

PHYSICIAN ASSISTANT BOARD

INITIAL STATEMENT OF REASONS

Hearing Date: January 13, 2020

Subject Matters of Proposed Regulations: Substantial Relationship Criteria; Rehabilitation Criteria for Denials and Reinstatements; Rehabilitation Criteria for Suspensions and Revocations

Sections Affected: Section 1399.525, 1399.526, and 1399.527 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 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.

Effective July 1, 2020, under the provisions of Assembly Bill (AB) 2138 (Stats. 2018, ch. 995), the board's existing authority to deny an applicant a license based upon a substantially related criminal conviction will significantly change. 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.

Effective July 1, 2020, Business and Professions Code section 481(b) will require the board's existing substantial relationship criteria regulations to include all of the following:

- 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 in which the applicant seeks licensure or in which the licensee is licensed.

Further amendments to the board's regulations will be needed to address other changes to law enacted by AB 2138. These proposed amendments include the addition of references to "professional misconduct" as this will be considered a legal basis for denial under Business and Professions Code section 480. The proposed language will also add references to discipline under Business and Professions Code section 141 because substantially related acts that are the basis for discipline in another jurisdiction may be used to discipline a licensee under that section. In addition, the board proposes to add new rehabilitation criteria to help the board consider whether an applicant or licensee made a "showing of rehabilitation" as required by AB 2138 (Bus. & Prof. Code, §§ 480, 482, as added by AB 2138, §§ 4, 9). This proposal will also implement changes to how the board considers rehabilitation evidence when considering denials, discipline or a petition for reinstatement of a license or modification of a disciplinary penalty (e.g., petition for early termination of probation).

2. Anticipated benefits from this regulatory action:

The proposed amendments would place applicants and licensees on notice that the board is statutorily authorized to deny, suspend, or revoke a license on the basis of professional misconduct and discipline taken by another licensing board or jurisdiction. The proposal would also make relevant parties (e.g., the Deputy Attorney Generals, Administrative Law Judges, respondents, and respondent's counsels) aware that when considering denial or discipline of applicants or licensees, the board uses the listed criteria to determine whether the crime, act, or professional misconduct is substantially related to the practice of medicine. AB 2138 was enacted to reduce licensing and employment barriers for people who are rehabilitated. These proposed amendments would further that goal by adopting criteria that would emphasize an applicant's or licensee's rehabilitative efforts and what would be needed to make a showing of rehabilitation. This may lead to fewer denials and an increase in the number of licensed physician assistants in the marketplace. Therefore, allowing for more health care providers to treat increasing numbers of California consumers.

Factual Basis/Rationale

Amend Sections 1399.525, 1399.526, and 1399.527

Factual basis for the determination that each proposed amendment to Sections 1399.525, 1399.526, and 1399.527 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 November 5, 2018 meeting, members discussed how existing law authorizes the board to deny, suspend, or revoke a license or to take disciplinary action against a

licensee on the grounds that the licensee or applicant has been convicted of a substantially related crime. The amended law would revise and recast those provisions to authorize the board to deny based upon a substantially related crime only if certain criteria are met.

Beginning July 1, 2020, this board 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. Absent these circumstances, AB 2138 will permit the board 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 1 192.7; (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. (Bus. & Prof. Code, § 480, subdiv.(a)(1), as added by Stats. 2018, ch. 995 (“AB 2138”).)

At the board’s January 28, 2019 meeting, members discussed and approved proposed changes to Section 1399.525 to implement changes to Business and Professions Code sections 480, 481, and 493. The proposed language incorporates the substantial relationship criteria as set forth in Business and Professions Code sections 481 and 493, effective July 1, 2020. It also expands the current regulation to include discipline under Business and Professions Code section 141 because substantially related acts that are the basis for discipline in another jurisdiction may be used to discipline a licensee under this section.

The proposed language adds references to “professional misconduct” as this may be considered a legal basis for denial under Business and Professions Code section

480(b), which will become effective July 1, 2020, per AB 2138. This proposal will also update the regulations to more accurately reflect the board's authority to evaluate rehabilitation evidence for all applicants and licensees where the board is considering denial, discipline or reinstatement or modification of penalties for a physician assistant license.

Amend Section 1399.525 – Substantial Relationship Criteria

Specifically, the board proposes the adoption of the following amendments to Section 1399.525 for the following reasons:

- (1) Add new subsections; amend subsection (a) to add section 141 of the Business and Professions Code and “professional misconduct” as specified within Business and Professions Code section 480

This proposal would create new subsections for better organization and grouping of similar concepts within the regulatory proposal.

