

ACUPUNCTURE BOARD

INITIAL STATEMENT OF REASONS

Hearing Date: TBD

Subject Matters of Proposed Regulations: Substantial Relationship Criteria and Rehabilitation Criteria for Denials, Suspensions and Revocations

Sections Affected: Sections 1399.469.4, 1399.469.5, 1399.469.6 of Title 16 of the California Code of Regulations (CCR)

Specific Purpose of Each Adoption

1. Problem Being Addressed

The Acupuncture Board (Board) licenses acupuncturists, who are licensed health care practitioners that provide acupuncture services in California. Existing law (Business and Professions Code (BPC) sections 480 and 490) presently authorizes the Board to deny an application for licensure. This law further authorizes the Board to discipline an acupuncturist based on a conviction for a crime or act “substantially related” to the licensed business or profession for which the applicant is still incarcerated or for which the applicant has been released from incarceration for fewer than seven years.

BPC section 481 authorizes the Board to develop criteria for determining whether a crime or act is substantially related to the qualifications, functions, or duties of the acupuncture profession. BPC section 482 requires the Board to develop criteria to evaluate an applicant’s or licensee’s rehabilitation when considering the denial or discipline of an acupuncture license.

Consistent with that authority, the Board is proposing regulations that set forth its substantial relationship criteria and rehabilitation criteria for crimes or acts considered substantially related to qualifications, functions, or duties of an acupuncture licensee. The Board currently does not have criteria for determining a substantially related crime or criteria for rehabilitation set out in regulation. Therefore, the Board must adopt regulations to meet the mandate of existing law pursuant to BPC sections 481 and 482, and the statutory mandate from Assembly Bill 2138 (Stats. 2018, Ch. 995) (AB 2138) to implement these new laws.

Effective July 1, 2020, under the provisions of AB 2138, the Board’s existing authority to deny an applicant a license based upon a substantially related criminal conviction will significantly change. This proposal seeks to adopt new regulations consistent with this recently enacted legislation and to more accurately reflect the Board’s authority to consider denials and discipline.

Effective July 1, 2020, BPC section 481(b) will require the Board to adopt substantial relationship criteria regulations to include the following:

- The nature and gravity of the offense;
- The number of years elapsed since the date of the offense;
- The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.

New regulations are needed to address other changes to law enacted by AB 2138. These proposed regulations include the addition of references to “professional misconduct,” as this will be considered a legal basis for denial under BPC section 480. The proposed language will also add references to discipline under BPC section 141, since substantially related acts that are the basis for discipline in another jurisdiction may be used to discipline a licensee under that section.

The Board also proposes to add new rehabilitation criteria to help the Board consider whether an applicant or licensee made a “showing of rehabilitation” consistent with new and existing requirements of AB 2138 (BPC, §§ 480, 482, as added by AB 2138, §§ 4, 9). This proposal will also establish how the Board considers rehabilitation evidence when considering denials and discipline.

2. Anticipated Benefits from this Regulatory Action

The proposed regulations will place applicants and licensees on notice that the Board is statutorily authorized to deny, suspend, or revoke a license based on professional misconduct and discipline taken by another licensing board or jurisdiction. The proposal would also make relevant parties (e.g., the Deputy Attorneys General from the Office of the Attorney General (AG), Administrative Law Judges from the Office of Administrative Hearings (OAH), respondents, and respondents’ counsels) aware that when considering denial or discipline of applicants or licensees, the Board uses the listed criteria to determine whether the crime, act, or professional misconduct is substantially related to the practice of acupuncture, and to the extent that it would adversely affect the applicant’s ability to be a licensed acupuncturist in California.

AB 2138 was enacted to reduce licensing and employment barriers for people who are rehabilitated. These proposed regulations would further that goal by adopting criteria that would emphasize an applicant’s or licensee’s rehabilitative efforts and what would be needed to make a showing of rehabilitation. This may lead to fewer licensing denials and an increase in the number of licensed acupuncturists in the marketplace, thus allowing for more medical providers to treat increasing numbers of California health care consumers.

Factual Basis/Rationale

Factual basis for the determination that each proposed regulation for adoption, 16 CCR sections 1399.469.4, 1399.469.5, 1399.469.6, is reasonably necessary to address the problem for which it is proposed:

BPC section 4933 authorizes the Board to adopt, amend, and repeal regulations as may be necessary to enable it to carry into effect the provisions of law relating to the practice of acupuncture, including the Acupuncture Licensure Act (Act).

By enacting AB 2138, the Legislature intended to reduce licensing and employment barriers for persons who are rehabilitated. At the Board's March 28, 2019 meeting, members discussed how AB 2138 proposed to create new standards for how the Board could deny an applicant based upon a crime or act substantially related to acupuncture licensure. Members discussed how existing law authorizes the Board to deny, suspend, or revoke a license, or to take disciplinary action against a licensee, because the licensee or applicant has been convicted of a substantially related crime. The new laws authorize the Board to deny a license based upon a substantially related crime only if certain criteria are met.

Board members also discussed how the Board currently does not have regulations to determine substantial relationship and rehabilitation criteria, as required under AB 2138. Staff explained that to meet the mandates of AB 2138, the Board must adopt regulations setting forth the criteria authorized by new and existing authority pursuant to BPC sections 481 and 482. The Board then discussed options for proposed text, based on templates provided by the Department of Consumer Affairs (DCA) to promote uniformity among DCA boards. DCA modelled these templates after existing regulations adopted by other boards, prior to the enactment of AB 2138, with revisions to comply with AB 2138. Finally, Board staff made further revisions to account for the Board's needs to properly regulate the acupuncture profession in California.

By enacting AB 2138, the Legislature intended to reduce licensing and employment barriers for people who are rehabilitated. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.) Accordingly, beginning July 1, 2020, pursuant to amendments to BPC section 480 made by AB 2138, the Board may not deny a license 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.

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

(1) The conviction occurred within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of:

(a) a serious felony under Penal Code section 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.

(BPC, § 480, subd. (a)(1), as added by AB 2138, effective July 1, 2020.)

