

Respiratory Care Board of California

Department of Consumer Affairs

Initial Statement of Reasons

Hearing Date No hearing date has been scheduled for this proposed action.

Subject Matter of Proposed Regulations:

Substantial Relationship Criteria, and Rehabilitation Criteria for Denials, Suspensions, or Revocations.

Sections Affected:

1399.370, and 1399.372, of Division 13.6, Title 16 of the California Code of Regulations (CCR).

Background and Problem Being Addressed

The Respiratory Care Board (Board) enforces the Respiratory Care Practice Act at Business and Professions Code (BPC) sections 3700-3779 and oversees approximately 23,600 licensed respiratory care practitioners and respiratory care practitioner applicants.

Business and Professions Code (BPC) section 141 currently authorizes the Board to discipline a licensee because of substantially related acts that form the basis for out-of-state discipline. BPC section 480 also authorizes the Board to deny a license application because of substantially related acts that form the basis for formal discipline by a licensing board in or outside of California.

In accordance with the statutory amendments implemented by Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018), beginning July 1, 2020, BPC sections 481 and 493 will require the Board, when considering the denial, suspension, or revocation of a license based on a crime, to determine whether the crime is substantially related to the qualifications, functions, or duties of the professions it regulates. Further, BPC section 493 will require the Board to determine whether a crime is substantially related to the qualifications, functions, or duties of a licensee by using specified criteria. The substantial relationship requirement stems from the due process principle that a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to the individual's fitness or competence to practice. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 448; *Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1137-1138).

Rehabilitation Criteria: In addition, BPC section 482 requires the Board to develop criteria to evaluate the rehabilitation of an applicant or licensee when considering the denial, suspension, or revocation of a license pursuant to BPC section 480 or 490. Beginning July 1, 2020, BPC section 482 will require the Board, when considering the denial, suspension, or revocation of a license based on a crime, professional misconduct, or act

pursuant to BPC section 480 or 490, to consider whether the applicant or licensee is rehabilitated based on specific criteria. In the context of professional licensing decisions, the courts have said that, “[r]ehabilitation . . . is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration.” (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058, internal punctuation omitted). Additionally, the Legislature’s “clear intent” in enacting AB 2138 was “to reduce licensing and employment barriers for people who are rehabilitated.” (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135).

Existing regulations: 16 CCR 1399.370 establishes the criteria for determining when a crime or act is substantially related to the qualifications, functions, and duties of a licensee. 16 CCR 1399.372 establishes the criteria for determining rehabilitation of an applicant or licensee when considering denial, suspension, or revocation of a license based on a crime or act, or whether to grant a petition for reinstatement of a license.

Problem Statement: In order to comply with the mandates of AB 2138, the Board proposes to amend sections 1399.370 and 1399.372 of Article 7 of Division 13.6 of title 16 of the CCR to adhere to these mandates and revise its substantial relationship and rehabilitation criteria.

SPECIFIC PURPOSE, ANTICIPATED BENEFIT, AND RATIONALE:

Amend section 1399.370 - Substantial Relationship Criteria

Amend Section 1399.370 subdivision (a):

Purpose: The purpose of amending 16 CCR 1399.370, subd. (a) is to expand the regulation to include discipline under BPC section 141 because the substantially related acts that are the basis for discipline in an out-of-state jurisdiction may be used to discipline a licensee under BPC section 141. This subdivision would also be amended to require the Board to apply these criteria in its evaluation of “professional misconduct,” because, beginning July 1, 2020, the Board will be expressly authorized to deny licenses based on such misconduct under BPC section 480. (BPC section 480, subd. (a)(2), as added by AB 2138, section 4). The subdivision would be amended to reword and move to subd. (c) the phrase, “[s]uch crimes or acts shall include but not be limited to those involving the following.”

Anticipated Benefit: The proposed revisions to 16 CCR 1399.370, subd. (a) will provide clarity to applicants and licensees that the Board will apply the substantial relationship criteria in that section in its proceedings to deny, suspend, or revoke a license, as applicable, on the basis of professional misconduct and pursuant to BPC section 2480, or a disciplinary action described in BPC section 141. The proposal would also make relevant parties to any administrative appeal arising from a licensing decision (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s

counsel) aware that when disciplining applicants or licensees for a criminal conviction, the Board is required to determine whether the act is substantially related to the practice of respiratory care using the listed criteria.

