

DENTAL BOARD OF CALIFORNIA
FINAL STATEMENT OF REASONS

Effective Date

The Dental Board (Board) requests an effective date on filing to coincide as closely as possible with the implementation date in Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018).

Subject Matter of Proposed Regulations: Substantial Relationship Criteria and Application Review and Criteria for Evaluating Rehabilitation

Section(s) Affected: Sections 1019 and 1020 of Title 16 of the California Code of Regulations (CCR)

Updated Information

The Informative Digest and Initial Statement of Reasons are included in the rulemaking file and incorporated as though set forth herein.

The information contained therein is updated as follows:

Modifications were made to the originally approved and noticed text. The Board approved the modified text during its May 14, 2020 Board meeting. The 15-day public comment period for the modified text ran from May 18, 2020 to June 2, 2020. An extended comment period on the modifications ran from June 2, to June 17, 2020. The Board did not receive any comments regarding the modified text.

Below is a description of the modifications that were made to the text.

Section 1019

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

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

- B. Insertion in subdivision (a) of “or Sections 1670.1, 1680(e), 1681(c).”

The cited sections refer to grounds for discipline listed in the Board’s practice act for “substantially related” offenses. They are proposed to be added here so that references to substantial relationship are addressed together in one regulation. This amendment

will add clarity to this subdivision.

C. Insertion in Note of Reference sections 1670.1, 1680, and 1681.

The Board proposes to add these sections to the Reference section of the regulation because the regulation, as modified, implements, interprets, and/or makes specific these additional BPC sections.

Section 1020

A. Insertion in re-numbered subdivision (b) of “Denial of a license.”

The Board proposes the addition of this category because it lends greater organization and clarity to the regulation.

B. Re-numbering of subdivision (b)(1)-(5) to subdivision (1)(A)-(E) and re-numbering of subdivision (c)(1)-(6) to subdivision (2)(A)-(F).

This re-numbering is necessitated by the creation of new subdivision (b).

C. Deletion in subdivision (b)(1) of “was” and insertion of “has been.”

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

D. Deletion in subdivision (b)(1) of “and is presently eligible for a license.”

The Board proposes to delete this phrase from subdivision (b)(1) of section 1020 because “eligible” could be seen as referring to other eligibility requirements for licensure, rather than referring to fitness or suitability for licensure. Deletion of this phrase will clarify the regulation.

E. Insertion in subdivision (b)(2) of “If the applicant has not completed the criminal sentence at issue without a violation of parole or probation, the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (b)(1), the denial is based on professional misconduct, or the denial is based on the ground specified in Section 1687,” deletion of “If subdivision (b) is inapplicable, or the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (b),” and deletion of “The board shall find that the applicant made a showing of

rehabilitation and is presently eligible for a license if, after considering of the following criteria, the board finds that the applicant is rehabilitated.”

The original text of subdivision (b)(2) was unclear in specifying the circumstances when the regulation would apply. Instead of catch-all language, the Board proposes to delete the former preface to the regulation and enumerate each specific instance of when subdivision (b)(1) would not apply, and proposes to include all of the specified categories.

The Board proposes to cite BPC section 1687 since it is in the Board's practice act and authorize the Board to deny a license. This would make the regulation inclusive of all of the instances in which the Board could deny a license.

The Board proposes to delete the final sentence of subdivision (b)(2) for clarity and brevity.

F. Insertion in subdivision (b)(2)(A)-(C) of “professional misconduct.”

The addition of “professional misconduct” to subdivision (b)(2)(A) through (C) is made necessary by the addition of “professional misconduct” in subdivision (b)(2).

G. Deletion in subdivision (b)(2)(B) of “under Section 480 of the Code.”

Because the Board proposes to add “professional misconduct” to subdivision (b)(2), that necessitates the removal of this phrase because the amended subdivision now encompasses more than crimes and acts enumerated in section 480.

H. Re-numbering of (1) and (2) in subdivision (b)(2)(C) to (A) and (B).

This re-numbering is necessitated by the creation of new subdivision (b).

I. Deletion in subdivision (b)(2)(E) of “-” and insertion of “through.”

The Board proposes this amendment to lend greater clarity to the subdivision.

J. Insertion in re-numbered subdivision (c) of “Suspension or revocation of a license.”

The Board proposes the addition of this category because it lends greater organization and clarity to the regulation.

K. Deletion in subdivision (c)(1) of “and is presently eligible for a license.”

The Board proposes to delete this phrase from subdivision (c)(1) of section 1020 because “eligible” could be seen as referring to other eligibility requirements for

licensure, rather than referring to fitness or suitability for licensure. Deletion of this phrase will clarify the regulation.

