

BUREAU OF AUTOMOTIVE REPAIR

**INITIAL STATEMENT OF REASONS**

**HEARING DATE:**

No hearing has been scheduled for the proposed action.

**SUBJECT MATTER OF THE PROPOSED REGULATIONS:**

REHABILITATION AND SUBSTANTIAL RELATIONSHIP CRITERIA

**SECTIONS AFFECTED:**

Amend California Code of Regulations Title 16, Division 33, Chapter 1, Article 12, Sections 3395 and 3395.2.

**PROBLEM STATEMENT**

In accordance with the statutory amendments implemented by Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018), by July 1, 2020, BPC section 481 requires the Bureau to develop criteria, when considering the denial, suspension, or revocation of a license or registration, to determine whether a crime is substantially related to the qualifications, functions, or duties of the professions it regulates. Further, BPC section 493 requires the Bureau to determine whether a crime is substantially related to the qualifications, functions, and/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 section 482 requires the Bureau 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.)

CCR section 3395.2 establishes the criteria for determining when a crime is substantially related to the qualifications, functions and duties of a licensee. CCR section 3395 establishes the criteria for determining rehabilitation of an applicant or licensee when considering denial, suspension, or petition for reinstatement of a license on the ground of a criminal conviction.

As required under AB 2138, the Bureau proposes to amend sections 3395 and 3395.2, of article 12 of division 33 of title 16 of the CCR, to adhere to these mandates and revise its criminal conviction substantial relationship and rehabilitation criteria.

## **SPECIFIC PURPOSE OF THE REGULATORY PROPOSAL**

### **I. AMEND SECTION 3395. CRITERIA FOR REHABILITATION**

#### **Amend section 3395, subsection (a)**

Purpose: The purpose of amending CCR section 3395, subsection (a), is to comply with the requirements of AB 2138, section 9, and BPC section 482, which requires the Bureau to consider whether an applicant or licensee has made a showing of rehabilitation if the applicant or licensee has completed the criminal sentence at issue without a violation of parole or probation or whether after applying rehabilitation criteria that the applicant, licensee, or registrant is rehabilitated. Since, AB 2138 does not prescribe new rehabilitation criteria that boards and bureaus must consider when denying, suspending or revoking a license, the Bureau has determined that where there is the finding that the applicant, licensee or registrant has completed the criminal sentence at issue without a violation of parole or probation, then for the purposes of AB 2138, the Bureau will find that the applicant, licensee or registrant has been rehabilitated. In addition, adding *suspension* and *revocation* language merges existing subsection (b) into this subsection. The consolidation of these sections makes the regulation less wordy, clear, and concise.

Anticipated Benefit: The proposed revisions to CCR section 3395, subsection (a), will provide transparency and clarity to applicants, licensees, and registrants who have completed their criminal sentence without a violation of parole or probation. The proposal would also assist relevant parties to any administrative appeal arising from a license denial, suspension, or revocation (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, applicants or licensees and registrants who have criminal convictions and completed parole or probation without a violation.

Rationale: Existing law requires that the Bureau develop criteria to evaluate the rehabilitation of an applicant, licensee, and registrant when considering denying or disciplining a license or registration based on a conviction, and to consider evidence of rehabilitation in making such decisions. (BPC, § 482.). The Bureau may not deny, suspend, or revoke an applicant's license or registration, based solely on a misdemeanor conviction, if the applicant meets the applicable requirements of the criteria of rehabilitation that the Bureau has developed. (BPC, § 480, subd. (b).)

AB 2138 allows the Bureau to consolidate and use the same criteria when considering the denial, suspension, or revocation of a license or registration.

Operative July 1, 2020, BPC section 480, will prohibit the Bureau 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, suspend, or revoke a license or registration based on a conviction, the Bureau must consider evidence of the applicant’s rehabilitation.

To implement AB 2138, it is necessary for the Bureau to revise its regulations to reflect the finding of rehabilitation, when deciding whether to deny, suspend, or revoke a license based on a criminal conviction (BPC, § 482, subd. (a), as added by AB 2138, § 9.) when an applicant, licensee, or registrant has “made a showing of rehabilitation,” through the completion of the criminal sentence at issue without a violation of parole or probation. (BPC, § 482, subd. (b), as added by AB 2138, § 9.).

**Amend section 3395, subsection (b)**

Purpose: The purpose of amending CCR section 3395, subsection (b), is to comply with the requirements of AB 2138, section 9, and BPC section 482, subdivision (b)(2), which require the Bureau to consider whether an applicant has made a showing of rehabilitation if the applicant, licensee, or registrant has not completed the criminal sentence at issue without a violation of parole or probation; or 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 Bureau to consider for these applicants, which is not limited to the applicable parole or probation. The list of criteria anticipates that the Bureau may be considering “act(s)” that are the basis for the denial, suspension, or revocation, since the Bureau may be evaluating the rehabilitation of an applicant where the ground for denial, suspension, or revocation 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 bureaus and boards under DCA.

