



# CONTRACTORS STATE LICENSE BOARD

## PROPOSED RULEMAKING RELATED TO TITLE 16—RESPONSE TO COMMENTS

### **Proposed Rulemaking Related to Title 16—Response to Comments**

In response to Assembly Bill 2138 (Chiu, 2018), CSLB was obligated to amend its regulations related to the discipline of contractors or denial of applicants who have been convicted of a crime. At its September 2019 meeting, the Board approved proposed regulatory text for submission to various control agencies that authorized the registrar to take all steps necessary to initiate the rulemaking process and set the rulemaking matter for a hearing.

That public hearing was held on April 28, 2020. The Board did not receive any oral comments at that hearing; however, the Board did receive written comments in advance of the hearing.

The law requires that the Board respond to these written comments; the comments and proposed responses are included below.

If the Board approves the responses, they will be incorporated into the Board's Final Statement of Reasons for this rulemaking and included in the final rulemaking file.

### **PROPOSED RULEMAKING**

#### **Title 16, Division 8, California Code of Regulations Sections 868, 868.1, 869, 869.5, and 869.9**

#### **45-DAY COMMENT PERIOD – COMMENTS AND RESPONSES**

On April 27, 2020, the Board received a joint letter from 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; and Underground Scholars Initiative on the Board's proposed regulations implementing AB 2138. Below are the Board's responses to the comments made therein.



## Comment 1

### Comment Summary:

This comment states that the proposed regulations leave some gaps in the regulatory scheme pursuant to the changes to BPC sections 480, 481, 482, and 493 as modified by AB 2138. The comment states that the proposed regulations fail to meet and implement these statutes. Additionally, the comment states that the proposed regulations fall short of the intent of the bill, which includes combating discrimination against people with records who have demonstrated rehabilitation and seek to establish themselves professionally.

### Response:

The Board rejects this comment. The purpose of the proposed regulations is to clarify substantial relationship criteria and criteria for rehabilitation, as required by AB 2138. (BPC, § 481.) Consistent with the requirements enacted by AB 2138, these regulations would adopt all of the following criteria, which would assist the Board in implementing a balanced approach to evaluating an applicant's eligibility for licensure:

1. The nature and gravity of the offense.
2. The number of years elapsed since the date of the offense.
3. The nature and duties of a contractor or home improvement salesperson.

Clarifying how to determine whether a crime is substantially related and clarifying the factors that will be considered when evaluating rehabilitation should assist applicants and licensees with demonstrating their rehabilitation.

Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

## Comment 2

### Comment Summary:

Section 868 lists certain crimes, professional misconduct, and 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 BPC section 481. AB 2138 allows the Board discretion to determine which crimes are substantially related on an individual basis.

Moreover, section 868 fails to note that criminal history and the acts underlying a conviction that resulted in the applicant obtaining a certificate of rehabilitation, pardon, dismissal per Penal Code section 1203.4, *et seq.*, or an arrest that resulted in a disposition other than a conviction, shall not result in the denial of a license.

**Response:**

The Board rejects this comment.

As explained below, the inclusion of each of these categories of conduct reflects a Board determination that they evidence the present or potential unfitness of a person holding a license to perform the functions authorized and/or mandated by the license. Passage of time does not lessen the qualitative nexus between an act, professional misconduct, or crime and a substantial relationship to the functions and duties of a profession. While courts have looked to the type of work performed by a licensee in determining whether or not a nexus exists, they have not created time limits for when a crime, professional misconduct, or act becomes “no longer” related.

- (1) Any violation of the provisions of Chapter 9 of Division 3 of the Code or other state or federal laws governing contractors or home improvement salespersons.

This category recognizes that a violation of the California laws governing these professionals and other state or federal laws or regulations governing these professionals are indicative of potential issues with the individual’s competence, personal or professional judgment, or ability to practice in a manner consistent with the health, safety, and welfare of the public

- (2) Failure to comply with the provisions of the California Code of Regulations, Title 16, Division 8.

This category recognizes that the requirements of the cited regulations, which apply to licensees and registrants, are directly related to the duties of licensure. Therefore, to the extent a licensee violates these requirements, it evidences the unfitness of a person holding a license to perform the functions authorized and/or mandated by the license.

- (3) Crimes, professional misconduct, or acts involving dishonesty, fraud, deceit, or theft with the intent to substantially benefit oneself or another or to substantially harm another.

Contractors and home improvement salespersons work in settings where they personally accept payment for services rendered on a regular basis. Honesty in financial transactions services is a duty required by licensees. Conduct involving fiscal dishonesty erodes trust that the services will be accurately billed. Furthermore, these professionals are entrusted to faithfully comply with safety standards in construction. Therefore, to enhance trust in the profession, dishonesty, fraud, deceit, or theft are deemed substantially related to the duties of licensure.