Existing law at Section 141 of the Business and Professions Code authorizes the board to discipline a licensee for discipline taken by another state, a federal agency, or a country (“foreign jurisdiction”) for any act “substantially related” to the practice regulated by the California license. In addition, effective July 1, 2020, Business and Professions Code section 480 will authorize this board to deny a license on the basis that the applicant was subject to formal discipline by a licensing board located in or outside California for “professional misconduct” under specified conditions (see Bus. & Prof. Code, § 480, subdiv. (b), as added by AB 2138).

This proposal would add references to Section 141 (discipline by a foreign jurisdiction) and “professional misconduct” to the board’s substantial relationship criteria regulation to more accurately reflect the board’s authority to discipline or deny on these bases.

The board’s existing substantial relationship criteria regulation sets forth what crimes or acts the board believes are logically connected to a physician assistant’s fitness or competence to practice the profession or to the qualifications, functions, or duties of the physician assistant license. The current standard specifies that a crime or act is considered substantially related “if to a substantial degree it evidences present or potential unfitness of a person holding such a license to perform the functions authorized by the license in a manner consistent with the public health, safety or welfare.”

In the board’s experience, this existing standard would be equally relevant when considering crimes, acts committed by a licensee in a foreign jurisdiction or professional misconduct committed by an applicant before another licensing board. As a result, these proposed changes are necessary to give proper notice to those affected applicants and licensees of what standard the board will use in evaluating what professional misconduct or acts the board considers “substantially related,” and that could be a basis for license denial, suspension, or revocation by this board pursuant to Business and Professions Code sections 141, 480, or 490.

- (2) Delete the sentence “Such crimes or acts shall include, but are not limited to, the following:”

This proposal would repeal this existing language in subsection (a) that introduces the list of specific crimes or acts the board considers substantially related to the profession. Similar language is proposed for subsection (c) of Section 1399.525, so the board believes this introductory phrase is no longer necessary. The removal of this language will also allow the board to more easily distinguish criteria specific to crimes contained in subsection (b) from those applicable to other grounds for discipline or denial of a license in subsection (c) without appearing duplicative.

- (3) Add a new subsection: “(b) In making the substantial relationship determination required under subdivision (a) for a crime, the board shall consider the following criteria:
(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 a physician assistant.”

Current law specifies that each board shall develop criteria for determining whether a crime is substantially related to a specific business or profession. AB 2138 mandates that there are 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[s]; (2) The number of years elapsed since the date of the offense[s]; and,] (3) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.” (Bus. & Prof. Code, § 481, subd. (b), as added by AB 2138, § 7; see also Bus. & Prof. Code, § 493, subd. (b), as added by AB 2138, § 13.) .

Since Business and Professions Code sections 481 and 493 require the board to use these three criteria in evaluating whether a crime is substantially related to the qualifications, functions, or duties of the profession, the board is proposing to amend its current substantial relationship regulation to include all three items listed in subsection (b)(1)-(3). The addition of these criteria to Section 1399.525(b) will also permit the board to provide notice to interested parties of all of the board’s criteria for evaluating whether a crime is substantially related to the qualifications, functions, or duties of the profession in one convenient location.

- (4) Add new subsection: “(c) For purposes of subdivision (a), substantially related crimes, professional misconduct, or acts shall include, but are not limited to, the following:”; renumber subsections (a) through (i) to numbers 1 through 9 as part of subsection (c).

This proposal would create a new subdivision (c) and new sentence that introduces a list of crimes, professional misconduct, or acts that the board has determined are substantially related to the qualifications, functions, or duties of a licensee. This new sentence would help specify which crimes, acts or professional misconduct would be grounds for denial or discipline in accordance with Business and Professions Code

sections 141, 480, or 490.

This proposal would maintain existing categories that are already considered by the board to be substantially related to the qualifications, functions or duties of the profession, but expands the list's applicability to "professional misconduct" before another licensing board. In the board's experience, this existing list of crimes or acts would still be logically connected to the practice of the profession and equally relevant in determining fitness or competence of a licensee or applicant when considering crimes, acts committed by a licensee in a foreign jurisdiction, or professional misconduct committed by an applicant before another licensing board. As a result, these proposed changes are necessary to give proper notice to those affected applicants and licensees that the board considers these crimes, professional misconduct or acts to be "substantially related" to the profession, which could be a basis for license denial, suspension, or revocation by this board pursuant to Business and Professions Code sections 141, 480, or 490.

