

TITLE 16. BOARD OF BARBERING AND COSMETOLOGY

INITIAL STATEMENT OF REASONS

Hearing Date: February 6, 2020

Subject Matter of Proposed Regulations: Substantial Relationship, Rehabilitation Criteria

Section(s) Affected: 970 and 971

Background

The Board of Barbering and Cosmetology (the Board) enforces the Barbering and Cosmetology Act and oversees licensed barbers, cosmetologists, estheticians, manicurists, and electrologists in California.

In accordance with the statutory amendments implemented by Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018), by July 1, 2020, Business and Professions Code (BPC) Section 481 will require the Board to develop criteria, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the professions it regulates. Further, BPC Section 493 will require the Board to determine whether a crime is substantially related to the qualifications, functions, or duties of the profession it regulates by using criteria including the nature and gravity of the offense, the number of years elapsed since the date of the offense, and the nature and duties of the profession. The substantial relationship requirement stems from the due process principle that a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 448; *Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.)

In addition, BPC Section 482 will require the Board to develop criteria to evaluate the rehabilitation of a person when considering the denial, suspension, or revocation of a license. In the context of professional licensing decisions, the courts have said that, “[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.)

California Code of Regulations (CCR) Section 970 establishes the criteria for determining when a crime is substantially related to the qualifications, functions and duties of a licensee. CCR Section 971 establishes the criteria for determining rehabilitation of an applicant or licensee when considering denial, suspension, or petition for reinstatement of a license on the ground of a criminal conviction.

As required under AB 2138, the Board proposes to amend Sections 970 and 971 of Article 10 of Division 9 of Title 16 of the CCR to adhere to these mandates and revise its criminal conviction substantial relationship and rehabilitation criteria.

Specific Purpose, Anticipated Benefit, and Rationale

Section 970, subsection (a)

Purpose: The purpose of amending CCR Section 970, subsection (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 subsection would also include substantially related “professional misconduct,” since the Board may consider such misconduct in denying licenses under BPC section 480. The subsection would be amended to reword and move to subsection (c) the phrase, “[t]he crimes or acts shall include, but not be limited to, those involving the following:”.

Anticipated Benefit: The proposed revisions to Section 970, subsection (a) would provide clarity to license applicants and licensees that the Board is statutorily authorized to deny, suspend, or revoke a license, as applicable, on the basis of professional misconduct and discipline in an out-of-state jurisdiction. The proposal would also make aware relevant parties to any administrative appeal arising from a licensing decision (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s counsel) that when disciplining applicants or licensees for a criminal conviction, the Board is required to determine whether the act is substantially related to the practice of barbering and cosmetology using the listed criteria.

Rationale: BPC section 141 authorizes the Board to discipline a license on the basis of substantially related out-of-state discipline. BPC section 480 also authorizes the Board to deny a license application on the basis of substantially related formal discipline by a licensing Board in or outside of California. The regulation seeks to implement, interpret, and make specific BPC sections 141 and 480 by adding their relative provisions to the Board’s substantial relationship criteria regulation. Accordingly, the proposal is necessary to provide the appropriate notice to license applicants and licensees that discipline in an out-of-state jurisdiction and professional misconduct are grounds for

license denial, suspension, or revocation, and implement the requirements of BPC sections 141 and 480. The proposal is also necessary to consolidate into one regulation the criteria the Board will apply in evaluating whether a crime or other misconduct is substantially related to the licensed profession.

Section 970, subsection (b)

Purpose: The purpose of adding CCR Section 970, subsection (b) is to implement AB 2138 and BPC Section 481, which requires each board to develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the professions regulated by the boards.

Anticipated Benefit: The proposed revisions to section 970, subsection (b) would provide clarity and transparency to license applicants and licensees by listing the specific criteria the Board must consider when making the substantial relationship determinations applicable to criminal convictions. The proposal would also make aware relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent's counsel) of the specific criteria used by the Board to determine whether a criminal conviction is substantially related to the practice of veterinary medicine.

