



**California State Board of Pharmacy**  
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Business, Consumer Services and Housing Agency  
Department of Consumer Affairs  
Gavin Newsom, Governor



To: Board Members

Subject: Agenda Item VIII. Discussion and Consideration of Adoption of Board Approved Regulations, Comments Pending Review by the Board

**b. Proposed Regulation to Amend Title 16, Sections 1769 and 1770, Substantial Relationship and Rehabilitation Criteria**

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**Background:**

During the May 2019 Board meeting, the Board approved proposed text to amend Sections 1769 and 1770 of Title 16, CCR, related to the Substantial Relationship and Rehabilitation Criteria. This proposal will increase transparency and clarity to applicants with respect to rehabilitation criteria the Board considers when evaluating an individual's eligibility for licensure.

As required by the Administrative Procedure Act, Board staff released the proposed text for the 45-day comment period on March 13, 2020, which ends on April 27, 2020. The Board received one comment during the comment period. Board staff and legal counsel will be available at the Board meeting to answer any questions. The proposed text and the comment received is attached following this memo.

**At this Meeting**

The Board will have the opportunity to discuss the regulation, the comments received and determine what course of action it wishes to pursue. Among its options:

1. Adopt the regulation as approved at the May 2019 Board Meeting and noticed for 45-day comment on March 13, 2020.
2. Amend the regulation to address concerns expressed by stakeholders and notice the modified text for a 15-day comment period.

**Possible Adoption Language:** Adopt the regulatory language as noticed on March 13, 2020, and delegate to the executive officer the authority to make technical or non-substantive changes as may be required by Control agencies to complete the rulemaking file.

**Possible Amendment Language:** Approve the modified language and initiate a 15-day public comment period. Additionally, should no negative comments be received, delegate to the executive officer the authority to make technical or non-substantive changes as may be required by the Control agencies to complete the rulemaking file.

**Criminal Conviction  
Substantial  
Relationship and  
Rehabilitation Criteria  
16 CCR §§  
1769 and 1770**

**Title 16. Board of Pharmacy  
Proposed Regulation**

Proposed changes to the current regulation language are shown by strikethrough for deleted language and underline for added language.

**Amend section 1769 of Article 8 of Division 17 of Title 16 of the California Code of Regulations to read as follows:**

§ 1769. Criteria for Rehabilitation.

(a) In addition to any other requirements for licensure, when considering the approval of an application, the board or its designee may require an applicant to be examined by one or more physicians and surgeons or psychologists designated by the board if it appears that the applicant may be unable to safely practice due to mental illness or physical illness affecting competency. An applicant's failure to comply with the examination requirement shall render his or her application incomplete. The board shall pay the full cost of such examination. The board shall seek that the evaluation be conducted within 60 days of the date the applicant is advised that an examination is required. The board shall receive the examiner's evaluation within 60 days of the date the examination is completed. The report of the examiner shall be made available to the applicant.

If after receiving the report of the evaluation, the board determines that the applicant is unable to safely practice, the board may deny the application.

(b) When considering the denial of a facility or personal license under Section 480 of the Business and Professions Code on the grounds that the applicant was convicted of a crime, the board will consider whether the applicant made a showing of rehabilitation and is presently fit for a license, if the applicant completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the board will consider the following criteria: ~~the board, in evaluating the rehabilitation of the applicant and his present eligibility for licensing or registration, will 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.

(c) If subdivision (b) is inapplicable, or the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (b), the board will apply the following criteria in evaluating an applicant's rehabilitation:

(1) The nature and ~~severity~~gravity of the act(s) or ~~offense(s)~~crime(s) under consideration as grounds for denial.

(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.

(3) The time that has elapsed since commission of the act(s) or crime(s) referred to in ~~subdivision~~paragraph (1) or (2).

(4) Whether the applicant has complied with any terms of parole, probation, restitution or any other sanctions lawfully imposed against the applicant.

(5) The criteria in subdivisions (b)(1)-(5), as applicable.

~~(5)(6)~~ Evidence, if any, of rehabilitation submitted by the applicant, including as provided in the board's Disciplinary Guidelines, identified in section 1760.

~~(c)(d)~~ When considering the suspension or revocation of a facility or a personal license on the ground that the licensee or the registrant has been convicted of a crime, the board, ~~in evaluating the~~ will consider whether the licensee made a showing of rehabilitation of such person and his ~~presently eligibility~~ fit for a license, if the licensee completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the board will consider the criteria in subdivisions (b)(1)-(5). If the board determines that the licensee did not make a showing of rehabilitation based on the criteria in subdivisions (b)(1)-(5), or if a licensee has not completed the criminal sentence at issue without a violation of parole or probation, the board will consider the following criteria:

(1) Nature and ~~severity~~gravity of the act(s) or offenses.

(2) Total criminal record.

(3) The time that has elapsed since commission of the act(s) or offenses.

(4) Whether the licensee has complied with all terms of parole, probation, restitution or any other sanctions lawfully imposed against the licensee.

