

PHYSICAL THERAPY BOARD OF CALIFORNIA

INITIAL STATEMENT OF REASONS

Subject Matter of Proposed Regulations: Substantial Relationship Criteria; Rehabilitation Criteria for Denials and Reinstatements; Rehabilitation Criteria for Suspensions or Revocations

Sections Affected: Sections 1399.20, 1399.21, and 1399.22 of title 16 of the California Code of Regulations (CCR)

Specific Purpose of each adoption, amendment, or repeal:

1. Problem being addressed:

The Physical Therapy Board of California (Board) licenses physical therapists (PT), who are health care practitioners licensed to provide physical therapy services, and physical therapist assistants (PTA), who are health care practitioners licensed to provide physical therapy services under the supervision of a licensed PT (Business and Professions Code section (BPC) § 2630.3). Existing law (BPC §§ 480 and 490) authorizes the Board to deny an application for licensure or discipline of a PT or PTA, based on a conviction for a crime or act substantially related to the profession. BPC sec. 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 physical therapy profession. BPC sec. 482 requires the Board to develop criteria to evaluate an applicant's or licensee's rehabilitation when considering the denial or discipline of a PT or PTA license. Consistent with that authority, the Board has adopted regulations that set forth its substantial relationship criteria and rehabilitation criteria for crimes or acts considered substantially related to qualifications, functions, or duties of a PT or PTA licensee.

As required by Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018), the Board must promulgate regulations by July 1, 2020, to implement, interpret, and make specific BPC sections 141, 480, 481, 482, 488, 493, 2660, and 2660.5, with respect to the substantial relationship of a crime and rehabilitation criteria.

The Legislature's "clear intent" in enacting AB 2138 is to diminish obstacles to licensing for people with convictions who are rehabilitated. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.) Accordingly, the Legislature amended BPC sec. 480 to limit the Board's ability to use prior convictions or acts when denying licenses.

This regulatory proposal will make changes to existing regulations, with respect to the substantial relationship of a crime and rehabilitation criteria, to ensure the Board's licensing activities are consistent with the changes brought forth by AB 2138.

A. Criminal Conviction Substantial Relationship

Operative on July 1, 2020, the laws governing the Board's existing authority to deny an applicant for a license, based upon substantially related criminal conviction(s), will change. 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 permits 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.

Operative on July 1, 2020, BPC sec. 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. BPC sec. 493 will also 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.)

B. Rehabilitation Criteria

Operative on July 1, 2020, BPC sec. 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, 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.)

2. Anticipated benefits from this regulatory action:

The proposed amendments will place applicants and licensees on notice that the Board is statutorily authorized to deny, suspend, or revoke a license because of professional misconduct and discipline taken by another licensing board or jurisdiction. The proposal will also make relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorneys General, Administrative Law Judges, respondents, and respondents' legal counsel) 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 physical therapy. AB 2138 was enacted to reduce licensing and employment barriers for people who are rehabilitated. These proposed amendments will further that goal by adopting criteria that will emphasize an applicant's or licensee's rehabilitative efforts and what will be needed

to make a showing of rehabilitation. This may lead to fewer license denials and an increase in the number of licensed PTs and PTAs in the marketplace, thereby allowing more health care providers to treat increasing numbers of California medical consumers.

Factual Basis/Rationale

Amend California Code of Regulations, title 16, sections 1399.20, 1399.21, and 1399.22.

The factual basis for determining that each proposed amendment to 16 CCR 1399.20, 1399.21, and 1399.22 is reasonably necessary to address the problem for which it is proposed:

BPC sec. 2615 authorizes the Board to adopt, amend, and repeal regulations that may be necessary to enable it to carry out the provisions of its practice act. The Legislature's intent, in enacting AB 2138, was to reduce licensing and employment barriers for persons who are rehabilitated. At the Board's March 21-22, 2019, meeting, members discussed how AB 2138 created new standards for how the Board will be authorized to deny an applicant based upon a crime or act substantially related to physical therapy licensure. The members also discussed how existing law authorizes the Board to deny, suspend, or revoke a license or to take disciplinary action, against a licensee, if the licensee or applicant has been convicted of a substantially related crime to the PT or PTA professions. The amended law will revise and recast those provisions to authorize the Board to deny a license based upon a substantially related crime only if certain criteria are met.