L. Re-numbering of subdivision (d)(1)-(5) to subdivision (1)(A)-(E)

This re-numbering is necessitated by the creation of new subdivision (c).

M. Insertion in subdivision (c)(2) of “If the licensee has not completed the criminal sentence at issue without a violation of parole or probation, the board determines that the licensee did not make the showing of rehabilitation based on the criteria in subdivision (c)(1), the suspension or revocation is based on a disciplinary action as described in Section 141 of the code, or the suspension or revocation is based on one or more of the grounds specified in Sections 1611.5, 1638.1, 1646.7, 1647.9, 1647.17, 1647.25, 1647.34, 1670, 1670.1, 1680, 1681, 1682, 1683, 1683.1, 1684, 1684.1, 1684.5, 1685, 1687,” deletion of “If subsection (d) is inapplicable, or the board determine s that the licensee did not make the showing of rehabilitation based on the criteria in subsection (d),” and deletion of “. The board shall find that the licensee made a showing of rehabilitation and is presently eligible for a license if, after considering the following criteria, the board finds that the licensee is rehabilitated.”

The original text of subdivision (c)(2) was unclear in specifying the circumstances when the regulation would apply. Instead of catch-all language, the Board proposes to delete the former preface to the regulation and enumerate each specific instance of when subdivision (c)(1) would not apply, and now proposes to include all of the specified categories.

The Board proposes to cite BPC sections 1611.5, 1638.1, 1646.7, 1647.9, 1647.17, 1647.25, 1647.34, 1670, 1670.1, 1680, 1681, 1682, 1683, 1683.1, 1684, 1684.1, 1684.5, 1685, 1687 since they are in the Board's practice act and authorize the Board to discipline a license. This would make the regulation inclusive of all of the instances in which the Board could discipline a license.

The Board proposes to delete the final sentence of subdivision (c)(2) for clarity and brevity.

N. Re-numbering of subdivision (e)(1)-(7) to subdivision (2)(A)-(G).

This re-numbering is necessitated by the creation of new subdivision (c).

O. Insertion in subdivision (b)(2)(A) and (b)(2)(C) of “disciplinary action(s).”

The addition of “disciplinary action(s)” to subdivision (c)(2)(A) and (c)(2)(C) is made necessary by the addition of “disciplinary action” in subdivision (c)(2).

P. Deletion in subdivision (c)(2)(F) of “-” and insertion of “through.”

The Board proposes this amendment to lend greater clarity to the subdivision.

Q. Re-numbering of (d)(1)-(5) in subdivision (c)(2)(F) to (c)(1)(A)-(e).

This re-numbering is necessitated by the creation of new subdivision (c).

R. Re-numbering of subdivision (f) to (d) and re-numbering of (e) to (c)(2) in re-numbered subdivision (d).

This re-numbering is necessitated by the creation of new subdivision (c).

S. Insertion in Note of Reference sections 1611.5, 1638.1, 1646.7, 1647.9, 1647.17, 1647.25, 1647.34, 1670, 1670.1, 1680, 1681, 1682, 1683, 1683.1, 1684, 1684.1, 1684.5, 1685, and 1687.

The Board proposes to add these sections to the Reference section of the regulation because the regulation, as modified, implements, interprets, and/or makes specific these additional BPC sections.

The Board provided 15 days’ notice of these modifications to the public for comment. No comments were received.

No hearing was requested. No hearing was held.

Local Mandate

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

The initial 45-day public comment period ran from March 13, 2020 to April 28, 2020.

On April 28, 2020, the Board received public comment in a joint letter from A New Way of Life Reentry Project, Californians for Safety and Justice, Center for Employment Opportunities, Center for Living and Learning, Community Legal Services in East Palo Alto, Criminal Justice Clinic, UC Irvine School of Law, East Bay Community Law Center, Legal Aid at Work, Legal Services for Prisoners with Children, All of Us or None, Los Angeles Regional Reentry Project, National Association of Social Workers, California Chapter, REDF, The Record Clearance Project, San Jose State University, Root and Rebound, Rubicon Programs, and Underground Scholars Initiative on the Board’s proposed regulations implementing Assembly Bill (AB) 2138. Below are the Board’s responses to the comments made therein.

Comment 1

Comment Summary:

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

Response:

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

1. The nature and gravity of the offense.
2. The number of years elapsed since the date of the offense.
3. The nature and duties of a dentist or dental auxiliary.

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

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

Comment 2

Comment Summary:

The regulations do not comply with AB 2138 because proposed section 1019(c) states that certain violations are substantially related regardless of the time that has passed or the nature and gravity of the offense in contravention of BPC section 481. AB 2138 allows the Board discretion to determine which crimes are substantially related on an individual basis.

