

**California State Board of Optometry
Department of Consumer Affairs**

**Implementation of AB 2138
Initial Statement of Reasons**

Hearing Date: No hearing has been scheduled for the proposed action.

Subject Matter of Proposed Regulations: Criminal Conviction Substantial Relationship and Rehabilitation Criteria

Sections Affected: California Code of Regulations (CCR), Title 16, §§ 1399.270, 1399.271, 1399.272, 1516, and 1517.

Background and Statement of the Problem:

The California State Board of Optometry (Board) regulates the largest population of optometrists and dispensing opticians in the United States with approximately 17,400 licenses, registrations, and permits. The Board exercises its powers and duties over the optometry profession pursuant to the Optometry Practice Act (Act) and statutory provisions relating to the practice of opticians. The Board is also responsible for issuing optometry certifications for Diagnostic Pharmaceutical Agents, Therapeutic Pharmaceutical Agents, Lacrimal Irrigation and Dilation, and Glaucoma.

In accordance with the statutory amendments implemented by Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018), by July 1, 2020, Business and Professions Code (BPC) § 481 will require the Board to develop criteria, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the professions it regulates. Further, BPC § 493 will require the Board to determine whether a crime is substantially related to the qualifications, functions, or duties of the profession it regulates by using criteria including the nature and gravity of the offense, the number of years elapsed since the date of the offense, and the nature and duties of the profession. The substantial relationship requirement stems from the due process principle that a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to his or her fitness or competence to practice. (*Arneson v. Fox* (1980) 28 Cal.3d 440, 448; *Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.)

In addition, BPC § 482 will require the Board to develop criteria to evaluate the rehabilitation of a person when considering the denial, suspension, or revocation of a license. In the context of professional licensing decisions, the courts have said that, “[r]ehabilitation . . . is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration.” (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058, internal punctuation omitted.) Additionally, the Legislature’s “clear intent” in enacting AB 2138 was “to reduce licensing and employment barriers for people who are rehabilitated.” (*Moustafa v. Board*

of Registered Nursing (2018) 29 Cal.App.5th 1119, 1135.)

Currently, CCR § 1399.270 establishes the criteria for determining when a crime is substantially related to the qualifications, functions and duties of a dispensing optician. CCR §§ 1399.271 and 1399.272 establishes the criteria for determining rehabilitation of a dispensing optician applicant or registrant when considering denial, suspension, or petition for reinstatement of a dispensing optician on the grounds of a criminal conviction. Further, CCR § 1516 establishes the criteria for determining rehabilitation of an optometry applicant or licensee when considering denial, suspension, or petition for reinstatement of an optometrist license on the grounds of a criminal conviction. CCR § 1517 establishes the criteria for determining when a crime is substantially related to the qualifications, functions and duties of an optometrist licensee.

At the Board's April 5, 2019 public meeting, this regulatory proposal was presented to the Board for its review and approval. In a series of motions, the Board approved the proposed language and delegated authority to the executive officer to make any technical, non-substantive changes if necessary.

As required under AB 2138, the Board proposes to amend Title 16 of the CCR, §§ 1399.270, 1399.271, 1399.272, 1516 and 1517, to adhere to these statutory mandates and revise its substantial relationship and rehabilitation criteria.

SPECIFIC PURPOSE, ANTICIPATED BENEFIT, AND RATIONALE:

Registered Dispensing Opticians

Amend § 1399.270 of Article 7 of Division 13.5 of Title 16 of the CCR (Substantial Relationship Criteria)

§ 1399.270, subdivision (a)

Purpose: The purpose of amending CCR § 1399.270(a) is to expand the regulation to include discipline under BPC § 141, because the substantially related acts that are the basis for discipline in an out-of-state jurisdiction may be used to discipline a licensee under BPC § 141. This subdivision would also include substantially related "professional misconduct," since the Board may consider such misconduct in denying licenses under BPC § 480. The subdivision would be amended to reword and move to subdivision (c) the phrase, "[s]uch crimes or acts shall include but not be limited to those involving the following."

Anticipated Benefit: The proposed revisions to § 1399.270(a) would provide clarity to license applicants and registrants that the Board is statutorily authorized to deny, suspend, or revoke a registration, as applicable, on the basis of professional misconduct and discipline in an out-of-state jurisdiction. The proposal would also make aware relevant parties to any administrative appeal arising from a licensing decision (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent's counsel) that when disciplining applicants or registrants for a criminal

conviction, the Board is required to determine whether the act is substantially related to the practice of dispensing opticians using the listed criteria.

Rationale: BPC § 141 authorizes the Board to discipline a license on the basis of substantially related out-of-state discipline. BPC § 480 also authorizes the Board to deny a license application on the basis of substantially related formal discipline by a licensing Board in or outside of California. The regulation seeks to implement, interpret, and make specific BPC §§ 141 and 480 by adding their relative provisions to the Board's substantial relationship criteria regulation. Accordingly, the proposal is necessary to provide the appropriate notice to license applicants and registrants that discipline in an out-of-state jurisdiction and professional misconduct are grounds for registration denial, suspension, or revocation, and to implement the requirements of BPC §§ 141 and 480. The proposal is also necessary to consolidate into one regulation the criteria the Board will apply in evaluating whether a crime or other misconduct is substantially related to the licensed profession.

§ 1399.270, subdivision (b)

Purpose: The purpose of adding CCR § 1399.270(b) is to implement AB 2138 and BPC § 481, which requires each board to develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the professions regulated by the boards.

Anticipated Benefit: The proposed revisions to §1399.270(b) would provide clarity and transparency to license applicants and registrants by listing the specific criteria the Board must consider when making the substantial relationship determinations applicable to criminal convictions. The proposal would also make aware relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent's counsel) of the specific criteria used by the Board to determine whether a criminal conviction is substantially related to the practice of opticianry.

Rationale: BPC § 480 presently authorizes the Board to deny an application for licensure based on a conviction for a crime or act substantially related to the licensed business or profession. (BPC, § 480, subd. (a)(3)(B).) Likewise, § 490 authorizes the Board to suspend or revoke a license on the basis that the licensee was convicted of a crime substantially related to the qualifications, functions, or duties of the business or profession. (BPC, §490, subd. (a).) BPC § 481 requires the Boards to develop criteria to help evaluate whether a crime was substantially related to the regulated business or profession, and the Board established the criteria via regulations.

The Legislature's clear intent in enacting AB 2138 was to reduce licensing and employment barriers for people who are rehabilitated. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.) Accordingly, in AB 2138, the Legislature amended BPC § 480 to limit the boards' ability to use prior convictions or acts when denying licenses. Beginning July 1, 2020, boards may not deny a license to an applicant

because the applicant was convicted of a crime, or due to the acts underlying the conviction, if the applicant has a certificate of rehabilitation, was granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged. (BPC, § 480, subds. (b) & (c), as added by AB 2138, § 4.)

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

- 1) the conviction occurred within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of: (a) a serious felony under Penal Code §1192.7; (b) a registerable offense under Penal Code §290, subdivision (d)(2) or (3)); or, (c) a felony financial crime that is directly and adversely related to the fiduciary qualifications, functions, or duties of a specified business or profession regulated by the Accountancy Board, Professional Fiduciaries Bureau, Contractors State License Board, Bureau of Security and Investigative Services, and Cemetery and Funeral Bureau;
- 2) the applicant is presently incarcerated for the crime; or
- 3) the applicant was released from incarceration for the crime within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of: (a) a serious felony under Penal Code §1192.7; (b) a registerable offense under Penal Code §290, subdivision (d)(2) or (3)); or, (c) a felony financial crime that is directly and adversely related to the fiduciary qualifications, functions, or duties of specified businesses or professions regulated by the Accountancy Board, Professional Fiduciaries Bureau, Contractors State License Board, Bureau of Security and Investigative Services, and Cemetery and Funeral Bureau.