Beginning July 1, 2020, 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 if 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, subdivision (a)(1), as added by Statutes. 2018, chapter 995 (“AB 2138”).)

At the Board’s March 21-22, 2019, meeting, the Board discussed and approved proposed changes to 16 CCR 1399.20, to implement 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, operative on July 1, 2020. It also expands the current regulation to include discipline under BPC sec. 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 adds references to “professional misconduct,” as this may be considered a legal basis for denial under BPC § 480, subsection (b), which will become operative on July 1, 2020. This proposal will also update the regulations to more accurately reflect the Board’s authority to evaluate rehabilitation evidence, for all applicants and licensees, where the Board is considering denial, discipline or reinstatement or modification of penalties for a PT or PTA license.

Amend California Code of Regulations, title 16, section 1399.20 – Substantial Relationship Criteria

Specifically, the Board proposes the adoption of the following amendments to 16 CCR 1399.20 for the following reasons:

- (1) Add new subsection (a); amend subsection (a) to add section 141 of the Business and Professions Code and “professional misconduct,” as specified within Business and Professions Code section 480.

This proposal will create a new subsection (a) for better organization and grouping of similar concepts within the regulatory proposal.

Existing law, at BPC sec. 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 by the California license. In addition, on July 1, 2020, BPC sec. 480 will authorize 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(b), as added by AB 2138).

This proposal will add references to BPC sec. 141 (discipline by a foreign jurisdiction) and “professional misconduct” to the Board’s substantial relationship criteria regulation to

more accurately reflect the Board's authority to discipline or deny on these bases. The Board's existing substantial relationship criteria regulation sets forth what crimes or acts the Board believes are logically connected to a PT's or PTA's fitness or competence to practice the profession or to the qualifications, functions, or duties of the PT or PTA license. The current standard specifies that a crime or act is considered substantially related "if to a substantial degree it evidences present or potential unfitness of a person to perform the functions authorized by the license in a manner consistent with the public health, safety or welfare."

In the Board's experience, this existing standard is equally relevant when considering crimes, acts committed by a licensee in a foreign jurisdiction, or professional misconduct committed by an applicant before another licensing Board. As a result, these proposed changes are necessary to give proper notice to those affected applicants and licensees of what standard the Board will use in evaluating what professional misconduct 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.

- (2) Delete the sentence "Such crimes or acts shall include but not be limited to the following:"

This proposal will repeal this existing language, in subsection (a), that introduces the list of specific crimes or acts the Board considers substantially related to the profession. The Board proposes to delete the list of specific crimes or acts the Board considers substantially related to the profession, so the Board believes this introductory phrase is no longer necessary.

- (3) This proposal will repeal existing subsections (a), (b) and (c), since the Board has chosen to evaluate each and every crime, act, or professional misconduct underlying a disciplinary action based upon the factors provided by AB 2138 listed in the new subdivision (b), discussed below and incorporated herein.
- (4) Add new subsection (b): "(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 a licensed physical therapist or physical therapist assistant."

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 that there are 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(b), as added by AB 2138, § 7; see also BPC § 493(b), as added by AB 2138, § 13.).

Since BPC sections 481 and 493 require the Board to use these three criteria when evaluating whether a crime is substantially related to the qualifications, functions, or duties of the profession, the Board proposes amending its current substantial relationship regulation to include all three items listed in subsection (b)(1)-(3). The addition of these criteria to 16 CCR 1399.20, subsection (b), will also permit the Board to provide notice to interested parties of all of the Board's criteria for evaluating whether a crime is substantially related to the qualifications, functions, or duties of the profession in one convenient location.