Existing sections (a) through (i) would be renumbered to (1) through (9) to accommodate the addition of this new introductory sentence at subsection (c) and to allow for greater comprehension and readability of the regulation.

(5) Amend subsection (c)(2) to include "or other state or federal laws governing the practice of physician assistants."

Existing law at Sections 141 and 480(a)(3)(A) of the Business and Professions Code authorizes the board to discipline a licensee or deny an application based upon discipline taken by another state, a federal agency, or a country ("foreign jurisdiction") for any act "substantially related" to the practice regulated by the California license. In addition, effective July 1, 2020, Business and Professions Code section 480 will authorize this board to deny a license on the basis that the applicant was subject to formal discipline by a licensing board located in or outside California for "professional misconduct" under specified conditions, including that the foreign discipline would have been cause for discipline before this board (see Bus. & Prof. Code, § 480, subdiv. (b), as added by AB 2138, § 4.) In addition, existing law authorizes the board to deny an application or discipline a license for any crime, whether under the laws of this state or another, or under federal law, which is substantially related to the qualifications, functions or duties of the physician assistant (Bus. & Prof. Code, § 480(a)(3)(B), 490, 3527, and 3531.) Effective July 1, 2020, these statutes will still authorize the board to deny or discipline for a crime that is substantially related to the qualifications, functions or duties of the physician assistant under specified conditions.

In recognition of the board's authority to discipline or deny for substantially related crimes, acts, or professional misconduct occurring in California or in other jurisdictions, this proposal would specify that the board considers violating or attempting to violate other state or federal laws governing the practice of physician assistants to be substantially related to the qualifications, functions or duties of a physician assistant. This change acknowledges that other state or federal laws governing the practice of physician assistants should be considered related to the physician assistant practice in California. In the board's opinion, an applicant or licensee's violation or attempted

violation of the laws or regulations governing his or her practice of medicine is indicative of his or her competence and ability to practice with safety to the public. As a result, these proposed changes are necessary to give proper notice to those affected applicants and licensees that the board considers these violations or attempted violations to be “substantially related” to the profession, which could be a basis for license denial, suspension, or revocation by this board pursuant to Business and Professions Code sections 141, 480, or 490.

- (6) Add “professional misconduct” to (c)(5) relating to acts involving the sale, gift, administration, or furnishing of narcotics or dangerous drugs or dangerous devices, as defined in Section 4022 of the code.

Existing regulation specifies that the board considers any crime or act involving the sale, gift, administration, or furnishing of narcotics or dangerous drugs or dangerous devices, as defined, to be substantially related to the qualifications, functions or duties of the physician assistant. Physician assistants perform medical services that directly impact the health, safety and welfare of their patients. Such services include furnishing and prescribing narcotics or dangerous drugs to patients. If these services are done incompetently, negligently or willfully in violation of the laws or standards governing the practice of medicine, it could have serious consequences to the health, safety and welfare of patients. In the board’s experience, such crimes or acts would demonstrate present or potential unfitness for a license.

This proposal would add the words “professional misconduct” to this section since the board believes that these public safety concerns apply equally to professional misconduct involving the sale, gift, administration, or furnishing of narcotics or dangerous drugs or dangerous devices. This proposed amendment is necessary to notify all affected licensees or applicants that the board considers such conduct serious, substantially related to the qualifications, functions or duties of a physician assistant, and that it could be a basis for denial pursuant to Business and Professions Code section 480(b), as enacted by AB 2138.

Amendment to Section 1399.525 Note:

Since a substantially related crime, act or professional misconduct as defined in Section 1399.525 would be a basis for imposing discipline or denying an application pursuant to Sections 141, 480, 490 and 493, 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. Since the board is impliedly authorized to include new substantial relationship criteria from Business and Professions Code section 493(b) in its regulations, as enacted by AB 2138 and effective July 1, 2020, the board proposes to add Business and Professions Code section 493 to the “notes” section of this regulation to comply with the “Authority” standard in the Administrative Procedure Act.

Amend Section 1399.526 – Rehabilitation Criteria for Denials/Reinstatements

Specifically, the board proposes the adoption of the following amendments to Section

1399.526 for the following reasons:

- (1) Add new subsections; Amend subsection (a) to add “on the ground that the applicant was convicted of a crime,”...shall consider whether the applicant made a showing of rehabilitation and is presently eligible for a license, if the applicant completed the criminal sentence at issue without a violation of parole or probation..”

This proposal would create new subsections for better organization and grouping of similar concepts within the regulatory proposal.