AB 2138 also specified three criteria that boards must consider when evaluating whether a crime is “substantially related” to the regulated business or profession. The criteria “shall include all of the following: (1) The nature and gravity of the offense [;] (2) The number of years elapsed since the date of the offense [; and,] (3) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.” (BPC, § 481, subd. (b), as added by AB 2138, §7; see also BPC, § 493, subd. (b), as added by AB 2138, §13.) Accordingly, the proposed regulation lists each of these criteria for the Board to consider when making the substantial relationship determination. This proposed addition is necessary to conform the regulation to statute, and to consolidate the Board’s substantial relationship criteria in one place.

§ 1399.270, subdivision (c)

Purpose: The purpose of amending CCR §1399.270(c) is to clarify that crimes, professional misconduct, or acts that are substantially related to the qualifications,

functions, or duties of a Board registrant include, but are not limited to, violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any other state or federal laws governing the practice of opticianry. Additionally, acts involving theft, dishonesty, fraud or deceit; assault or abusive behavior; or any acts of sexual misconduct or conviction subject to an order of registration pursuant to Penal Code §290 were added to this regulatory section by the Board. The proposal also makes minor technical revisions to this subdivision to accommodate the revisions made to subdivision (a).

Anticipated Benefit: The proposed revisions to §1399.270(c) would provide clarity to license applicants and registrants of the specific crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a registrant. The proposal would also make aware relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent's counsel) that substantially related crimes, professional misconduct, and acts include violations of other state or federal laws governing the practice of opticianry.

Rationale: The current regulation provides that crimes or acts that are substantially related to the practice of opticianry include violating or attempting to violate, directly, or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provisions governing the practice of opticianry pursuant to Division 2 of the BPC.

- Subdivision (c)(4), Any act involving theft, dishonesty, fraud or deceit

The proposed text adds acts of theft, dishonesty, fraud, or deceit to the list of substantially related activities. To enhance trust in a licensed profession, acts or crimes involving fiscal dishonesty are deemed substantially related to the duties of licensure. For instance, a conviction for tax evasion/income tax fraud was considered substantially related to the practice of medicine in *Windham v. Bd. of Med. Quality Assurance* (1980) 104 Cal. App. 3d 461.

A dispensing optician, like the physician in *Windham*, may deal financially with the state and private insurance carriers for payment. (*Windham v. Bd. of Med. Quality Assurance*, supra, 104 Cal. App. 3d at p. 471.) Therefore, an optician's propensity or willingness to engage in acts involving theft, dishonesty, fraud, or deceit is substantially related to the optician's qualifications, functions, and duties, to the extent such functions and duties involve billing the state or insurance carriers for services rendered. (See also, *Hanna v. Dental Bd. of California* (2012) 212 Cal.App.4th 759, 765 [court upheld the revocation of a dental license based on Medi-Cal fraud; "Convictions for Medi-Cal fraud are substantially related to a professional's fitness or capacity to practice her profession."].)

Another basis for finding such acts substantially related to a professional's fitness or capacity to practice is that this relationship is based on utmost trust and confidence in the professional's honesty and integrity. Intentional dishonesty in the medical profession, for instance, has been found to demonstrate a lack of moral character and

can support a finding of unfitness to practice medicine. (*Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 305–306.)

- Subdivision (c)(5), Any act involving assaultive or abusive conduct as defined in Penal Code section 11160.

The proposed text adds assault or abusive conduct as defined in Penal Code section 11160. A dispensing optician necessarily touches people when fitting and adjusting spectacle lenses. Accordingly, he or she occupies a position of trust over these individuals. To the extent, therefore, the optician has engaged in assaultive or abusive conduct as defined, this conduct is substantially related to the optician's duties and would violate the trust reposed in the optician.

- Subdivision (c)(6), Any act involving sexual misconduct as defined in Business and Professions Code section 726(a).

The proposed text adds sexual misconduct “as defined in Business Code section 726(a)” as an act substantially related to licensure. Business and Professions Code section 726(a) provides that “[t]he commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary action for any person licensed under this division or under any initiative act referred to in this division.” Accordingly, section 726 represents a legislative determination that the specified conduct is unprofessional conduct as a matter of law. (See also, *Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786 [the court found a dentist's sexual conduct with patients substantially related to his functions and duties as dentist and thus disciplinary action was warranted].)

Amend § 1399.271 of Article 7 of Division 13.5 of Title 16 of the CCR (Criteria for Denial and Reinstatement of Registration)

§ 1399.271, subdivision (a)

Purpose: The purpose of amending CCR § 1399.271(a) is to comply with the requirements of AB 2138, section 9, and BPC § 482, subdivision (b)(1), which requires the Board to consider whether an applicant has made a showing of rehabilitation if the applicant has completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific list of criteria for the Board to consider for these applicants. The list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of an applicant who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under the Department of Consumer Affairs (DCA).

Anticipated Benefit: The proposed revisions to CCR § 1399.271(a) would provide transparency and clarity to license applicants who have completed their criminal

sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria would help license applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, applicants who have criminal convictions and completed parole or probation without a violation, by listing rehabilitation criteria applicable to the applicant.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of an applicant when considering denying or disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) A board may not deny an applicant a license based solely on a misdemeanor conviction, if the applicant met the applicable requirements of the criteria of rehabilitation that the board developed. (BPC, § 480, subd. (b).)

Operative July 1, 2020, BPC § 480 will prohibit the Board from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or on the basis of the facts underlying a conviction, if the applicant “made a showing of rehabilitation pursuant to Section 482.” (BPC, § 480, subd. (b), as added by AB 2138, § 4.) In deciding whether to deny a license based on a conviction, the Board must consider evidence of the applicant's rehabilitation, pursuant to the process established in the Act, or its regulations, and as directed under BPC § 482. (BPC, § 481, subd. (c), as added by AB 2138, § 7; see also BPC, § 493, subd. (b)(2), as added by AB 2138, § 13 [“A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation”].)

To implement AB 2138, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny a license based on a criminal conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.) The Board must also decide whether an applicant “made a showing of rehabilitation,” if the applicant or licensee completed the criminal sentence at issue without a violation of parole or probation. (BPC, § 482, subd. (b), as added by AB 2138, § 9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when denying a license. The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional

crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the Board must now consider whether an applicant who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

The proposal specifies the following criteria for the Board to consider when making the determination that the applicant who has successfully completed the criminal sentence has made a showing of rehabilitation: (1) the circumstances, nature and gravity of the crime(s); (2) the length(s) of time that has elapsed since the criminal conduct and the completion of probation; (3) whether the applicant is a repeat offender of the same or similar crime(s) and the total criminal record; and (4) the terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation and the fitness to practice the profession. The criteria are necessary to assist the Board in evaluating rehabilitation. Since the purpose of evaluating an applicant’s rehabilitation is to determine whether the applicant is sufficiently reformed to be licensed, but AB 2138 requires the Board to evaluate rehabilitation in the narrow context of an applicant who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and would provide to the Board information specific to the applicant’s criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the applicant’s rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

The Board must consider the circumstances, nature, and gravity of the crime, because this is the offense against which the applicant’s rehabilitative efforts will be evaluated. In considering the circumstances of the crime, the Board may focus on the related facts of the case, versus the type of crime at issue. Additionally, the Board will consider the length of the applicable parole or probation period, because the length of time that the applicant served probation or parole without a violation is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 [“a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice”].)