Rationale: BPC section 141 authorizes the Board to discipline a licensee because of a disciplinary action taken by another state, by any agency of the federal government, or by another country based upon a substantially related act. Beginning July 1, 2020, BPC section 480 will authorize the Board to deny a license application because of substantially related professional misconduct that results in formal discipline by a licensing board in or outside of California. (BPC section 480, subd. (a)(2), as added by AB 2138, section 4). The regulation seeks to implement, interpret, and make specific BPC sections 141 and 480 by adding their respective provisions to the Board's substantial relationship criteria regulation. The proposal is necessary to provide the appropriate notice to license applicants and licensees that the substantial relationship criteria in 16 CCR 1399.370 applies to determinations of whether acts that form the basis of disciplinary actions taken by another state, by an agency of the federal government, or by another country, or professional misconduct, are grounds for license denial, suspension, or revocation, and to implement the requirements of BPC sections 141 and 480. The proposal is also necessary to consolidate into one regulation the criteria the Board will apply in evaluating whether a crime or other misconduct is substantially related to the qualifications, functions, and duties of a licensee.

Amend Section 1399.370 subdivision (b):

Purpose: The purpose of adding 16 CCR 1399.370, subd. (b) is to implement AB 2138, adding BPC sections 481 and 493 which, beginning July 1, 2020, will require the Board, when considering the denial, suspension, or revocation of a license based on a crime, to determine whether the crime is substantially related to the qualifications, functions, or duties of the profession regulated by the Board by using specified criteria. (BPC section 481, subd. (b), as added by AB 2138, section 7, BPC section 493, subd. (b) as added by AB 2138, section 13). Those criteria are: (1) the nature and gravity of the offense; (2) the number of years elapsed since the date of the offense; and (3) the nature and duties of the profession. (Id.)

Anticipated Benefits: The proposed revisions to 16 CCR 1399.370, subd. (b) would provide clarity and transparency to applicants and licensees by listing the specific criteria the Board must consider when making the substantial relationship determinations applicable to criminal convictions. The proposal would also make relevant parties to any administrative appeal arising from a licensing decision (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent's counsel) aware of the specific criteria used by the Board to determine whether a criminal conviction is substantially related to the practice of respiratory care.

Rationale: BPC section 480 presently authorizes the Board to deny an application for licensure based on a crime or act that is substantially related to the qualifications, functions, and duties of a licensee. (BPC section 480, subd. (a)(3)(B)). Likewise, BPC section 490 authorizes the Board to suspend or revoke a license on the basis that the licensee was convicted of a crime substantially related to the qualifications, functions, or duties of a licensee. (BPC section 490, subd. (a)). BPC section 481 requires the Board to develop criteria to help evaluate whether a crime or act was substantially related to the qualifications, functions, or duties of a licensee when considering the denial, suspension, or revocation of a license. The Board is establishing the criteria via regulations.

The Legislature's clear intent in enacting AB 2138 was to reduce licensing and employment barriers for people who are rehabilitated. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135). Accordingly, in AB 2138, the Legislature amended BPC section 480 to limit the boards' ability to use prior criminal convictions or acts when denying licenses. Beginning July 1, 2020, boards may not deny a license to an applicant because the applicant was convicted of a crime, or due to the acts underlying the conviction, if the applicant has a certificate of rehabilitation, was granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged. (BPC section 480, subs (b) & (c), as added by AB 2138, section 4).

Absent these circumstances, AB 2138 will permit boards to deny a license when an applicant has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the regulated business or profession, and one of the following conditions exist:

- 1) the conviction occurred within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of: (a) a serious felony under Penal Code section 1192.7; (b) a registerable offense under Penal Code section 290, (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, subd. (d)(2) or (3); or, (c) a felony financial crime that is directly and adversely related to the fiduciary qualifications, functions, or duties of specified businesses or

professions regulated by the Accountancy Board, Professional Fiduciaries Bureau, Contractors State License Board, Bureau of Security and Investigative Services, and Cemetery and Funeral Bureau.