At the Board's March 28, 2019 meeting, members discussed and approved new regulations, 16 CCR sections 1399.469.4, 1399.469.5, 1399.469.6, to implement criteria to determine whether a crime or act is substantially related to the qualifications, functions, or duties of acupuncture, criteria of rehabilitation, and changes to BPC sections 480, 481, and 493. The proposed language incorporates the substantial relationship criteria as set forth in BPC sections 481 and 493, effective July 1, 2020. The proposed language also includes discipline under BPC section 141 because substantially related acts that are the basis for discipline in another jurisdiction may be used to discipline a licensee under this section in California.

The proposed language includes references to "professional misconduct" as this may be considered a legal basis for denial under BPC section 480(b), which will become effective July 1, 2020, per AB 2138. This proposal will also more accurately reflect the Board's authority to evaluate rehabilitation evidence for all applicants and licensees where the Board is considering denial or discipline of a license.

Adopt 16 CCR § 1399.469.4. Substantial Relationship Criteria.

Specifically, the Board proposes the adoption of 16 CCR section 1399.469.4 for the following reasons:

- (1) Add new subsection (a): “For the purpose of denial, suspension, or revocation of a license pursuant to Section 141 or Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime, professional misconduct, or act shall be considered substantially related to the qualification, functions, or duties of a licensee if, to a substantial degree, it evidences present or potential unfitness of a licensee to perform the functions authorized by the license in a manner consistent with the public health, safety, or welfare.”

This proposal would create new regulations for better organization and grouping of similar concepts within the regulatory proposal.

Existing law, at BPC section 141, authorizes the Board to discipline a licensee for discipline taken by another state, a federal agency, or a country (“foreign jurisdiction”) for any act “substantially related” to the practice regulated through California licensure. In addition, effective July 1, 2020, BPC section 480 authorizes this Board to deny a license on the basis that the applicant was subject to formal discipline by a licensing board located in or outside California for “professional misconduct” under specified conditions. (See BPC, § 480, subd. (b), as added by AB 2138).

This proposal includes references to BPC section 141 (discipline by a foreign jurisdiction) and “professional misconduct” in the Board’s proposed substantial relationship criteria regulation, to more accurately reflect the Board’s authority to discipline or deny on these bases.

The proposed language also specifies that a crime, professional misconduct, or act is considered substantially related “if, to a substantial degree, it evidences present or potential unfitness of a person holding such a license to perform the functions authorized by the license in a manner consistent with the public health, safety, or welfare.”

The purpose of connecting the licensee’s crime, professional misconduct, or act to an evidenced unfitness related to performing functions consistent with the public’s health, safety, or welfare is to identify the types of crimes, professional misconduct, or acts with which the Board is concerned.

In the Board’s experience, this standard would be equally relevant when considering crimes and/or acts committed by a licensee in a foreign jurisdiction or professional misconduct committed by an applicant before another licensing board. As a result, the proposed language is necessary to give proper notice to those affected applicants and licensees of what standard the Board will use in evaluating what crimes, professional misconduct, and/or acts the Board considers “substantially related,” and that could be a basis for license denial, suspension, or revocation by this Board pursuant to BPC sections 141, 480, or 490. The proposed regulation also provides notice to applicants and licensees, with a criminal history, that the Board may deny, suspend, or revoke a license for a crime, professional misconduct, and/or act that evidences unfitness to perform

functions of an acupuncturist and involves a concern for public health, safety, or welfare.

- (2) Add new subsection (b): “In making the substantial relationship determination required under subdivision (a) for a crime, the board shall consider the following criteria:
- (1) The nature and gravity of the offense;
 - (2) The number of years elapsed since the date of the offense; and
 - (3) The nature and duties of an acupuncturist.”

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

Since BPC sections 481 and 493 require the Board to use these three criteria in evaluating whether a crime is substantially related to the qualifications, functions, and/or duties of the profession, the Board proposes adopting a substantial relationship regulation to include all three items listed in subsection (b)(1)-(3). The inclusion of these criteria in proposed 16 CCR section 1399.469.4, subsection (b), will also permit the Board to provide notice to interested parties of the Board’s criteria for evaluating whether a crime is substantially related to the qualifications, functions, and/or duties of the acupuncture profession in one convenient location.

- (3) Adopt Note with Authority and Reference Citations to Title 16, CCR section 1399.469.4, as follows:

Note: Authority cited: Sections 481, 493, 4933, Business and Professions Code. Reference: Sections 141, 480, 481, 490, 493, 4955(b), 4955(h), 4955(j), and 4956, Business and Professions Code.

The Board proposes adding the following citations to the Authority section for the following reasons:

- BPC section 481 provides existing and unchanged authority for a 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 business or profession it regulates.
- BPC section 493 authorizes the Board to include new substantial relationship criteria in its regulations.
- BPC section 4933 authorizes the Board to adopt, amend, or repeal regulations to

carry out the provisions of law relating to acupuncture.

The Board adds the following implemented statutes as References:

- BPC sections 141, 480, 481, 490, and 493 provide the basis for imposing discipline or denying an application for a substantially related crime, act, or professional misconduct, as defined in the proposed text of 16 CCR 1399.469.4.
- BPC section 4955(b) provides the authority for the denial, suspension, or revocation of a license for unprofessional conduct related to a conviction of a crime substantially related to the qualifications, functions, or duties of an acupuncturist.
- BPC section 4955(h) authorizes the Board to deny, suspend, or revoke a license for disciplinary action taken by any public agency for any act substantially related to the qualifications, functions, or duties of an acupuncturist or any professional health care licensee.
- BPC section 4955(i) authorizes the Board to deny, suspend, or revoke a license for any action or conduct warranting the denial of an acupuncture license, relating back to authority pursuant to BPC section 480.
- BPC section 4956 defines what a conviction is and authorizes the Board to deny, suspend or revoke a license when the time for criminal appeal has elapsed, when the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence irrespective of a subsequent order under the provisions of Penal Code section 1203.4.

Adopt 16 CCR § 1399.469.5. Criteria for Rehabilitation – Denial of Licensure.

Specifically, the Board proposes the adoption of 16 CCR section 1399.469.5 for the following reasons:

- (1) Add new subsection (a): “When considering the denial of a license under Section 480 of the Business and Professions Code on the ground that the applicant was convicted of a crime, the board shall consider whether the applicant made a showing of rehabilitation and is presently eligible for a license, if the applicant completed the criminal sentence at issue without a violation of parole or probation.”

This proposal would create subsections for better organization and grouping of similar concepts within the regulatory proposal.