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person’s rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation as specified in § 1399.272. The Board will also consider evidence of the applicant’s total criminal record. This is an existing regulatory criterion for registrants, as specified in §1399.272. It is necessary for the Board to consider the applicant’s total criminal record because additional prior or subsequent misconduct by the applicant is relevant to the Board’s decision regarding whether the applicant is sufficiently rehabilitated to be licensed and the applicant’s willingness to conform to the requirements of licensure.

The Board must consider the terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation, because the actual parole or probation terms can inform the Board on whether the applicant is rehabilitated. For instance, in cases where an applicant was convicted of a crime involving alcohol, probation terms requiring the applicant to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the applicant's rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368 ["An alcoholic's rehabilitation is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous"].)

§ 1399.271, subdivision (b)

Purpose: The purpose of amending CCR § 1399.271(b) is to comply with the requirements of AB 2138 § 9, and BPC § 482, subdivision (b)(2), which requires the Board to consider whether an applicant has made a showing of rehabilitation if: (1) the applicant has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the applicant made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (a); or, (3) the denial is based on something other than a crime, such as professional misconduct. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific, more comprehensive, list of criteria for the Board to consider for these applicants, which is not limited to the applicable parole or probation. The list of criteria incorporates the criteria from subdivision (a) for applicants convicted of a crime, so that similarly-situated applicants have the opportunity to be evaluated by the Board under the same set of criteria. The list of criteria also anticipates that the Board may be considering "act(s)" that are the basis for the denial, since the Board may be evaluating the rehabilitation of an applicant where the ground for denial involves acts of professional misconduct, rather than a conviction. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to CCR § 1399.271(b) would provide transparency and clarity to license applicants who have not completed their criminal sentence without a violation of parole or probation or otherwise do not qualify for consideration under subdivision (a). Providing the list of rehabilitation criteria would help license applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, applicants who do not qualify for consideration under subdivision (a), by listing rehabilitation criteria applicable to the applicant.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of an applicant when considering denying a license based on a conviction, acts of dishonesty, fraud, or deceit, or acts that would be grounds for discipline, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) A board may not deny an applicant a license based solely on a misdemeanor conviction, if the applicant

met the applicable requirements of the criteria of rehabilitation that the board developed. (BPC, § 480, subd. (b).)

Operative July 1, 2020, BPC section 480 will prohibit the Board from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or on the basis of the facts underlying a conviction, if the applicant “made a showing of rehabilitation pursuant to Section 482.” (BPC, § 480, subd. (b), as added by AB 2138, § 4.) In deciding whether to deny a license based on a conviction, the Board must consider evidence of the applicant’s rehabilitation, pursuant to the process established in the Act, or its regulations, and as directed under BPC section 482. (BPC, § 481, subd. (c), as added by AB 2138, § 7; see also BPC, § 493, subd. (b)(2), as added by AB 2138, § 13 [“A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation”].)

To implement AB 2138, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny a license based on a conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.) The Board must also decide whether an applicant or licensee “made a showing of rehabilitation,” if the applicant did not complete the criminal sentence at issue without a violation of parole or probation, or the board finds, in applying its rehabilitation criteria, that the applicant is rehabilitated. (BPC, § 482, subd. (b), as added by AB 2138, § 9.) AB 2138 also authorized the Board to deny a license based on prior disciplinary misconduct. Accordingly, it is necessary to amend the regulation to account for denials on this ground.

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when denying a license. The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the Board must now consider whether an applicant who has complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria. If, however, the applicant did not comply with the terms of parole or probation, the Board would apply its standard rehabilitation criteria, as modified in this proposal.

The proposal uses the existing rehabilitation criteria with the addition of the criteria specified in CCR § 1399.271(a) and makes other minor revisions. Each of these criteria

are designed to focus the Board's evaluation on facts and circumstances relevant to an applicant's rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the applicant's rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

The Board will consider the nature and gravity of the crime or act for the same reasons as discussed in subdivision (a). This is the offense or misconduct against which the Board will judge the applicant's rehabilitation. This is also already an existing regulatory criterion. The Board proposes to amend "severity" to "gravity." This is not a substantive change and would make the regulation internally consistent.

The Board will also consider evidence of acts or crimes committed after the act or crime that is the basis for denial. Such acts or crimes typically reflect additional misconduct by the applicant and bear on the Board's decision regarding whether the applicant is sufficiently rehabilitated to be licensed and conform to the requirements of licensure. The Board would omit "which also could be considered as grounds for denial," because AB 2138 repealed the Board's ability to deny a license based on dishonest, fraudulent, or deceitful acts, or acts that would be grounds for discipline. This is also already an existing regulatory criterion.

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation.

The Board will also consider the criteria in subdivision (a). This is necessary to ensure that all applicants convicted of a crime have the opportunity to be evaluated under the same set of rehabilitation criteria. For applicants that completed their criminal parole or probation without a violation, the Board would first evaluate their eligibility for licensure under the criteria in subdivision (a). If the applicant did not demonstrate sufficient rehabilitation under the criteria in subdivision (a), the Board would apply the broader criteria in subdivision (b). For applicants that did not complete their criminal parole or probation without a violation, the Board would apply the criteria in subdivision (b), which incorporates the criteria from subdivision (a). This way, similarly-situated applicants (those being considered for denial based on a conviction) have the benefit of the same set of criteria.

The Board would consider rehabilitation evidence the applicant submitted. There was no change to this criterion, and the Board is required to consider such evidence under BPC section 481(c). It is necessary to retain this requirement in order to consolidate the Board's rehabilitation criteria in one place.

**Amend § 1399.272 of Article 7 of Division 13.5 of Title 16 of the CCR
(Rehabilitation Criteria for Suspensions and Revocations)**

§ 1399.272, subdivision (a)

Purpose: The purpose of amending CCR §1399.272(a) is to comply with the requirements of AB 2138, section 9, and BPC section 482, subdivision (b)(1), which requires the Board to consider whether a registrant has made a showing of rehabilitation if the licensee has completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also seeks to provide a specific list of criteria for the Board to consider for these registrants. For uniformity purposes, the proposal follows the same approach as

§ 1399.271(b). The list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of an registrant who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the disciplinary process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to CCR § 1399.272(a) are intended to provide transparency and clarity to registrants who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria would help registrants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, registrants who have criminal convictions and completed parole or probation without a violation, by listing rehabilitation criteria applicable to the registrant.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of a licensee when considering disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation evidence between license denials and discipline, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend or revoke a registration based on a conviction. (BPC, §482, subd. (a), as added by AB 2138, §9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when suspending or revoking a license. It requires the Board to decide whether an applicant or licensee "made a showing of rehabilitation" in two circumstances: (1) the licensee completed the applicable criminal sentence without a violation of parole or probation, or (2) the board finds, after applying its rehabilitation criteria, that the applicant is rehabilitated. (BPC, § 482, as added by AB 2138, § 9.)

