduct, or act involving the use, sale, gift, administration, furnishing of narcotics, or dangerous drugs or dangerous devices Section 4022 of the Code) to an extent or in a manner dangerous to the individual or the public.²

Healing arts are governed in principle by the Hippocratic oath ("Oath") to do no harm. The Board has determined that any conviction or act involving assault, battery, or other violence, or furnishing of dangerous drugs or devices, is substantially related to the covenant not to harm fellow persons. According to *Weissbuch v. Board of Medical Examiners* (1974) 41 Cal.App.3d 924, 929:

...conviction of a doctor for violation of the laws regarding narcotics and dangerous drugs or a doctor's personal non-prescribed use of such substances evidences a sufficient danger to the public that sanctions should be imposed regardless of the availability of evidence that such conduct in fact impaired the doctor's professional skill.

¹ After consultation with the Office of Administrative Law (OAL), the Board amended this language to state: "Assaultive or abusive conduct as defined in Penal Code section 11160, subdivision (d)."

² After consultation with OAL, the Board amended this language to state: "Any criminal conviction, professional misconduct, or act involving the use, sale, gift, administration, furnishing of narcotics, dangerous drugs or dangerous devices (Section 4022 of the Code) to an extent or in a manner dangerous to the individual or the public."

7. Subdivision (c)(9), a conviction for driving under the influence of drugs or alcohol.

The Board has determined that any licensee who drives under the influence of drugs or alcohol is presumed to understand the risk they pose to other members of society and thus violates the Oath.

In *Watson, supra*, 176 Cal.App.4th 1407, the Medical Board of California revoked the license of a physician based on four arrests for DUI. (*Id.* at pp. 1411-1412.) None of the arrests had resulted in a conviction, although criminal charges related to the most recent arrest were still pending at the time of the administrative hearing. (*Id.* at pp. 1413-1414.) On appeal, the physician asserted section 2239 permitted discipline based on the use of alcohol in a dangerous manner only if there was a separate finding establishing a nexus between such use and the physician's ability to practice medicine safely. (*Id.* at p. 1411.) The court determined the Legislature had made an implied finding that the use of alcohol in a dangerous manner was de facto unprofessional conduct that substantially related to the physician's fitness to practice medicine such that no further finding was required in an individual case, and that it was constitutional for the Legislature to establish the nexus in this manner. (*Id.* at pp. 1418-1424.)

In *Walker v. Physical Therapy Bd. of California* (2017), 16 Cal. App. 5th 1219, a single act (not a conviction) of intemperance formed the basis for discipline of a physical therapist. In *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, the court concluded that a nexus exists, given that driving under the influence "reflect[s] a lack of sound professional and personal judgment," threatens the safety of the public, and demonstrates both a disregard of the medical knowledge of the effects of alcohol and the legal prohibitions against drinking and driving. (*Id.* at p. 770; see also, *Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195 [a nurse was disciplined for a single incidence of DUI].)

Additionally, registered dental hygienists in alternative practice are authorized to operate mobile dental hygiene clinics (MDHC) registered as a dental hygiene office or facility. (Bus. & Prof. Code, §§ 1926.1 & 1926.2.) The Board is presently developing regulations to govern MDHCs. Licensees operating MDHCs would need to drive to operate such clinics. Accordingly, driving is substantially related to this function of a licensee.

Passage of time, instead, would be reflected as a factor in rehabilitation.

As for the comment in the second paragraph, please see response to Comment 5.

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 3:

Comment Summary:

Sections 1136 and 1137 rely too heavily on law enforcement's reports and determination of the applicant's progress. Rehabilitation can and does take many forms that the current language does not fully embrace. The comment refers to Comment 8 below for examples of rehabilitation to expand the proposed regulations.

Response:

The Board incorporates herein by reference its response to Comment 8.

Comment 4:

Comment Summary:

This comment requests the proposed language include a "7-year washout period" for consideration of convictions or discipline which are not statutorily considered serious felonies under Penal Code section 1192.7. (BPC, § 480, subd. (a)(1), effective July 1, 2020.)

Response:

The Board rejects this comment.

Regulations should not indiscriminately incorporate statutory language. (Gov. Code, § 11349, subd. (f).)

The seven-year period during which a board can deny a license for a conviction or formal discipline is fully described in BPC section 480(a)(1)(A) and (B), effective July 1, 2020. As this is already included in statute, adding this provision is duplicative of section 480(a)(1). Therefore, it is not necessary to repeat it in the regulations.

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 5

Comment Summary:

This comment states that the regulations should provide that a person with a criminal history shall not be denied a license if the applicant has obtained a certificate of rehabilitation, dismissal per Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.42, or an arrest which led to an infraction/citation or a disposition other than a conviction, or juvenile adjudication. (BPC, § 480, subds. (b)-(d).)