(4) Crimes, professional misconduct, or acts involving physical violence.

Contractors and home improvement salespersons may work in consumers' homes in the course of their duties. If these professionals have engaged in physical violence, this would endanger the public with whom they may be required to work in private settings.

(5) Crimes, professional misconduct, or acts that indicate a substantial or repeated disregard for the health, safety, or welfare of the public.

Contractors and home improvement salespersons must be trusted to comply with safety standards in the course of their work. Accordingly, the repeated disregard for health, safety, or welfare of the public indicates an inability or unwillingness to protect the public.

As for the comment in the second paragraph of Comment 2, please see response to Comment 6.

Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

### **Comment 3**

#### **Comment Summary:**

Section 868.1 states that crimes or attempted crimes involving direct financial harm or a direct financial benefit shall be considered directly and adversely related to the fiduciary qualifications, functions, or duties of a license or registrant. The comment urges the Board to consider and incorporate the Department of Fair Employment and Housing (DFEH)'s regulations regarding consideration of criminal history in employment decisions found at Section 11017.1 of Article 2, Subchapter 2, Chapter 5, of Division 4.1, of Title 2 of the California Code of Regulations. Section 11017.1(e) states that a "criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job...and measure the person's fitness for the specific position(s)."

A policy must be tailored and take into account: 1) the nature and gravity of the offense or conduct, 2) the time that has passed since the offense or conduct and/or the completion of the sentence, and 3) the nature of the job held or sought. The current language is missing these criteria and is not tailored to allow for an assessment of the individual circumstances or the amount of time that has passed, nor is it related to the functions of the license or registration. The Board should only consider felony financial crimes that are directly and adversely tied to the qualifications, duties, and/or functions of a contractor's license or registration in accordance with existing regulations.

**Response:**

The Board rejects this comment. The Board incorporates by reference its response to Comment 2, with respect to the substantial relationship crimes, professional misconduct, or acts involving dishonesty, fraud, deceit, or theft with the intent to substantially benefit oneself or another or to substantially harm another and their nexus to the functions and duties of these professions.

Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

**Comment 4****Comment Summary:**

Section 869 and 869.9 rely 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. The comment refers the reader to Comment 9 for examples of rehabilitation to expand the proposed regulations.

The comment states that section 869.9 should allow denied applicants a chance to reapply before the reapplication date. If the applicant chooses to reapply, the registrar must advise applicants that they may submit documentation in accordance with section 869.9(5)-(11) and the registrar must consider this evidence.

**Response:**

The Board rejects this comment. As addressed more fully in the Board's response to Comment 9, section 869 permits the applicant to offer evidence of rehabilitation that can encompass any of the forms of rehabilitation proposed in the letter. Accordingly, the Board believes that the proposed language is consistent with legislative intent.

BPC section 486 provides that, where the Board has denied an application for licensure, the earliest date on which the applicant may reapply for a license is generally one year from the effective date of the decision or the mailing of a denial notice, unless the Board prescribes an earlier date. (Bus. & Prof. Code, § 485, subd. (a).)

In existing regulatory language, the Board has established the minimum required reapplication date at one year. If the Board were to allow applicants to reapply before the one-year minimum reapplication period, applicants would have to pay the application fees again, but their proof of rehabilitation and demonstrated fitness for licensure would likely not have changed in such a short period of time, and they would have paid the fees unnecessarily. For these reasons, the Board believes that one year is an appropriate minimum timeframe.

Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

**Comment 5****Comment Summary:**

This comment requests the proposed language include a “7 year washout period” for consideration of convictions or discipline that are not statutorily considered serious felonies under Penal Code section 1192.7. (BPC, § 480, subd. (a)(1), effective July 1, 2020.)

**Response:**

The Board rejects this comment. Regulations should not indiscriminately incorporate statutory language. (Gov. Code, § 11349, subd. (f).) The seven-year period during which a board can deny a license for a conviction or formal discipline is fully described in BPC section 480(a)(1)(A) and (B), effective July 1, 2020. As this is already included in statute, adding this provision is duplicative of section 480(a)(1). Therefore, it is not necessary to repeat it in the regulations.

Accordingly, the Board is making no changes to the regulations in response to this comment.

**Comment 6****Comment Summary:**

This comment states that the 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, an arrest that led to an infraction/citation or a disposition other than a conviction, or a juvenile adjudication. (BPC, § 480, subds. (b)-(d).)