Existing law requires boards to develop criteria to evaluate the rehabilitation of an applicant or licensee when considering the denial or discipline of a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (Bus. & Prof. Code, § 482.) However, beginning July 1, 2020, Business and Professions Code 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.” (§ 480, subd. (b), as added by AB 2138, Stats. 2018, ch. 995, § 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 board’s practice act, or its regulations, and as directed under Business and Professions Code section 482. (§ 481, subd. (c), as added by Stats. 2018, ch. 995, § 7; see also § 493, subd. (b)(2), as added by Stats. 2018, ch. 995, § 13 [“A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation”].)

As a result of the foregoing changes in law, the board will need to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to deny, suspend, or revoke a license based on a conviction. (§ 482, subd. (a), as added by Stats. 2018, ch. 995, § 9.) In particular, revisions to Section 482 require the board to consider whether an applicant or licensee “made a showing of rehabilitation,” if the applicant or licensee:

- (a) completed the criminal sentence at issue without a violation of parole or probation; or,
- (b) the board finds, after applying its rehabilitation criteria, that the applicant is rehabilitated. (§ 482, subd. (b), as added by Stats. 2018, ch. 995, § 9.)

Current regulations do not explicitly require the board to consider whether the applicant made a showing of rehabilitation if the individual completed the criminal sentence at issue without a violation of parole or probation. Since Section 482 will explicitly require the board to consider whether under those circumstances the applicant has made a showing of rehabilitation for licensing purposes, the board is adding this new requirement to this Section to provide adequate notice to applicants that this new requirement must be considered by the board prior to considering denial. The addition of this text at the beginning of this Section also allows the board to clearly distinguish between this criteria and other criteria that the board may use in considering denials

based upon other statutory authority.

- (2) “In making this determination, the board...” shall consider the following criteria:
 - (1) the nature and gravity of the crime(s).
 - (2) the length(s) of the applicable parole or probation period(s).
 - (3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.
 - (4) The terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation.
 - (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification.

In earlier versions of the bill, AB 2138 mandated that the board “shall find” an applicant had made a showing of rehabilitation if the applicant or licensee had completed his or her criminal sentence without a violation of parole or probation (see AB 2138, as amended in Assembly on April 2, 2018, § 5.) This would have effectively eliminated the board’s discretion to further inquire into rehabilitative efforts after an applicant’s release from the criminal justice system.

However, the “shall find” language in earlier versions of AB 2138 was struck and later replaced with the words “shall consider” following recommendations by the Senate Business, Professions and Economic Development Committee on June 20, 2018 (see AB 2138, as amended on June 20, 2018, § 5 and Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018, p. 11, 19). As enacted, the board will be authorized to exercise its discretion 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 (see Bus. & Prof. Code, § 482, subd. (b), operative July 1, 2020.)

To meet constitutional requirements, courts have found that criminal probation conditions must be reasonably related to the goals of enhancing rehabilitative and deterrence objectives and protecting the victim. (*People v. Jungers* (2005) 127 Cal.App.4th 698, 703.) However, courts typically reject the view that applicants and licensees who comply with the terms of their parole or probation 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 *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”].)

The purpose of the board’s licensing and enforcement proceedings are to protect the public. As the courts have stated: “The purpose of such a proceeding is not to punish but to afford protection to the public upon the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent.” (*Borrer v. Department of*

Investment (1971) 15 Cal.App.3d 531, 540; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817 [45 Cal.Rptr.2d 486, 490].

To further assist the board in exercising its discretion for the protection of the public, the board proposes to use these five criteria to evaluate whether the applicant has made a “showing of rehabilitation” when the applicant has completed the criminal sentence at issue without a violation of parole or probation. In the board’s experience, analyzing the nature and gravity of the crime(s) committed, the length and extent of the probation or parole periods, and any modifications to parole or probation will assist the board in making a fair and balanced determination of whether the applicant would be safe to practice, with or without restrictions on a license. In addition, analyzing the terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation will further assist the board in determining whether the applicant’s parole or probation adequately remediated the criminal conduct or whether future monitoring or restriction (e.g., probationary license) would be necessary for public protection.

- (3) Delete “in evaluating the rehabilitation of the applicant and his or her present eligibility for a license”

For greater readability of the regulation and to accommodate further amendments to this Section, the Board proposes to delete this existing text.

