

# OSTEOPATHIC MEDICAL BOARD OF CALIFORNIA

## FINAL STATEMENT OF REASONS

**Request for Early Effective Date:** The Osteopathic Medical Board of California (Board) requests that this regulatory proposal become effective upon filing to align as closely as possible with the statutory implementation date of July 1, 2020, in Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018). These regulations explain how the Board will individually examine each licensure, renewal, or reinstatement decision for individuals with a criminal conviction. Further, they clarify to the public how the Board will decide which convictions are substantially related to licensure. It would benefit all Californians to hasten the promulgation of these regulations, which encourage individuals with criminal convictions to pursue licensure and employment and which could potentially provide Californians with greater choices in licensees.

**Hearing Date:** No public hearing was requested or held.

**Subject Matter of Proposed Regulations:** Substantial Relationship Criteria, and Rehabilitation Criteria for Denial, Suspension or Revocation, and Rehabilitation Criteria for Petition for Reinstatement or Modification of Penalty.

**Sections Affected:** 1654, 1655, 1657 of Title 16 of the California Code of Regulations (16 CCR)

### Updated Information

The Initial Statement of Reasons is included in the rulemaking file. The information contained therein is updated as follows:

On April 28, 2020, the Board received a public comment letter from Faride Perez-Aucar of Root and Rebound Reentry Advocates and Vinuta Naik, of Community Legal Services of East Palo Alto, submitted a letter commenting on the Board's implementation of Assembly Bill 2138, dated April 28, 2020 ("the letter"). Perez-Aucar and Naik submitted all comments below on behalf of their respective organizations and A New Way of Life Reentry Project, Californians for Safety and Justice, Center for Employment Opportunities, Center for Living and Learning, 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, Rubicon Programs, and Underground Scholars Initiative.

On September 10, 2020, the Board held a teleconference meeting to discuss the April 28, 2020 letter submitted by Faride Perez-Aucar of Root & Rebound and Vinuta Naik of Community Legal Services of East Palo Alto on behalf of their organizations and the other organizations. The Board rejected the comments submitted in the April 28, 2020 letter from Ms. Perez-Aucar, Ms. Naik and the other organizations for the reasons described in the Comment section below.

The Board made the following non-substantive modifications to the proposed regulatory text:

#### 16 CCR 1654 Substantial Relationship Criteria

Subdivision (b) - correct “board” to read “Board” to match the definition in 16 CCR 1399.302 which defines “Board” with a capital B to mean the Osteopathic Medical Board of California.

Note: Authority Cited – Remove “Osteopathic Act (Initiative Measure, Stats. 1923, p. xciii), Section 1; and” as it is duplicative. Additionally, add Section 141 to clarify that the Board has the authority to take disciplinary action against certification holders for any act substantially related to the practice of osteopathic medicine.

#### 16 CCR 1655 Rehabilitation Criteria for Denial, Suspension or Revocation

Subdivision (a) - correct “board” to read “Board” to match the definition in 16 CCR 1399.302 which defines “Board” with a capital B to mean the Osteopathic Medical Board of California.

Subdivision (a) – Remove “and is presently fit for license,” as it is assumed that the applicant is eligible if the Board is considering a denial of the certificate.

Subdivision (a)(1) – Change “offense” to “crime” to for clarification purposes and to be consistent with the language throughout the regulation.

Subdivision (b) - correct “board” to read “Board” to match the definition in 16 CCR 1399.302 which defines “Board” with a capital B to mean the Osteopathic Medical Board of California.

Subdivision (b) – Remove “If subdivision (a) is inapplicable” and add “If the applicant has not completed the criminal sentence at issue without a violation of parole or probation” to make more specific the intent of this section relative to denials.

Subdivision (c)(1), (2) and (3) – Add in “professional misconduct” for clarity. The Board has the power to deny a license on the grounds of professional misconduct under the AB 2138 amendments to BPC 480 (see BPC section 480(a)(2)). Therefore, the regulation is clearer with the term “professional misconduct” so the list reads “acts, professional misconduct, and or crimes.”

Note: Authority Cited – Remove “Osteopathic Act (Initiative Measure, Stats. 1923, p. xciii), Section 1; and” as it is duplicative. Additionally, add Section 481 to clarify that the Board has the authority to develop criteria when considering the denial, suspension, or revocation of a license.