Amend California Code of Regulations, title 16, section 1399.21 – Rehabilitation Criteria for Denial and Reinstatement of Licensure

Specifically, the Board proposes the adoption of the following amendments to 16 CCR 1399.21, for the following reasons:

- (1) Add new subsection (a) and amend language to add “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 creates new 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 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.) However, beginning July 1, 2020, BPC sec. 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, subdivision (b), operative July 1, 2020, as added by AB 2138, Statutes 2018, Chapter 995, § 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 practice act, or its regulations, and as directed under BPC sec. 482. (§ 481, subdivision (c), as added by Statutes 2018, Chapter 995, § 7; see also BPC § 493, subdivision (b)(2), as added by Statutes 2018, Chapter 995, § 13 [“A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation”].)

The foregoing changes necessitate revision of the Board's regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny, suspend, or revoke a license based on a conviction. (BPC § 482, subdivision (a), as added by Statutes 2018, Chapter 995, § 9, operative July 1, 2020.) Specifically, revisions to BPC sec. 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, subdivision (b), as added by Statutes. 2018, Chapter 995, § 9, operative July 1, 2020.)

Current regulations do not explicitly require the Board to consider whether the applicant made a showing of rehabilitation if the individual completed the criminal sentence without a violation of parole or probation. Since BPC § 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 adding this new requirement, to this subsection, to provide adequate notice to applicants that this new requirement must be considered, by the Board, prior to considering denial. The addition of this text, at the beginning of this subsection, also allows the Board to clearly distinguish between this and other criteria that the Board may use in considering denials based upon other statutory authority.

- (2) Add language to new subsection (a), amend and renumber old subsection (a) as subsection (a)(1), and add new subsections (a)(2)-(5):
“(a) . . . 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.”

This subsection is added to comply with AB 2138, which prohibits the Board from denying a license on the basis that the applicant was convicted of a crime if the applicant made a showing of rehabilitation. BPC sec. 482, as amended by AB 2138, will require the Board to determine whether an applicant or licensee has made a showing of rehabilitation if the applicant or licensee completed the applicable criminal sentence without a violation of parole or probation or if the Board finds, after applying its rehabilitation criteria, that an applicant is rehabilitated.

To comply with AB 2138, the Board must revise this regulation to establish criteria for evaluating rehabilitation. Subsection (a) will require the Board to consider whether an applicant made a showing of rehabilitation if the person completed the applicable criminal sentence without a parole or probation violation. In this circumstance, the Board will apply defined rehabilitation criteria focused on the applicant’s parole or probation and whether successful completion of parole or probation sufficiently demonstrates the applicant’s rehabilitation as follows:

- The nature and gravity of the crime(s). This change is necessary because this is the offense against which the applicant’s rehabilitative efforts will be evaluated.

- The length of the applicable parole or probation. This change is necessary because the length of time the applicant served parole or probation, without a violation, is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future.
- The extent to which the parole or probation period was shortened or lengthened and the reason(s) for the modification. This change is necessary because a parole or probation period can be shortened or lengthened for good or bad conduct and this may bear on whether the applicant is sufficiently rehabilitated.
- The terms and conditions of parole and probation and the extent to which they bear on the applicant's rehabilitation. This change is necessary because the actual parole or probation terms can inform the Board whether the applicant is rehabilitated.
- The extent to which the terms or conditions of parole or probation were modified and the reason(s) for any modification. This change is necessary because it may demonstrate whether the applicant may be willing to conform to the rules of licensure.

These changes will provide transparency and clarity to applicants who have completed their criminal sentence without a violation of parole or probation. Providing the defined list of rehabilitation criteria will help applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation.

- (3) Delete “, the board, in evaluating the rehabilitation of the applicant and his or her present eligibility for a license shall consider the following criteria:”, from the prior version of subsection (a).

For greater readability of the regulation and to accommodate further amendments to this section, the Board proposes deleting this existing text. This language is also redundant of language in new subsection (b).

- (4) Add a 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, subdivision (b), as added by AB 2138 § 4), and will retain authority to deny based upon unprofessional conduct grounds, as defined in BPC sec. 2660. 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, subdivision (b), operative July 1, 2020.) This proposal will permit the Board to consider its existing rehabilitation criteria in evaluating whether an applicant made a showing of rehabilitation when the grounds for denial do not involve a crime, the applicant violated parole or probation, or the showing of rehabilitation was not made under subsection (a).