- (4) Add a new subsection: “(b) If subdivision (a) is inapplicable, or the board determines that the applicant did not make the showing of rehabilitation based on the criteria in subdivision (a), the board shall apply the following criteria in evaluating an applicant’s rehabilitation. The board shall find that the applicant made a showing of rehabilitation and is presently eligible for a license if, after considering the following criteria, the board finds that the applicant is rehabilitated:

In addition to the authority to deny based upon criminal convictions, in deciding whether to deny a license, the board will be authorized to deny a license based upon professional misconduct (Bus. & Prof. Code, § 480, subdiv. (b), as added by AB 2138, § 4), and will retain authority to deny based upon unprofessional conduct grounds as defined in Business and Professions Code section 3527. As a result, the board’s rehabilitation criteria must also include consideration of rehabilitation evidence for other types of conduct, other than criminal convictions, that may constitute grounds for denial.

In addition to considering rehabilitation when an applicant completes a criminal sentence without a violation of probation or parole, AB 2138 requires the board to consider whether an applicant made a showing of rehabilitation, if the board finds, in applying its rehabilitation criteria, that the applicant is rehabilitated. (Bus. & Prof. Code, § 482, subd. (b), operative July 1, 2020.) This proposal would permit the board to consider its standard rehabilitation criteria in evaluating whether an applicant made a showing of rehabilitation when either the grounds for denial do not involve a crime, or the showing of rehabilitation was not made under subdivision (a) of this Section.

In the board’s experience, these existing standards would continue to be useful when considering denials based upon crimes, unprofessional conduct, or professional misconduct committed by an applicant before another licensing board. These standards

are needed to provide the board with a fair, balanced and thoughtful approach to evaluating whether sufficient rehabilitative efforts have been made to satisfy the board that the applicant is presently eligible for a license. As a result, these proposed changes are necessary to give the board discretion to analyze rehabilitation evidence using these criteria when considering a denial, and to give proper notice to those affected applicants of what standards the board will use in evaluating whether a “showing of rehabilitation” has been made.

- (5) Amend subsections (b)(1), (b)(2) and (b)(3) to delete references to “act(s)” and add references to “conduct”; add reference to Business and Professions Code section 3527 at subsection (b)(2).

Existing law at Business and Professions Code section 480 authorizes the board to deny an application for licensure based on an “act” that if done by a licentiate would be grounds for suspension or revocation of the license. (Bus. & Prof. Code, § 480, subd. (a)(3)(A).) However, effective, July 1, 2020, the board will no longer be authorized to deny an application on this basis (see AB 2138, § 4). After AB 2138 becomes effective, the board will be authorized to deny an applicant based upon “professional misconduct,” and will retain its authority to deny based upon unprofessional conduct grounds as defined in Business and Professions Code section 3527.

Based on the foregoing, the board is proposing to strike the word “act(s)” and replace it with “conduct,” a term that would cover either professional misconduct or unprofessional conduct grounds for denial. In addition, the board proposes to add the words “or Section 3527” to subsection (b)(2) after the words “...grounds for denial under section 480.” These changes to these sections will more accurately reflect the board’s denial authority in Sections 480 and 3527 of the Business and Professions Code and help avoid applicant confusion regarding the board’s authority to deny a license.

- (6) Delete subsection (a) and add new cross-references to new subsection (b)(1) and (b)(2).

For easier comprehension and readability of the regulation, subsection (a) is proposed to be deleted and cross-references to the newly renumbered sections in (b)(1) and (b)(2) will be added.

- (7) Change subsection (b) to (c): amend subsection (c) to include “or a petition for modification or termination of probation”; delete 11522; add 3530; delete Government before the word “Code”.

This proposal would retain the board’s current authority to evaluate all applicants, whether for initial licensure or reinstatement, using the same rehabilitation criteria. The existing regulation authorizes the board to analyze evidence of rehabilitation submitted by an applicant for reinstatement using the same criteria as for initial applicants. In the board’s experience, using the same criteria helps ensure a fair and balanced approach to analyzing whether all applicants have made a showing of rehabilitation. In addition, using the same criteria furthers the public policy objectives of AB 2138 in requiring the board to use new criteria that would allow more opportunities for all applicants to make

a showing of rehabilitation.

In addition, this proposal would remove existing references to Government Code section 11522 related to procedures for reinstatement petitions and add new text that would refer to the board's own reinstatement or modification of penalty statute at Business and Professions Code section 3530. It would also add new references to petitions for modification or termination of probation, the two other types of petitions that are routinely filed with the board as authorized by Section 3530.