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently

considered by the Board in evaluating rehabilitation. (16 CCR § 1399.272., subd. (b)(4).) But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the Board must now consider whether a registrant who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

The proposal specifies the following criteria for the Board to consider when making the determination that the registrant who has successfully completed the criminal sentence has made a showing of rehabilitation: (1) the circumstances, nature and gravity of the crime(s); (2) the length(s) of time that has elapsed since the criminal conduct and the completion of probation; (3) whether the registrant is a repeat offender of the same or similar crime(s) and the total criminal record; and (4) the terms or conditions of parole or probation and the extent to which they bear on the registrant’s rehabilitation and the fitness to practice the profession. The criteria are necessary to assist the Board in evaluating rehabilitation. Since the purpose of evaluating a registrant’s rehabilitation is to determine whether the registrant is sufficiently reformed to be licensed, but AB 2138 requires the Board to evaluate rehabilitation in the narrow context of a registrant who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and would provide to the Board information specific to the registrant’s criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the registrant’s rehabilitation. In addition, to provide consistency with how the Board considers rehabilitation criteria, and uniformity with other DCA boards, the proposed criteria was adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

The Board must consider the circumstances, nature and gravity of the crime, because this is the offense against which the registrant’s rehabilitative efforts will be evaluated. In considering the circumstances of the crime, the Board may focus on the related facts of the case, versus the type of crime at issue. Additionally, the Board will consider the length of the applicable parole or probation period, because the length of time that the registrant served probation or parole without a violation is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 [“a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice”].)

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation as specified in § 1399.272. The Board will also consider evidence of the registrant's total criminal record. This is an existing regulatory criterion as specified in § 1399.272. It is necessary for the Board to consider the registrant's total criminal record because additional prior or subsequent misconduct by the registrant is relevant to the Board's decision regarding whether the registrant is sufficiently rehabilitated to be licensed and the registrant's willingness to conform to the requirements of licensure.

The Board must consider the terms or conditions of parole or probation and the extent to which they bear on the registrant's rehabilitation, because the actual parole or probation terms can inform the Board on whether the registrant is rehabilitated. For instance, in cases where an applicant was convicted of a crime involving alcohol, probation terms requiring the applicant to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the applicant's rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368 ["An alcoholic's rehabilitation is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous"].)

§ 1399.272, subdivision (b)

Purpose: The purpose of amending § 1399.272(b) is to conform to changes the Board proposes to implement AB 2138, section 9, and BPC section 482, subdivision (b)(2), which require the Board to consider whether an applicant has made a showing of rehabilitation if: (1) the applicant has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the applicant made a sufficient showing of rehabilitation based on a narrow set of criteria; or, (3) the Board's decision is based on something other than a crime. Likewise here, the Board would consider the rehabilitation criteria in subdivision (b) if: (1) a licensee has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the licensee made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (c); or, (3) the Board's decision is based on something other than a crime, such as out-of-state discipline under BPC section 141.

As AB 2138 does not prescribe new rehabilitation criteria, the proposal also seeks to provide a specific, more comprehensive, list of criteria for the Board to consider for these registrants, which is not limited to the person's parole or probation. The list of criteria is mostly unchanged from existing regulation, and it anticipates that the Board may be considering "act(s)" that are the basis for discipline, since the Board may, for instance, be evaluating the rehabilitation of a licensee where the ground for discipline involves disciplinary acts in other states. The list of criteria incorporates the criteria from subdivision (a) for registrants convicted of a crime, so that similarly-situated registrants have the opportunity to be evaluated by the Board under the same set of criteria. This proposal is also intended to provide predictability and consistency in the licensing and

disciplinary process, and uniformity of rehabilitation criteria with other boards under DCA. Thus, the proposal follows the same approach as section 1399.271 for license applicants.

Anticipated Benefit: The proposed revisions to CCR § 1399.272(b) would provide transparency and clarity to registrants who have not completed their criminal sentence without a violation of parole or probation, or otherwise do not qualify for consideration under subdivision (a). Providing the list of rehabilitation criteria would help registrants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal (e.g., the Deputy Attorney General, the Administrative Law Judge, and the licensee's counsel) in advocating for or against, or deciding upon, registrants who do not qualify for consideration under subdivision (a), by listing rehabilitation criteria applicable to the registrant.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of a licensee when considering disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation between license denials and discipline, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend or revoke a license based on a conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when suspending or revoking a license. It requires the Board to decide whether an applicant or licensee “made a showing of rehabilitation” in two circumstances: (1) the licensee completed the applicable criminal sentence without a violation of parole or probation, or (2) the board finds, after applying its rehabilitation criteria, that an applicant is rehabilitated. (BPC, § 482, as added by AB 2138, § 9.)

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. (16 CCR § 1399.272, subd. (b)(4).) But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the Board must now consider whether a registrant who has complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other

standard rehabilitation criteria. If, however, the registrant did not comply with the terms of parole or probation, the Board would apply its standard rehabilitation criteria, as modified in this proposal.

The proposal uses the existing rehabilitation criteria with the addition of the criteria specified in CCR § 1399.272 (a) and makes other minor revisions. Each of these criteria are designed to focus the Board's evaluation on facts and circumstances relevant to a registrant's rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the registrant's rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

The Board will consider the nature and gravity of the crime or act for the same reasons as discussed in subdivision (a). This is the offense or misconduct against which the Board will judge the registrant's rehabilitation. This is also already an existing regulatory criterion. The Board proposes to amend "severity" to "gravity" and "offense" to "crime." These are not substantive changes and would make the regulation internally consistent.

The Board will also consider evidence of the registrant's total criminal record. This is an existing regulatory criterion. It is necessary for the Board to consider the registrant's total criminal record because additional prior or subsequent misconduct by the registrant is relevant to the Board's decision regarding whether the registrant is sufficiently rehabilitated to be licensed and the registrant's willingness to conform to the requirements of licensure.

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation.

The Board will consider whether the registrant complied with parole, probation, restitution or other sanctions imposed on the registrant. This is an existing regulatory criterion. The information embraced in this criterion bears on a registrant's rehabilitation in terms of the registrant's willingness to make amends from prior misconduct and to conform to the rules of licensure. Accordingly, it is necessary for the Board to consider these elements to evaluate a registrant's reformation from prior misconduct.

The Board will also consider the criteria in subdivision (a). This is necessary to ensure that all registrants convicted of a crime have the opportunity to be evaluated under the same set of rehabilitation criteria. For registrants that completed their criminal parole or probation without a violation, the Board would first evaluate their eligibility for licensure under the criteria in subdivision (a). If the registrant did not demonstrate sufficient rehabilitation under the criteria in subdivision (a), the Board would apply the broader criteria in subdivision (b). For registrants that did not complete their criminal parole or probation without a violation, the Board would apply the criteria in subdivision (b), which incorporates the criteria from subdivision (a). This way, similarly-situated registrants

(those being considered for discipline based on a conviction) have the benefit of the same set of criteria.

The Board would consider evidence that a registrant's conviction was dismissed pursuant to Penal Code section 1203.4. This is an existing regulatory requirement, and it is necessary to consider dismissal proceedings because they are relevant to the Board's evaluation of whether a registrant is rehabilitated. The word "expungement" would be amended to "dismissal," but this is not a substantive change. Dismissal is simply a more accurate description of the proceedings conducted under Penal Code section 1203.4. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1129, fn.5.)

The Board would consider rehabilitation evidence the registrant submitted. This is an existing regulatory criterion. It is necessary to retain this requirement in order to maintain consistency between the Board's evaluation of rehabilitation in the licensing and discipline context.