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

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

Absent these circumstances, AB 2138 will permit boards to deny a license when an applicant has been convicted of a crime, if the crime is substantially related to the

qualifications, functions, or duties of the regulated business or profession, and one of the following conditions exist:

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

AB 2138 also specified three criteria that boards must consider when evaluating whether a crime is “substantially related” to the regulated business or profession. The criteria “shall include all of the following: (1) The nature and gravity of the offense[;] (2) The number of years elapsed since the date of the offense[; and,] (3) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.” (BPC, § 481, subd. (b), as added by AB 2138, § 7; see also BPC, § 493, subd. (b), as added by AB 2138, § 13.) Accordingly, the proposed regulation lists each of these criteria for the Board to consider when making the substantial relationship determination. This proposed addition is necessary to conform the regulation to statute.

Section 970, subsection (c)

Purpose: The purpose of amending CCR Section 970, subsection (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 other state or federal laws governing the practice of barbering and cosmetology. The proposal also makes minor technical revisions to this subsection to accommodate the revisions made to subsection (a).

Anticipated Benefit: The proposed revisions to Section 970, subsection (c) would provide clarity to license applicants and licensees of the specific crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a Board licensee. The proposal would also make aware relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent's counsel) that substantially related crimes, professional misconduct, and acts include violations of other state or federal laws governing the practice of barbering and cosmetology.

Rationale: The current regulation provides that crimes or acts that are substantially related to the barbering and cosmetology professions, include violating or attempting to violate, directly, or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provisions or term of the Act, and crimes including, but not limited to, lewd conduct or using or selling drugs while on the job or in association with the job. As reflected in BPC sections 141 and 480, the Board may deny, suspend, or revoke a license, as applicable, on the ground of substantially related out-of-state discipline or professional misconduct. To incorporate and clarify these statutory provisions, the proposal would specify that substantially related crimes, professional misconduct, and acts include violations of other state or federal laws governing the practice of barbering and cosmetology.

Section 971, subsection (a)

Purpose: The purpose of amending CCR Section 971, subsection (a) is to comply with the requirements of AB 2138, section 9, and BPC Section 482, subdivision (b)(1), which require the Board to consider whether an applicant has made a showing of rehabilitation if the applicant has completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria, the Board's proposal also provides a specific list of criteria for the Board to consider for these applicants, some of which are already considered under the existing Section 971, subsection (a) – namely, the nature and severity of the crime, and modifications to the length of the parole or probation period. The proposed list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of an applicant who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under the Department of Consumer Affairs (DCA).

Anticipated Benefit: The proposed revisions to CCR section 971, subsection (a) would provide transparency and clarity to license applicants who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of

rehabilitation criteria would help license applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, applicants who have criminal convictions and completed parole or probation without a violation, by listing rehabilitation criteria applicable to the applicant.

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

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

To implement AB 2138, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny a license based on a criminal conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.) The Board must also decide whether an applicant “made a showing of rehabilitation,” if the applicant or licensee completed the criminal sentence at issue without a violation of parole or probation. (BPC, § 482, subd. (b), as added by AB 2138, § 9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when denying a license. The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and is currently considered by the Board in evaluating rehabilitation. (16 CCR § 971, 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 Board proposes the following specific criteria be considered by the Board when making the determination that the applicant who has successfully completed his or her criminal sentence has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the length(s) of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. The criteria are necessary to assist the Board in evaluating rehabilitation. Because the purpose of evaluating an applicant’s rehabilitation is to determine whether the applicant is sufficiently reformed to be licensed, but AB 2138 requires the Board to evaluate rehabilitation in the narrow context of an applicant who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and would provide to the Board information specific to the applicant’s criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the applicant’s rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

The Board must consider the nature and gravity of the crime, because this is the offense against which the applicant’s rehabilitative efforts will be evaluated. The Board will consider the length of the applicable parole or probation period, because the length of time that the applicant served probation or parole without a violation is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 [“a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice”].)