Existing law, in BPC section 482, requires boards to develop criteria to evaluate the rehabilitation of an applicant or licensee when considering the denial or discipline of a license based on a conviction and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) The Board does not have a regulation that sets forth its criteria of rehabilitation. Therefore, the Board must adopt regulations to evaluate the rehabilitation of a person when the Board considers the denial of a license.

Beginning 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 (except those under PC 1192.7)), based on the facts underlying a conviction, has been out of prison the preceding seven years (either in California or in another state), or if the applicant “made a showing of rehabilitation pursuant to BPC section 482.” (§ 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 Board’s Act, or its regulations, and as directed under BPC section 482. (§ 481, subd. (c), as added by AB 2138, § 7; see also § 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”].)

As a result of the foregoing changes in law, AB 2138 requires the Board to adopt regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny, suspend, or revoke a license based on a conviction. (§ 482, subd. (a), as added by AB 2138, § 9.) Specifically, the revisions to BPC section 482 require the Board to consider whether an applicant or licensee “made a showing of rehabilitation,” if the applicant or licensee:

- (a) Completed the criminal sentence at issue without a violation of parole or probation; or,
- (b) The Board finds, after applying its rehabilitation criteria, that the applicant is rehabilitated. (§ 482, subd. (b), as added by AB 2138, § 9.)

Current regulations do not exist explicitly requiring the Board to consider whether the applicant made a showing of rehabilitation if the individual completed the criminal sentence at issue without a violation of parole or probation. Since BPC section 482 will explicitly require the Board to consider whether, under those circumstances, the applicant has made a showing of rehabilitation for licensing purposes, the Board is including this new requirement in 16 CCR 1399.469.5 to provide adequate notice to applicants that this new requirement must be considered by the Board prior to considering denial. The inclusion of this text at the beginning of 16 CCR 1399.469.5 also allows the Board to clearly distinguish between this criteria and other criteria that the Board may use in considering denials based upon other statutory authority.

- (2) Add new subsection (a)(1)-(5): “In making this determination, the board shall consider the following criteria:
- (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.
 - (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.”

In earlier versions of the bill, AB 2138 mandated that the Board “shall find” an applicant had made a showing of rehabilitation if the applicant or licensee had completed his or her criminal sentence without a violation of parole or probation (see AB 2138, as amended in Assembly on April 2, 2018, § 5.) This would have effectively eliminated the Board’s discretion to further inquire into rehabilitative efforts after an applicant’s release from the criminal justice system.

However, the “shall find” language in earlier versions of AB 2138 was struck and later replaced with the words “shall consider” following recommendations by the Senate Business, Professions and Economic Development Committee on June 20, 2018 (see AB 2138, as amended on June 20, 2018, § 5 and Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018, p. 11, 19). As enacted, the Board will be authorized to exercise its discretion to “consider whether” an applicant has made a showing of rehabilitation if the applicant has completed the criminal sentence at issue without a violation of parole or probation (see BPC, § 482, subd. (b), operative July 1, 2020.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when denying 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. However, since the Board currently does not have criteria of rehabilitation set out in regulation, the Board must adopt a regulation to implement the provisions of existing law under BPC section 482, subdivision (a)(1) and the new requirements pursuant to AB 2138.

To meet constitutional requirements, courts have found that criminal probation conditions must be reasonably related to the goals of enhancing rehabilitative and deterrence objectives and protecting the victim (*People v. Jungers* (2005) 127 Cal.App.4th 698, 703.) However, courts typically reject the view that applicants and licensees who comply with the terms of their parole or probation are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].)

The purpose of the Board's licensing and enforcement proceedings are to protect the public. As the courts have stated: "The purpose of such a proceeding is not to punish but to afford protection to the public upon the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent." (*Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 540; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817 [45 Cal.Rptr.2d 486, 490].)

To further assist the Board in exercising its discretion for the protection of the public, the Board proposes to use these five criteria to evaluate whether the applicant has made a "showing of rehabilitation" when the applicant has completed the criminal sentence at issue without a violation of parole or probation. Each of these criteria are narrow in scope and will provide 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 when making the determination as to the applicant's rehabilitation.

The Board also intends to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under DCA through the new regulation and the five criteria that are included. In the Board's experience, analyzing the nature and gravity of the crime(s) committed, the length and extent of the probation or parole periods, and any modifications to parole or probation will assist the Board in making a fair and balanced determination of whether the applicant would be safe to practice, with or without restrictions on their license. 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 also 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 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.

In addition, analyzing the terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation will further assist the Board in determining whether the applicant's parole or probation adequately remediated the criminal conduct or whether future monitoring or restriction (e.g., probationary license) would be necessary for public protection.

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.

Proposed regulation 16 CCR 1399.469.5, subsection (a) will provide transparency and clarity to license applicants who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria would help license applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal will also assist relevant parties to any administrative appeal arising from a license denial (e.g., AG, OAH, and the applicant’s counsel) in advocating for or against, or deciding upon, applicants who have criminal convictions and have completed parole or probation without a violation, by listing rehabilitation criteria applicable to the applicant.

- (3) Add new subsection (b): “If subdivision (a) is inapplicable, or the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (a), the board shall apply the following criteria in evaluating an applicant’s rehabilitation. The Board shall find that the applicant made a showing of rehabilitation and is presently eligible for a license if, after considering the following criteria, the board finds that the applicant is rehabilitated:”

In addition to the authority to deny based upon criminal convictions, in deciding whether to deny a license, the Board will be authorized to deny a license based upon professional misconduct (BPC, § 480, subd. (b), as added by AB 2138, § 4), and will retain authority to deny based upon unprofessional conduct grounds as defined in BPC section 4955. As a result, the Board’s rehabilitation criteria must also include consideration of rehabilitation evidence for other types of conduct, other than criminal convictions, that may constitute grounds for denial.

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

In the Board’s experience, these proposed standards will be useful when considering denials based upon crimes, unprofessional conduct, or professional misconduct committed by an applicant before another licensing board. AB 2138 also authorizes the Board to deny a license based on prior disciplinary misconduct. Accordingly, the Board

must include such a provision in the regulation to account for denials on this ground. These standards are needed to provide the Board with a fair, balanced and thoughtful approach to evaluating whether sufficient rehabilitative efforts have been made to satisfy the Board that the applicant is presently eligible for a license.

