

PHYSICIAN ASSISTANT BOARD

INITIAL STATEMENT OF REASONS

Hearing Date: The Board has not scheduled a hearing in this matter.

Subject Matters of Proposed Regulations: Required Actions Against Registered Sex Offenders

Sections Affected: Section 1399.523.5 of Title 16 of the California Code of Regulations

Specific Purpose of each adoption, amendment, or repeal:

1. Problem being addressed:

The Physician Assistant Board (Board) licenses physician assistants, who are licensed health care practitioners that provide medical services under the supervision of a licensed physician and surgeon (Business and Professions Code section 3502). Existing law (Business and Professions Code sections 480 and 490) presently authorizes the Board to deny an application for licensure or discipline a physician assistant based on a conviction for a crime or act substantially related to the licensed business or profession. Business and Professions Code section 481 authorizes the Board to develop criteria for determining whether a crime or act is substantially related to the qualifications, functions, or duties of the physician assistant profession. Business and Professions Code section 482 requires the Board to develop criteria to evaluate an applicant's or licensee's rehabilitation when considering the denial or discipline of a physician assistant license. Consistent with that authority, the Board has adopted regulations that set forth its substantial relationship criteria and rehabilitation criteria for crimes or acts considered substantially related to qualifications, functions, or duties of a physician assistant licensee.

In July 2009, the Los Angeles Times published an article indicating that the Board of Registered Nursing often takes years to take disciplinary action on complaints of egregious misconduct, while the licensees were still practicing. As a result of the article, the Department of Consumer Affairs (Department) held an informational hearing and investigated the problems that were addressed in the Los Angeles Times article. The Department developed a report (Department of Consumer Affairs "Consumer Protection Enforcement Initiative BCP Independent Verification & Validation Report, March 2010") regarding the existing enforcement problems and made recommendations for improving the enforcement programs of the healing arts boards.

In 2011 the Department encouraged this Board to adopt its recommendations to enhance consumer protection, including this regulation that requires the Board to deny an application or petition for reinstatement, or promptly revoke the license of any individual who is required to register as a sex offender in every case as provided in subsection (a). The regulation also includes few exceptions to these prohibitions in subsection (b); mainly exceptions in cases where an individual was relieved of the requirement to register, the

requirement for registration was terminated, or the individual was convicted of a misdemeanor under Penal Code section 314 (indecent exposure). However, the Board explicitly retained its discretion to deny or discipline a licensee under any other provision of state law for this conduct.

Effective July 1, 2020, under the provisions of Assembly Bill (AB) 2138 (Stats. 2018, ch. 995), the Board's existing authority to deny an initial applicant a license based upon a substantially related criminal conviction significantly changed. This proposal seeks to update the Board's current regulations consistent with this recently enacted legislation and to more accurately reflect the Board's authority to consider denials, discipline or petitions for reinstatement or modification of penalty for individuals required to register as a sex offender under California law or its equivalent in another state or territory, or under military or federal law.

Effective July 1, 2020, Business and Professions Code section 480 (Section 480), subdivision (b) prohibits the Board from denying a license to a person on the basis that he or she has been convicted of a crime, or on the basis of acts underlying a conviction for a crime, if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code, has been granted clemency or a pardon by a state or federal executive, or has made a showing of rehabilitation pursuant to Business and Professions Code section 482. As a result, the Board will need to revise 16 CCR 1399.523.5 to make it consistent with the aforementioned changes to the law enacted by AB 2138. This includes permitting an individual who is required to register as a sex offender to be eligible for licensure if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code, has been granted clemency or a pardon by a state or federal executive, or made a "showing of rehabilitation."

2. Anticipated benefits from this regulatory action:

The proposed amendment would allow applicants the opportunity to supply evidence to the Board of rehabilitation without automatically being denied a license based on sex offender registration. AB 2138 was enacted to reduce licensing and employment barriers for people who are rehabilitated. This includes permitting an individual who is required to register as a sex offender to be eligible for licensure if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code, has been granted clemency or a pardon by a state or federal executive, or made a showing of rehabilitation. These proposed amendments would further that goal by adopting criteria that would remove restrictions for an initial applicant to qualify for licensure under the aforementioned conditions, provide notice to applicants of these new eligibility requirements, and emphasize an applicant's rehabilitative efforts. This may lead to fewer denials and an increase in the number of licensed physician assistants in the marketplace. Therefore, this may allow for more health care providers to treat increasing numbers of California consumers.