Optometrists

Amend § 1516 of Article 3 of Division 15 of Title 16 of the CCR (Application Review and Criteria for Rehabilitation)

CCR § 1516

The Authority citations are being corrected to remove outdated references. This regulation does not relate to educational institutions.

CCR § 1516, subdivision (b)

Purpose: The purpose of amending CCR § 1516(b) is to comply with the requirements of AB 2138, section 9, and BPC § 482, subdivision (b)(1), which requires the Board to consider whether an optometry license applicant has made a showing of rehabilitation if the applicant has completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific list of criteria for the Board to consider for these applicants. The list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of an applicant who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under the DCA.

Anticipated Benefit: The proposed revisions to CCR § 1516(b) would provide transparency and clarity to license applicants who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria would help license applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g.,

the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, applicants who have criminal convictions and completed parole or probation without a violation, by listing rehabilitation criteria applicable to the applicant.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of an applicant when considering denying or disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) A board may not deny an applicant a license based solely on a misdemeanor conviction, if the applicant met the applicable requirements of the criteria of rehabilitation that the board developed. (BPC, § 480, subd. (b).)

Operative July 1, 2020, BPC § 480 will prohibit the Board from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or on the basis of the facts underlying a conviction, if the applicant “made a showing of rehabilitation pursuant to Section 482.” (BPC, § 480, subd. (b), as added by AB 2138, § 4.) In deciding whether to deny a license based on a conviction, the Board must consider evidence of the applicant’s rehabilitation, pursuant to the process established in the Act, or its regulations, and as directed under BPC § 482. (BPC, § 481, subd. (c), as added by AB 2138, § 7; see also BPC, § 493, subd. (b)(2), as added by AB 2138, § 13 [“A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation”].)

To implement AB 2138, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny a license based on a criminal conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.) The Board must also decide whether an applicant “made a showing of rehabilitation,” if the applicant or licensee completed the criminal sentence at issue without a violation of parole or probation. (BPC, § 482, subd. (b), as added by AB 2138, § 9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when denying a license. The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the Board must now consider whether an applicant who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

The proposal specifies the following criteria for the Board to consider when making the determination that the applicant who has successfully completed the criminal sentence has made a showing of rehabilitation: (1) the circumstances, nature, and gravity of the crime(s); (2) the length(s) of time that has elapsed since the criminal conduct and the completion of probation; (3) whether the applicant is a repeat offender of the same or similar crime(s) and the total criminal record; and (4) the terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation and the fitness to practice the profession. The criteria are necessary to assist the Board in evaluating rehabilitation. Since the purpose of evaluating an applicant's rehabilitation is to determine whether the applicant is sufficiently reformed to be licensed, but AB 2138 requires the Board to evaluate rehabilitation in the narrow context of an applicant who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and would provide to the Board information specific to the applicant's criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the applicant's rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

The Board must consider the circumstances, nature and gravity of the crime, because this is the offense against which the applicant's rehabilitative efforts will be evaluated. In considering the circumstances of the crime, the Board may focus on the related facts of the case, versus the type of crime at issue. Additionally, the Board will consider the length of the applicable parole or probation period, because the length of time that the applicant served probation or parole without a violation is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future.

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation as specified in § 1516. The Board will also consider evidence of the applicant's total criminal record. This is an existing regulatory criterion as specified in § 1516. It is necessary for the Board to consider the applicant's total criminal record because additional prior or subsequent misconduct by the applicant is relevant to the Board's decision regarding whether the applicant is sufficiently rehabilitated to be licensed and the applicant's willingness to conform to the requirements of licensure.

The Board must consider the terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation, because the actual parole or probation terms can inform the Board on whether the applicant is rehabilitated. For instance, in cases where an applicant was convicted of a crime involving alcohol, probation terms requiring the applicant to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the applicant's rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368 ["An alcoholic's rehabilitation

is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous”].)

CCR § 1516, subdivision (c)

Purpose: The purpose of amending CCR § 1516(c) is to comply with the requirements of AB 2138 § 9, and BPC § 482, subdivision (b)(2), which requires the Board to consider whether an optometry license applicant has made a showing of rehabilitation if: (1) the applicant has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the applicant made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (a); or, (3) the denial is based on something other than a crime, such as professional misconduct. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also provides a specific, more comprehensive, list of criteria for the Board to consider for these applicants, which is not limited to the applicable parole or probation. The list of criteria incorporates the criteria from subdivision (b) for applicants convicted of a crime, so that similarly-situated applicants have the opportunity to be evaluated by the Board under the same set of criteria. The list of criteria also anticipates that the Board may be considering “act(s)” that are the basis for the denial, since the Board may be evaluating the rehabilitation of an applicant where the ground for denial involves acts of professional misconduct, rather than a conviction. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to CCR § 1516(c) would provide transparency and clarity to license applicants who have not completed their criminal sentence without a violation of parole or probation or otherwise do not qualify for consideration under subdivision (b). Providing the list of rehabilitation criteria would help license applicants understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant’s counsel) in advocating for or against, or deciding upon, applicants who do not qualify for consideration under subdivision (a), by listing rehabilitation criteria applicable to the applicant.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of an applicant when considering denying a license based on a conviction, acts of dishonesty, fraud, or deceit, or acts that would be grounds for discipline, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) A board may not deny an applicant a license based solely on a misdemeanor conviction, if the applicant met the applicable requirements of the criteria of rehabilitation that the board developed. (BPC, § 480, subd. (b).)

Operative July 1, 2020, BPC § 480 will prohibit the Board from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or on the basis of the facts underlying a conviction, if the applicant “made a showing of rehabilitation pursuant to Section 482.” (BPC, § 480, subd. (b), as added by AB 2138, §

4.) In deciding whether to deny a license based on a conviction, the Board must consider evidence of the applicant's rehabilitation, pursuant to the process established in the Act, or its regulations, and as directed under BPC section 482. (BPC, § 481, subd. (c), as added by AB 2138, § 7; see also BPC, § 493, subd. (b)(2), as added by AB 2138, § 13 ["A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation"].)

To implement AB 2138, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny a license based on a conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.) The Board must also decide whether an applicant or licensee "made a showing of rehabilitation," if the applicant did not complete the criminal sentence at issue without a violation of parole or probation, or the board finds, in applying its rehabilitation criteria, that the applicant is rehabilitated. (BPC, § 482, subd. (b), as added by AB 2138, § 9.) AB 2138 also authorized the Board to deny a license based on prior disciplinary misconduct. Accordingly, it is necessary to amend the regulation to account for denials on this ground.

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when denying a license. The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: "The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense." (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 ["Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole"].) Nonetheless, under AB 2138, the Board must now consider whether an applicant who has complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria. If, however, the applicant did not comply with the terms of parole or probation, the Board would apply its standard rehabilitation criteria, as modified in this proposal.

The proposal utilizes the existing rehabilitation criteria with the addition of the criteria specified in CCR § 1516(c) and makes other minor revisions. Each of these criteria are designed to focus the Board's evaluation on facts and circumstances relevant to an applicant's rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the applicant's rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

The Board will consider the nature and gravity of the crime or act for the same reasons as discussed for subdivision (b). This is the offense or misconduct against which the Board will judge the applicant's rehabilitation. This is also already an existing regulatory criterion. The Board proposes to amend "severity" to "gravity." This is not a substantive change and would make the regulation internally consistent.