Government Code section 11522 provides, in part, that: "This section shall not apply if the statutes dealing with the particular agency contain different provisions for reinstatement or reduction of penalty." The board has its own reinstatement statute at Business and Professions Code section 3530 that sets forth provisions for reinstatement, and modification or termination of probation petitions. However, petitioners are often not aware of Section 3530's requirements when filing these types of petitions due to the outdated reference to Section 11522 that is retained in this regulation.

When this regulation was first adopted, the board did not have its own petition for reinstatement or modification of penalty statute. In 2007, Business and Professions Code section 3530 was added to the Physician Assistant Practice Act. These changes are therefore needed to provide accurate notice to the regulated community regarding the board's authority and procedures for considering these types of petitions.

Amendment to Section 1399.526 Note:

Since the board is required to consider rehabilitation evidence prior to considering denial or discipline pursuant to Sections 480, 481, 488 and 493, 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. In addition, since the board will be adding new cross-references to Section 3530 of the Business and Professions Code related to its petition statute to the body of the regulation, the Board proposes to add Section 3530 of the Business and Professions Code to the "notes" section of this regulation to comply with the "Reference" standard in the Administrative Procedure Act.

Amend Section 1399.527 – Rehabilitation Criteria for Denials/Reinstatements

Specifically, the board proposes the adoption of the following amendments to Section 1399.527 for the following reasons:

- (1) Add new subsections; Amend subsection (a) to add "shall consider whether the applicant made a showing of rehabilitation and is presently fit for a license, if the licensee completed the criminal sentence at issue without a violation of parole or probation..."

This proposal would create new subsections for better organization and grouping of similar concepts within the regulatory proposal.

Existing law requires boards to develop criteria to evaluate the rehabilitation of a licensee when considering the discipline of a license based on a conviction, and to consider evidence of rehabilitation in making such decisions. (Bus. & Prof. Code, § 482.) In deciding whether to discipline a license based on a conviction, the board must consider evidence of the licensee's rehabilitation, pursuant to the process established in the board's practice act, or its regulations, and as directed under Business and Professions Code section 482.

However, beginning July 1, 2020, Business and Professions Code section 482(b) will require the board to consider whether an applicant or licensee "made a showing of rehabilitation," if the applicant or licensee completed 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. (§ 482, subd. (b), as added by Stats. 2018, ch. 995, § 9.)

As a result of the foregoing changes in law, the board will need to revise its regulations that establish criteria for evaluating rehabilitation, when deciding whether to suspend, or revoke a license based on a conviction. (§ 482, subd. (a), as added by Stats. 2018, ch. 995, § 9.) In particular, revisions to Section 482 require the board to consider whether an applicant or licensee "made a showing of rehabilitation," if the applicant or licensee:

- (a) completed the criminal sentence at issue without a violation of parole or probation; or,
- (b) the board finds, after applying its rehabilitation criteria, that the applicant is rehabilitated. (§ 482, subd. (b), as added by Stats. 2018, ch. 995, § 9.)

Current regulations do not explicitly require the board to consider whether a licensee made a showing of rehabilitation if the individual completed the criminal sentence at issue without a violation of parole or probation. Since Section 482 will explicitly require the board to consider whether under those circumstances the licensee has made a showing of rehabilitation when considering suspension or revocation of a license (discipline), the board is adding this new requirement to this Section to provide adequate notice to licensees that this new requirement must be considered by the board prior to considering discipline and fitness for a license. The addition of this text at the beginning of this Section also allows the board to clearly distinguish between this criteria and other criteria that the board may use in considering discipline based upon other statutory authority.

(2) "In making this determination, the board shall consider the following criteria:

- (1) the nature and gravity of the crime(s).
- (2) the length(s) of the applicable parole or probation period(s).
- (3) The extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified.
- (4) The terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation.
- (5) The extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification."

In earlier versions of the bill, AB 2138 mandated that the board “shall find” an applicant or licensee had made a showing of rehabilitation if the applicant or licensee had completed his or her criminal sentence without a violation of parole or probation (see AB 2138, as amended in Assembly on April 2, 2018, § 5.) This would have effectively eliminated the board’s discretion to further inquire into rehabilitative efforts after a licensee’s release from the criminal justice system.

However, the “shall find” language in earlier versions of AB 2138 was struck and later replaced with the words “shall consider” following recommendations by the Senate Business, Professions and Economic Development Committee on June 20, 2018 (see AB 2138, as amended on June 20, 2018, § 5 and Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018, p. 11, 19). As enacted, the board will be authorized to exercise its discretion to “consider whether” a licensee has made a showing of rehabilitation if the licensee has completed the criminal sentence at issue without a violation of parole or probation (see Bus. & Prof. Code, § 482, subd. (b), operative July 1, 2020.)