As a result, these proposed changes are necessary to give the Board discretion to analyze rehabilitation evidence using these criteria when considering a denial, and to give proper notice to those affected applicants of what standards the Board will use in evaluating whether a “showing of rehabilitation” has been made.

As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific and more comprehensive list of criteria for the Board to consider for these applicants, which is not limited to the applicable parole or probation. This list of criteria incorporates the criteria from 16 CCR 1399.469.5, subsection (a) for applicants convicted of a crime, so that similarly-situated applicants may be evaluated by the Board under the same set of criteria.

The list of criteria also anticipates that the Board may be considering “act(s)” that are the basis for the denial, 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. Through this proposal, the Board also intends to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under DCA.

- (4) Add new subsection (b)(1): “The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.”

The Board will consider the nature and severity of the crime or act, for the same reasons as discussed for subsection (a)(1), when the nature and gravity of the crime(s) are considered in determining a license applicant’s rehabilitation. This is the offense or misconduct against which the Board will judge the applicant’s rehabilitation. Here, the term “severity” has the same meaning and intent as “gravity.” The word “severity” is being used in this subsection to make the regulation consistent with other DCA boards’ existing rehabilitation criteria. The term “gravity” is used in subsection (a) to be consistent with the substantial relationship criteria specified by AB 2138.

- (5) Add new subsection (b)(2): “Evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial under Section 480 of the Business and Professions Code.”

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.

- (6) Add new subsection (b)(3): “The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).”

The Board will consider the time elapsed since commission of the prior crimes or misconduct, since this passage of time bears on a person’s rehabilitation. The greater

the number of years that have passed, the more time the Board can take into consideration that the applicant has not committed any acts threatening public safety. Additionally, during such time, the applicant may have completed other rehabilitative efforts for the Board's consideration. The ability to maintain rehabilitation over a prolonged period suggests reoffending is less likely to recur. Conversely, when only a short amount of time has passed, there has been less time for the applicant to make changes and demonstrate reformation. Accordingly, the Board must consider this criterion in evaluating rehabilitation.

- (7) Add new subsection (b)(4): "The extent to which the applicant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the applicant."

The extent to which a person has complied with the terms of parole or probation is already a factor boards consider when evaluating rehabilitation. The Board will consider whether the applicant has complied with parole, probation, restitution and/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 shows a willingness to conform to the rules of licensure. Accordingly, the Board must consider these elements to evaluate an applicant's reformation from prior misconduct.

- (8) Add new subsection (b)(5): "The criteria in subdivision (a)(1)-(5), as applicable."

This proposal adds authority to consider the rehabilitation criteria that the Board is proposing for licensees who have completed parole or probation without further violation in subdivision (a)(1)-(5) to the criteria in subdivision (b), where appropriate. This will allow the Board greater discretion and further opportunities to assess whether a licensee who has not made a showing under subdivision (a) can make a showing using the criteria in both subdivisions.

In addition, allowing the Board to use the same criteria for criminal convictions furthers the public policy objectives of AB 2138 in requiring the Board to use new criteria that will allow more opportunities for all applicants or licensees to make a showing of rehabilitation.

Using this criterion from subdivision (a)(1)-(5) is necessary to ensure that all applicants convicted of a crime are evaluated under the same set of rehabilitation criteria. For applicants who have completed their criminal parole or probation without a violation, the Board will 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 will apply the broader criteria in subsection (b). For applicants who do not complete their criminal parole or probation without a violation, the Board will 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.

- (9) Add new subsection (b)(6): “Evidence, if any, of rehabilitation submitted by the applicant.”

Because the Board is required by BPC section 481(c) to consider evidence of rehabilitation submitted by the applicant, the Board is consolidating this requirement into the rehabilitation criteria.

- (10) Adopt Note with Authority and Reference Citations for Title 16, CCR section 1399.469.5, as follows:

Note: Authority cited: Sections 482 and 4933, Business and Professions Code. Reference: Sections 480, 481, 482, 488, 493, 4938, 4944, 4955, 4955.1, 4955.2, and 4956, Business and Professions Code.

The Board proposes adding the following citations to the Authorities section of this regulation, for the following reasons:

- BPC section 482 provides both an existing and unchanged basis for a board to develop criteria to evaluate the rehabilitation of a person when considering the denial of a license. AB 2138 also establishes the Board’s authority, under BPC section 482, to consider whether an applicant or licensee has made a showing of rehabilitation if the applicant or licensee has completed the criminal sentence without a violation of parole or probation or has met the Board’s criteria for rehabilitation.
- BPC section 4933 authorizes the Board to adopt, amend, or repeal regulations.

The Board adds the following citations as References because these regulations implement the statutory provisions of AB 2138, for the following reasons:

- BPC sections 480, 481, 482, 488 and 493 are added because the Board is required to consider rehabilitation evidence prior to considering denial or discipline pursuant to these provisions.
- BPC section 480 authorizes the Board to deny a license to an applicant for a substantially related conviction. This works in conjunction with BPC section 482, which requires boards to develop criteria of rehabilitation to evaluate whether an applicant or licensee has made a showing of rehabilitation when the Board is considering denying a license under BPC section 480.
- BPC section 481 as amended by AB 2138 requires boards to develop specified criteria to aid them 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 business(es) or profession(s) it regulates. The criteria specified directly correlates with BPC sections 480 and 482, as they work together when considering a denial of a license for a substantially related conviction.
- BPC section 488 identifies the different actions that boards can take following a

hearing requested by an applicant who was denied a license. This authority directly relates to proposed 16 CCR section 1399.469.5, subdivision (b)(6); specifically, evidence of rehabilitation submitted by the applicant, as the hearing provides an additional opportunity for the applicant to submit evidence of their rehabilitation.