AB 2138 also specified three criteria that boards must consider when evaluating whether a crime is “substantially related” to the regulated business or profession. The criteria “shall include all of the following: (1) The nature and gravity of the offense; (2) The number of years elapsed since the date of the offense [; and,] (3) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.” (BPC 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). Accordingly, the proposed regulation includes each of these criteria for the Board to consider when making the substantial relationship determination regarding a crime. This proposed addition is necessary to conform the regulation to statute, and to consolidate the Board’s substantial relationship criteria in one place.

Amend Section 1399.370 subdivision (c):

Purpose: The purpose of amending 16 CCR 1399.370, subd. (c) is to clarify that crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a Board licensee include, but are not limited to, violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any laws related to the practice of respiratory medicine.

The proposed revisions also make minor technical revisions to this subdivision to accommodate the revisions made to subd. (a). In addition, the amendment of 16 CCR 1399.370, subd. (c)(10) also makes it clear that the commission of an act and/or the conviction of a crime involving elder and/or child abuse, endangerment or neglect also would be considered substantially related to the qualifications, functions or duties of a Board applicant or license.

Anticipated Benefit: The proposed revisions to 16 CCR 1399.370, subd. (c) will provide clarity to applicants and licensees of the specific crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a Board licensee. The proposal would also make relevant parties to any administrative appeal arising from a licensing decision (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s counsel) aware that included into consideration are substantially related crimes, professional misconduct, and acts that are violations of other laws relating to the practice of respiratory care.

Rationale: The current regulation provides that nine categories of crimes or acts that the Board would consider to be related to the practice of respiratory care. They are largely unchanged in this proposed action.

With the proposed action, the Board may also deny, suspend, or revoke a license, as applicable, on the ground of substantially related out-of-state discipline or professional misconduct. To incorporate and clarify these statutory provisions, the proposal would make conforming changes to the first part of subd. (c). The deletion of the “as defined by the Penal Code and/or Civil Code” language would remove jurisdictional restrictions on the Board by allowing it to deny or discipline licensees for violations of other states’ laws or federal laws that similarly relate to the practice of Respiratory Care medicine as opposed to only violations of related California laws. This amendment is necessary to allow the Board to deny applications or to discipline licensees for substantially related acts or crimes that were either committed out of state or the substantially related act constitutes a violation under another jurisdiction but not under California law.

The addition of acts and crimes related to child and elder abuse, endangerment and neglect is necessary to discourage licensees from abusing and/or neglecting elderly or young patients, and because practitioners have unsupervised access to these vulnerable populations, they should not be permitted to practice if they have committed such acts before. The Board has encountered instances of licensees who have committed acts of neglect or abuse against vulnerable individuals (e.g. children, dependent adults, elderly), endangering their well-being. The Board has had incidents where abuse or neglect has occurred but could not pursue disciplinary action because it did not have the authority or has been advised that the acts would likely not be deemed to be substantially related. The Board believes that any act endangering a child, a dependent adult, or the elderly causes grave concerns for a licensee’s ability to care for another vulnerable population: respiratory care patients. Licensees regularly care for this vulnerable population without direct oversight and demonstrated willingness to neglect or abuse causes serious concern for patient safety. Any act endangering the well-being of a vulnerable person should be considered to be substantially related to the practice of respiratory care. Therefore, this addition is necessary to protect all respiratory care patients, as well as respiratory care patients who are minors and elders, by preventing individuals who may have a proclivity for abusing them from working with them.

Amend section 1399.372 - Rehabilitation Criteria for Denials, Suspensions, or Revocations

Amend Section 1399.372 subdivision (a):

Purpose: The purpose of amending 16 CCR 1399.372, subd. (a) is to comply with the requirements of AB 2138, section 9, and BPC section 482, subds (a)(1) and (b)(1), which beginning July 1, 2020, will require the Board, when considering the denial of a license based on a crime pursuant to BPC section 480, to consider whether the applicant has made a showing of rehabilitation based on their having completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when evaluating an applicant in this category, the proposed amendments also provide a special list of criteria for the Board to

consider for these applicants. The list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of an applicant with a criminal conviction who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under the Department of Consumer Affairs (DCA).

Anticipated Benefits: The proposed revisions to 16 CCR 1399.372, subd. (a) would provide transparency and clarity to applicants with a criminal conviction who have completed their criminal sentence without a violation of parole or probation. Providing the special list of rehabilitation criteria would help those applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation in denial proceedings. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, applicants who have criminal convictions and completed parole or probation without a violation, by listing the special rehabilitation criteria applicable to those applicants.