(5) The criteria in subdivisions (b)(1)-(5), as applicable.

~~(5)~~(6) Evidence, if any, of rehabilitation submitted by the licensee, including as provided in the board's Disciplinary Guidelines, identified in section 1760.

Note: Authority cited: Sections 482 and 4005, Business and Professions Code. Reference: Sections 480, 481, 482, 488, 493, 4030, 4200 and 4400, Business and Professions Code.

**Amend section 1770 of Article 8 of Division 17 of Title 16 of the California Code of Regulations to read as follows:**

§ 1770. Substantial Relationship Criteria.

(a) For the purpose of denial, suspension, or revocation of a personal or facility 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 qualifications, functions or duties of a licensee or registrant if to a substantial degree it evidences present or potential unfitness of a licensee or registrant to perform the functions authorized by ~~his~~the license or registration in a manner consistent with the public health, safety, or welfare.

(b) In making the substantial relationship determination required under subdivision (a) for a crime, the board will 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 the profession or occupation the person may perform with the license type sought or held.

(c) For purposes of subdivision (a), substantially related crimes, professional misconduct, or acts shall include, but are not limited to, those which:

(1) Violate or attempt to violate, directly or indirectly, or to aid, abet or conspire to violate, any provision of law of this state, or any other jurisdiction, governing the practice of pharmacy.

(2) Violate or attempt to violate, directly or indirectly, or to aid, abet or conspire to violate, any provision of Chapter 13 (commencing with Section 801) of Title 21 of the United States Code regulating controlled substances or any law of this state, or any other jurisdiction, relating to controlled substances or dangerous drugs.

(3) Violate or attempt to violate, directly or indirectly, or to aid, abet or conspire to violate, any provision of law of this state, or any other jurisdiction, relating to government provided or government supported healthcare.

(4) Involve dishonesty, fraud, deceit, or corruption related to money, items, documents, or personal information.

(5) Involve a conviction for driving under the influence of drugs or alcohol.

Note: Authority cited: Sections 481, 493, and 4005, Business and Professions Code. Reference: Sections 141, 480, 481, 490, 493, 4300, 4301, 4301.5, and 4309, Business and Professions Code.

**Criminal Conviction  
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16 CCR §§  
1769 and 1770**

**45-Day Comment**



COMMUNITY  
LEGAL SERVICES  
IN EAST PALO ALTO



Center for  
Employment  
Opportunities

April 27, 2020

**Via Email**

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**RE: Comments in Response to Dept. of Consumer Affairs, California State Board of Pharmacy Regulatory Action Concerning the Implementation of AB 2138, Proposal to Amend Sections 1769 and 1770 of Article 8 of Division 17 of Title 16, of the California Code of Regulations**



Dear Lori Martinez and Debbie Damoth:

Thank you for the opportunity to submit comments to the Department of Consumer Affairs (“DCA”), Board of Pharmacy (“Board”) regarding proposed regulations to implement AB 2138.

Assembly Bill 2138 was authored by Assemblymembers David Chiu and Evan Low to help formerly incarcerated people have a fair chance at obtaining occupational licensure. AB 2138 was sponsored by the Anti-Recidivism Coalition, East Bay Community Law Center, Legal Services for Prisoners with Children, Root & Rebound and supported by a coalition of 50 organizations. Thanks to the passage of AB 2138 in 2018, the roughly 1 in 3 or 8 million Californians with arrest or conviction records will face fewer barriers to employment and will help to fill the much needed occupational employment gaps in the State.

Formerly incarcerated workers strive to obtain permanent, stable, and living wage jobs, however around 30% of jobs require licensure, clearance, or oversight by a governing body. This oversight, while intended to protect public safety, disproportionately impacts people of color, low-income, and indigent communities of people. These communities have been disproportionately impacted by over-policing and over-criminalization resulting in contacts with law enforcement that bar these applicants from later obtaining the licensure they require to pursue employment under DCA’s regulation. Moreover, applicants have been deterred by the lengthy process, lack of clarity, and obstacles to obtaining licensure – problems that AB 2138 seeks to rectify to offer a fair chance to all people.

However, across the state of California, there are only a handful of organizations that support low-income and indigent people seeking occupational licensure. Licensure applicants look for help answering questions about general eligibility, the initial application, appeals, probationary and restricted licenses, and license revocations or suspensions. The lack of clarity in this process and lack of low-cost or free service providers, leads many people facing differing levels of adversity to give up entirely. We believe that our direct experience with clients who are undergoing this difficult process, along with our involvement in the drafting and passage of AB 2138, makes us equipped to understand the proper implementation of this bill.

The undersigned organizations write to you regarding the implementation of AB 2138 which will reduce discrimination against people of color in California, who are disproportionately denied job opportunities because of occupational licensing-related conviction background checks. We support amendments to Sections 1769 and 1770 of Article 8 of Division 17 of Title 16, of the California Code of Regulations to reflect the passage of Assembly Bill 2138, Chiu, but believe the current language should be clarified and go further in order to fully implement the intention and spirit of the AB 2138 text.