- BPC section 493 specifies that the record of conviction of the crime, for which the Board denied an application for a license or suspended or revoked a license, shall be conclusive evidence of the fact that the conviction occurred. It further reiterates the criteria for determining whether a crime is substantially related to the qualifications, functions, and/or duties of the business or profession the Board regulates. BPC section 493 also states that a board shall not categorically bar an applicant, based solely on the type of conviction, without consideration of the applicant's evidence of rehabilitation. This section works in conjunction with BPC sections 480, 481, 482, and 488 during the process in which a board considers a denial of license for a substantially related crime.
- BPC section 4938 includes the Board's statutory licensing requirements and it requires that any person who applies for an acupuncture license must meet specified criteria. One of the criteria requires the person applying for licensure not be subject to denial pursuant to Division 1.5 (commencing with BPC section 475), and includes the code sections affected by AB 2138.
- BPC section 4944 provides the Board's authority to investigate and evaluate each applicant applying for an acupuncture license. It is through such an investigation and evaluation where the Board will apply the proposed substantially related criteria and criteria of rehabilitation when determining if an applicant's conviction(s) will warrant the denial of a license.
- BPC section 4955 provides the authority for the denial, suspension, or revocation of a license for various forms of unprofessional conduct, including a conviction of a crime substantially related to the qualifications, functions, and/or duties of an acupuncturist.
- BPC sections 4955.1 and 4955.2 authorize the Board to deny, suspend, revoke, or impose probationary conditions upon a license, based on specified acts, which relate to denials of licensure for substantially related convictions pursuant to BPC sections 480, 481, 482, and 488.
- BPC section 4956 further defines what a conviction is and authorizes the Board to deny, suspend or revoke a license when a criminal appeal time has elapsed, when the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence irrespective of a subsequent order under the provisions of Penal Code section 1203.4. The Board must include this section as a reference because it clarifies what constitutes a conviction.

Adopt 16 CCR § 1399.469.6. Criteria for Rehabilitation – Suspensions or Revocations.

Specifically, the Board proposes the adoption of 16 CCR section 1399.469.6 for the following reasons:

- (1) Add new subsection (a): “When considering the suspension or revocation of a license on the ground that a person holding a license under the Acupuncture Licensure Act has been convicted of a crime, the board shall consider whether the licensee made a showing of rehabilitation and is presently eligible for a license if the licensee completed the criminal sentence at issue without a violation of parole or probation.”

This proposal creates subsections for better organization and grouping of similar concepts within the regulatory proposal.

Existing law requires boards to develop criteria to evaluate the rehabilitation of a licensee when considering discipline based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) In deciding whether to discipline a licensee based on a conviction, the Board must consider evidence of the licensee’s rehabilitation, pursuant to the process established in the Act, or its regulations, and as required under BPC section 482. The Board does not currently have a regulation that sets forth its criteria of rehabilitation. Therefore, the Board must adopt a regulation to evaluate the rehabilitation of a person when the Board considers the suspension or revocation of a license.

Beginning July 1, 2020, BPC section 482, subsection (b) shall require the Board to consider whether an applicant or licensee “made a showing of rehabilitation,” if the applicant or licensee completed the criminal sentence without a violation of parole or probation, or the Board finds, in applying its rehabilitation criteria, that the applicant is rehabilitated. (§ 482, subd. (b), as added by AB 2138, § 9.)

Due to the foregoing changes in law, the Board needs to adopt regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend, or revoke a license based on a conviction. (§ 482, subd. (a), as added by AB 2138, § 9.) Specifically, revisions to BPC section 482 require the Board to consider whether an applicant or licensee “made a showing of rehabilitation,” if the applicant or licensee:

- (a) Completed the criminal sentence at issue without a violation of parole or probation; or,
- (b) The Board finds, after applying its rehabilitation criteria, that the applicant is rehabilitated. (§ 482, subd. (b), as added by AB 2138, § 9.)

Current regulations do not explicitly require the Board to consider whether a licensee made a showing of rehabilitation if the individual completed the criminal sentence at issue without a violation of parole or probation. Since BPC section 482 will explicitly require the Board to consider whether, under those circumstances, the licensee has made a showing of rehabilitation when considering suspension or revocation of a license (discipline), the Board is including this new requirement from AB 2138 to this Section to

provide adequate notice to licensees that this new requirement must be considered by the Board prior to considering discipline and fitness for a license. The inclusion of this text at the beginning of this Section also allows the Board to clearly distinguish between this and other criteria that the Board may use in considering discipline based upon other statutory authority.

- (2) Add new subsection (a)(1)-(5): “In making this determination, the board shall consider the following criteria:
- (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.
 - (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.”

In reviewing its various options, the Board reviewed the bill’s history and determined that AB 2138 mandated that the Board “shall find” an applicant or licensee made a showing of rehabilitation if the applicant or licensee completed his or her criminal sentence without a violation of parole or probation (see AB 2138, as amended in Assembly on April 2, 2018, § 5.) This would have effectively eliminated the Board’s discretion to further inquire into rehabilitative efforts after a licensee’s release from the criminal justice system and to make a determination based upon those findings.

However, the “shall find” language, in earlier versions of AB 2138, was stricken and later replaced with the words “shall consider,” following recommendations by the Senate Business, Professions and Economic Development Committee on June 20, 2018 (see AB 2138, as amended on June 20, 2018, § 5 and Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018, p. 11, 19). As enacted, the Board will be authorized to exercise its discretion to “consider whether” a licensee has made a showing of rehabilitation if the licensee has completed the criminal sentence without a violation of parole or probation (see Bus. & Prof. Code, § 482, subd. (b), operative July 1, 2020.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when suspending or revoking 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. However, since the Board does not currently have criteria of rehabilitation set out in regulation, the Board must adopt a regulation to implement the provisions of existing law, pursuant to BPC section 482, subdivision (a)(2), and AB 2138.

To meet constitutional requirements, courts have found that criminal probation conditions must be reasonably related to the goals of enhancing rehabilitative and deterrence objectives and protecting the victim. (*People v. Jungers* (2005) 127 Cal.App.4th 698, 703.) However, courts typically reject the view that applicants and licensees who comply with the terms of their parole or probation are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with

the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].)

The purpose of the Board’s licensing and enforcement proceedings are to protect the public. As the courts have stated: “The purpose of such a proceeding is not to punish but to afford protection to the public upon the rationale that respect, and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent.” (*Borrer v. Department of Investment* (1971) 15 Cal.App.3d 531, 540; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817 [45 Cal.Rptr.2d 486, 490].

To further assist the Board in exercising its discretion for the protection of the public, the Board proposes to use these five criteria to evaluate whether a licensee has made a “showing of rehabilitation” when the licensee has completed the criminal sentence without a violation of parole or probation. Each of these criteria are narrow in scope and would provide the Board with information specific to the applicant’s criminal sentence, and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider when making the determination as to the licensee’s rehabilitation.