To meet constitutional requirements, courts have found that criminal probation conditions must be reasonably related to the goals of enhancing rehabilitative and deterrence objectives and protecting the victim. (*People v. Jungers* (2005) 127 Cal.App.4th 698, 703.) However, courts typically reject the view that applicants and licensees who comply with the terms of their parole or probation 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 *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”].)

The purpose of the board’s licensing and enforcement proceedings are to protect the public. As the courts have stated: “The purpose of such a proceeding is not to punish but to afford protection to the public upon the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent.” (*Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 540; *Fahmy v. Medical Bd. of California* (1995) 38 Cal.App.4th 810, 817 [45 Cal.Rptr.2d 486, 490].

To further assist the board in exercising its discretion for the protection of the public, the board proposes to use these five criteria to evaluate whether a licensee has made a “showing of rehabilitation” when the licensee has completed the criminal sentence at issue without a violation of parole or probation. In the board’s experience, analyzing the nature and gravity of the crime(s) committed, the length and extent of the probation or parole periods, and any modifications to parole or probation will assist the board in making a fair and balanced determination of whether the licensee would be safe to practice, with or without restrictions on a license. In addition, analyzing the terms or

conditions of parole or probation and the extent to which they bear on the licensee's rehabilitation will further assist the board in determining whether the licensee's parole or probation adequately remediated the criminal conduct or whether future monitoring or discipline would be necessary for public protection.

- (3) Delete "in evaluating the rehabilitation of the applicant and his or her present eligibility for a license shall consider the following criteria:"

For greater readability of the regulation and to accommodate further amendments to this Section, the Board proposes to delete this existing text.

- (4) Add a new subsection: "(b) If subdivision (a) is inapplicable, or the board determines that the licensee did not make the showing of rehabilitation based on the criteria in subdivision (a), the board shall apply the following criteria in evaluating a licensee's rehabilitation. The board shall find that the licensee made a showing of rehabilitation and is presently fit for a license if, after considering the following criteria, the board finds that the licensee is rehabilitated:

In addition to the authority to discipline based upon criminal convictions, the board will retain authority to discipline based upon substantially related acts in a foreign jurisdiction as set forth in Business and Professions Code section 141, and on unprofessional conduct grounds as defined in Business and Professions Code section 3527. As a result, the board's rehabilitation criteria must also include consideration of rehabilitation evidence for other types of conduct, other than criminal convictions, that may constitute grounds for discipline.

In addition to considering rehabilitation when a licensee completes a criminal sentence without a violation of probation or parole, AB 2138 requires the board to consider whether an applicant or licensee made a showing of rehabilitation, if the board finds, in applying its rehabilitation criteria, that the applicant is rehabilitated¹. (Bus. & Prof. Code, § 482, subd. (b)(2), operative July 1, 2020.) This proposal would permit the board to consider its standard rehabilitation criteria in evaluating whether a licensee made a showing of rehabilitation when either the grounds for denial do not involve a crime, or the showing of rehabilitation was not made under subdivision (a) of this Section.

In the board's experience, these existing standards would continue to be useful when considering discipline based upon crimes, unprofessional conduct, or substantially related acts committed by a licensee before a foreign licensing body. These standards are needed to provide the board with a fair, balanced and thoughtful approach to evaluating whether sufficient rehabilitative efforts have been made to satisfy the board that the licensee is presently fit for a license. As a result, these proposed changes are necessary to give the board discretion to analyze rehabilitation evidence using these criteria when considering discipline, and to give proper notice to those affected licensees of what standards the board will use in evaluating whether a "showing of

¹ Due to the use of the word "licensee" in the introduction to subsection (b)(2) of Section 482, it is presumed that the Legislature intended for the board to use these criteria for applicants or licensees, and not just applicants.

rehabilitation” has been made.

Existing sections (a) through (f) would be renumbered to (1) through (7) to accommodate the addition of this new introductory sentence at subsection (b) and to allow for greater comprehension and readability of the regulation.

(3) Amend subsections (b)(1) and (b)(3) to delete “offense” and add “crime”.

This proposal would strike the word “offense” from the existing regulation and replace it with “crime” in these sections to more accurately identify the criminal conduct that would be the legal basis for the board’s discipline or petition decision. This will help avoid applicant or licensee confusion regarding what “offense” might mean and what might be considered in evaluating a petition applicant’s or licensee’s showing of rehabilitation.

(4) Add subsection (b) (5): “The criteria in subdivision (a)(1)-(5), as applicable.”