#### 16 CCR 1657 Rehabilitation Criteria for Petition for Reinstatement or Modification of Penalty

Subdivision (a)(1), (2) & (3) – Add in “professional misconduct” for clarity. The Board has the power to deny a license on the grounds of professional misconduct under the AB 2138

amendments to BPC 480 (see BPC section 480(a)(2)). Therefore, the regulation is clearer with the term “professional misconduct” so the list reads “acts, professional misconduct, and or crimes.”

Note: Authority Cited – Remove “Osteopathic Act (Initiative Measure, Stats. 1923, p. xciii), Section 1; and” as it is duplicative.

### **Local Mandate**

A mandate is not imposed on local agencies or school districts.

### **Small Business Impact**

This Board has determined that the proposed regulations would have no significant statewide adverse economic impact directly affecting small businesses. Moreover, the Board already reviews evidence of rehabilitation in a manner that is similar to the changes provided for in the proposed amendments. Nonetheless, small businesses may have a greater pool of licensed professionals to choose from as barriers to licensure are reduced. This determination is based on the following facts or evidence/documents/testimony:

To the extent license applicants and licensees were convicted of a crime or were previously disciplined, the proposed regulations could impact individual licensees by authorizing individuals with criminal convictions to obtain licensure by the Board, if their criminal convictions are not substantially related to the practice regulated by the Board, and the Board determines they have met the rehabilitative criteria, as established in the regulatory proposal.

### **Economic Impact**

To the extent license applicants and licensees were convicted of a crime or were previously disciplined, the proposed regulations could impact individual licensees by authorizing individuals with criminal convictions or professional misconduct disciplinary actions to obtain licensure by the Board, if they have met the rehabilitative criteria, and the criminal convictions or professional misconduct are substantially related as established in the regulatory proposal. However, because the Board historically denies a minimal number (range – zero to one) of initial applications per year, the Board does not anticipate an increase in the number of new initial licenses resulting from the proposed regulations.

### **Fiscal Impact**

Because the Board historically denies a minimal number (range – zero to one) of initial applications per year, no increase in the number of initial applications approved per year is anticipated. As a result, the proposed regulations are not anticipated to increase licensing and/or enforcement costs related to any expansion of the licensee population.

### **Anticipated Benefits of this Proposal**

The proposed amendments would place applicants and licensees on notice that the Board is statutorily authorized to deny, suspend, or revoke a license on the basis of professional

misconduct and discipline taken by another licensing board or jurisdiction. The proposal would also make relevant parties (e.g., the Deputy Attorneys General, Administrative Law Judges, respondents, and respondents' counsels) aware that when considering denial or discipline of applicants or licensees, the Board uses the listed criteria to determine whether the crime, act, or professional misconduct is substantially related to the practice of osteopathic medicine. AB 2138 was enacted to reduce licensing and employment barriers for people who are rehabilitated. These proposed amendments would further that goal by adopting criteria that would emphasize an applicant's or licensee's rehabilitative efforts and what is needed to make a showing of rehabilitation. This proposal does not affect worker safety or the state's environment.

### **Consideration of Alternatives**

The Board has determined that no reasonable alternative to the regulatory proposal it considered or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the regulatory proposal, or would be more cost effective to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

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

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

### **Objections or Recommendations/Responses**

One comment letter, and no other objections or recommendations concerning the proposed amendment were received during the 45-day Notice period.

The comment letter received was considered by the Board, and responded to as follows:

### **Comment from Faride Perez-Aucar of Root & Rebound and Vinuta Naik, of Community Legal Services of East Palo Alto received April 28, 2020**

Faride Perez-Aucar of Root and Rebound Reentry Advocates and Vinuta Naik, of Community Legal Services of East Palo Alto, submitted a letter commenting on the Board's implementation of Assembly Bill 2138, dated April 28, 2020. Perez-Aucar and Naik submitted all comments below on behalf of their respective organizations and A New Way of Life Reentry Project, Californians for Safety and Justice, Center for Employment Opportunities, Center for Living and Learning, 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, Rubicon Programs, and Underground Scholars Initiative. Below is a summary of each comment and the Board's response.

**Initial Comment: General Statement/ Purpose of the Letter**

**Summary:** The letter states that the organizations supporting the letter believe the proposal should go further in order to fully implement the intention and spirit of the AB 2138 text. They believe there is a lack of clarity in the licensure process for individuals who have been impacted by the criminal justice system, coupled with the limited number of organizations that support low-income and indigent people seeking occupational licensure, leads many to give up. They believe the proposed regulations leave gaps and fail to implement Business and Professions Code (BPC) sections 480, 481, 482, and 493 and fall short of the intent of the bill to combat discrimination against people with records who have demonstrated rehabilitation and are seeking a professional career.