The Board will also consider evidence of acts or crimes committed after the act or crime that is the basis for denial. Such acts or crimes typically reflect additional misconduct by the applicant and bear on the Board's decision regarding whether the applicant is sufficiently rehabilitated to be licensed and conform to the requirements of licensure. The Board would omit "which also could be considered as grounds for denial," because AB 2138 repealed the Board's ability to deny a license based on dishonest, fraudulent, or deceitful acts, or acts that would be grounds for discipline. This is also already an existing regulatory criterion.

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation.

The Board will also consider the criteria in subdivision (b). This is necessary to ensure that all applicants convicted of a crime have the opportunity to be evaluated under the same set of rehabilitation criteria. For applicants that completed their criminal parole or probation without a violation, the Board would first evaluate their eligibility for licensure under the criteria in subdivision (b). If the applicant did not demonstrate sufficient rehabilitation under the criteria in subdivision (b), the Board would apply the broader criteria in subdivision (c). For applicants that did not complete their criminal parole or probation without a violation, the Board would apply the criteria in subdivision (c), which incorporates the criteria from subdivision (b). This way, similarly-situated applicants (those being considered for denial based on a conviction) have the benefit of the same set of criteria.

The Board would consider rehabilitation evidence the applicant submitted. There was no change to this criterion, and the Board is required to consider such evidence under BPC section 481(c). It is necessary to retain this requirement in order to consolidate the Board's rehabilitation criteria in one place.

CCR § 1516, subdivision (d)

Purpose: The purpose of amending CCR §1516(d) is to comply with the requirements of AB 2138, § 9, and BPC § 482, subdivision (b)(1), which requires the Board to consider whether an optometry licensee has made a showing of rehabilitation if the licensee has completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria, the proposal also seeks to provide a specific list of criteria for the Board to consider for these licensees. For uniformity purposes, the proposal follows the same approach as subdivision (b). The list of criteria is narrow in scope and limited to considerations relevant to the crime and the

criminal sentence, since AB 2138 requires the Board to consider rehabilitation in the narrow context of an applicant who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the disciplinary process and uniformity of rehabilitation criteria with other boards under DCA.

Anticipated Benefit: The proposed revisions to CCR § 1516(d) are intended to provide transparency and clarity to licensees who have completed their criminal sentence without a violation of parole or probation. Providing the narrow list of rehabilitation criteria would help licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, licensees who have criminal convictions and completed parole or probation without a violation, by listing rehabilitation criteria applicable to the licensee.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of a licensee when considering disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation evidence between license denials and discipline, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend or revoke a license based on a conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when suspending or revoking a license. It requires the Board to decide whether an applicant or licensee "made a showing of rehabilitation" in two circumstances: (1) the licensee completed the applicable criminal sentence without a violation of parole or probation, or (2) the board finds, after applying its rehabilitation criteria, that the applicant is rehabilitated. (BPC, § 482, as added by AB 2138, § 9.)

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: "The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense." (Windham v. Board of Medical Quality Assurance (1980) 104 Cal.App.3d 461, 473; see also In re Gossage (2000) 23 Cal.4th 1080, 1099 ["Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole"].) Nonetheless, under AB 2138, the Board must now consider whether a licensee who

complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

The proposal specifies the following criteria for the Board to consider when making the determination that the licensee who has successfully completed the criminal sentence without a violation of parole or probation has made a showing of rehabilitation: (1) the circumstance, nature and gravity of the crime(s); (2) the length(s) of time that has elapsed since the criminal conduct and the completion of probation.; (3) Whether the applicant is a repeat offender of the same or similar crime(s), and the total criminal record; and (4) the terms or conditions of parole or probation and the extent to which they bear on the licensee's rehabilitation and fitness to practice the profession. The criteria are necessary to assist the Board in evaluating rehabilitation. Since the purpose of evaluating a licensee's rehabilitation is to determine whether the licensee is sufficiently reformed to be licensed, but AB 2138 requires the Board to evaluate rehabilitation in the narrow context of a licensee who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and would provide to the Board information specific to the licensee's criminal sentence and terms or conditions of parole or probation, so that the Board knows the relevant criteria it must consider to make the determination as to the licensee's rehabilitation. In addition, to provide consistency with how the Board considers rehabilitation criteria, and uniformity with other DCA boards, the proposed criteria was adopted by the Board pursuant to DCA's recommended rehabilitation criteria.

The Board must consider the circumstances, nature, and gravity of the crime, because this is the offense against which the licensee's rehabilitative efforts will be evaluated.

The Board must consider the length(s) of time that has elapsed since the criminal conduct and the completion of probation, since this may bear on whether the licensee is sufficiently rehabilitated because the length of time that the licensee served probation or parole without a violation is relevant to whether the licensee is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 ["a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice"].)

The Board must consider whether the licensee is a repeat offender of the same or similar crime(s), and the total criminal record, since these criteria can inform the Board on whether the licensee is rehabilitated. An licensee who demonstrates a commitment to not committing the same crimes may show a stronger desire to meet the requirements of licensure and a pledge to his or her rehabilitation.

The Board must consider the terms or conditions of parole or probation and the extent to which they bear on the licensee's rehabilitation and fitness to practice the profession, as this may be relevant to the Board's final determination. For instance, if correctional authorities removed terms of parole or probation due to the licensee's good behavior,

this would bear on the Board's evaluation of the licensee's rehabilitation and willingness to conform to the rules of licensure.

§ 1516, subdivision (e)

Purpose: The purpose of amending § 1516(e) is to conform to changes the Board proposes to implement AB 2138, section 9, and BPC section 482, subdivision (b)(2), which require the Board to consider whether an optometry license applicant has made a showing of rehabilitation if: (1) the applicant has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the applicant made a sufficient showing of rehabilitation based on a narrow set of criteria; or, (3) the Board's decision is based on something other than a crime. Likewise here, the Board would consider the rehabilitation criteria in subdivision (e) if: (1) a licensee has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Board does not find that the licensee made a sufficient showing of rehabilitation based on the narrow criteria in subdivision (d); or, (3) the Board's decision is based on something other than a crime, such as out-of-state discipline under BPC section 141.

As AB 2138 does not prescribe new rehabilitation criteria, the proposal also seeks to provide a specific, more comprehensive, list of criteria for the Board to consider for these licensees, which is not limited to the person's parole or probation. The list of criteria is mostly unchanged from existing regulation, and it anticipates that the Board may be considering "act(s)" that are the basis for discipline, since the Board may, for instance, be evaluating the rehabilitation of a licensee where the ground for discipline involves disciplinary acts in other states. The list of criteria incorporates the criteria from subdivision (d) for licensees convicted of a crime, so that similarly-situated licensees have the opportunity to be evaluated by the Board under the same set of criteria. This proposal is also intended to provide predictability and consistency in the licensing and disciplinary process, and uniformity of rehabilitation criteria with other boards under DCA. Thus, the proposal follows the same approach as subdivision (b).

Anticipated Benefit: The proposed revisions to CCR § 1516(e) would provide transparency and clarity to optometry licensees who have not completed their criminal sentence without a violation of parole or probation, or otherwise do not qualify for consideration under subdivision (d). Providing the list of rehabilitation criteria would help licensees understand the facts and documents to present to the Board to demonstrate their rehabilitation. The proposal would also assist relevant parties to any administrative appeal (e.g., the Deputy Attorney General, the Administrative Law Judge, and the licensee's counsel) in advocating for or against, or deciding upon, licensees who do not qualify for consideration under subdivision (d), by listing rehabilitation criteria applicable to the licensee.