Anticipated Benefit: The proposed revisions to CCR section 3395, subsection (b), provide transparency and clarity to applicants, licensees, and registrants who have not completed their criminal sentence without a violation of parole or probation or otherwise do not qualify for consideration under subsection (a). Providing the list of rehabilitation criteria will help applicants, licensees, and registrants understand the facts and documents to present to the Bureau to demonstrate their rehabilitation. The proposal will also assist relevant parties to any administrative appeal arising from a license denial, suspension, or revocation (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant’s counsel) in advocating for or against, or deciding upon, applicants, licensees, or registrants who do not qualify for consideration under subsection (a), by listing rehabilitation criteria applicable to the applicant, licensee, or registrant.

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

Operative July 1, 2020, BPC section 480 will prohibit the Bureau 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 or registration based on a conviction, the Bureau must consider evidence of the applicant’s rehabilitation.

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

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Bureau must consider when denying a license. The extent to which a person complied with the terms of parole or probation is already a factor that bureaus and boards often consider, when evaluating rehabilitation, and it is currently considered by the Bureau in evaluating rehabilitation. (16 CCR, §3395, subs. (a)(4).) Under AB 2138, the Bureau must now consider whether an applicant, who has complied with the terms of parole or probation, has made a showing of rehabilitation sufficient for licensure or registration, even without considering other standard rehabilitation criteria. If, however, the applicant did not comply with the terms of parole or probation, the Bureau would apply its standard rehabilitation criteria, as modified in this proposal.

This proposal uses the existing rehabilitation criteria and makes other minor revisions. Each of these criteria are designed to focus the Bureau’s evaluation on facts and circumstances relevant to an applicant’s, licensee’s, or registrant’s rehabilitation, so that the Bureau knows the relevant criteria it must review to make the determination as to the applicant’s, licensee’s, or registrant’s rehabilitation. In addition, to provide uniformity with other DCA bureaus and boards, the proposed

criteria were adopted, by the Bureau, pursuant to DCA's recommended rehabilitation criteria.

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

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

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

The Bureau will also consider whether the applicant complied with parole, probation, restitution or other sanctions imposed on the applicant. The Bureau proposes amending "The extent to which," to "Whether," but does not view this as a substantive change. This criterion is, otherwise, unchanged from the existing regulation. The information embraced in this criterion bears on an applicant's rehabilitation in terms of the applicant's willingness to make amends from their prior misconduct and shows their willingness to conform to the rules of licensure. Accordingly, it is necessary for the Bureau to consider these elements to evaluate an applicant's reformation from prior misconduct.

The Bureau will consider rehabilitation evidence that the applicant, licensee, or registrant submitted. There was no change to this criterion and the Bureau is required to consider such evidence under BPC section 481(c). It is also necessary to retain this requirement to consolidate the Bureau's rehabilitation criteria in one place.

**Delete existing section 3395, subsection (b)**

This section covers suspension and revocation. Suspension and revocation were added to subsection (a), above. This subsection is no longer necessary because consideration for suspension and revocation matters has been included in subsection (a).

Subsections (b) (1), (3), (4), and (6), of the original text, are removed due to redundancy as found in proposed subsection (b). Specifically, original subsection (b)(1) is now reflected in new subsection (b)(1); original subsection (b)(3) in new subsection (b)(3); original subsection (b)(4) in new subsection (b)(4); and original subsection (b)(6) in new subsection (b)(5).

Subsection (b)(2), entitled “total criminal record,” is removed because it is no longer relevant. The Bureau may deny a license, pursuant to BPC section 480(a)(3)(b), only if the crime or act is substantially related to the qualifications, functions, and/or duties of the business or profession for which application is made. It is not necessary to consider the total criminal record.

Subsection (b)(5), “evidence of expungement proceedings, pursuant to section 1203.4 of the penal code,” is removed because, as stated in BPC section 480(c), “... a person shall not be denied a license solely on the basis of a conviction that has been dismissed pursuant to Section 1203.4...”. Therefore, this section is no longer necessary when considering the suspension or revocation of a license or registration.

## **II. AMEND SECTION 3395.2. SUBSTANTIAL RELATIONSHIP CRITERIA**

### **Retitle section 3395.2 to “Substantial Relationship Criteria”.**

The Bureau has revised and added provisions to this section that clarify the substantial relationship criteria for denial, suspension, or revocation of a license or registration. The retitling is necessary to accurately convey the contents of the section and make the regulations easier to reference, comprehend, and comply with.