Response:

The Board rejects this comment.

Regulations should not indiscriminately incorporate statutory language. (Gov. Code, § 11349, subd. (f).) BPC section 480(c), effective July 1, 2020, already states that a license may not be denied based on a conviction, or on the basis of the underlying acts, if it has been dismissed pursuant to Penal Code sections 1203.4, 1203.4a, 1203.41, 1203.42, or 1203.425, or otherwise dismissed or expunged. In addition, BPC section 480(b), effective July 1, 2020, prohibits license denial if the applicant has obtained a certificate of rehabilitation, was granted clemency or a pardon, or has made a showing of rehabilitation per BPC section 482. BPC section 480(d), effective July 1, 2020, prohibits license denial based on an arrest that resulted in something other than a conviction, such as an infraction, citation, or juvenile adjudication. Since these provisions are already specifically addressed in statute, adding them again in regulation would be duplicative.

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 6**Comment Summary:**

This comment states that the regulations fail to state that the Board shall not require an applicant to disclose any information or documentation regarding the applicant's criminal history. (BPC, § 480, subd. (f)(2).)

Response:

The Board rejects this comment.

Section 480(f)(2), effective July 1, 2020, provides that a board cannot require an applicant for licensure to disclose any information or documentation regarding the applicant's criminal history. As this is already provided by statute, adding this provision is duplicative of section 480(f)(2). Therefore, it is not necessary to repeat it in the regulations.

Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

Comment 7

Comment Summary:

This comment states that the proposed language fails to include that the board must notify the applicant in writing if the applicant is denied a license or is disqualified from licensure. The comment states that the Board must provide procedures describing the process for an applicant to challenge a decision or request consideration, a procedure stating that the applicant has a right to appeal the Board's decision, and provide a process for requesting a complete conviction history. (BPC, § 480, subd. (f)(3).)

Response:

The Board rejects this comment.

BPC sections 480(f)(3), 485 through 487, and the Administrative Procedure Act, at Government Code section 11500, *et seq.*, already contain these requirements, including requirements for providing the legal and factual basis for the denial, service of the denial on the applicant, and notice to the applicant regarding the opportunity to request a hearing to challenge the decision. Restating these requirements would be duplicative of the statutes. (Gov. Code, § 11349, subd. (f).)

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 8

Comment Summary:

This comment states that the intent of AB 2138 was not to incorporate mere probation or parole reports into the occupational licensing determinations. The letter states that rehabilitation can and does take many forms that extend beyond law enforcement supervision. Therefore, the letter recommends that the Board consider adding the following rehabilitation criteria:

- Volunteer service;
- Successful employment in a related field;
- A history of work experience in an employment social enterprise;
- Unpaid work in the community;
- Furthered education;
- Abstinence from controlled substances and/or alcohol;
- Stability of family life, fulfillment of parental and familial responsibilities;
- New and different social and business relationships from those which existed at the time of the underlying charges at issue;
- Change in attitude of the applicant as evidenced by:

- Personal testimony,
- Evidence of rehabilitation submitted by the applicant,
- Evidence from family, friends, and/or other persons familiar with the applicant's previous behavior patterns and subsequent attitude and behavioral changes; and
- Other markers of rehabilitation.

Response:

The Board rejects this comment.

BPC section 482, effective July 1, 2020, requires boards to develop criteria to evaluate rehabilitation and to consider whether an applicant or licensee has made a showing of rehabilitation if either the criminal sentence has been completed without violation of probation or parole, or if the board otherwise finds the applicant rehabilitated. Sections 1136(b)(5) and 1137(b)(7) are catch-all categories for the licensee to provide evidence of rehabilitation. The Board prefers to articulate broad categories for this evidence, instead of articulating possible forms of such evidence, as listing particular examples or scenarios might be seen as a limitation to those types of evidence listed.

Accordingly, the Board is making no changes to the regulations in response to this comment.

Comment 9

Comment Summary:

The comment states that the proposed regulations fail to state the requirements set forth in BPC section 480(g)(2), effective July 1, 2020, including, that a board retain the number of applicants with a criminal record who received notice of denial or disqualification of licensure, the number of applicants with a criminal record who provided evidence of mitigation or rehabilitation, and the final disposition and demographic information.

Response:

The Board rejects this comment.

These requirements are already set forth in statute. (BPC, § 480, subd. (g)(2), effective July 1, 2020.) Stating them in regulation would be duplicative of the statute. (Gov. Code, § 11349, subd. (f).)

Accordingly, the Board is making no changes to the regulations in response to this comment.