Rationale: Existing law required boards to develop criteria to evaluate the rehabilitation of a licensee when considering disciplining a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.) To implement AB 2138 and maintain consistency in how the Board evaluates rehabilitation

between license denials and discipline, it is necessary for the Board to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend or revoke a license based on a conviction. (BPC, § 482, subd. (a), as added by AB 2138, § 9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Board must consider when suspending or revoking a license. It requires the Board to decide whether an applicant or licensee “made a showing of rehabilitation” in two circumstances: (1) the licensee completed the applicable criminal sentence without a violation of parole or probation, or (2) the board finds, after applying its rehabilitation criteria, that an applicant is rehabilitated. (BPC, § 482, as added by AB 2138, § 9.)

The extent to which a person complied with the terms of parole or probation is already a factor boards often consider when evaluating rehabilitation, and it is currently considered by the Board in evaluating rehabilitation. But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the Board must now consider whether an applicant who has complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria. If, however, the applicant did not comply with the terms of parole or probation, the Board would apply its standard rehabilitation criteria, as modified in this proposal.

The proposal uses the existing rehabilitation criteria with the addition of the criteria specified in CCR § 1516 (d) and makes other minor revisions. Each of these criteria are designed to focus the Board’s evaluation on facts and circumstances relevant to a licensee’s rehabilitation, so that the Board knows the relevant criteria it must review to make the determination as to the licensee’s rehabilitation. In addition, to provide uniformity with other DCA boards, the proposed criteria were adopted by the Board pursuant to DCA’s recommended rehabilitation criteria.

The Board will consider the nature and severity of the crime or act for the same reasons as discussed for subdivisions (b) and (c). This is the offense or misconduct against which the Board will judge the licensee’s rehabilitation. This is also already an existing regulatory criterion. The Board proposes to amend “offense” to “crime.” These are not substantive changes and would make the regulation internally consistent.

The Board will also consider evidence of the licensee’s total criminal record. This is an existing regulatory criterion. It is necessary for the Board to consider the licensee’s total

criminal record because additional prior or subsequent misconduct by the licensee is relevant to the Board's decision regarding whether the licensee is sufficiently rehabilitated to be licensed and the licensee's willingness to conform to the requirements of licensure.

The Board would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation.

The Board will consider whether the licensee complied with parole, probation, restitution or other sanctions imposed on the licensee. This is an existing regulatory criterion. The information embraced in this criterion bears on a licensee's rehabilitation in terms of the licensee's willingness to make amends from prior misconduct and to conform to the rules of licensure. Accordingly, it is necessary for the Board to consider these elements to evaluate a licensee's reformation from prior misconduct.

The Board will also consider the criteria in subdivision (d). This is necessary to ensure that all licensees convicted of a crime have the opportunity to be evaluated under the same set of rehabilitation criteria. For licensees that completed their criminal parole or probation without a violation, the Board would first evaluate their eligibility for licensure under the criteria in subdivision (d). If the licensee did not demonstrate sufficient rehabilitation under the criteria in subdivision (d), the Board would apply the broader criteria in subdivision (e). For licensees that did not complete their criminal parole or probation without a violation, the Board would apply the criteria in subdivision (e), which incorporates the criteria from subdivision (d). This way, similarly-situated licensees (those being considered for discipline based on a conviction) have the benefit of the same set of criteria.

The Board would consider evidence that a licensee's conviction was dismissed pursuant to Penal Code section 1203.4. This is an existing regulatory requirement, and it is necessary to consider dismissal proceedings because they are relevant to the Board's evaluation of whether a licensee is rehabilitated. The word "expungement" would be amended to "dismissal," but this is not a substantive change. Dismissal is simply a more accurate description of the proceedings conducted under Penal Code section 1203.4. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1129, fn.5.)

The Board would consider rehabilitation evidence the licensee submitted. This is an existing regulatory criterion. It is necessary to retain this requirement in order to maintain consistency between the Board's evaluation of rehabilitation in the licensing and discipline context.

§ 1516, subdivision (f)

This existing subdivision has been renumbered to subdivision (f). The text from this existing regulatory section has not changed.

Amend § 1517 of Article 3 of Division 15 of Title 16 of the CCR (Substantial Relationship Criteria)

§ 1517, subdivision (a)

Purpose: The purpose of amending CCR § 1517(a) is to expand the regulation to include discipline under BPC § 141, because the substantially related acts that are the basis for discipline in an out-of-state jurisdiction may be used to discipline an optometry licensee under BPC § 141. This subdivision would also include substantially related “professional misconduct,” since the Board may consider such misconduct in denying licenses under BPC § 480. The subdivision would be amended to reword and move to subdivision (c) the phrase, “[s]uch crimes or acts shall include but not be limited to those involving the following.”

Anticipated Benefit: The proposed revisions to § 1517(a) would provide clarity to license applicants and licensees that the Board is statutorily authorized to deny, suspend, or revoke a license, as applicable, on the basis of professional misconduct and discipline in an out-of-state jurisdiction. The proposal would also make aware relevant parties to any administrative appeal arising from a licensing decision (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s counsel) that when disciplining applicants or licensees for a criminal conviction, the Board is required to determine whether the act is substantially related to the practice of dispensing opticians using the listed criteria.

Rationale: BPC § 141 authorizes the Board to discipline a license on the basis of substantially related out-of-state discipline. BPC § 480 also authorizes the Board to deny a license application on the basis of substantially related formal discipline by a licensing Board in or outside of California. The regulation seeks to implement, interpret, and make specific BPC §§ 141 and 480 by adding their relative provisions to the Board’s substantial relationship criteria regulation. Accordingly, the proposal is necessary to provide the appropriate notice to license applicants and licensees that discipline in an out-of-state jurisdiction and professional misconduct are grounds for license denial, suspension, or revocation, and implement the requirements of BPC §§ 141 and 480. The proposal is also necessary to consolidate into one regulation the criteria the Board will apply in evaluating whether a crime or other misconduct is substantially related to the licensed profession.

§ 1517, subdivision (b)

Purpose: The purpose of adding CCR § 1517(b) is to implement AB 2138 and BPC § 481, which requires each board to develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the professions regulated by the boards.

Anticipated Benefit: The proposed revisions to § 1517(b) would provide clarity and transparency to license applicants and licensees by listing the specific criteria the Board

must consider when making the substantial relationship determinations applicable to criminal convictions. The proposal would also make aware relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent's counsel) of the specific criteria used by the Board to determine whether a criminal conviction is substantially related to the practice of opticianry.

Rationale: BPC § 480 presently authorizes the Board to deny an application for licensure based on a conviction for a crime or act substantially related to the licensed business or profession. (BPC, § 480, subd. (a)(3)(B).) Likewise, § 490 authorizes the Board to suspend or revoke a license on the basis that the licensee was convicted of a crime substantially related to the qualifications, functions, or duties of the business or profession. (BPC, § 490, subd. (a).) BPC § 481 requires the Boards to develop criteria to help evaluate whether a crime was substantially related to the regulated business or profession, and the Board established the criteria via regulations.

The Legislature's clear intent in enacting AB 2138 was to reduce licensing and employment barriers for people who are rehabilitated. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.) Accordingly, in AB 2138, the Legislature amended BPC § 480 to limit the boards' ability to use prior convictions or acts when denying licenses. Beginning July 1, 2020, boards may not deny a license to an applicant because the applicant was convicted of a crime, or due to the acts underlying the conviction, if the applicant has a certificate of rehabilitation, was granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged. (BPC, § 480, subs. (b) & (c), as added by AB 2138, § 4.)