Factual Basis/Rationale

Amend Section 1399.523.5 – Required Actions Against Registered Sex Offenders

The factual basis for the determination that each proposed amendment to Section 1399.523.5 is reasonably necessary to address the problem for which it is proposed:

Business and Professions Code section 3510 (Section 3510) authorizes the Board to adopt, amend, and repeal regulations that may be necessary to enable it to carry out the provisions of its practice act. At the Board's August 10, 2018 meeting, members discussed how AB 2138 proposed to create new standards for how the Board would be authorized to deny an applicant based upon a crime or act substantially related to physician assistant licensure. The Legislature's intent in enacting AB 2138 was to reduce licensing and employment barriers for persons who are rehabilitated. At the Board's April 29, 2019 meeting, members discussed how existing law presently authorizes the Board to deny an application for licensure based on a conviction for a crime or act substantially related to the qualifications, functions, or duties of a physician assistant license. Likewise, Business and Professions Code section 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 physician assistant license.

Specifically, the Board proposes the adoption of the following amendments to Section 1399.523.5 for the following reasons:

- (1) Subsection (b)(1) delete the words "deny or"

Current subsection (b) of this Section exempts certain categories of individuals from the prohibitions against licensure in subsection (a) for registered sex offenders. Subsection (b)(1) exempts licensees who were relieved of the requirement to register, or the requirement for registration was terminated under California law or the law that required the registration. However, subsection (b)(1) also includes the following:

[p]rovided, however, that nothing in this paragraph shall prohibit the board from exercising its discretion to deny or discipline a licensee under any other provision of state law based upon the licensee's conviction under any other provision of state law.

This proposal would repeal the words "deny or" in subsection (b)(1) to make it clearer that the exception applies to licensees only.

Effective July 1, 2020, Business and Professions Code section 480 was amended under the provisions of AB 2138 to prohibit any board in the Department of Consumer Affairs, including the Physician Assistant Board (Board), from denying any license "regulated by this code" on the basis of a conviction unless it meets the criteria set forth in Section 480 "notwithstanding any other provision of law." (Bus. & Prof. Code, §480, subd. (a), as amended by AB 2138, § 4.) In addition, 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. (Bus. & Prof. Code, § 480, subds. (b) & (c), as added by AB 2138, § 4.) As a result, the Board's regulation that currently permits the Board to consider denial for the same acts under different provisions of law would be inconsistent with Section 480.

However, these amendments and restrictions on the Board's authority expressly apply to initial applicants for licensure and not licensees. To avoid possible conflicts with Section 480 and confusion regarding the scope of the Board's authority to deny an initial applicant under these revised amendments, the Board is proposing to delete the words "deny or" from this subsection.

Further, denial is a term used in the Board's laws for applicants for licensure and the Board does not deny licensees, but rather imposes discipline (e.g. suspension or revocation) as authorized by Business and Professions Code sections 490 and 3531. As a result, the reference to "deny" in conjunction with "licensee" creates confusion in the administration of this subsection and this language should be removed to avoid creating any ambiguities in interpretation of this subsection.

(2) Subsection (b)(2) delete the words "deny or"

Current Subsection (b)(2) exempts licensees from the prohibitions in subsection (a) if the licensee was convicted of misdemeanor under Penal Code section 314 (indecent exposure). However, subsection (b)(2) also includes the following provision:

[p]rovided, however, that nothing in this paragraph shall prohibit the board from exercising its discretion to deny or discipline a licensee under any other provision of state law based upon the licensee's conviction under any other provision of state law.

This proposal would delete the words "deny or" in subsection (b)(2) to make it clearer that the exception applies to licensees only. See discussion of amending 16 CCR section 1399.523.5, subsection (b)(1), above, supporting removing "deny or" to clarify that the exception made there only applies to licensees, as that same rationale supports removing "deny or" in subsection (b)(2), again to clarify that the exception only applies to licensees.

(3) Add a new subsection: "(b)(3) An individual applying for licensure who has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code, or who has been granted clemency or a pardon by a state or federal executive."

This proposal would create a new subsection (b)(3) and a new sentence that exempts an applicant from the prohibitions in subsection (a), if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code, or has been granted clemency or a pardon by a state or federal executive. This addition is necessary to make the regulation consistent with amendments to Section 480 enacted by AB 2138.

Effective July 1, 2020, Business and Professions Code section 480 (Section 480), subdivision (b) prohibits the Board from denying a license to a person on the basis that he or she has been convicted of a crime, or on the basis of acts underlying a conviction for a crime, if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code, or has been granted clemency or a pardon by a state or federal executive. As a result, the addition of this subsection is needed to make Section 1399.523.5 consistent with the aforementioned changes to the law enacted by AB 2138. This includes permitting an individual who is required to register as a sex offender to be eligible for licensure if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code or has been granted clemency or a pardon by a state or federal executive.

- (4) Add new subsection: “(b)(4) An individual applying for licensure who has made a showing of rehabilitation pursuant to Section 1399.526.”

This proposal would create a new subsection (b)(4) and new sentence that expressly exempts an individual who is required to register as a sex offender from the prohibitions in subsection (a) if the individual makes a showing of rehabilitation pursuant to the Board’s rehabilitation criteria in Section 1399.526. This addition is necessary to make the regulation consistent with amendments to Section 480 enacted by AB 2138.