The five criteria in the new regulation are also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under DCA. In the Board’s experience, analyzing the nature and gravity of the crime(s) committed, the length and extent of the probation or parole periods, and any modifications to parole or probation will assist the Board in making a fair and balanced determination of whether the licensee would be safe to practice, with or without restrictions on a license.

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 also 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. (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 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.

In addition, analyzing the terms or conditions of parole or probation and the extent to which they bear on the licensee’s rehabilitation will further assist the Board in determining whether the licensee’s parole or probation adequately remediated the criminal conduct or whether future monitoring or discipline would be necessary for public protection.

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.

The proposed regulation 16 CCR 1399.469.6, subsection (a) will provide transparency and clarity to licensees who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria will help licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation. This proposal will also assist relevant parties to any administrative appeal arising from a license subject to discipline (e.g., AG, OAH, and the licensee's counsel) in advocating for or against, or deciding upon, licensees who have criminal convictions and have completed parole or probation without a violation, by listing rehabilitation criteria applicable to the licensee.

- (3) Add new subsection (b): "If subdivision (a) is inapplicable, or the board determines that the licensee did not make the showing of rehabilitation based on the criteria in subdivision (a), the board shall apply the following criteria in evaluating a licensee's rehabilitation. The board shall find that the licensee made a showing of rehabilitation and is presently fit for a license if, after considering the following criteria, the board finds that the licensee is rehabilitated:"

In addition to the authority to discipline based upon criminal convictions, the Board will retain authority to discipline based upon substantially related acts in a foreign jurisdiction as set forth in BPC section 141, and on unprofessional conduct grounds as defined in BPC section 4955. As a result, the Board's rehabilitation criteria must also include consideration of rehabilitation evidence for other types of conduct, other than criminal convictions, that may constitute grounds for discipline.

In addition to considering rehabilitation when a licensee completes a criminal sentence without a violation of probation or parole, AB 2138 requires the Board to consider whether an applicant or licensee made a showing of rehabilitation, if the Board finds, in applying its rehabilitation criteria, that the applicant is rehabilitated¹. (BPC, § 482, subd. (b)(2), operative July 1, 2020.) This proposal would permit the Board to consider its

¹ Due to the use of the word "licensee" in the introduction to subsection (b)(2) of Section 482, it is presumed that the Legislature intended for the board to use these criteria for applicants or licensees, and not just applicants.

standard rehabilitation criteria in evaluating whether a licensee made a showing of rehabilitation when either the grounds for denial do not involve a crime, or the showing of rehabilitation was not made under subdivision (a) of this Section.

In the Board's experience, these proposed standards will be useful when considering discipline based upon crimes, unprofessional conduct, or substantially related acts committed by a licensee before a foreign licensing body; i.e. another state or jurisdiction. These standards are needed to provide the Board with a fair, balanced and thoughtful approach to evaluating whether sufficient rehabilitative efforts have been made to satisfy the Board that the licensee is presently fit for a license.

As a result, these proposed changes are necessary to provide the Board discretion to analyze rehabilitation evidence, using these criteria when considering discipline, and to give proper notice to those affected licensees of what standards the Board will use in evaluating whether a "showing of rehabilitation" has been made.

As AB 2138 does not prescribe new rehabilitation criteria, this proposal also provides a specific, more comprehensive, list of criteria for the Board to consider for licensees who are subject to discipline, which is not limited to the applicable parole or probation. The list of criteria incorporates the criteria from subsection (a) for licensees convicted of a crime, so that similarly-situated licensees can 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 discipline, since the Board may be evaluating the rehabilitation of a licensee 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.

(4) Add new subsection (b)(1): "The nature and severity of the act(s) or crime(s)."

The Board will consider the nature and severity of the crime or act for the same reasons as discussed for subdivision (a)(1), above, when the nature and gravity of the crime(s) is considered when deciding whether a licensee is rehabilitated. This is the offense or misconduct against which the Board will judge the licensee's rehabilitation. The term "severity" has the same meaning and intent as "gravity." The word "severity" is being used, in this subdivision, to make the regulation consistent with other DCA boards' existing rehabilitation criteria. The term "gravity" was used in subdivision (a) to be consistent with the substantial relationship criteria specified by AB 2138.

(5) Add new subsection (b)(2): "The total criminal record."

A licensee's total criminal record is a relevant and important consideration, since a pattern of criminal behavior may be evidenced. The Board must consider all of the crimes, the dates in which the convictions occurred, and the nature of each crime to determine if a licensee is likely to reoffend. Similarly, whether a licensee has a prior criminal record, including crimes committed after the Board took disciplinary action, is relevant to determine whether the licensee is rehabilitated and eligible for licensure.

- (6) Add new subsection (b)(3): “The time that has elapsed since commission of the act(s) or crime(s).”

The Board will also consider the time elapsed since commission of the prior crimes or misconduct, since the passage of time bears on a person’s rehabilitation. The greater number of years that have passed, the more time the Board can take into consideration that the licensee has not committed any acts concerning public safety. Additionally, during such time, the licensee may have completed other rehabilitative efforts for the Board’s consideration. The ability to maintain rehabilitation over a prolonged period suggests reoffending is less likely to recur. Conversely, when only a short amount of time has passed, there has been less time for the licensee to make changes and demonstrate reformation. Accordingly, the Board must consider this criterion in evaluating rehabilitation.

- (7) Add new subsection (b)(4): “The extent to which the applicant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against such person.”

The extent to which a person has complied with the terms of parole or probation is already a factor that boards consider when evaluating rehabilitation. The Board will consider whether the licensee complied with parole, probation, restitution and/or other sanctions imposed on the licensee. 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 exhibit a willingness to conform to the rules of licensure. Accordingly, the Board must consider these elements to evaluate a licensee’s reformation from prior misconduct.

- (8) Add new subsection (b)(5): “The criteria in subdivision (a)(1)-(5), as applicable.”

This proposal adds the authority to consider the rehabilitation criteria that the Board is proposing for licensees who have completed parole or probation without further violation set forth in subdivision (a)(1)-(5) to the criteria in subdivision (b), where appropriate. This will allow the Board greater discretion and further opportunities to assess whether a licensee who has not made a showing under subdivision (a) can make a showing using the criteria in both subdivisions.