**Response:** The Board rejects these comments about the general purpose of the proposed regulatory changes. The purpose of the proposed regulations is to clarify substantial relationship criteria and criteria for rehabilitation, as required by AB 2138 (BPC § 481). In particular, consistent with the requirements enacted by AB 2138, these regulations would adopt all of the following criteria, which would assist the Board with 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 the profession in which the applicant seeks licensure or is licensed.

Further, 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.

**Specific Complaints re: Section 1654, and Sections 1655 and 1657**

**Summary:** In response to the specific objection that the Section 1654 would deem certain listed violations of statutes to be substantially related to the qualifications, functions, or duties

of an osteopathic doctor without requiring the Board to evaluate those crimes on an individual basis using the three criteria listed in BPC section 481, the amendments made by AB 2138 to BPC section 481 only require boards to consider the listed criteria “when considering the denial, suspension, or revocation of a license,” and do not preclude a board from determining outside of that context that certain violations necessarily bear a substantial relationship to the qualifications, functions, or duties of the regulated profession, and do not, therefore, need to be considered on an individual basis. Although the substantial relationship criteria listed in BPC section 481 offers safeguards against arbitrary or inconsistent determinations, rulemaking proceedings under the California Administrative Procedure Act are subject to separate safeguards against that possibility, including notice and comment procedures. Section 1654 would deem the violations of statute set out in Section 1654 to be substantially related to the qualifications, functions, or duties of an osteopathic doctor to ensure greater consistency in Board substantial relationship determinations; to save the Board duplicative determinations in the case of violations that are necessarily grounds for denying, suspending, or revoking a license for the reasons stated in the Initial Statement of Reasons; and to save applicants and licensees who have been convicted of those crimes the time and resources they may otherwise expend debating the existence of a substantial relationship, so that they may focus on providing evidence of rehabilitation. The Board has chosen to not reiterate various subdivisions of BPC section 480 to avoid duplicating statutory language, as is further discussed in the response to Comment #2, below.

In response to the specific objection that the Sections 1655 and 1657 rely too much on law enforcement reports and determination of an applicant’s progress mischaracterizes the two-step guidance concerning rehabilitation these regulations provide the Board, which is further discussed in the response to Comment #5, below.

#### **Comment #1**

**Summary:** The letter says the proposed regulations should include the 7-year washout period for consideration of convictions or discipline which are not considered serious felonies under the Penal Code § 1192.7. (See BPC, § 480, subd. (a).)

**Response:** The Board rejects this comment. 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, subdivision (a)(1). As this is already included in statute, adding this provision is duplicative of section 480 and therefore it is not necessary to repeat it in the regulations.

#### **Comment #2**

**Summary:** The letter asks that 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 1263.42, or an arrest which led to an infraction/citation or a disposition other than conviction, or juvenile adjudication. (See BPC, § 480, subd. (b) – (d).)

**Response:** The Board rejects this comment. BPC section 480, subdivision (c) already clearly states that a license may not be denied based on a conviction, or its underlying acts, if it has been dismissed or expunged pursuant to Penal Code sections 1203.4, 1203.4a, 1203.41, or 1203.42. In addition, BPC section 480, subdivision (b) 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, subdivision (d) prohibits license denial based on arrest that resulted in something other than a conviction, such as an infraction, citation, or juvenile adjudication. As noted above, Business and Professions Code section 480, subdivisions (b), (c), and (d) explicitly prohibit denial of a license in those specific circumstances. Since these provisions are already specifically covered in statute, adding them again in regulation would be duplicative. Therefore, it is not necessary to repeat them in regulations.

**Comment #3**

**Summary:** The letter states that the 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 BPC, § 480, subd. (f)(2).)

**Response:** The Board rejects this comment. Business and Professions Code section 480, subdivision (f)(2) already covers this in detail. It would therefore be duplicative of the statute and not necessary to repeat this in the regulations.

**Comment #4**

**Summary:** The letter states that the regulations fail to include that the Board must notify the applicant in writing if the applicant is denied or disqualified from licensure. The letter states the Board must have procedures in place for the applicant to challenge a decision or to request reconsideration, and that the applicant has a right to appeal the Board's decision and the process of requesting a complete conviction history. (See BPC, § 480, subd(f)(3).)

**Response:** The Board rejects this comment. Business and Professions Code sections 480(f)(3), 485 through 487, and the California Administrative Procedure Act commencing at Government Code sections 11500 and following already contains 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. It would therefore be duplicative of these statutes and not necessary to repeat this in the regulations.