Rationale: Existing law requires boards to develop criteria to evaluate the rehabilitation of an applicant when considering denial of a license, and to consider evidence of rehabilitation in making such decisions. (BPC section 482, subd. (a)). Under existing law, the Board may not deny an applicant a license based solely on a misdemeanor conviction, if the applicant meets the applicable requirements of the criteria of rehabilitation that the board develops. (BPC section 480, subd. (b)).

Operative July 1, 2020, BPC section 480 will prohibit the Board from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or because of the facts underlying a criminal conviction, if the applicant "made a showing of rehabilitation pursuant to Section 482." (BPC section 480, subd. (b), as added by AB 2138, section 4). In deciding whether to deny a license based on a criminal conviction, the Board must consider evidence of the applicant's rehabilitation, pursuant to the process established in the 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"]).

To implement AB 2138, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny a license based on a criminal conviction. (BPC section 482, subdivisions (a)(1) & (b), as added by AB 2138, section 9). Relevant to the proposed amendments to 16 CCR 1399.370, subd. (a), the Board must also decide whether an applicant with a criminal conviction "made a showing of rehabilitation," based on their having completed the criminal sentence at issue without a

violation of parole or probation. (BPC section 482, subdivisions (a)(1) & (b)(1), as added by AB 2138, section 9).

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when evaluating an applicant in this category. The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR 1399.372, subs. (a)(4)). But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”]). Nonetheless, under AB 2138, the Board must now consider whether an applicant who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

The proposed amendments specify the following special criteria the Board will consider when making the determination that the applicant with a criminal conviction who has successfully completed the criminal sentence without a violation of parole and probation has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the length(s) of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. The criteria are necessary to assist the Board in evaluating rehabilitation. Because BPC section 482, subdivisions (a)(1) and (b)(1) requires the Board to evaluate rehabilitation in the narrow context of an applicant with a criminal conviction who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and would provide to the Board information specific to the applicant’s criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the applicant’s rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to the DCA’s recommended rehabilitation criteria.

The rationale for each criterion:

Nature and gravity of the crime(s): The Board must consider the nature and gravity of the crime, because this is the offense against which the applicant’s rehabilitative efforts will be evaluated.

The Length of, and any modification of, the parole or probation period: The Board would consider the length of the applicable parole or probation period, because the length of time that the applicant served probation or parole without a violation is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 [“a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice”]). The Board must also consider the extent the parole or probation period was shortened or lengthened, as well as the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the applicant is sufficiently rehabilitated.

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

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

Amend Section 1399.372, subdivision (b):

Purpose: The purpose of amending 16 CCR section 1399.372, subd. (b) is to comply with the requirements of AB 2138, section 9, adding BPC section 482, subdivisions (a)(1) and (b)(2), which, beginning July 1, 2020, will require the Board, when considering the denial of a license to consider whether the applicant has made a showing of rehabilitation if: (1) the applicant has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the applicant made a sufficient showing of rehabilitation based on the special criteria in 16 CCR 1399.370 subd. (a), discussed above; or, (3) the application is subject to denial on a basis other than a crime, such as professional misconduct.

As AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when evaluating an applicant pursuant to BPC section 482 subdivisions (a)(1) and (b)(2),

the proposed amendments also provide a specific, more comprehensive list of standard rehabilitation 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 special criteria from 16 CCR 1399.370 subd. (a), discussed above, so that similarly-situated applicants can be evaluated by the Board under the same set of criteria. The revised list of standard rehabilitation criteria also anticipates that the Board may be considering “act(s)” that are the basis for the denial, since the Board may be evaluating the rehabilitation of an applicant where the ground for denial involves professional misconduct, or another act, rather than a criminal conviction. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under the DCA.

Anticipated Benefits: The proposed revisions to 16 CCR 1399.372, subd. (b) will provide transparency and clarity to applicants: (1) who have not completed their criminal sentence without a violation of parole or probation; (2) who have not made a sufficient showing of rehabilitation based on the special criteria in 16 CCR 1399.370 subd. (a) discussed above; or (3) whose application is subject to denial on a basis other than a crime. Providing the revised list of standard rehabilitation criteria would help those applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation in denial proceedings. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant’s counsel) in advocating for or against, or deciding upon, those applicants by listing the standards rehabilitation criteria applicable to the applicant.