**Response:**

The Board rejects this comment. Regulations should not indiscriminately incorporate statutory language. (Gov. Code, § 11349, subd. (f).) BPC section 480(c), effective July 1, 2020, already states that a license may not be denied based on a conviction, or on the basis of the underlying acts, if it has been dismissed pursuant to Penal Code section 1203.4, 1203.4a, 1203.41, 1203.42, or 1203.425, or otherwise dismissed or expunged. In addition, BPC section 480(b), effective July 1, 2020, prohibits license denial if the applicant has obtained a certificate of rehabilitation, was granted clemency or a pardon, or has made a showing of rehabilitation per BPC section 482. BPC section 480(d), effective July 1, 2020, prohibits license denial based on an arrest that resulted in something other than a conviction, such as an infraction, citation, or juvenile adjudication. Since these provisions are already specifically addressed in statute, adding them again in regulation would be duplicative.

Accordingly, the Board is making no changes to the regulations in response to this comment.

**Comment 7****Comment Summary:**

This comment states that the regulations fail to state that the Board shall not require an applicant to disclose any information or documentation regarding the applicant's criminal history. (BPC, § 480, subd. (f)(2).)

**Response:**

The Board rejects this comment. Section 480(f)(2), effective July 1, 2020, provides that a board cannot require an applicant for licensure to disclose any information or documentation regarding the applicant's criminal history. As this is already provided by statute, adding this provision is duplicative of section 480(f)(2). Therefore, it is not necessary to repeat it in the regulations.

Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

**Comment 8****Comment Summary:**

This comment states that the proposed language fails to include that the Board must notify the applicant in writing if the applicant is denied a license or is disqualified from licensure. The comment states that the Board must provide procedures describing the process for an applicant to challenge a decision or request consideration, a procedure stating that the applicant has a right to appeal the Board's decision, and a process for requesting a complete conviction history. (BPC, § 480, subd. (f)(3).)

**Response:**

The Board rejects this comment. BPC sections 480(f)(3) and 485 through 487 and the Administrative Procedure Act, at Government Code section 11500, *et seq.*, already contain these requirements, including requirements for providing the legal and factual basis for the denial, service of the denial on the applicant, and notice to the applicant regarding the opportunity to request a hearing to challenge the decision. Restating these requirements would be duplicative of the statutes. (Gov. Code, § 11349, subd. (f).)

Accordingly, the Board is making no changes to the regulations in response to this comment.



## Comment 9

### Comment Summary:

This comment states that the intent of AB 2138 was not to incorporate mere probation or parole reports into the occupational licensing determinations. The letter states that rehabilitation can and does take many forms that extend beyond law enforcement supervision. Therefore, the letter recommends that the Board consider adding the following rehabilitation criteria:

- Volunteer service;
- Successful employment in a related field;
- A history of work experience in an employment social enterprise;
- 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.

### Response:

The Board rejects this comment. BPC section 482, effective July 1, 2020, requires boards to develop criteria to evaluate rehabilitation and to consider whether an applicant or licensee has made a showing of rehabilitation if either the criminal sentence has been completed without violation of probation or parole, or if the board otherwise finds the applicant rehabilitated.

The final text for proposed Section 869 articulates a two-step process for evaluating rehabilitation:

1. First, the Board must determine if the completion of the criminal sentence with no violations constitutes rehabilitation. Consistent with the direction in AB 2138, to consider rehabilitation if an applicant completes the criminal sentence at issue without a violation of parole or probation, specific criteria are being added to section 869(a) to help the Board determine whether sentence completion demonstrates rehabilitation. Criteria include the nature and gravity of the crime(s), the length(s) of the applicable parole or probation period(s), the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the



period was modified, the terms and conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation, and the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. If the Board finds rehabilitation, no further information needs to be provided.

2. The second step, if rehabilitation is not demonstrated based on sentence completion, section 869(b) requires the Board consider certain other criteria to evaluate rehabilitation. A general category permitting submission of any rehabilitation evidence allows an applicant to offer evidence relating to the proposed categories suggested above. As the Board can and already does give serious consideration to these factors when considering whether an individual is rehabilitated, the Board believes that the proposed language is consistent with legislative intent.

Accordingly, the Board is making no changes to the regulations in response to this comment.

### **Comment 10**

#### **Comment Summary:**

The comment states that the proposed regulations fail to state the requirements set forth in BPC section 480(g)(2), effective July 1, 2020, including, that a board retain the number of applicants with a criminal record who received notice of denial or disqualification of licensure, the number of applicants with a criminal record who provided evidence of mitigation or rehabilitation, and the final disposition and demographic information.

#### **Response:**

The Board rejects this comment. These requirements are already set forth in statute. (BPC, § 480, subd. (g)(2), effective July 1, 2020.) Stating them in regulation would be duplicative of the statute. (Gov. Code, § 11349, subd. (f).)

Accordingly, the Board is making no changes to the regulations in response to this comment.