In addition, allowing the Board to use the same criteria for criminal convictions furthers the public policy objectives of AB 2138 in requiring the Board to use new criteria that will allow more opportunities for all applicants or licensees to make a showing of rehabilitation.

Using this criterion from subdivision (a)(1)-(5) 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 parole or probation without a violation, the Board will 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 will then apply the broader criteria in subsection (b).

For applicants that did not complete their criminal parole or probation without a violation, the Board will 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 being considered under the same set of criteria.

(9) Add new subsection (b)(6): “If applicable, evidence of dismissal proceedings pursuant to section 1203.4 of the Penal Code.”

Penal Code section 1203.4 provides relief to a petitioner by withdrawing the person’s plea of guilty or plea of *nolo contendere* and instead enter a plea of not guilty; or, the courts will set aside a verdict of guilty and dismiss the accusations or information against the person.

There are certain criteria the petitioner must meet to be eligible for relief under this law. The petitioner must have fulfilled the conditions of their probation, for the entire period of probation or been discharged prior to the termination of probation, and the petitioner cannot be serving a sentence for any offense. If someone met the provisions of Penal Code section 1203.4 and were granted this relief, and evidence of the dismissal proceedings are provided, then this is a reliable form of evidence of rehabilitation. Specifically, the licensee already had to prove to the criminal courts that they were compliant with the conditions of their probation, did not reoffend, and met their criteria of rehabilitation to the satisfaction of the courts.

(10) Add new subsection (b)(7): “Evidence, if any, of rehabilitation submitted by the licensee.”

The Board will consider evidence of rehabilitation submitted by the licensee, since the Board is required to consider such evidence under BPC section 481(c). The Board must implement this requirement to consolidate the Board’s rehabilitation criteria in one place.

(11) Adopt Note with Authorities and References cited for Title 16, CCR § 1399.469.6, as follows:

Note: Authority cited: Sections 482 and 4933, Business and Professions Code. Reference: Sections 141, 480, 481, 482, 488, 493, 4955, 4955.1, 4955.2, and 4956, Business and Professions Code.

The Board proposes to add the following citations to the Authority section of this regulation, for the following reasons:

- BPC section 482 provides the basis for a board to develop criteria to evaluate the rehabilitation of a person when considering the suspension or revocation of a license. AB 2138 also establishes the Board’s authority, under BPC section 482, to consider whether an applicant or licensee has made a showing of rehabilitation if the applicant or licensee has completed the criminal sentence without a violation of parole or probation or has met the Board’s criteria for rehabilitation.
- BPC section 4933 authorizes the Board to adopt, amend, or repeal regulations.

The Board proposes adding the following citations as Reference because these regulations further implement the statutory provisions of AB 2138:

- BPC sections 141, 480, 482, and 493 are added because the Board considers rehabilitation evidence prior to considering denial or discipline pursuant to these sections.
- BPC section 480 authorizes a board to deny a license to an applicant for a conviction that is substantially related to acupuncture. This works in conjunction with BPC section 482, which requires boards to develop criteria of rehabilitation to evaluate whether an applicant or licensee has made a showing of rehabilitation when considering denying a license under BPC section 480.
- BPC section 481 requires, pursuant to AB 2138, boards to develop specified criteria to aid them when considering the denial, suspension, or revocation of a license, and to determine whether a crime is substantially related to the qualifications, functions, and/or duties of the business or professions it regulates. The criteria stipulated in this law directly correlates with BPC sections 480 and 482, as they work together when considering a denial, suspension, or revocation of a license for a substantially related conviction.
- BPC section 488 identifies the different actions that boards can take following a hearing requested by an applicant who was denied a license. The authority provided by this section for the hearing directly relates to proposed 16 CCR section 1399.469.6, subdivision (b)(7), that will allow evidence of rehabilitation to be submitted, by the applicant or licensee, so that the hearing can provide an additional opportunity for the applicant or licensee to submit evidence of their rehabilitation.
- BPC section 493 specifies that the record of conviction of the crime in which the Board denied an application for license or suspended or revoked a license shall be conclusive evidence of the fact that the conviction occurred. This section further reiterates the criteria for determining whether a crime is substantially related to the qualifications, functions, and/or duties of the business or profession that the Board regulates. This section also states that a board shall not bar an applicant based solely on the type of conviction without consideration of the applicant's evidence of rehabilitation. This section also works in conjunction with BPC sections 480, 481, 482, and 488 during the process in which a board considers a denial, suspension, or revocation of a license for a substantially related crime.
- BPC section 4955 authorizes the Board to deny, suspend, or revoke a license for various forms of unprofessional conduct, including a conviction of a crime substantially related to the qualifications, functions, and/or duties of an acupuncturist.
- BPC sections 4955.1 and 4955.2 authorize the Board to deny, suspend, revoke, or impose probationary conditions upon a license based on specified acts, which relate to denials of licensure for substantially related convictions pursuant to BPC

sections 480, 481, 482, and 488.

- BPC section 4956 further defines what a conviction is and authorizes the Board to deny, suspend or revoke a license after a criminal appeal period has elapsed, when the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence irrespective of a subsequent order under the provisions of Penal Code section 1203.4. The Board must also add BPC section 4956 as a reference because it clarifies what constitutes a conviction.

Underlying Data

Technical, theoretical or empirical studies, reports, or documents relied upon (if any):

1. Minutes of the Acupuncture Board's March 28 – 29, 2019 meeting.
2. Meeting materials (number 10) from March 2019 Board meeting.
3. Assembly Bill 2138, as amended in Assembly April 2, 2018.
4. Assembly Bill 2138, as amended in Senate June 20, 2018.
5. Assembly Bill 2138, Chapter 995, Statutes of 2018.
6. Senate Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018.
7. Assembly Floor Analysis, dated August 24, 2018.

Business Impact

This regulation will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts:

The Board has approximately 12,000 licensees for the current fiscal year. During the 2016/2017 fiscal year, the Board issued 534 licenses and denied one. In 2017/2018, the Board issued 452 licenses and denied three. In the first half of 2018/2019, the Board issued 172 licenses and denied zero. Therefore, the Board has denied fewer than one percent of all applicants under the circumstances for which AB 2138 was enacted.