Effective July 1, 2020, Business and Professions Code section 480 (Section 480), subdivision (b) prohibits the Board from denying a license to a person on the basis that he or she has been convicted of a crime, or on the basis of acts underlying a conviction for a crime, if he or she has made a showing of rehabilitation pursuant to Business and Professions Code section 482 (Section 482). As a result, the Board will need to revise this subsection to make it consistent with the amendment. This includes permitting an individual who is required to register as a sex offender to be eligible for licensure if he or she made a “showing of rehabilitation.”

Section 482 requires this Board to develop criteria to evaluate the rehabilitation of an applicant when considering a denial. The Board has adopted criteria to evaluate an applicant’s rehabilitation at Title 16, California Code of Regulations section 1399.526. Consequently, this new subsection is both necessary to comport with amendments enacted by AB 2138 and provide proper notice of where those criteria are located in compliance with Sections 480 and 482.

- (5) Renumber subsection (b)(3) to (b)(5) and amend as follows: delete the words “the effective date of this regulation”; add the date of “July 1, 2020.”

Existing section (b)(3) would be renumbered to (b)(5) to accommodate the addition of the new subsections (b)(3) and (b)(4) and to allow for greater comprehension and readability of the regulation.

The Board is also proposing changing the effective date of the regulation to coincide with the effective date of AB 2138. Effective July 1, 2020, under the provisions of AB 2138, the Board’s existing authority to deny an applicant a license based upon a substantially

related criminal conviction significantly changed. As a result, this proposed change is necessary to provide accurate notice to all parties of the Board's authority to evaluate initial applicants' eligibility for licensure and make it clearer that the amendments made in conformity with AB 2138 will not have a retroactive effect. The proposed changes will not apply to those administrative cases that were fully adjudicated prior to the effective date of the new changes in law, which is July 1, 2020.

- (6) Add new subsection (c) and amend: replace the word "paragraph" with the word "Section"; add the sentence "Subsection (b)(4) of this Section shall not be interpreted to apply to any individual applying for reinstatement of a license."

Existing subsection (c) states that "A petition for reinstatement of a revoked or surrendered license shall be considered a new proceeding for purposes of this paragraph, and the prohibition in subsection (a) against reinstating a license shall govern." This proposal would change the word "paragraph" to "Section" to avoid confusion about whether a petition for reinstatement should be considered a new proceeding for purposes of the prohibitions against issuing a license in subsection (a)(3).

The proposal would also add a new sentence as follows: "Subsection (b)(4) of this Section shall not be interpreted to apply to any individual applying for reinstatement of a license," indicating an individual applying for reinstatement of his or her license will not be affected by AB 2138.

As discussed above, changes to the law required by AB 2138 mean that the Board will be limited in its discretion to consider crimes, including sex offender types of convictions, as a legal basis for denial when evaluating the past conduct of initial applicants.

However, those statutory limitations will not apply to disciplinary matters or petitions for reinstatement. Section 480 expressly applies to applicants and the legislative history shows a deliberate intent to extend the benefits of AB 2138 only to initial applicants. (See Committee analysis of AB 2138 bill that states, "As such the bill should be amended so that is (*sic*) only applies to initial licensure considerations and strike reference to suspension and revocation determinations," Senate Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018, p. 11.)

As the California Court of Appeal has explained, a petitioner for reinstatement is "not in the position of an untried newcomer, but a fallen licentiate. Under the circumstances, it is not unreasonable for the Board to be exacting in its requirements as to proof of reform." (*Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398.)

In the Board's experience, given the seriousness of the offense and the high risk of harm to patients for a licensee with this type of criminal history, using the same criteria as those used for licensees helps ensure no "revolving" door where a licensee disciplined under subsection (b)(2) could apply to have a license reinstated under subsection (c). In addition, this clearer restriction helps ensure a licensee that has already endangered the public meets a more exacting standard for the protection of the public.

Amendment to Section 1399.523.5 Note:

Since a substantially related crime as defined in Section 1399.523.5 would be a basis for imposing discipline or denying an application pursuant to Sections 480, and 482, the Board proposes to add these sections of the Business and Professions Code to the “notes” section of this regulation to comply with the “Reference” standard in the Administrative Procedure Act.

Underlying Data

Technical, theoretical or empirical studies, reports, or documents relied upon (if any):

1. Minutes of the Physician Assistant Board’s April 29, 2019 meeting.
2. Assembly Bill 2138, as amended in Assembly April 2, 2018.
3. Assembly Bill 2138, as amended in Senate June 20, 2018.
4. Assembly Bill 2138, chapter 995, Statutes of 2018.
5. Senate Committee on Business, Professions and Economic Development Analysis for AB 2138, dated June 18, 2018.
6. Assembly Floor Analysis for AB 2138 dated August 24, 2018.