This proposal would add authority to consider the rehabilitation criteria that the board is proposing for licensees who have completed parole or probation without further violation in subdivision (a)(1)-(5) to the criteria in subdivision (b), where appropriate. This will allow the board greater discretion and further opportunities to assess whether a licensee who has not made a showing under subdivision (a) can make a showing using the criteria in both subdivisions. In addition, allowing the board to use the same criteria for criminal convictions furthers the public policy objectives of AB 2138 in requiring the board to use new criteria that would allow more opportunities for all applicants or licensees to make a showing of rehabilitation.

(5) Amend subsection (b)(6): change the term “expungement” to “dismissal”.

This proposal would delete a reference to “expungement” in this subsection and replace it with the word “dismissal.” The board determined that the language should be updated to reflect more accurately the actions that a court could take under Section 1203.4 of the Penal Code. Under Section 1203.4, a criminal defendant may “petition the court to withdraw his or her plea of guilty or nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusatory pleading against the defendant...”

In consideration of the foregoing, the word “expungement” would be deleted and replaced with the word “dismissal.” This change is necessary to more accurately describe to affected parties the actions that a criminal court could take, as stated above, under Penal Code section 1203.4, and to help avoid licensee or petitioner confusion regarding what evidence the board might consider in evaluating rehabilitation.

Amendment to Section 1399.527 Note:

Since the board considers rehabilitation evidence prior to considering denial or discipline pursuant to Sections 141, 480, 488 and 493, 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 August 10, 2018 meeting.
2. Minutes of the Physician Assistant Board’s November 5, 2018 meeting.
3. Minutes of the Physician Assistant Board’s January 28, 2019 meeting.
4. Assembly Bill 2138, as amended in Assembly April 2, 2018.
5. Assembly Bill 2138, as amended in Senate June 20, 2018.
6. Assembly Bill 2138, chapter 995, Statutes of 2018.
7. Assembly Bill 2138: Senate Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018.
8. Assembly Bill 2138: Assembly Floor Analysis 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 12,690 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 in the first half of fiscal year 2018/2019 the board has issued 794 licenses and denied one (1). Therefore, the board has denied 0.17% of all applicants.

Since the board has denied less than 1% of all applicants this proposal will not have an 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, 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 implement new substantial relationship and rehabilitation criteria. As a result, it is anticipated that there may be fewer denials or disciplinary actions based upon criminal convictions 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, made a showing of rehabilitation, or their conviction was dismissed or expunged. This proposal will amend regulations to add substantial relationship criteria and rehabilitation criteria that emphasize an applicant's or licensee's rehabilitative efforts, which may result in having fewer license denials or disciplinary actions based on substantially related crimes, acts or professional misconduct. 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 business, eliminate existing businesses, or eliminate jobs 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 or discipline 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 or discipline 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 have been convicted of a crime 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.

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 define how to consider denial of a license when an applicant has been convicted of a crime or professional misconduct if the crime or professional misconduct is substantially related to the qualifications, functions, or duties of the physician assistant profession in light of recent legislative amendments. AB 2138 requires the board to include new substantial relationship criteria and consider how to evaluate a showing of rehabilitation for an applicant or licensee, which is not currently addressed in board regulations.
2. Explore Options for Simplifying Rehabilitation Criteria for Sections 1399.526 and 1399.527 Related to Criminal Convictions: The Board considered the following options in evaluating an applicant or licensee that made a showing of rehabilitation when an applicant or licensee has been convicted of a crime and successfully completed parole or probation without a violation:
 - a. The first option: Permit the Board to evaluate an applicant's rehabilitative efforts using five criteria designed to examine whether the applicant's or licensee's parole or probation was of sufficient duration and magnitude to address the possibility of recurrence of the misconduct.
 - b. The second option: Create a presumption that a licensee or applicant was rehabilitated if the individual completed parole or probation without a violation and would provide a simplified approach to analyzing convictions. In consideration of the vulnerability of the patient population that physician assistants serve, the Board rejected Option 2 and elected to use greater discretion and resources to evaluate rehabilitative efforts using Option 1.
3. Amend the regulation: This option was selected: The Board determined that amending Section 1399.525 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 or professional misconduct, if the crime or professional misconduct is substantially related to the qualifications, functions, or duties of the physician assistant profession in light of recent legislative amendments. AB 2138 requires the board to include new substantial relationship criteria in its regulations and consider how to evaluate a showing of rehabilitation for an applicant or licensee, which is not currently addressed in board regulations.