### **Amend section 3395.2, subsection (a)**

Purpose: The purpose of amending CCR section 3395.2, subsection (a), is to expand the regulation to include discipline under Business and Professions Code (BPC) section 141, since 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 section 141. This subsection will also include substantially related “professional misconduct,” since the Bureau may consider such misconduct in denying licenses and registrations under BPC section 480.

Anticipated Benefit: The proposed revisions to section 3395.2, subsection (a), will provide clarity to license applicants and licensees that the Bureau is statutorily authorized to deny, suspend, or revoke a license or registration, as applicable, on the basis of professional misconduct and discipline in an out-of-state jurisdiction. The proposal will 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 Bureau is required to determine whether the act is substantially related to the automotive repair profession.

Rationale: BPC section 141 authorizes the Bureau to discipline a licensee on the basis of substantially related out-of-state discipline. BPC section 480 also authorizes the Bureau to deny a license application on the basis of substantially related formal discipline by a licensing Bureau in or outside of California. The proposed regulation seeks to implement, interpret, and make specific BPC sections 141 and 480 by adding their relative provisions to the Bureau'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 sections 141 and 480. The proposal is also necessary to consolidate, into one regulation, the criteria that the Bureau will apply in evaluating whether a crime or other misconduct is substantially related to the licensed profession.

**Amend section 3395.2, subsection (b)**

Purpose: The purpose of adding CCR section 3395.2, subsection (b), is to implement AB 2138 and BPC section 481, which requires each bureau or 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 bureaus and boards.

Anticipated Benefit: The proposed revisions to section 3395.2, subsection (b), would provide clarity and transparency to license applicants and licensees by listing the specific criteria the Bureau must consider when making the substantial relationship determinations applicable to criminal convictions. The proposal would also make relevant parties aware of 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 Bureau to determine whether a criminal conviction is substantially related to the automotive repair profession.

Rationale: BPC section 480 presently authorizes the Bureau 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, section 490 authorizes the Bureau 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 section 481 requires the Bureau to develop criteria to help evaluate whether a crime was substantially related to the regulated business or profession, and the Bureau 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 section 480 to limit the ability to use prior convictions or acts when denying licenses. Beginning July 1, 2020, the Bureau 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 the Bureau to deny a license when an applicant has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the regulated business or profession, and one of the following conditions exist:

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

AB 2138 also specifies three criteria that Bureau 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 Bureau to consider when making the substantial relationship determination. This proposed addition is necessary to conform

the regulation to statute, and to consolidate the Bureau's substantial relationship criteria in one place.

### **CONSIDERATION OF ALTERNATIVES**

No reasonable alternative to the regulatory proposal was found to be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

BAR considered the alternative of taking no action. However, taking no action was rejected because, per AB 2138, the Bureau is mandated to adopt proposed regulations by July 1, 2020.

### **TECHNICAL, THORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

None.

### **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 applicants, licensees, and registrants with criminal histories or licensure discipline to obtain and maintain licensure. This regulatory proposal does not impose new burdens or requirements on those applicants, licensees, nor registrants that would eliminate jobs;
- It will not create new business 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. This regulatory proposal does not impose new burdens or requirements on those applicants, licensees, nor registrants that would create or eliminate business;
- 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 does not impose new burdens or requirements on those applicants, licensees, nor registrants that would expand business;
- This regulatory proposal benefits the health and welfare of California residents, because it would increase their access to licensed professional to conduct an automotive repair-related business.
- This regulatory proposal does not affect worker safety because it is not relevant to worker safety. This proposal establishes criteria, based upon recent statutory mandates for licensure following the applicant's, licensee's or registrant's criminal conviction;
- This regulatory proposal does not affect the state's housing needs because it is not relevant to the state's housing issues; and

- This regulatory proposal does not affect the state’s environment because it only regulates applicants, licensees, and registrants, and their qualifications for licensure following a criminal conviction or disciplinary action and as such is not relevant to the state’s environment.

**IMPACT ON BUSINESSES**

BAR has made an initial determination that the proposed regulatory action will not have a significant adverse economic impact on businesses. The regulatory changes do not impose additional requirements that impact the conduct of an automotive repair-related business. This initial determination is based on the purpose of AB 2138, which sought to reduce barriers to licensure for applicants, licensees, and registrants with criminal histories or licensure discipline. The Bureau anticipates that the proposed regulation will impact businesses to the extent that individual applicants or licensees are able to be licensed or retain licensure under the proposal. The Bureau does not know how many applicants will gain or retain licensure, but does not anticipate the number to significantly impact businesses.

**SPECIFIC TECHNOLOGIES OR EQUIPMENT**

None.

**DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS**

None.