**Staff Recommendation:** That the Board approve the responses (as drafted) to the public comments received on April 27, 2020 on the Board's proposed rulemaking regarding Title 16, Division 8, California Code of Regulations, Sections 868, 868.1, 868, 869.5, and 869.9 and authorize staff to make any nonsubstantive changes to the Board's comments for inclusion in the Final Statement of Reasons.



# CONTRACTORS STATE LICENSE BOARD

PROPOSED RULEMAKING RELATED TO TITLE 16—PROPOSED AMENDMENTS

## Proposed Rulemaking Related to Title 16—Proposed Amendments

The board approved proposed regulatory text related to meeting the requirements of Assembly Bill 2138 (Chiu, 2018) at its September 2019 meeting, and a public hearing was held on April 28, 2020. Following that hearing, legal counsel recommended modifications to the originally approved and noticed text, which are below.

If the board approves the proposed modifications to the text, the changes will be sought through a 15-Day Notice of Modified Text and the proposed descriptions will be incorporated into the board's Final Statement of Reasons for this rulemaking, which will be included in the final rulemaking file, along with the modified text.

### CONTRACTORS STATE LICENSE BOARD ORIGINALLY PROPOSED LANGUAGE

California Code of Regulations  
Title 16, Division 8

#### MODIFIED TEXT

#### Section 868

- A. Insertion in subdivision (a) of “,” after “141” and deletion of “or.”

Because the Board is proposing to add the Business and Professions Code (BPC) sections enumerated in B., infra, it proposes to add a comma after “141,” and eliminate “or” because the amendment outlined in B. creates an additional list item.

- B. Insertion in subdivision (a) of “, or Sections 7073 or 7123.”

The cited sections refer to grounds for denial and discipline listed in the Board's practice act for "substantially related" offenses. They are proposed to be added here so that references to substantial relationship are addressed together in one regulation. This amendment will add clarity to this subdivision.

Section 868.1A. Deletion in introductory paragraph of “was” and insertion of “has been.”

The Board proposes to delete “was” and replace it with “has been” because “has been” is used to refer to something that started in the past and is still continued in the present tense. “Was,” on the other hand, is used to refer to some action that was going on at some time in the past. The Board prefers to use “has been” to include the present tense, so the relevant time period for a conviction includes the past up to the present.

Section 869A. Deletion in subdivision (a) of “was” and insertion of “has been.”

The Board proposes to delete “was” and replace it with “has been” because “has been” is used to refer to something that started in the past and is still continued in the present tense. “Was,” on the other hand, is used to refer to some action that was going on at some time in the past. The Board prefers to use “has been” to include the present tense, so the relevant time period for a conviction includes the past up to the present.

B. Deletion in subdivisions (a) and (b)(1) of “eligible or.”

The Board proposes to delete this phrase from subdivision (a) and (b)(1) of section 869 because “eligible” could be seen as referring to other eligibility requirements for licensure, rather than referring to fitness or suitability for licensure. Deletion of this phrase will clarify the regulation.

Below is the final regulatory text for the Board’s approval. If approved, the **highlighted** changes will be sought through a 15-Day Notice of Modified Text.

**California Code of Regulations  
Title 16, Division 8****Article 7. Special Provisions**

Proposed amendments to the regulatory language are shown in single underline for new text and single ~~strikethrough~~ for deleted text.

Modifications to the proposed regulatory language are shown in double underline for new text and double ~~strikethrough~~ for deleted text.



**Amend Section 868 as follows:**

§ 868. Criteria to Aid in Determining if Crimes, Professional Misconduct, or Acts Are Substantially Related to ~~Contracting Business~~ Qualifications, Functions, or Duties of a Licensee or Registrant.

(a) For the purposes of denial, suspension, or revocation of a license or registration pursuant to Section 141, ~~or~~ Division 1.5 (commencing with Section 475), or Sections 7073 or 7123 of the eCode, a crime, professional misconduct, or act, ~~as defined in Section 480 of the code~~, shall be considered to be substantially related to the qualifications, functions, or duties of a licensee or registrant (under Division 3, Chapter 9 of the eCode) if it evidences present or potential unfitness of an applicant, ~~or licensee,~~ or registrant to perform the functions authorized by the license or registration in a manner consistent with the public health, safety, and welfare. ~~The crimes or acts shall include, but not be limited to, the following:~~

(b) In making the substantial relationship determination required under subdivision (a) for a crime, the Board or Registrar 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 contractor or home improvement salesperson.

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

(a1) Any violation of the provisions of Chapter 9 of Division 3 of the eCode or other state or federal laws governing contractors or home improvement salespersons.

(b2) Failure to comply with the provisions of the California Administrative Code of Regulations, Chapter 8, Title 16, Division 8.