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

- 1) the conviction occurred within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of: (a) a serious felony under Penal Code §1192.7; (b) a registerable offense under Penal Code §290, subdivision (d)(2) or (3)); or, (c) a felony financial crime that is directly and adversely related to the fiduciary qualifications, functions, or duties of a specified business or profession regulated by the Accountancy Board, Professional Fiduciaries Bureau, Contractors State License Board, Bureau of Security and Investigative Services, and Cemetery and Funeral Bureau;
- 2) the applicant is presently incarcerated for the crime; or
- 3) the applicant was released from incarceration for the crime within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of: (a) a serious felony under Penal Code

§1192.7; (b) a registerable offense under Penal Code §290, subdivision (d)(2) or (3)); or, (c) a felony financial crime that is directly and adversely related to the fiduciary qualifications, functions, or duties of specified businesses or professions regulated by the Accountancy Board, Professional Fiduciaries Bureau, Contractors State License Board, Bureau of Security and Investigative Services, and Cemetery and Funeral Bureau.

AB 2138 also specified three criteria that boards must consider when evaluating whether a crime is “substantially related” to the regulated business or profession. The criteria “shall include all of the following: (1) The nature and gravity of the offense [;] (2) The number of years elapsed since the date of the offense [; and,] (3) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.” (BPC, § 481, subd. (b), as added by AB 2138, § 7; see also BPC, § 493, subd. (b), as added by AB 2138, § 13.) Accordingly, the proposed regulation lists each of these criteria for the Board to consider when making the substantial relationship determination. This proposed addition is necessary to conform the regulation to statute, and to consolidate the Board’s substantial relationship criteria in one place.

§ 1517, subdivision (c)

Purpose: The purpose of amending CCR § 1517(c) is to clarify that crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a Board licensee include, but are not limited to, violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any other state or federal laws governing the practice of opticianry. Additionally, any acts of theft, dishonesty, fraud or deceit; assault or abusive behavior; or any acts of sexual misconduct or conviction subject to an order of registration pursuant to Penal Code §290 were added to this regulatory section by the Board. The proposal also makes minor technical revisions to this subdivision to accommodate the revisions made to subdivision (a).

Anticipated Benefit: The proposed revisions to § 1517(c) would provide clarity to license applicants and licensees of the specific crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a registrant. The proposal would also make aware relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s counsel) that substantially related crimes, professional misconduct, and acts include violations of other state or federal laws governing the practice of optometry.

Rationale: The current regulation provides that crimes or acts that are substantially related to the practice of opticianry include violating or attempting to violate, directly, or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provisions or term of the Act, and crimes involving fiscal dishonesty. As reflected in BPC sections 141 and 480, the Board may deny, suspend, or revoke a license, as applicable, on the ground of substantially related out-of-state discipline or professional misconduct. To incorporate and clarify these statutory provisions, the proposal would specify that

substantially related crimes, professional misconduct, and acts include violations of other state or federal laws governing the practice of optometry.

- Subdivision (c)(5), Any act involving theft, dishonesty, fraud or deceit

The proposed text adds acts of theft, dishonesty, fraud, or deceit to the list of substantially related activities. To enhance trust in a licensed profession, acts or crimes involving fiscal dishonesty are deemed substantially related to the duties of licensure. For instance, a conviction for tax evasion/income tax fraud was considered substantially related to the practice of medicine in *Windham v. Bd. of Med. Quality Assurance* (1980) 104 Cal. App. 3d 461.

An optometrist, like the physician in *Windham*, may deal financially with the state and private insurance carriers for payment. (*Windham v. Bd. of Med. Quality Assurance*, supra, 104 Cal. App. 3d at p. 471.) Therefore, an optometrist's propensity or willingness to engage in acts involving theft, dishonesty, fraud, or deceit is substantially related to the optometrist's functions and duties, to the extent such functions and duties involve billing the state or insurance carriers for services rendered. (See also, *Hanna v. Dental Bd. of California* (2012) 212 Cal.App.4th 759, 765 [court upheld the revocation of a dental license based on Medi-Cal fraud; "Convictions for Medi-Cal fraud are substantially related to a professional's fitness or capacity to practice her profession."].)

Another basis for finding such acts substantially related to a professional's fitness or capacity to practice is that this relationship is based on utmost trust and confidence in the professional's honesty and integrity. Intentional dishonesty in the medical profession, for instance, has been found to demonstrate a lack of moral character and can support a finding of unfitness to practice medicine. (*Matanky v. Board of Medical Examiners* (1978) 79 Cal.App.3d 293, 305–306.)

- Subdivision (c)(6), Any act involving assaultive or abusive conduct as defined in Penal Code section 11160.

The proposed text adds assault or abusive conduct as defined in Penal Code section 11160. An optometrist necessarily touches people performing examinations. Accordingly, he or she occupies a position of trust over these individuals. To the extent, therefore, the optometrist has engaged in assaultive or abusive conduct as defined, this conduct is substantially related to the optometrist's duties and would violate the trust reposed in the doctor.

- Subdivision (c)(7), Any act involving sexual misconduct as defined in Business and Professions Code section 726(a)

The proposed text adds sexual misconduct "as defined in Business Code section 726(a)" as an act substantially related to licensure. Business and Professions Code section 726(a) provides that "[t]he commission of any act of sexual abuse, misconduct, or relations with a patient, client, or customer constitutes unprofessional conduct and

grounds for disciplinary action for any person licensed under this division or under any initiative act referred to in this division.” Accordingly, section 726 represents a legislative determination that the specified conduct is unprofessional conduct as a matter of law. (See also, *Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786 [the court found a dentist’s sexual conduct with patients substantially related to his functions and duties as dentist and thus disciplinary action was warranted].)

Underlying Data

- April 5, 2019 Board Meeting Agenda; Relevant Meeting Materials; and Draft Meeting Minutes
- Text of Assembly Bill 2138 (Chiu, Chapter 995, Statutes of 2018)

Business Impact

The proposed regulations will not have a significant adverse economic impact on businesses as the regulations do not directly affect businesses. This initial determination is based on the purpose of AB 2138, which sought to reduce barriers to licensure for applicants and licensees with criminal histories or licensure discipline. It is also based on the lack of testimony at the Board’s meeting that the regulation would impact businesses. The Board anticipates that the proposed regulations will impact businesses to the extent that individual applicants or licensees are able to be licensed or retain licensure under the proposal. The Board does not know how many applicants will gain or retain licensure but does not anticipate the number to significantly impact businesses.

Economic Impact Assessment

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for license applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- It will not create new businesses or eliminate existing business within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for license applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- It will not affect the expansion of businesses currently doing business within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for license applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- This regulatory proposal benefits the health and welfare of California residents because it would increase their access to licensed professionals to treat their health.
- This regulatory proposal does not affect worker safety because it establishes criteria, based upon recent statutory mandates for licensure following the applicant’s or licensee’s criminal conviction. It does not involve worker safety.
- This regulatory proposal does not affect the state’s environment because it only regulates license applicants and licensees and their qualifications for licensure

following a criminal conviction or disciplinary action. It does not involve environmental issues.

Specific Technologies or Equipment

This regulatory proposal does not mandate the use of specific technologies or equipment.

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the regulation is proposed or would be as effective or less burdensome to affected private persons than the proposed regulation, or 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 alternative was rejected or adopted:

Option 1: 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.

Any interested person may submit comments to the Board in writing relevant to the above determinations at 2450 Del Paso Road, Suite 105, Sacramento, CA 95834.