In the Board's experience, these existing standards will continue to be useful when considering denials based upon crimes, unprofessional conduct, or professional misconduct committed by an applicant before another licensing board. 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.

- (5) Add new subsection (b)(1); delete references to old subsections (b), (c), (d), and (e); add new cross-references to subsections (b)(2), (3), (4), and (6).

For easier comprehension and readability of the regulation, subsection (a) is proposed to be deleted and cross-references to the newly renumbered subsections in (b)(1)-(6) will be added. The new language of (b)(1) is the language of the former subsection (a) and has been moved for better organization and grouping of similar concepts within the regulatory proposal.

- (6) Amend subsection (b)(2) to add "of the Business and Professions Code."

This non-substantive change is added for clarity and reference.

- (7) Amend subsection (b)(3) to delete "subsections (a) or (b)" and add "subdivisions (1) or (2)".

This is non-substantive change to restructure for clarity.

- (8) Amend subsection (b)(4) to delete "The extent to which" and add "Whether."

This is a non-substantive grammatical change.

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

This proposal will add authority to consider the rehabilitation criteria that the Board is proposing for licensees who have completed parole or probation without further violation in subsections (a)(1)-(5) to the criteria in subsection (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 subsection (a) can make a showing using the criteria in both subsections. 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. This addition also provides parity between applicants convicted of a crime who are elevated under subsection (a) or (b).

Amend CCR, title 16, section 1399.22 – Rehabilitation Criteria for Suspensions or Revocations

Specifically, the Board proposes adopting the following amendments to 16 CCR 1399.22, for the following reasons:

- (1) Add new subsections; Amend subsection (a) to add ... “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 new 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 the discipline of a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC § 482.) In deciding whether to discipline a license based on a conviction, the Board must consider evidence of the licensee’s rehabilitation, pursuant to the process established in the Board’s practice act, or its regulations, and as directed under BPC sec. 482.

However, beginning July 1, 2020, BPC sec. 482, subsection (b), requires the Board to consider whether an applicant or licensee “made a showing of rehabilitation,” if the applicant or licensee completed 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, subdivision (b), operative July 1, 2020, as added by Statutes 2018, Chapter 995, § 9.)

The foregoing changes necessitate revision to the Board’s regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend, or revoke a license based on a conviction (BPC § 482, subdivision (a), as added by Statutes 2018, Chapter 995, § 9.). Specifically, revisions to BPC sec. 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. (BPC § 482, subdivision (b), as added by Statutes 2018, Chapter 995, § 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 sec. 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 adding this new requirement, 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 addition of this text also allows the Board to clearly distinguish between this criteria and other criteria that the Board may use in considering discipline based upon other statutory authority.

(2) Add to new subsection (a):

“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.”

This subsection is also amended to comply with AB 2138, which requires the Board to develop criteria to evaluate the rehabilitation of a person when considering the suspension or revocation of a license. BPC sec. 482, as amended by AB 2138, shall require the Board to determine whether an applicant or licensee has made a showing of rehabilitation if the applicant or licensee completed the applicable criminal sentence without a violation of parole or probation or if the Board finds, after applying its rehabilitation criteria, that an applicant is rehabilitated.

Current regulations establish criteria for rehabilitation for suspensions and revocations. To create a consistent standard, the Board chose to make this subsection consistent with the criteria used to evaluate the rehabilitation of an applicant when considering the denial or reinstatement of a license. This subsection will require the Board to consider whether a licensee made a showing of rehabilitation if the person completed the applicable criminal sentence without a parole or probation violation. In this circumstance, the Board will apply defined rehabilitation criteria focused on the licensee’s parole or probation and whether successful completion of parole or probation sufficiently demonstrates the licensee’s rehabilitation as follows:

- The nature and gravity of the crime(s). (This change is necessary because this is the offense against which the licensee’s rehabilitative efforts will be evaluated.)
- The length of the applicable parole or probation. (This change is necessary because the length of time the licensee served parole or probation without a violation is relevant to whether the licensee is rehabilitated and will comply with licensure requirements in the future.)
- The extent to which the parole or probation period was shortened or lengthened and the reason(s) for the modification. (This change is necessary because a parole or probation period can be shortened or lengthened for good or bad conduct and this may bear on whether the licensee is sufficiently rehabilitated.)
- The terms and conditions of parole and probation and the extent to which they bear on the licensee’s rehabilitation. (This change is necessary because the actual

parole or probation terms can inform the Board whether the licensee is rehabilitated.)

- The extent to which the terms or conditions of parole or probation were modified and the reason(s) for any modification. (This change is necessary because it may demonstrate whether the licensee may be willing to conform to the rules of licensure.)

These changes will provide transparency and clarity to licensees who have completed their criminal sentence without a violation of parole or probation. Providing the defined list of rehabilitation criteria will help licensees understand the information that will be used by the Board to determine rehabilitation.

- (3) Delete “in evaluating the rehabilitation of such person and his or her eligibility for a license”

For greater readability of the regulation and to accommodate further amendments to this section, the Board proposes to delete this existing text.

- (4) Add a 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 eligible 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 shall retain authority to discipline based upon substantially related acts in a foreign jurisdiction, as set forth in BPC sec. 141, and on unprofessional conduct grounds, as defined in BPC sec. 2660. 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, subdivision (b)(2), operative July 1, 2020.) For uniformity purposes, this proposal will permit the Board to consider its current rehabilitation criteria in evaluating whether a licensee made a showing of rehabilitation when the grounds for denial do not involve a crime, the licensee violated parole or probation, or the showing of rehabilitation was not made under subsection (a) of this section.

In the Board’s experience, these existing standards will continue to be useful when considering discipline based upon crimes, unprofessional conduct, or substantially related acts committed by a licensee before a foreign licensing body. 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 give 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.

Existing subsections (a) through (f) will be renumbered to (1) through (7) to accommodate the addition of this new introductory sentence, at subsection (b), and to allow for greater comprehension and readability of the regulation.

(3) Amend subsections (b)(1) and (b)(3) to delete “offense(s)” and add “crime(s)”.

This proposal strikes the word “offense(s)” from the existing regulation and replaces it with “crime(s),” to more accurately identify the criminal conduct that will be the legal basis for the Board’s discipline or petition decision. This will help avoid applicant or licensee confusion regarding what “offense(s)” might mean and what might be considered in evaluating an applicant’s or licensee’s showing of rehabilitation.

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

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

(5) Amend subsection (b)(6): change the term “expungement” to “dismissal”.

This proposal will delete a reference to “expungement,” in this subsection, and replace it with the word “dismissal.” The Board determined that the language should be updated to reflect more accurately the actions that a court could take under Section 1203.4 of the Penal Code. Under this provision, a criminal defendant may “petition the court to withdraw his or her plea of guilty or nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusatory pleading against the defendant...”

In consideration of the foregoing, the word “expungement” will be deleted and replaced with the word “dismissal.” This change is necessary to more accurately describe, to affected parties, the actions that a criminal court could take, as stated above, under Penal Code section 1203.4, and to help avoid licensee or petitioner confusion regarding what evidence the Board might consider in evaluating rehabilitation.

Amendment to California Code of Regulations, title 16, section 1399.22, Note:

Since the Board considers rehabilitation evidence prior to considering denial or discipline, pursuant to BPC sections 141, 480, 488 and 493, the Board proposes adding these sections of the BPC to the “notes” section of this regulation to comply with the “Reference” standard in the Act.