Rationale: Existing law requires boards to develop criteria to evaluate the rehabilitation of an applicant when considering denial of a license, and to consider evidence of rehabilitation in making such decisions. (BPC section 482, subd. (a)). Under existing law, the Board may not deny an applicant a license based solely on a misdemeanor conviction, if the applicant met the applicable requirements of the criteria of rehabilitation that the Board develops. (BPC section 480, subd. (b)).

Operative July 1, 2020, BPC section 480 will prohibit the Board from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or because of the facts underlying a criminal conviction, if the applicant “made a showing of rehabilitation pursuant to Section 482.” (BPC section 480, subd. (b), as added by AB 2138, section 4). In deciding whether to deny a license based on a criminal conviction, the Board must consider evidence of the applicant’s rehabilitation, pursuant to the process established in the 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”]).

To implement AB 2138, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny a license based on a criminal conviction or other misconduct. (BPC section 482, subdivisions (a) (1) & (b), as added by AB 2138, section 9). In particular, relevant to the proposed revisions to 16 CCR 1399.372, subd. (b), the Board must decide whether an applicant who does not have a clean parole or probation record, who has not “made a showing of rehabilitation” based on the special criteria in 16 CCR 1399.372, subd. (a) discussed above, or whose application is subject to denial on the basis of something other than a crime has been rehabilitated, based on the Board’s standard rehabilitation criteria. Starting July 1, 2020, AB 2138 will also expressly authorize the Board to deny a license based on prior professional misconduct. (BPC section 480, subd. (a)(2), as added by AB 2138, section 4). Accordingly, it is necessary to amend the regulation to account for denials on this ground.

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when evaluating an applicant pursuant to BPC section 482, subdivisions (a)(1) and (b)(2). Accordingly, the proposed amendments would revise the Board’s existing rehabilitation criteria by adding the criteria specified in 16 CCR 1399.370 subd. (a) and make other minor revisions. Each of these criteria are designed to focus the Board’s evaluation on facts and circumstances relevant to an applicant’s rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the applicant’s rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

The rationale for each criterion:

Nature and gravity of the crime or act: The Board would consider the nature and gravity of the crime or act for the same reasons that this criterion is included among the special rehabilitation criteria in 16 CCR 1399.372 subd. (a), discussed above. This is the offense or misconduct against which the Board will judge the applicant’s rehabilitation. This is also already an existing regulatory criterion. This is not a substantive change.

Evidence of subsequent acts or crimes: The Board would also consider evidence of acts or crimes committed after the act or crime that is the basis for denial. Such acts or crimes typically reflect additional misconduct by the applicant and bear on the Board’s decision regarding whether the applicant is sufficiently rehabilitated to be licensed and conform to the requirements of licensure. This is also already an existing rehabilitation criterion.

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

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

Criteria from new subdivision (a): This is necessary to ensure that all applicants convicted of a crime can be evaluated under the same set of rehabilitation criteria. For applicants that completed their criminal sentence without a violation of parole or probation, the Board would first evaluate their eligibility for licensure under the special criteria in 16 CCR 1399.372, subd. (a), discussed above. If the applicant did not demonstrate sufficient rehabilitation under the special criteria in subd. (a), the Board would apply the other criteria in 16 CCR 1399.372, subd. (b). For applicants with a criminal conviction that did not complete their criminal sentence without a violation of parole or probation, the Board would apply all the standard criteria in subd. (b), which incorporates the special criteria from 16 CCR 1399.372 subd. (a). This way, similarly-situated applicants (those being considered for denial based on a criminal conviction) have the benefit of being evaluated by the same set of criteria.

Evidence of rehabilitation submitted by applicant. The Board would consider rehabilitation evidence the applicant submitted. The proposed amendments would not change this criterion, although they omit the specific types of evidence the Board would consider. Pursuant to BPC sections 481 and 493, the Board will be required to consider evidence of rehabilitation. Thus, the Board proposes to delete the specific types of evidence listed in current regulations to encourage applicants to submit all types of rehabilitation evidence to the Board.