C. A letter was received from Yunuen Aguirre on July 6, 2020, in support of the proposed regulation package of 16 CCR sections 1135,1136, and 1137.

Ms. Aguirre recounted her personal rehabilitation experience with the DHBC and was supportive of the proposed regulation package of 16 CCR sections 1135,1136, and 1137. There was nothing to accommodate or reject within this comment letter.

D. A letter was received from Justine McLeod on July 9, 2020, in support of the proposed regulation package of 16 CCR sections 1135,1136, and 1137.

Ms. McLeod recounted her personal rehabilitation experience with the DHBC and was supportive of the proposed regulation package of 16 CCR sections 1135,1136, and 1137. There was nothing to accommodate or reject within this comment letter.

During the 15-day comment period for the second modified text, the Board received the the following comment:

E. On October 14, 2020, the Board received a letter from Brinton Fickett (E) on the Board's proposed regulations implementing Assembly Bill (AB) 2138. Below is the Board's response to the comments made therein.

Comment Summary:

This comment states that regardless of proof of rehabilitation, those convicted of crimes should not be rewarded with the opportunity to practice in this profession and that no shortage of dental hygienists would be so great that opening it up to criminals should be considered an option.

Response:

The Board appreciates the sentiment behind the comment but declines to modify the text in response.

The author of letter E incorrectly identifies their opposition to "proposed legislation." AB 2138 was already passed and must be acted upon by the Board. The purpose of the notification was to advise as to proposed regulations to clarify substantial relationship criteria and criteria for rehabilitation, as required by AB 2138. (BPC, § 481.) Consistent with the requirements enacted by AB 2138, these regulations would adopt all of the following criteria, which would assist the Board in implementing a balanced approach to evaluating an applicant's eligibility for licensure:

1. The nature and gravity of the offense.
2. The number of years elapsed since the date of the offense.
3. The nature and duties of a dental hygienist, dental hygienist in alternative practice, or a dental hygienist in extended functions.

Clarifying how to determine whether a crime is substantially related and clarifying the factors that will be considered when evaluating rehabilitation should assist applicants and licensees with demonstrating their rehabilitation, while protecting the public and maintaining the integrity of the profession.

Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

Consideration of Alternatives

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Bureau would be more effective in carrying out the purpose for which it was proposed or would be as effective and less burdensome to affected private persons than the adopted regulations or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Economic Impact

To the extent license applicants and licensees were convicted of a crime or were previously disciplined, the proposed regulations could impact individual licensees by authorizing individuals with criminal convictions to obtain licensure by the Board, if they have met the rehabilitative criteria, and the criminal convictions are substantially related, as established in this regulatory proposal.

However, because the Board historically denies a minimal number (less than one) initial license applications per year, as specified, the Board does not anticipate an increase in the number of new initial licensees resulting from the proposed regulations.

Fiscal Impact

The Board does not anticipate increased workload or costs resulting from the proposed regulations.

Because the Board historically denies a minimal number (less than one) of initial license applications per year, no increase in the number of initial applications approved per year is anticipated. As a result, the proposed regulations are not anticipated to increase licensing and/or enforcement costs related to any expansion of the licensee population.

Nonduplication Statement - 1 CCR § 12

As stated throughout the Initial and Final Statements of Reasons, the proposed regulations partially duplicate or overlap several state statutes amended by the passage of AB 2138. In particular, AB 2138 amended Business and Professions Code sections 480 (grounds upon which a board can deny a license for applicants convicted of a crime

or subject to formal discipline by a licensing board), 481 (the criteria boards can apply in determining if a crime bears a substantial relationship to the qualifications, functions or duties of the profession a board regulates), 482 (the rehabilitation criteria a board must consider when considering the denial, suspension or revocation of a license due to conviction of a crime), and 493 (the evidentiary effect of a conviction and criteria for determining if a crime has a substantial relationship to the profession). By repeating key language from these statutes within these regulations, the steps the Board will take, and the reasoning it will apply, the regulations become significantly clearer, and will better guide Board members, parties, administrative law judges, attorneys, and individuals with criminal convictions.

The changes made by AB 2138 and these regulations are directly applicable to individuals convicted of a crime who seek licensure, and to licensees who are convicted of a crime. As these regulations implement, interpret, and make specific how the laws amended by AB 2138 will be enforced by the Board, some duplication or overlap is necessary to ensure that the steps the Board must follow and the reasoning the Board must apply is clear and consistent with statute. The partial duplication or overlap with the statutes amended by AB 2138 are thus necessary to effectively implement the new standards in a way that satisfies the “clarity” standard of Government Code section 11349.1, subdivision (a)(3).