(e3) Crimes, professional misconduct, or acts involving dishonesty, fraud, deceit, or theft with the intent to substantially benefit oneself or another or to substantially harm another.



**CSLB**

PROPOSED RULEMAKING RELATED TO TITLE 16—PROPOSED  
AMENDMENTS

(d4) Crimes, professional misconduct, or acts involving physical violence against persons.

(e5) Crimes, professional misconduct, or acts that indicate a substantial or repeated disregard for the health, safety, or welfare of the public.

Note: Authority cited: Sections 481, 493 and 7008, Business and Professions Code.

Reference: Sections 141, 480, 481, 490, 493, 7066, 7069, 7073, 7090, 7123, and 7124, Business and Professions Code.

**Add Section 868.1 as follows:****§ 868.1. Criteria to Aid in Determining if Financial Crimes Are Directly and Adversely Related to Fiduciary Qualifications, Functions, or Duties of a Licensee or Registrant for the Purpose of Considering Denials of Applications.**

For the purpose of determining whether there are grounds to deny a license or registration to an applicant who ~~was~~ **has been** convicted of a financial crime currently classified as a felony pursuant to Section 480 of the Code, the crime shall be considered to be directly and adversely related to the fiduciary qualifications, functions, or duties of a licensee or registrant if it involves dishonesty, fraud, deceit, or theft that resulted in: (i) direct financial benefit to the applicant or another person or entity, (ii) direct financial harm to another person or entity, or (iii) an attempt to obtain direct financial benefit or cause direct financial harm to another person or entity. The felony financial crimes shall include, but not be limited to, the following:

(a) Crimes involving the acquisition or provision of false, altered, forged, counterfeit, or fraudulent document(s), or the acquisition or provision of false or fraudulent statement(s).

(b) Crimes involving the use of personal identifying information for an unlawful purpose, including for the purpose of illegally obtaining money, credit, goods, services, real property, or medical information of another person (also known as identify theft).

(c) Crimes involving stolen property, embezzlement, grand theft, larceny, burglary, monetary transactions in property derived from a specified unlawful activity (also known as money laundering), or crimes related to obtaining money, labor, or property under false or fraudulent pretenses.

(d) Crimes involving an attempt or conspiracy to commit such crimes listed in subsections (a), (b), or (c).



(e) For the purposes of this section, “personal identifying information” has the meaning set forth in Penal Code section 530.55.

Note: Authority cited: Sections 480 and 7008, Business and Professions Code.

Reference: Sections 7.5, 480, 7069, 7073, 7090, and 7124, Business and Professions Code; Section 530.55, Penal Code.

**Amend Section 869 as follows:**

§869. Criteria for Rehabilitation.

(a) When considering the denial, suspension, or revocation of a license or registration pursuant to Division 1.5 (commencing with Section 475) of the eCode on the ground that the individual ~~was~~ **has been** convicted of a crime, the Board or Registrar shall consider whether the applicant, licensee, or registrant made a showing of rehabilitation and is presently **eligible** or fit for a license or registration if the applicant, licensee, or registrant completed the criminal sentence at issue without a violation of parole or probation. In making this determination, the Board or Registrar ~~in evaluating the applicant's or licensee's rehabilitation and present eligibility for a license~~ 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; and

(5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

(b) If subsection (a) is inapplicable, or the Board or Registrar determines that an applicant, licensee, or registrant did not make a showing of rehabilitation based on the



criteria in subsection (a), the Board or Registrar shall apply the following criteria in evaluating an applicant's, licensee's, or registrant's rehabilitation:

(1) Subject to the provisions of subsection (a)(2), an applicant or licensee may be determined to be rehabilitated if he or she meets the following criteria. The Board or Registrar shall find that an applicant, licensee, or registrant made a showing of rehabilitation and is presently eligible or fit for a license or registration if, after considering the following criteria and the provisions of subsection (b)(2), the Board or Registrar finds that the individual is rehabilitated:

Denial Based on Felony Convictions Within Seven Years of Application

(A) When considering the denial of a license or registration, the Board or Registrar may consider the applicant rehabilitated if the applicant was convicted of a felony within the preceding seven (7) years from the date of application that is substantially related to the qualifications, functions, or duties of a licensee or registration as defined in Section 868, and five (5) years have passed from the time of the applicant's release from incarceration or completion of probation if no incarceration was imposed, without the occurrence of additional substantially-related criminal activity, professional misconduct, acts, or omissions that also could be grounds for denial. This subsection does not apply to any crimes listed in subsection (b)(1)(B).