Underlying Data

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

1. Minutes of the Physical Therapy Board of California’s March 21-22, 2019 meeting.
2. AB 2138 meeting materials of the Physical Therapy Board of California’s March 21-22, 2019 meeting.
3. Assembly Bill 2138, chapter 995, Statutes of 2018.
4. Senate Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018.
5. 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 40,499 licensees for the current fiscal year. During 2016/2017, the Board issued 2,180 licenses and denied 4; in 2017/2018, the Board issued 2,454 licenses and denied 11; and in 2018/2019, the Board has issued 2,437 licenses and denied 2. Therefore, the Board has denied less than one percent of all applicants over the past four years

Since the Board has denied less than one percent of all applicants since [fiscal year 2016/2017], this proposal will not have a significant adverse economic impact. AB 2138 was enacted to reduce licensing and employment barriers for people who have been convicted of a crime or due to acts underlying the conviction, who have a certificate of rehabilitation, were granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged. These amendments 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.

Economic Impact Assessment

This regulatory proposal will have the following effects:

It may result in the creation of new jobs within the state of California because it implements AB 2138; legislation designed to reduce licensing and employment barriers for people who have been convicted of a crime who have a certificate of rehabilitation, were granted clemency, made a showing of rehabilitation, or when their conviction was dismissed or expunged. This proposal will amend regulations to add substantial relationship criteria 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 from these efforts.

It will not create new business or eliminate existing businesses, within the state of California, because the proposal is not of sufficient magnitude to create or eliminate businesses. Even assuming the number of denials or discipline will decrease, because of these amendments, the Board believes that these amendments will not be significant enough to create or eliminate businesses who hire PTs or PTAs.

It will not affect the expansion of businesses, currently doing business within the state of California, because the proposal is not of sufficient magnitude to expand businesses. Even assuming the number of denials or discipline will decrease because of these amendments, the Board believes that it will not be significant enough to expand businesses who hire PTs or PTAs.

This regulatory proposal will benefit the health and welfare of California residents because by implementing criteria that emphasize rehabilitative efforts, it will create an opportunity for employment for people who have been convicted of a crime and are able to make a showing of rehabilitation. This may lead to an increase in PTs and PTAs in the marketplace, therefore, allowing for more health care providers to treat the increasing numbers of California healthcare 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 California's housing costs, because it does not affect 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 will be more effective in carrying out the purpose for which the regulation is proposed, will be as effective and less burdensome to affected private persons than the adopted regulation, or will be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Set forth, below, are the reasons for rejecting any proposed alternatives that will lessen the adverse economic impact on small business:

1. Not amend the regulation: This alternative was rejected because the Board needs to define how to consider denial of a license when an applicant has been convicted of a crime or professional misconduct if the crime or professional misconduct is substantially related to the qualifications, functions, or duties of the physical therapy profession considering recent legislative amendments. AB 2138 requires the Board to include new substantial relationship criteria and consider how to evaluate a showing of rehabilitation for an applicant or licensee, which is not currently addressed in Board regulations.
2. Amend regulations: This option was selected; all other options were rejected. The Board determined that amending sec. 1399.20 will allow the Board the ability to set criteria for how to consistently process the denial, suspension or revocation of a license when an applicant has been convicted of a crime or engaged in other misconduct, if the crime or misconduct is substantially related to the qualifications, functions, or duties of the physical therapy profession considering recent legislative amendments. 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 Simplifying Rehabilitation Criteria for Sections 1399.21 and 1399.22 Related to Criminal Convictions: In addition, the Board considered two options for how to evaluate whether an applicant or licensee has 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. The first option (Option 1) permitted 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 second option (Option 2) 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 PTs and PTAs serve, the Board rejected Option 2 and elected to use greater discretion and resources to evaluate rehabilitative efforts using Option 1.

WRITTEN COMMENT PERIOD

Any interested person, or his/her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. Comments may also be submitted by facsimile (FAX) at 916 263-2560 or by e-mail to brooke.arneson@dca.ca.gov. The written comment period closes at **11:59 p.m. on August 3, 2020**. The Board will consider only comments received at the Board's office by that time. Submit comments to:

Brooke Arneson, Administrative Analyst
Physical Therapy Board of California
2005 Evergreen Street, Suite 1350
Sacramento, CA 95815

Or: Via email to: brooke.arneson@dca.ca.gov

Or: By facsimile (FAX) at: 916 263-2560