Amend Section 1399.372, subdivision (c)

Purpose: The purpose of amending 16 CCR 1399.372, subd. (c) is to comply with the requirements of AB 2138, section 9, adding BPC section 482, subdivisions (a)(2) and (b)(1), which, beginning July 1, 2020, will require the Board, when considering the suspension or revocation of a license based upon a crime pursuant to BPC section 490, to consider whether a licensee has made a showing of rehabilitation based on their having completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when evaluating a licensee in this category, the proposal also provides a special list of criteria for the Board to consider for these licensees. For uniformity purposes, the proposed amendments follow the same approach discussed above regarding the criteria set forth in 16 CCR 1399.372, subd. (a). The list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of a licensee with a criminal

conviction who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the disciplinary process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefits: The proposed revisions to 16 CCR 1399.372, subd. (c) provide transparency and clarity to licensees with a criminal conviction who have completed their criminal sentence without a violation of parole or probation. Providing the special list of rehabilitation criteria helps those licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation in suspension or revocation proceedings. The proposal also assists relevant parties to any administrative appeal arising from a license suspension or revocation (e.g., the Deputy Attorney General, the Administrative Law Judge, and the licensee’s counsel) in advocating for or against, or deciding upon, licensees who have criminal convictions and completed parole or probation without a violation, by listing the special rehabilitation criteria applicable to those licensees.

Rationale: Existing law requires boards to develop criteria to evaluate the rehabilitation of a licensee when considering suspending or revoking a license, and to consider evidence of rehabilitation in making such decisions. (BPC section 482). Beginning July 1, 2020, the Board must decide, when considering a suspension or revocation of a license based on a crime pursuant to BPC section 490, whether the licensee has “made a showing of rehabilitation” based on their having completed the criminal sentence without a violation of parole or probation. (BPC section 482, subdivisions (a)(2) & (b)(1), as added by AB 2138 section 9).

To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation evidence between license denial proceedings and license suspension or revocation proceedings, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation when deciding whether to suspend or revoke a license based on a conviction. (BPC section 482, subdivisions (a)(2) & (b), as added by AB 2138, section 9).

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when evaluating suspending or revoking a license pursuant to BPC section 482, subdivisions (a)(2) & (b)(1). The extent to which a person complied with the terms of parole or probation is already a factor the Board considers when evaluating rehabilitation. (16 CCR 1399.372, subd. (d)). As discussed above concerning subd. (a) (1)-(5), courts have historically rejected the view that compliant applicants and licensees are, per se, rehabilitated. Nonetheless, under AB 2138, in proceedings to suspend or revoke a license, the Board must now consider whether a licensee who complied with the terms of parole or probation made a showing of rehabilitation.

The proposed amendments specify the following special criteria for the Board to consider when making the determination that the licensee with a criminal conviction who has successfully completed the criminal sentence without a violation of parole or probation has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the length(s) of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms or conditions of parole or probation and the extent to which they bear on the licensee's rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. The criteria are necessary to assist the Board in evaluating rehabilitation. Because BPC section 482 subdivisions (a)(2) & (b)(1) require the Board to evaluate rehabilitation in the narrow context of a licensee with a criminal conviction who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and would provide to the Board information specific to the licensee's criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the licensee's rehabilitation. In addition, to provide consistency with how the Board considers rehabilitation criteria, and uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

Each criterion set out in subd. (c)(1)-(5) is identical to the criterion set out in subd. (a) (1)-(5). The Board's rationale for adopting each of the criterion listed in the previous paragraph is also identical. Please see the discussion of the rationale for the criterion at pages 9-10, above, which is the same rationale the Board is relying upon to adopt subd. (c)(1)-(5).

Amend Section 1399.372, subdivision (d)

Purpose: The purpose of amending 16 CCR 1399.372, subd. (d) is to generally conform this subd. which sets forth the standard rehabilitation criteria applicable in suspension and revocation proceedings, with the changes the Board proposes in 16 CCR 1399.372, subd. (b), to implement BPC section 482, subdivisions (a)(1) & (b)(2), setting forth the standard rehabilitation criteria applicable in denial proceedings. Beginning July 1, 2020, BPC section 482 subdivisions (a)(2) & (b)(2), require the Board, when considering the suspension or revocation of a license based on a crime pursuant to BPC section 490, to consider whether a licensee has made a showing of rehabilitation if: (1) the licensee has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the licensee made a sufficient showing of rehabilitation based on a special set of criteria in 16 CCR 1399.372, subd. (c); or, (3) the Board's decision is based on something other than a crime, such as disciplinary action taken by another state, by an agency of the federal government, or by another country, as described in BPC section 141.

As AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when evaluating a licensee pursuant to BPC section 482, subdivisions (a)(2) & (b)(2), proposed subd. (d)(1)-(9) provides a specific, more comprehensive, list of standard rehabilitation criteria for the Board to consider for these licensees, which is not limited to the person's parole or probation. The list of criteria is mostly unchanged from the existing regulation, and it anticipates that the Board may be considering "act(s)" that are the basis for suspension or revocation, since the Board may, for instance, be evaluating the rehabilitation of a licensee where the grounds for suspension or revocation involve a disciplinary action taken by another state, by an agency of the federal government, or by another country. The list of criteria incorporates the special criteria from 16 CCR 1399.372 subd. (c) discussed above, so that similarly-situated licensees can be evaluated by the Board under the same set of criteria. This proposal is also intended to provide predictability and consistency in the licensing and disciplinary process, and uniformity of rehabilitation criteria with other boards under the DCA. Thus, the proposed amendments generally follow the same approach as 16 CCR 1399.372, subd. (b), discussed above.

Anticipated Benefits: The proposed revisions to 16 CCR 1399.372, subd. (d) provide transparency and clarity to licensees who: (1) have not completed their criminal sentence without a violation of parole or probation; (2) have not made a sufficient showing of rehabilitation based on the special criteria in 16 CCR 1399.372, subd. (c), discussed above; or (3) whose license is subject to suspension or revocation on the basis other than a crime. Providing a revised list of standard rehabilitation criteria helps those licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation in suspension or revocation proceedings. The proposal also assists relevant parties to any administrative appeal arising from a license suspension or revocation (e.g., the Deputy Attorney General, the Administrative Law Judge, and the licensee's counsel) in advocating for or against, or deciding upon, those licensees by listing rehabilitation criteria applicable to those licensees.

Rationale: Existing law requires boards to develop criteria to evaluate the rehabilitation of a licensee when considering suspending or revoking a license, and to consider evidence of rehabilitation in making such decisions. (BPC section 482). Beginning July 1, 2020, the Board must decide, when considering suspension or revocation of a license based on a crime pursuant to BPC section 490, whether a licensee who does not have a clean parole or probation record or who has not "made a showing of rehabilitation" based on the special criteria in 16 CCR 1399.372, subd. (c), discussed above, has demonstrated rehabilitation based on the standard rehabilitation criteria developed by the Board.

To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation between license denial proceedings and license suspension or revocation proceedings, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend or revoke a license. (BPC section 482, subdivisions (a)(2) & (b), as added by AB 2138, section 9).

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when evaluating a license pursuant to BPC section 482, subdivisions (a)(2) & (b)(2). The proposed amendments: revise the Board's existing rehabilitation criteria by adding the criteria specified in 16 CCR 1399.372, subd. (c) and make other minor revisions. Each of these criteria are designed to focus the Board's evaluation on facts and circumstances relevant to a licensee's rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the licensee's rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

The rationale for each criterion is:

Nature and gravity of the crime or act: The Board will consider the nature and gravity of the crime or act for the same reasons that this criterion is included among the special rehabilitation criteria in 16 CCR 1399.372, subdivisions (b) & (c), discussed above. This is the offense or misconduct against which the Board will judge the licensee's rehabilitation and is already in the existing regulation.

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

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

Compliance with terms and/or sanctions: The Board will consider whether the licensee complied with parole, probation, restitution or other sanctions imposed on the licensee, an existing regulatory criterion. This information bears on a licensee's rehabilitation in terms of the licensee's willingness to make amends for prior misconduct and to conform to the rules of licensure. It has been necessary, and remains so, for the Board to consider these elements to fully evaluate a licensee's reformation from prior misconduct.