Denial Based on Serious Felonies, Felonies Requiring Sex Offender Registration, or Felony Financial Crimes Directly and Adversely Related to the Qualifications, Functions, or Duties of a Licensee or Registrant

(B) When considering the denial of a license or registration on the ground that the applicant was convicted of a crime identified in Section 480(a)(1)(A) of the Code or a felony financial crime as defined in Section 868.1, the Board or Registrar may consider an applicant rehabilitated if seven (7) years have passed from the time of the applicant's release from incarceration or completion of probation if no incarceration was imposed, and the applicant committed no additional substantially-related criminal activity, professional misconduct, acts, or omissions that also could be grounds for denial.



### Discipline Based on Felony Convictions

(AC) When considering the suspension or revocation of a license or registration, the Board or Registrar may consider a licensee or registrant rehabilitated if the licensee or registrant was convicted of a ~~For~~ felony convictions that ~~are~~ is substantially related to the qualifications, functions, or duties of a licensee or registrant as defined in Section 868, and seven (7) years have passed from the time of release from incarceration or completion of probation if no incarceration was imposed, without the occurrence of additional substantially-related criminal activity, ~~or substantially-related acts, or omissions that also could be grounds for suspension or revocation.~~

### Denial or Discipline Based on Misdemeanor Convictions

(BD) When considering the denial, suspension, or revocation of a license or registration, the Board or Registrar may consider an applicant, licensee, or registrant rehabilitated if the applicant, licensee, or registrant was convicted of a ~~For~~ misdemeanor convictions that ~~are~~ is substantially related to the qualifications, functions, or duties of a licensee or registrant as defined in Section 868, and three (3) years have passed from the time of release from incarceration or completion of probation if no incarceration was imposed, without the occurrence of additional substantially-related criminal activity, ~~or substantially-related act(s), or omission(s) that also could be grounds for denial, suspension, or revocation.~~

### Denial or Discipline Based on Professional Misconduct, Acts, or Omissions

(GE) For professional misconduct or acts that are substantially related to the qualifications, functions, or duties of a licensee or registrant as defined in Section 868, or for other acts or omissions that are grounds for denial, suspension, or revocation, the Board or Registrar may consider the applicant, licensee, or registrant rehabilitated if three (3) years have passed from the time of commission of the professional misconduct, act(s), or omission(s) without the occurrence of additional substantially-related criminal activity, professional misconduct, ~~or additional-substantially-related act(s), or omission(s) that also could be grounds for denial, suspension, or revocation.~~



(2) The amount of time needed to demonstrate rehabilitation under subsection ~~(a)~~(b)(1) may be increased or decreased by taking into account the following:

(A) The nature and severity of the crime(s), professional misconduct, ~~act(s)~~, or omission(s) that are under consideration as, or that were, the grounds for denial, suspension, or revocation.

(B) Evidence of any crime(s), professional misconduct, ~~act(s)~~, or omission(s) committed subsequent to the crime(s), professional misconduct, ~~act(s)~~, or omission(s) that are under consideration as, or that were, the grounds for denial, suspension, or revocation, which also could be considered as grounds for denial, suspension, or revocation.

(C) The time that has elapsed since commission of the crime(s), professional misconduct, ~~act(s)~~, or omission(s) that are under consideration as, or that were, the grounds for denial, suspension, or revocation.

(D) The extent to which the applicant, ~~licensee~~, or registrant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant, ~~licensee~~, or registrant.

(E) Consistent work history subsequent to the release from incarceration, or the completion of probation if no incarceration was imposed, or subsequent to the time of commission of the professional misconduct, ~~act(s)~~, or omission(s).

(F) Documents or testimony from credible individuals who have personal knowledge of the applicant's, ~~licensee's~~, or registrant's life and activities subsequent to the time of commission of the crime(s), professional misconduct, ~~act(s)~~, or omission(s) who can attest to the applicant's, ~~licensee's~~, or registrant's present fitness for licensure or registration.

(G) If applicable, evidence of ~~expungement proceedings~~ a plea of guilty or of nolo contendere, a verdict of guilty, or a conviction having been withdrawn, set aside, or dismissed, and records having been sealed pursuant to Section 1203.4, 1203.4a, ~~or 1203.41, 1203.42, or 1203.425 of the Penal Code.~~



(H) Other relevant evidence, if any, of rehabilitation submitted by the applicant, ~~or licensee, or registrant.~~ For example, relevant evidence may include evidence of recovery from drug and/or alcohol addiction or abuse or completion of a drug and/or alcohol aversion or diversion program if the crime(s), professional misconduct, or act(s), or omission(s) related to or involved drug and/or alcohol use; or evidence of completion of an anger management program if the crime(s), professional misconduct, or act(s), or omission(s) demonstrated the applicant's, ~~or licensee's, or registrant's~~ inability to control one's temper.