**Comment #5**

**Summary:** The letter 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 merely looking to law enforcement will not adequately show how an applicant would do on the job. The letter further says rehabilitation can and does take many forms that extend beyond mere law enforcement supervision. The letter recommends that the Board provide examples of evidence of mitigating circumstances and rehabilitation efforts to better define rehabilitation and to assist both the Board and licensing applicants.

**Response:** The Board rejects this comment. Business and Professions Code section 482 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.

Therefore, sections 1654, 1655, and 1657 of the proposal would provide two-step rehabilitation guidance for the Board in complying with this law:

- 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 sections 1654, 1655, and 1657 to help the Board determine whether sentence completion demonstrates rehabilitation. Criteria the Board is proposing include length of the parole or probation, whether it was shortened or lengthened and the reasons, and any modifications to the parole or probation that may have been made. This represents the first step and includes probation or parole reports, because these are an indication of how well compliance was achieved. However, if the Board does not find rehabilitation based solely on sentence completion, there is still a second step that must be considered. An applicant can show rehabilitation as proposed in subdivision (b) of the regulations.
- The second step, if rehabilitation is not demonstrated solely based on the sentence completion, is that the Board must consider certain other criteria to evaluate rehabilitation. This includes nature and severity of the crime, time elapsed since the crime, evidence of any subsequent crimes or conduct, compliance with probation or parole, and evidence of rehabilitation submitted by the applicant or licensee. A general category permitting submission of any rehabilitation evidence allows an applicant to demonstrate volunteer or charity work, furthered education, successful employment, or any other activities that they choose to submit to be considered by the Board. The Board can and already does give serious consideration to these factors when considering whether an applicant or licensee is rehabilitated.

There are many possible ways of showing rehabilitation, and many unique scenarios of mitigating circumstances. Attempting to specifically list some but not others may be limiting or misleading to the applicant and the staff of the Board. In addition, the circumstances of each enforcement case are unique and what is sufficient evidence of rehabilitation for one case may not suffice for another or may not be relevant for all types of crimes (e.g., attendance at Alcoholics Anonymous is a common demonstration of rehabilitation for alcohol-related crimes but is not a good example of rehabilitation for a crime where alcohol was not involved). The Board believes that the regulation adequately addresses the rehabilitation issues while allowing the applicant to provide evidence that specifically addresses their rehabilitative efforts relative to a crime or conduct on a case-by-case basis.

#### **Comment #6**

**Summary:** The letter states that the regulations fail to mention requirements to obtain statistical information on the number of applicants with a criminal record who apply and receive notice of denial or disqualification of licensure, provided evidence of mitigation or rehabilitation, and the final disposition of the application, and demographic information. (See BPC, § 480, subd. (g)(1), (2).)

**Response:** The Board rejects this comment. These requirements are already stated in statute (BPC, § 480, subd. (g)(1) and (2)). It would therefore be duplicative of the statute and not necessary to repeat this in the regulations.

### **Finding of Necessity**

There are no reports required by this regulatory proposal.

### **Incorporation by Reference**

There are no documents incorporated by reference.

### **Nonduplication Statement - 1 CCR § 12**

As stated throughout the Initial and Final Statements of Reasons, the proposed regulations partially duplicate or overlap several state statutes amended by the passage of AB 2138. In particular, AB 2138 amended Business and Professions Code sections 480 (grounds upon which a board can deny a license for applicants convicted of a crime or subject to formal discipline by a licensing board), 481 (the criteria boards can apply in determining if a crime bears a substantial relationship to the qualifications, functions or duties of the profession a board regulates), 482 (the rehabilitation criteria a board must consider when considering the denial, suspension or revocation of a license due to conviction of a crime), and 493 (the evidentiary effect of a conviction and criteria for determining if a crime has a substantial relationship to the profession). By repeating key language from these statutes within these regulations, the steps the Board will take, and the reasoning it will apply, the regulations become significantly clearer, and will better guide Board members/staff, parties, administrative law judges, attorneys, and individuals with criminal convictions.

The changes made by AB 2138 and these regulations are directly applicable to individuals convicted of a crime who seek licensure, and to licensees who are convicted of a crime. As these regulations implement, interpret, and make specific how the laws amended by AB 2138 will be enforced by the Board, some duplication or overlap is necessary to ensure that the steps the Board must follow and the reasoning the Board must apply is clear and consistent with statute. The partial duplication or overlap with the statutes amended by AB 2138 are thus necessary to effectively implement the new standards in a way that satisfies the “clarity” standard of Government Code section 11349.1, subdivision (a)(3).