Since the Board has denied fewer than one percent of all applicants, this proposal is not anticipated to have an adverse economic impact. AB 2138 was enacted to reduce licensing and employment barriers for people who have been convicted of a crime or due to other acts underlying the conviction, who have a certificate of rehabilitation, were granted clemency, made a showing of rehabilitation, and/or where the conviction was dismissed or expunged. These adoptions will further assist that effort through adoption of standards designed to implement new substantial relationship and rehabilitation criteria.

As a result, it is anticipated that there may be fewer denials or disciplinary actions based upon criminal convictions and, therefore, no significant or statewide adverse economic impacts should exist.

Economic Impact Assessment

This regulatory proposal will have the following effects:

These regulations may result in the creation of new jobs, within California, because it implements AB 2138; legislation designed to reduce licensing and employment barriers for people who have been convicted of a crime and who have a certificate of rehabilitation, were granted clemency, made a showing of rehabilitation, or where their conviction was dismissed or expunged. This proposal will adopt regulations to add substantial relationship and rehabilitation criteria that emphasize an applicant's or licensee's rehabilitative efforts, which may result in having fewer license denials or disciplinary actions based on substantially related crimes, acts, or professional misconduct. However, the Board does not have data to project the number of jobs that may be created because of these efforts. And for these same reasons, these regulations are not expected to result in the elimination of any jobs.

It will not create substantially new business or eliminate existing businesses within California because the proposal is not of sufficient magnitude to create or eliminate businesses. Historically, similar Board regulations have resulted in fewer than one percent of all applicants being denied. Even assuming the number of denials or discipline would decrease because of these adoptions, the Board believes that this data demonstrates that these adoptions would not be significant enough to create or eliminate businesses who hire acupuncturists.

It will not affect the expansion of businesses currently operating within California, because the proposal is not of sufficient magnitude to significantly expand existing businesses. Historically, similar Board regulations have resulted in fewer than one percent of all applicants being denied licenses. Even assuming the number of denials or discipline will decrease, because of these adoptions, the Board believes that this data demonstrates that it would not be significant enough to expand businesses who hire acupuncturists.

This regulatory proposal will benefit the health and welfare of California residents because, by implementing criteria that emphasize rehabilitative efforts, it will create employment opportunities for people who have been convicted of a crime and are able to make a showing of rehabilitation. This may lead to an increase in acupuncturists in the marketplace, therefore, allowing for more health care providers to treat increasing numbers of California consumers.

This regulatory proposal will not affect worker safety because the proposal does not involve worker safety.

This regulatory proposal will not affect the state's environment because it does not involve environmental issues.

This regulatory proposal will not affect the state's housing because it does not involve housing 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 regulation is proposed or would be as effective or less burdensome to affected private persons than the proposed regulations, or be equally effective in achieving the purposes of the regulations 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:

1. Not adopt the regulations: This alternative was rejected because the Board is required to establish by statute (BPC sections 481, 482, 493, 4933, and AB 2138) the criteria for denial, suspension, or revocation of a license based on the conviction of a crime or professional misconduct that is substantially related to the qualifications, functions, or duties of the acupuncture profession.

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

2. Adopt regulations: This option was selected, and all other options were rejected. The Board determined that adopting Title 16, CCR sections 1399.469.4, 1399.469.5, and 1399.469.6 would allow the Board the ability to set criteria for how to consistently process the denial, suspension, or revocation of a license for conviction of a crime or professional misconduct, if the crime or professional misconduct is substantially related to the qualifications, functions, and/or duties of the acupuncture profession. AB 2138 requires the Board to include new substantial relationship criteria in its regulations and consider how to evaluate a showing of rehabilitation for an applicant or licensee, which is not currently addressed in Board regulations.

3. Explore Options for establishing Substantial Relationship Criteria for Title 16, CCR section 1399.469.4: The Board considered two options for how to evaluate whether an applicant's or licensee's crime, professional misconduct, and/or improper act is considered substantially related to the qualifications, functions, or duties of a licensee.

- Option 1: The first option incorporates the AB 2138 substantial relationship criteria. The Board also expanded this option to include discipline under BPC section 141 because substantially related acts that are the basis for discipline in another jurisdiction may be used to discipline a licensee under this section. The proposed language also includes "professional misconduct" as this may be considered for

denial under BPC section 480. The Board chose Option 1, because it is a simpler and more straightforward implementation of AB 2138 and the three criteria required therein.

- Option 2: The second option also incorporates the AB 2138 substantial relationship criteria and is expanded to include discipline under BPC section 141 because substantially related acts that are the basis for discipline in another jurisdiction may be used to discipline a licensee in California under this section. The proposed language also includes “professional misconduct,” as this may be considered for denial under BPC section 480. It also lists actual substantially related crimes, professional misconduct, and improper acts that the Board has determined are cause for denial, suspension, or revocation of a license. This option also specifies the list of crimes, professional misconduct, and improper acts that are included, but are not limited to just those listed. Therefore, the regulation does not serve as a comprehensive list.

The Board rejected Option 2 because the Board determined that this option reduces clarity insofar as Deputy Attorneys General, Administrative Law Judges, applicants, licensees, and/or their counsels may think the list is all-inclusive, and AB 2138 does not require a list of examples.

4. Explore Options for establishing Rehabilitation Criteria for Title 16, CCR sections 1399.469.5 and 1399.469.6 Related to Criminal Convictions: The Board considered two options for how to evaluate whether an applicant or licensee made a showing of rehabilitation when an applicant or licensee has been convicted of a crime and successfully completed parole or probation without a violation.

- Option 1: The first option would permit the Board to evaluate an applicant’s rehabilitative efforts using five criteria designed to examine whether the applicant’s or licensee’s parole or probation was of sufficient duration and magnitude to address the possibility of recurrence of the misconduct. The Board elected to use greater discretion and resources to evaluate rehabilitative efforts using Option 1.
- Option 2: The second option would create a presumption that a licensee or applicant was rehabilitated if the individual completed parole or probation without a violation and would provide a simplified approach to analyzing convictions. In consideration of the vulnerability of the patient population that acupuncturists serve, the Board rejected Option 2.

Submitting Comments

Any interested person may submit comments to the Board in writing relevant to the above determinations at 1747 North Market Blvd., Suite 180, Sacramento, California 95834.