The Board must consider the extent to which the parole or probation period was shortened or lengthened, and the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the applicant is sufficiently rehabilitated.

The Board must consider the terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation, because the actual parole or probation terms can inform the Board on whether the applicant is rehabilitated. For

instance, in cases where an applicant was convicted of a crime involving alcohol, probation terms requiring the applicant to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the applicant's rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368 ["An alcoholic's rehabilitation is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous"].)

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

Section 971, subsection (b)

Purpose: The purpose of amending CCR Section 971, Subsection (b) is to comply with the requirements of AB 2138, section 9, and BPC Section 482, subdivision (b)(2), which require the Board to consider whether an applicant has made a showing of rehabilitation if: (1) the applicant has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the applicant made a sufficient showing of rehabilitation based on the narrow criteria in subsection (a); or, (3) the denial is based on something other than a crime, such as professional misconduct. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific, more comprehensive, list of criteria for the Board to consider for these applicants, which is not limited to the applicable parole or probation. The list of criteria incorporates the criteria from subsection (a) for applicants convicted of a crime, so that similarly-situated applicants have the opportunity to be evaluated by the Board under the same set of criteria. The list of criteria also anticipates that the Board may be considering "act(s)" that are the basis for the denial, since the Board may be evaluating the rehabilitation of an applicant where the ground for denial involves acts of professional misconduct, rather than a conviction. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to CCR section 971, subsection (b) would provide transparency and clarity to license applicants who have not completed their criminal sentence without a violation of parole or probation or otherwise do not qualify for consideration under subsection (a). Providing the list of rehabilitation criteria would help license applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against,

or deciding upon, applicants who do not qualify for consideration under subsection (a), by listing rehabilitation criteria applicable to the applicant.

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

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

To implement AB 2138, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny a license based on a conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.) The Board must also decide whether an applicant or licensee “made a showing of rehabilitation,” if the applicant did not complete the criminal sentence at issue without a violation of parole or probation, or the board finds, in applying its rehabilitation criteria, that the applicant is rehabilitated. (BPC, § 482, subd. (b), as added by AB 2138, § 9.) AB 2138 also authorized the Board to deny a license based on prior disciplinary misconduct. Accordingly, it is necessary to amend the 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 denying a license. The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR, § 971, 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 has complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria. If, however, the applicant did not comply with the terms of parole or probation, the Board would apply its standard rehabilitation criteria, as modified in this proposal.

For CCR Section 971, subsection (b), the Board’s proposes to use the rehabilitation criteria listed in the existing CCR Section 971, subsection (a), that was not included as part of the parole/probation-focused criteria specified in the proposed CCR Section 971, subsection (a). Each of these criteria are designed to focus the Board’s evaluation on facts and circumstances relevant to an applicant’s rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the applicant’s rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

The Board will consider the nature and severity of the crime or act for the same reasons as discussed for subsection (a). This is the offense or misconduct against which the Board will judge the applicant’s rehabilitation. This is also already an existing regulatory criterion.

The Board will also consider evidence of acts or crimes committed after the act or crime that is the basis for denial. Such acts or crimes typically reflect additional misconduct by the applicant and bear on the Board’s decision regarding whether the applicant is sufficiently rehabilitated to be licensed and conform to the requirements of licensure. The Board would omit “which also could be considered as grounds for denial,” because AB 2138 repealed the Board’s ability to deny a license based on dishonest, fraudulent, or deceitful acts, or acts that would be grounds for discipline. This is also already an existing regulatory criterion.

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

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

The Board will also consider the criteria in subsection (a). This is necessary to ensure that all applicants convicted of a crime have the opportunity to be evaluated under the same set of rehabilitation criteria. For applicants that completed their criminal parole or probation without a violation, the Board would first evaluate their eligibility for licensure under the criteria in subsection (a). If the applicant did not demonstrate sufficient rehabilitation under the criteria in subsection (a), the Board would apply the broader criteria in subsection (b). For applicants that did not complete their criminal parole or probation without a violation, the Board would apply the criteria in subsection (b), which incorporates the criteria from subsection (a). This way, similarly-situated applicants (those being considered for denial based on a conviction) have the benefit of the same set of criteria.