Section 1019(c) fails to note that criminal history that resulted in the applicant obtaining a certificate of rehabilitation, pardon, dismissal per Penal Code section 1203.4 et seq., or an arrest that resulted in a disposition other than a conviction shall not be denied a license. See Business and Professions Code section 480(b)-(d).

Response:

The Board rejects this comment.

Subdivision (c) of section 1020 provides that substantially related crimes, professional misconduct, or acts shall include:

- Any violation of Article 6, Chapter 1, Division 2 (hereinafter, “Article”) of the Code except Sections 651.4, 654 or 655. (§ 1020, subd. (c)(1).)
- Any violation of the provisions of Chapter 4, Division 2 (hereinafter, “Dental Practice Act”) of the Code. (§ 1020, subd. (c)(2).)

Violations of the Article and violations of the Dental Practice Act are committed by licensees in performing the functions and duties of the dental profession. (See, for example, Bus. & Prof. Code, § 652 [violations of the Article “constitutes unprofessional conduct and grounds for suspension or revocation of his or her license by the board by whom he or she is licensed[.]”].) Accordingly, they evidence the present or potential unfitness of a person holding such a license to perform the functions authorized by the license. Furthermore, a violation of the Dental Practice Act does not become “no longer” substantially related due to the passage of time.

AB 2138 does allow a case-by-case determination of whether or not crimes, conduct, or acts are substantially related, and those factors are listed in subsection (b) to be used when otherwise not addressed by statute, regulation, case law, or precedential decision. By using a quasi-legislative method to determine those areas the Board considers substantially related in advance rather than on an individual (case-by-case) basis, however, the Board achieves consistency for violations seen on a regular basis and thus provides a fair and level playing ground for applicants. An applicant with a substantially related violation could still receive a license if rehabilitation is shown, such as passage of time since the violation occurred, pursuant to the rehabilitation criteria of section 1020.

As for the comment in the second paragraph, please see response to Comment 5.

Comment 3**Comment Summary:**

Section 1020 relies too heavily on law enforcement’s reports and determination of the applicant’s progress. Rehabilitation can and does take many forms that the current language does not fully embrace. The comment refers the reader to Comment 8 below for examples of rehabilitation to expand the regulations.

Response:

As addressed more fully in the Board's response to Comment 8, section 1020 permits the applicant to offer evidence of rehabilitation that can encompass any of the forms of rehabilitation proposed in the letter. Accordingly, the Board believes that the proposed language is consistent with legislative intent.

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

Comment 4

Summary:

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

Response:

The Board rejects this comment. Regulations should not indiscriminately incorporate statutory language. (Gov. Code, § 11349, subd. (f).)

The seven-year period during which a board can deny a license for a conviction or formal discipline is fully described in BPC section 480(a)(1)(A) and (B), effective July 1, 2020. As this is already included in statute, adding this provision is duplicative of section 480(a)(1). Therefore, it is not necessary to repeat it in the regulations.

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

Comment 5

Comment Summary: This comment states that the regulations should provide that a person with a criminal history shall not be denied a license if the applicant has obtained a certificate of rehabilitation, dismissal per Penal Code section 1203.4, 1203.4a, 1203.41, or 1203.42, or an arrest which led to an infraction/citation or a disposition other than a conviction, or juvenile adjudication. (BPC, § 480, subds. (b)-(d).)

Response:

The Board rejects this comment. Regulations should not indiscriminately incorporate statutory language. (Gov. Code, § 11349, subd. (f).) BPC section 480(c), effective July 1, 2020, already states that a license may not be denied based on a conviction, or on the basis of the underlying acts, if it has been dismissed pursuant to Penal Code

sections 1203.4, 1203.4a, 1203.41, 1203.42, or 1203.425, or otherwise dismissed or expunged. In addition, BPC section 480(b), effective July 1, 2020, prohibits license denial if the applicant has obtained a certificate of rehabilitation, was granted clemency or a pardon, or has made a showing of rehabilitation per BPC section 482. BPC section 480(d), effective July 1, 2020, prohibits license denial based on an arrest that resulted in something other than a conviction, such as an infraction, citation, or juvenile adjudication. Since these provisions are already specifically addressed in statute, adding them again in regulation would be duplicative.

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

Comment 6

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

Response:

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

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

Comment 7

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

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

11349, subd. (f).)