(bc) When considering a petition for reinstatement of the license of a contractor or the registration of a home improvement salesperson, the Board shall evaluate evidence of rehabilitation submitted by the petitioner, considering those criteria specified in subsections (a) and (b) relating to licensees or registrants.

Note: Authority cited: Sections 482 and 7008, Business and Professions Code.

Reference: Sections 7.5, 141, 480, 481, 482, 488, 490, 493, 496, 7066, 7069, 7073, 7090, 7102, 7123, and 7124, Business and Professions Code; Sections 1203.4, 1203.4a, 1203.41, 1203.42, and 1203.425, Penal Code.

**Repeal Section 869.5 as follows:**

~~§ 869.5. Inquiry into Criminal Convictions.~~

~~The Board may conduct an inquiry into the circumstances surrounding the commission of a crime in order to fix the degree of discipline or to determine if the crime is substantially related to the qualifications, functions, and duties of a licensee by requiring the applicant or licensee to provide documents including, but not limited to, certified court documents, certified court orders or sentencing documents.~~

~~Note: Authority cited: Sections 480, 481 and 7008, Business and Professions Code.~~

~~Reference: Sections 480, 481, 493, 7066, 7069 and 7073, Business and Professions Code.~~

**Amend Section 869.9 as follows:**

§869.9. Criteria to Aid in Determining Earliest Date a Denied Applicant May Reapply for Licensure or Registration.

(a) For an applicant who is denied licensure or registration pursuant to ~~subdivision~~section (a) of Section 480 of the Business and Professions Code, the date of reapplication shall be set by the ~~r~~Registrar at not less than one (1) year nor more than five (5) years after the denial. When computing the date for reapplication, the time shall commence from the effective date of the decision if an appeal is made or from the service of the notice of denial under Section 485(b) if a request for hearing is not made. The ~~r~~Registrar will consider the following criteria when setting the reapplication date of an individual who was denied a license or registration:

(1) For felony convictions listed in Section 869(b)(1)(B) that are substantially related to the qualifications, functions, or duties of a licensee as defined in Section 868, seven (7) years have passed from the time of release from incarceration or completion of probation if no incarceration was imposed, without the occurrence of additional substantially-related criminal activity, professional misconduct, or substantially-related act(s), or omission(s) that also could be grounds for denial.

(2) For felony convictions not listed in Section 869(b)(1)(B) that are substantially related to the qualifications, functions, or duties of a licensee as defined in Section 868, five (5) years have passed from the time of the applicant's release from incarceration or completion of probation if no incarceration was imposed, without the occurrence of additional substantially-related criminal activity, professional misconduct, act(s), or omission(s) that also could be grounds for denial.

(~~2~~3) For misdemeanor convictions that are substantially related to the qualifications, functions, or duties of a licensee or registrant as defined in Section 868, three (3) years have passed from the time of release from incarceration or completion of probation if no incarceration was imposed, without the occurrence of additional substantially-related criminal activity, professional misconduct, or substantially-related act(s), or omission(s) that also could be grounds for denial.



~~(34)~~ For ~~acts~~ professional misconduct that ~~are~~ is substantially related to the qualifications, functions, or duties of a licensee or registrant as defined in Section 868, or for other acts or omissions that are grounds for denial, three (3) years have passed from the time of commission of the professional misconduct, act(s), or omission(s), without the occurrence of substantially-related criminal activity, professional misconduct, or substantially-related act(s), or omission(s) that also could be grounds for denial.

~~(45)~~ The nature and severity of the crime(s), professional misconduct, or act(s), or omission(s) that were the grounds for denial.

~~(56)~~ Evidence of any crime(s), professional misconduct, or act(s), or omission(s) committed subsequent to the crime(s), professional misconduct, or act(s), or omission(s) that were the grounds for denial, which also could be considered as grounds for denial.

~~(67)~~ The time that has elapsed since commission of the crime(s), professional misconduct, or act(s), or omission(s) that were the grounds for denial.

~~(78)~~ The extent to which the applicant ~~or licensee~~ has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant in connection with the crime(s), professional misconduct, act(s), or omission(s) that were the grounds for denial.

~~(89)~~ Consistent work history subsequent to the release from incarceration, or the completion of probation if no incarceration was imposed, or subsequent to the ~~time~~ date of commission of the crime(s), professional misconduct, act(s), or omission(s) that were the grounds for denial.

~~(910)~~ Documents or testimony from credible individuals who have personal knowledge of the applicant's life and activities subsequent to the ~~time~~ date of commission of the crime(s), professional misconduct, or act(s), or omission(s) that were the grounds for denial and who can attest to the applicant's present fitness for licensure or registration.