Business Impact

This regulation will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. This initial determination is based on the following facts:

The Board has approximately 12,980 licensees for the current fiscal year. During the 2016/2017 fiscal year the Board issued 1,064 licenses and denied two (2), in fiscal year 2017/2018 the Board issued 1,096 licenses and denied two (2), and during the 2018/2019 fiscal year the Board has issued 1,189 licenses and denied one (1). The Board has denied 0.15 % of all applicants. The Board has never received an initial application for licensure from a registered sex offender. However, in fiscal year 2018/2019 the Board received a request for reinstatement from a former licensee whose license had been revoked and that reinstatement was denied because the former licensee was a registered sex offender.

Since the Board has denied less than 1% of all applicants this proposal will not have a significant adverse economic impact. AB 2138 was enacted to reduce licensing and employment barriers for people who have been convicted of a crime or due to acts underlying the conviction, who have a certificate of rehabilitation, were granted clemency, or made a showing of rehabilitation, or the conviction was dismissed or expunged.

These amendments will further assist in that effort through adoption of standards designed to permit an initial applicant who is required to register as a sex offender to be eligible for licensure if he or she has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code, has been granted clemency or a pardon by a state or federal executive, or has made a showing of rehabilitation. As a result, it is anticipated that there may be fewer denials based upon these types of criminal convictions requiring sex offender registration, and therefore, no significant or statewide adverse economic impacts.

Economic Impact Assessment

This regulatory proposal will have the following effects:

It may result in the creation of new jobs within the state of California because it implements AB 2138, legislation designed to reduce licensing and employment barriers for people who have been convicted of a crime who have a certificate of rehabilitation, were granted clemency, or made a showing of rehabilitation, or their conviction was dismissed or expunged. This proposal will amend the regulation to add explicit exemptions for applicants meeting the aforementioned criteria, which may result in having fewer license denials based on sex offender registration. However, the Board does not have data to project the number of jobs that may be created as a result of these efforts.

It will not create new businesses or eliminate existing businesses within the state of California because the proposal is not of sufficient magnitude to create or eliminate businesses. Historically, similar regulations adopted by the Board resulted in less than one percent (1%) of all applicants being denied. Even assuming that the number of denials would decrease as a result of these amendments, the Board believes that this data demonstrates that these amendments would not be significant enough to create or eliminate businesses who hire physician assistants.

It will not affect the expansion of businesses currently doing business within the state of California because the proposal is not of sufficient magnitude to expand businesses. Historically, similar regulations adopted by the Board resulted in less than one percent (1%) of all applicants being denied. Even assuming that the number of denials would decrease as a result of these amendments, the Board believes that this data demonstrates that it would not be significant enough to expand businesses who hire physician assistants.

This regulatory proposal will benefit the health and welfare of California residents because by implementing criteria that emphasize rehabilitative efforts, it will create an opportunity for employment for people who are required to register as a sex offender and are able to make a showing of rehabilitation. This may lead to an increase in physician assistants in the marketplace, therefore allowing for more health care providers to treat increasing numbers of California consumers.

This regulatory proposal will not affect worker safety because the proposal does not involve worker safety.

This regulatory proposal will not affect the state's environment because it does not involve environmental issues.

To the extent license applicants were convicted of a crime the proposed regulations could impact individual applicants by authorizing individuals with criminal convictions to obtain licensure by the Board, if they have met the rehabilitative criteria, and the criminal convictions are substantially related, as established in the regulatory proposal.

However, because the Board historically denies less than one initial application per year, as specified, the Board does not anticipate an increase in the number of new initial licensees resulting from the proposed regulations.

Fiscal Impact

The Board anticipates increased costs to the state as a result of adopting and amending the sections identified in the regulatory proposal. By further defining the substantial relationship and rehabilitation criteria for criminal convictions, Board staff may see increased workload to research convictions and to substantiate rehabilitation has been achieved. Any workload and costs are anticipated to be minor and absorbable within existing resources.

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

Specific Technologies or Equipment

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

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Set forth below are the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small business:

1. Not amend the regulation: This alternative was rejected because the Board needed to ensure that its actions taken against registered sex offender regulation was revised in light of recent legislative amendments. AB 2138 requires the Board to consider applicant eligibility for initial applicants who have been convicted of any crime and who have a certificate of rehabilitation, were granted clemency or a pardon, or made a showing of rehabilitation, which is not currently addressed in Board regulations.

2. Amend the regulation: This option was selected; all other options were rejected. The Board determined that amending Section 1399.523.5 would allow the Board the ability to set criteria for how to consistently process the denial of a license when an applicant has been convicted of a crime requiring sex offender registration, while ensuring that its regulations are consistent with changes in the law as a result of AB 2138, effective July 1, 2020.