The Board would consider rehabilitation evidence the applicant submitted. The Board is required to consider such evidence under BPC section 481(c).

Section 971, subsection (c)

Purpose: The purpose of amending CCR section 971, subsection (c) is to comply with the requirements of AB 2138, section 9, and BPC section 482, subdivision (b)(1), which require the Board to consider whether a licensee has made a showing of rehabilitation if the licensee has completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also seeks to provide a specific list of criteria for the Board to consider for these licensees. For uniformity purposes, the proposal follows the same approach as subsection (a). The list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of an applicant who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the disciplinary process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to CCR section 971, subsection (c) are intended to provide transparency and clarity to licensees who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria would help licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, licensees who have criminal convictions and completed parole or probation without a violation, by listing rehabilitation criteria applicable to the licensee.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of a licensee when considering disciplining a license based on a conviction, and to

consider evidence of rehabilitation in making such decisions. (BPC, § 482.) To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation evidence between license denials and discipline, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend or revoke a license based on a conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.)

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

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR § 971, subs. (b)(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 a licensee who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

The proposal specifies the following criteria for the Board to consider when making the determination that the licensee who has successfully completed the criminal sentence has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the length(s) of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms or conditions of parole or probation and the extent to which they bear on the licensee’s rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. The criteria are necessary to assist the Board in evaluating rehabilitation. Since the purpose of evaluating a licensee’s rehabilitation is to determine whether the licensee is sufficiently reformed to be licensed, but AB 2138 requires the Board to evaluate rehabilitation in the narrow context of a licensee who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in

scope and would provide to the Board information specific to the licensee's criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the licensee's rehabilitation. In addition, to provide consistency with how the Board considers rehabilitation criteria, and uniformity with other DCA boards, the proposed criteria was adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

The Board must consider the nature and gravity of the crime, because this is the offense against which the licensee's rehabilitative efforts will be evaluated. The Board will consider the length of the applicable parole or probation period, because the length of time that the licensee served probation or parole without a violation is relevant to whether the licensee is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 ["a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice"].)

The Board must consider the extent to which the parole or probation period was shortened or lengthened, and the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the licensee is sufficiently rehabilitated.

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

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

Section 971, subsection (d)

Purpose: The purpose of amending CCR section 971, subsection (d) is to comply with the requirements of by AB 2138, section 9, and BPC section 482, subdivision (b)(2), which require the Board to consider whether an applicant has made a showing of

rehabilitation if: (1) the applicant 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 a narrow set of criteria; or, (3) the Board's decision is based on something other than a crime. Likewise here, the Board would consider the rehabilitation criteria in subsection (d) if: (1) a licensee has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the licensee made a sufficient showing of rehabilitation based on the narrow criteria in subsection (c); or, (3) the Board's decision is based on something other than a crime, such as administrative discipline.

As AB 2138 does not prescribe new rehabilitation criteria, the proposal also seeks to provide a specific, more comprehensive, list of 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 existing regulation, and it anticipates that the Board may be considering "act(s)" that are the basis for discipline, since the Board may, for instance, be evaluating the rehabilitation of a licensee where the ground for discipline involves an administrative matter. The list of criteria incorporates the criteria from subsection (c) for licensees convicted of a crime, so that similarly-situated licensees have the opportunity to be evaluated by the Board under the same set of criteria. This proposal is also intended to provide predictability and consistency in the licensing and disciplinary process, and uniformity of rehabilitation criteria with other boards under DCA. Thus, the proposal follows the same approach as subsection (b).