The proposed regulations leave some gaps in the regulatory scheme under the changes to CA Business and Professions Code sections 480, 481, 482, and 493 as modified by AB 2138. These proposed regulations fail to meet and implement CA B&P Code sections 480, 481, 482, and 493

and are not, as currently written, valid. The proposed regulations also fall short of the intent of the bill, which includes combating discrimination against people with records that have demonstrated rehabilitation and seek to establish themselves professionally.

Specifically, the proposed regulations do not comply with AB 2138 as follows:

- Section 1769 as written, relies too heavily on law enforcement's reports and determination of the applicant's progress. Rehabilitation can and does take many forms that the current language does not fully embrace. Please see number 5 below for examples of rehabilitation to expand the proposed regulations.
- Section 1770 lists certain crimes, professional misconduct, acts and defines them as substantially related regardless of the time that has passed or the nature and gravity of the offense in contravention of AB 2138 Business and Professions Code section 481. AB 2138 allows the Board discretion to determine which crimes are substantially related on an individual basis. Moreover, section 1770 fails to note that criminal history that resulted in the applicant obtaining a Certificate of Rehabilitation, pardon, dismissal per Penal Code section 1203.4 *et seq.* and the acts underlying a conviction, or an arrest that resulted in a disposition other than a conviction **shall** not be denied a license. See Business and Professions Code section 480(b)-(d).

Further, we urge the Board to incorporate the full extent of AB 2138 by including the following provisions:

1. The proposed regulations should include the 7 year washout period for consideration of convictions or discipline which are not statutorily considered serious felonies under the Cal. Penal Code. 1192.7. See Cal Business and Professions Code section 480(a).
2. The proposed regulations should provide that a person with a criminal history **shall not** be denied a license if the applicant has obtained a Certificate of Rehabilitation, dismissal per Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.42, or an arrest which led to an infraction/citation or a disposition other than a conviction, or juvenile adjudication. See Cal Business and Professions Code section 480(b)-(d).
3. The proposed regulations fail to include that the board shall not require an applicant to disclose any information or documentation regarding the applicant's criminal history. See Cal Business and Professions Code section 480(f)(2).
4. The proposed regulations fails to include that the board shall notify the applicant in writing if the applicant is denied or disqualified from licensure. The Board must provide procedures describing the process for the applicant to challenge the decision or to request re-consideration, that the applicant has a right to appeal the board's decision, and the process of requesting a complete conviction history. See Cal Business and Professions Code section 480(f)(3).
5. The intent of AB 2138 was not to incorporate mere probation or parole reports into the occupational licensing determinations. Merely looking to law enforcement will not adequately show how an applicant would do on the job.

Rather, rehabilitation can and does take many forms that extend beyond mere law enforcement supervision. To better define rehabilitation, we recommend that the board provide examples of evidence of mitigating circumstances and rehabilitation efforts to assist both the Board and licensing applicants.

For instance, the Board should consider adding the following rehabilitation criteria:

- Volunteer service;
  - Successful employment in a related field;
  - Unpaid work in the community;
  - Furthered education;
  - Abstinence from controlled substances and/or alcohol;
  - Stability of family life, fulfillment of parental and familial responsibilities;
  - New and different social and business relationships from those which existed at the time of the underlying charges at issue;
  - Change in attitude of the applicant as evidenced by:
    - Personal testimony,
    - Evidence of rehabilitation submitted by the applicant,
    - Evidence from family, friends, and/or other persons familiar with the applicant's previous behavior patterns and subsequent attitude and behavioral changes, and;
  - Other markers of rehabilitation.
6. The proposed regulations fail to include any mention of requirements to obtain statistical information on the number of applicants with a criminal record who apply and receive notice of denial/disqualification of licensure, provided evidence of mitigation or rehabilitation, the final disposition of the application, and demographic information. See Cal Business and Professions Code section 480(g).

Adequate implementation of the changes to California Business and Professions Code sections 480, 481, 482, and 493 will go a long way toward restoring hope and opportunity for the nearly 1 in 3 or 8 million Californians who have an arrest or conviction record. Thank you for your consideration.

If you have any questions regarding the content of these comments, please contact Faride Perez-Aucar (Root and Rebound) or Vinuta Naik (Community Legal Services in East Palo Alto).

Sincerely,

*/s/ Faride Perez-Aucar*

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**Organizations:**

A New Way of Life Reentry Project  
Californians for Safety and Justice  
Center for Employment Opportunities  
Center for Living and Learning  
Community Legal Services in East Palo Alto  
Criminal Justice Clinic, UC Irvine School of Law  
East Bay Community Law Center  
Legal Aid at Work  
Legal Services for Prisoners with Children, All of Us or None  
Los Angeles Regional Reentry Project  
National Association of Social Workers, California Chapter  
REDF  
The Record Clearance Project, San Jose State University  
Root and Rebound  
Rubicon Programs  
Underground Scholars Initiative