~~(10)~~ If applicable, evidence of expungement proceedings pursuant to Section 1203.4 of the Penal Code.



(11) Other relevant evidence, if any, of eligibility for reapplication submitted by the applicant. For example, relevant evidence may include evidence of recovery from drug and/or alcohol addiction or abuse or completion of a drug and/or alcohol aversion or diversion program if the crime(s), professional misconduct, or act(s), or omission(s) that were the grounds for denial related to or involved drug and/or alcohol use; or evidence of completion of an anger management program if the crime(s), professional misconduct, or act(s), or omission(s) demonstrated the applicant's ~~or licensee's~~ inability to control one's temper.

(b) Nothing in this section shall preclude the ~~the~~ Registrar from denying the license or registration of an applicant who was previously denied a license or registration and who is eligible for reapplication in accordance with this section.

Note: Authority cited: Sections 482, 7008, and 7073, Business and Professions Code.

Reference: Sections 480, 482, 485, 486, 496, 7066, 7069, 7073, and 7124, Business and Professions Code.

**Staff Recommendation:** That the board direct staff to take all steps necessary to complete the rulemaking process, including sending out the modified text for an additional 15-day public comment period. If, after the 15-day public comment period, no further comments are received, authorize the registrar to make any non-substantive changes to the proposed regulation and adopt the proposed regulations as described in the modified text notice.



COMMUNITY  
LEGAL SERVICES  
IN EAST PALO ALTO



Center for  
Employment  
Opportunities

April 27, 2020

**Via Email**

California Department of Consumer Affairs  
California Contractors State License Board  
ATTN: Betsy Figueira and Michael Jamnetski  
9821 Business Park Drive  
Sacramento, CA 95827  
Email: [Betsy.Figueira@cslb.ca.gov](mailto:Betsy.Figueira@cslb.ca.gov)  
[Michael.Jamnetski@cslb.ca.gov](mailto:Michael.Jamnetski@cslb.ca.gov)

**RE: Comments in Response to Dept. of Consumer Affairs, California Contractors State License Board Regulatory Action Concerning the Implementation of AB 2138, Proposal to Amend Sections 868, 868.1, 869, 869.9, of Article 7 of Division 8 of Title 16, of the California Code of Regulations**

Dear Betsy Figueira and Michael Jamnetski:

Thank you for the opportunity to submit comments to the Department of Consumer Affairs (“DCA”), Contractors State License Board (“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 868, 868.1, 869, and 869.9, of Article 7 of Division 8 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 868 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 868 fails to note that criminal history and the acts underlying a conviction that resulted in the applicant obtaining a Certificate of Rehabilitation, pardon, dismissal per Penal Code section 1203.4 *et seq.*, 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).
- Section 868.1 states that crimes or attempted crimes involving direct financial harm or a direct financial benefit shall be considered directly and adversely related to the fiduciary qualifications, functions, or duties of a license or registrant.

We urge you to consider and incorporate the Department of Fair Employment and Housing (DFEH)'s regulations regarding consideration of criminal history in employment decisions found at Section 11017.1 of Article 2, Subchapter 2, Chapter 5, of Division 4.1, of Title 2 of the California Code of Regulations.<sup>1</sup> Specifically, Section 11017.1(e) states that a "criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job...and measure the person's fitness for the specific position(s)." A policy must be tailored and take into account: 1) the nature and gravity of the offense or conduct, 2) the time that has passed since the offense or conduct and/or the completion of the sentence, and 3) the nature of the job held or sought.

The current language is missing this criteria and is not tailored to allow for an assessment of the individual circumstances, the amount of time that has passed, nor is it related to the functions of the license or registration. **In particular, the Board should only consider felony financial crimes that are directly and adversely tied to the qualifications, duties, and/or functions of a contractor's license or registration in accordance with existing regulations.**

- Section 869 and 869.9 as written, rely too heavily on law enforcement's reports and determination of the applicant's progress. Rehabilitation can and does take many forms

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<sup>1</sup> Cal. Code Regs. tit. 2, Section 11017.1 (2017).

that the current language does not fully embrace. Please see number 5 below for examples of rehabilitation to expand the proposed regulations.

Specifically, section 869.9 should allow denied applicants a chance to re-apply before the reapplication date. If the applicant chooses to reapply, the Registrar must advise applicants that they may submit documentation in accordance with section 869.9(5)-(11) and that the Registrar must consider this evidence.

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;
- A history of work experience in an employment social enterprise;
- 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*

Faride Perez-Aucar

510-279-4662

[fperez@rootandrebond.org](mailto:fperez@rootandrebond.org)

*/s/ Vinuta Naik*

Vinuta Naik

650-326-6440

[vnaik@clsepa.org](mailto:vnaik@clsepa.org)

**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