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

Comment 8

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

- Volunteer service;
- Successful employment in a related field;
- A history of work experience in an employment social enterprise;
- Unpaid work in the community;
- Furthered education;
- Abstinence from controlled substances and/or alcohol;
- Stability of family life, fulfillment of parental and familial responsibilities;
- New and different social and business relationships from those which existed at the time of the underlying charges at issue;
- Change in attitude of the applicant as evidenced by:
 - Personal testimony,
 - Evidence of rehabilitation submitted by the applicant,
 - Evidence from family, friends, and/or other persons familiar with the applicant's previous behavior patterns and subsequent attitude and behavioral changes; and
- Other markers of rehabilitation.

Response:

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

The final text for proposed section 1020 articulates a two-step process for evaluating rehabilitation:

1. First, the Board must determine if the completion of the criminal sentence with no violations constitutes rehabilitation. Consistent with the direction in AB 2138, to consider rehabilitation if an applicant completes the criminal sentence at issue

without a violation of parole or probation, specific criteria are being added to section 1020(b) to help the Board determine whether sentence completion demonstrates rehabilitation. Criteria include the nature and gravity of the crime(s), the length(s) of the applicable parole or probation period(s), the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified, the terms and conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation, and the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. If the Board finds rehabilitation, no further information needs to be provided.

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

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

Comment 9

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

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

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

Consideration of Alternatives

The Board considered the alternatives presented in the public comment. The reasons for rejecting the suggested alternatives are described in the Board's responses to the public comment. No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be more effective in

carrying out the purpose for which it was proposed or would be as effective and less burdensome to affected private persons than the adopted regulations or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Economic Impact

The Board historically denies a minimal number (ranging from 0 to 5) of initial license applications per year. The Board notes, it anticipates AB 2138 to impact primarily Registered Dental Assistants (RDA) and RDAs in extended functions (RDAEF) applicants and not Dental applicants because this population is entry-level and has a significantly greater number of applicants with a criminal history.

Because Dentists have greater educational and professional experience requirements to licensure and because these applicants have significantly fewer criminal convictions than RDA and RDAEF applicants, the Board does not anticipate an expansion of dental licensees resulting from the proposed regulations.

The Board notes, while AB 2138 is intended to reduce barriers to initial licensure, it does not anticipate a significant increase (ranging from 0 to 1) of initial license applications approved per year and be required to pay the initial license fee of \$120 as follows:

Category	Applications Per Year	Fee Amount	Total Cost Per Year
RDA Application Fee	1	\$ 120	\$ 120

Licensees will also be required to pay ongoing biennial renewal fees as follows:

Category	Applications Per Year	Fee Amount	Total Cost Per Year
RDA Biennial Renewal Fee	1	\$100	\$100

The total economic impact is estimated to be up to approximately \$520 per year and \$3,200 over a ten-year period as follows:

AB 2138 Impact - Estimates Number of Additional Registrants and Licensees Per Year													
Registration and License Type	Applicants Per Year	Fee Costs Per Year	Years Ongoing										
			1	2	3	4	5	6	7	8	9	10	Total
Registered Dental Assistant Application	1	\$120	\$120	\$120	\$120	\$120	\$120	\$120	\$120	\$120	\$120	\$120	\$1,200
Registered Dental Assistant Biennial License Renewal	Varies	\$100	\$ -	\$ -	\$100	\$100	\$200	\$200	\$300	\$300	\$400	\$400	\$2,000
Total Costs:			\$120	\$120	\$220	\$220	\$320	\$320	\$420	\$420	\$520	\$520	\$3,200

Fiscal Impact

The Board anticipates no more than one initial RDA or RDAEF license will be approved per year as a result of the proposed regulations. Any workload and costs to process the initial and renewal applications will likely be absorbed within existing resources. The Board further anticipates any enforcement-related workload and costs to be minor and absorbable within existing resources.

The state impact is anticipated to be minor due to the small number of renewals (one anticipated) which will be impacted and the small amount of increased revenue resulting from the rulemaking. The Board estimates minimal increased license fee revenue of no more than \$120 per year for initial licenses and no more than \$520 per year resulting from the proposed regulations for both initial licenses and biennial renewals on an ongoing basis.

The Board anticipates costs to implement the provisions of AB 2138, the legislation upon which this regulatory proposal is based, which would include workload to obtain criminal history information either from the applicant or from local county courthouses. Staff will be required to contact the counties for this information, as well as paying any associated costs for such documents.

The Board anticipates costs of \$110,000 in 2020-21 and \$102,000 annually thereafter to fund 1.0 Office Technician position to implement the provisions of AB 2138.

Nonduplication Statement - 1 CCR § 12

The proposed regulations partially duplicate or overlap a state or federal statute or regulation which is cited as “authority” and “reference” for the proposed regulations and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code section 11349.1(a)(3).