Criteria from new subdivision (c): The Board includes the special rehabilitation criteria in 16 CCR 1399.372, subd. (c) discussed above, as part of its standard rehabilitation criteria. This is necessary to ensure that all licensees convicted of a crime can be evaluated under the same set of rehabilitation criteria. For licensees that completed their criminal sentence

without a violation of parole or probation, the Board first evaluates their eligibility for licensure under the special criteria in 16 CCR 1399.372, subd. (c). If the licensee did not demonstrate sufficient rehabilitation under the special criteria in subd. (c), the Board would apply the other criteria in 16 CCR 1399.372, subd. (d). For licensees that did not complete their criminal parole or probation without a violation, the Board applies all the standard criteria in subd. (d), which incorporates the special criteria from subd. (c). This way, similarly-situated licensees (those whose licenses are being considered for suspension or revocation based on a criminal conviction) have the benefit of being evaluated under the same set of criteria.

Evidence of dismissal proceedings: The Board would consider evidence that a licensee's criminal conviction was dismissed pursuant to Penal Code section 1203.4. It is necessary to consider dismissal proceedings because they are relevant to the Board's evaluation of whether a licensee is rehabilitated.

Evidence of rehabilitation submitted by the licensee: The Board considers rehabilitation evidence submitted by the licensee under the existing regulation and this is unchanged.

Character references, statements, letters: The Board considers statements or references of good character. It is necessary to retain this requirement for the Board to have the fullest picture possible of an individual when determining their rehabilitation. Without this requirement, the Board may not be able to accurately ascertain an applicant's or licensee's present behavior, as certificates of education do not address all aspects of an applicant's or licensee's true rehabilitation. This is also an existing regulatory criterion.

Underlying Data

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

Business Impact

The Board has made an initial determination that the proposed regulations will not have a

significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The regulations will only impact initial respiratory care practitioner (RCP) applicants, and a small group of RCPs who have violated the Act and are under investigation or are on probation, and employers who have RCPs in their employ that are under investigation or are on probation for violating the Act. This initial determination is based on the purpose of AB 2138, to reduce barriers to licensure for applicants and licensees with criminal histories or licensure discipline. The Board anticipates that these regulatory amendments will impact businesses only to the extent that individual applicants or licensees are able to be licensed, retain, or regain licensure, but does not anticipate those minimal numbers to significantly impact business.

The Board has approximately 23,600 licensees for the current fiscal year. During the 2016/2017 fiscal year the Board issued 1,105 licenses and denied 1, and in fiscal year 2017/2018 the Board issued 1,116 licenses and denied 0. Therefore, the Board has denied fewer than .01% of all applicants.

Since the Board has denied fewer than 1% of all applicants the Board anticipates that this proposal will not have a significant 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 further assist in that effort through the adoption of standards designed to implement new substantial relationship and rehabilitation criteria. The Board anticipates that there may be fewer denials or disciplinary actions based upon criminal convictions but no significant or statewide adverse economic impacts.

Economic Impact Assessment

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because the regulations do not make any changes or provide for any new provisions that would affect the creation or elimination of jobs. The regulations are aimed at reducing barriers to licensure and making it easier for applicants and licensees with criminal histories or licensure discipline to obtain, maintain, or reinstate licensure.
- It will not create new business or eliminate existing businesses within the State of California because the regulation does not make any changes or provide for any new provisions that would result in the creation or elimination of new businesses. The regulations are aimed at reducing barriers to licensure and making it easier for applicants and licensees with criminal histories or licensure discipline to obtain, maintain, or reinstate licensure.
- It will not result in expansion of any businesses currently doing business within the State of California because the regulation does not make any changes or provide for new provisions that would directly affect the expansion of any businesses. The regulations are aimed at reducing barriers to licensure and making it easier for

applicants and licensees with criminal histories or licensure discipline to obtain, maintain, or reinstate licensure.

- This regulatory proposal will benefit the health and welfare of California residents because this proposal ensures the Board will have the ability to effectively administer and enforce the provisions of the Respiratory Care Practice Act to protect California consumers.
- This regulatory proposal does not affect worker safety because it only establishes criteria, based upon recent statutory mandates for licensure following an applicant's or licensee's criminal conviction. The regulatory proposal does not involve worker safety.
- This regulatory proposal does not affect the state's environmental safety because it only regulates applicants and licensees of the Respiratory Care Board and employers of respiratory care practitioners and applicants who are under investigation or are on probation for violating the Act. The regulatory proposal does not involve environmental issues.

Specific Technologies or Equipment

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

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Any interested person may submit comments to the Board in writing relevant to the above determinations at 3750 Rosin Court, Suite 100, Sacramento, California 95834.