Anticipated Benefit: The proposed revisions to CCR section 971, subsection (d) would provide transparency and clarity to licensees who have not completed their criminal sentence without a violation of parole or probation, or otherwise do not qualify for consideration under subsection (c). Providing the list of rehabilitation criteria would help licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal (e.g., the Deputy Attorney General, the Administrative Law Judge, and the licensee's counsel) in advocating for or against, or deciding upon, licensees who do not qualify for consideration under subsection (c), by listing rehabilitation criteria applicable to the licensee.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of a licensee when considering disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation between license denials and discipline, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend or revoke a license based on a conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.)

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

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR § 971, subs. (b)(4).) But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the Board must now consider whether an applicant who has complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria. If, however, the applicant did not comply with the terms of parole or probation, the Board would apply its standard rehabilitation criteria, as modified in this proposal.

The proposal uses the existing rehabilitation criteria with the addition of the criteria specified in CCR section 971, subsection (c) and makes other minor revisions. Each of these criteria are designed to focus the Board’s evaluation on facts and circumstances relevant to a licensee’s rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the licensee’s rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

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

The Board will also consider evidence of any acts or crimes by the licensee subsequent to the acts or crimes being considered as grounds for denial. This is an existing regulatory criterion. It is necessary for the Board to consider the licensee’s subsequent

crimes or acts because subsequent misconduct by the licensee is relevant to the Board's decision regarding whether the licensee is sufficiently rehabilitated to be licensed and the licensee's willingness to conform to the requirements of licensure.

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

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

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

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

Section 971, subsection (e)

For those petitioning for reinstatement, the Board chose to use the criteria in subsection (d) because these six new criteria most closely match the criteria the Board formerly used in prior subsection (b). These six new criteria in subsection (d) provide the Board with the most insight into determining whether an individual who was previously licensed by the Board is now rehabilitated and thus able to practice in a safe and competent manner.

Each of the criteria proposed for subsection (e), as the existing subsection (c) would be renumbered, is designed to focus the Board's evaluation on facts and circumstances

relevant to a licensee's rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the licensee's rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

The Board will consider the nature and gravity of the crime or act for the same reasons as discussed for subsections (b) and (c). This is the offense or misconduct against which the Board will judge the licensee's rehabilitation. This is an existing regulatory criterion.

The Board will also consider evidence of any acts or crimes by the licensee subsequent to the acts or crimes being considered as grounds for denial of reinstatement. This is also an existing regulatory criterion, because the existing criterion is to look at the "total criminal record". It is necessary for the Board to consider the licensee's subsequent crimes or acts because subsequent misconduct by the licensee is relevant to the Board's decision regarding whether the licensee is sufficiently rehabilitated to be licensed and the licensee's willingness to conform to the requirements of licensure.

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a licensee's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This is an existing regulatory criterion.

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

The Board will also consider the criteria in subsection (c). This is necessary to ensure that licensees who have lost their license because of a criminal conviction who are seeking reinstatement have the opportunity to be evaluated under the same set of rehabilitation criteria as new applicants. For licensees that completed their criminal parole or probation without a violation, the Board would first evaluate their eligibility for licensure under the criteria in subsection (c). If the licensee did not demonstrate sufficient rehabilitation under the criteria in subsection (c), the Board would apply the broader criteria in subsection (d). For licensees that did not complete their criminal parole or probation without a violation, the Board would apply the criteria in subsection (d), which incorporates the criteria from subsection (c). This way, similarly-situated licensees (those whose reinstatement is being considered in light of a criminal conviction) have the benefit of the same set of criteria.

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

Underlying Data

None

Business Impact

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

Economic Impact Assessment

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for license applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- It will not create new businesses or eliminate existing business within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for license applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- It will not affect the expansion of businesses currently doing business within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for license applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- This regulatory proposal benefits the health and welfare of California residents because it would increase their access to licensed professionals in the beauty industry.

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

Specific Technologies or Equipment

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

Consideration of Alternatives

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

Set forth below are the alternatives that were considered and the reason the alternative was rejected or adopted:

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