BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS, AND GEOLOGISTS
FINAL STATEMENT OF REASONS

Request for Effective Date on Filing:
The Board for Professional Engineers, Land Surveyors, and Geologists (Board) requests that this regulatory proposal become effective upon filing to align as closely as possible with the statutory implementation date of July 1, 2020, in Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018). AB 2138 changed a policy of automatic denials of licensure for individuals with criminal convictions. These regulations make clear the Board's statutory commitment to providing an opportunity for a "second chance" and explain how the Board will individually examine each licensure, renewal, or reinstatement decision for individuals with a criminal conviction. Furthermore, they clarify to the public how the Board will decide which convictions are substantially related to licensure. It would benefit all Californians to hasten the promulgation of these regulations, which encourage individuals with criminal convictions to pursue licensure and employment and which could potentially provide Californians with greater choices in licensees.

Hearing Date: None.

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

Sections Affected: California Code of Regulations (CCR), Title 16, Division 5, Article 1, Sections 416 and 418, and Title 16, Division 29, Article 5, Sections 3060 and 3061.

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

The information contained therein is updated as follows:

The initial comment period for this rulemaking was from March 13, 2020, to April 27, 2020, during which two comments were received by the Board.

The Board approved at its meeting on March 12, 2020, modifications the proposed regulatory text as follows:

Section 416

a. Subsection (a): inserted “certification of an engineer-in-training or a land surveyor-in-training or”. The reference to these two certifications was inadvertently left out of the text as originally noticed; it was always the Board’s intent to include them. Issuance of these certifications can be denied under Business and Professions Code (BPC) section 480 (see BPC sections 6751 and 8741). Additionally, these certifications can be revoked or suspended pursuant to BPC sections 6775.1 and 8780.1. The Board’s intent to include these certifications originally is evidenced by the inclusion of BPC sections 6775.1 and 8780.1 in the Reference notation. Furthermore, these certifications were already referenced in 16 CCR section 418 regarding the criteria for rehabilitation the Board must evaluate in considering the denying issuance of these certifications under BPC section 480.

   Subsection (a): Added conforming changes to the grammar of proposed section 416 by changing the phrase “Section 141 or” to “Section 141,” which allows for the below changes to be made in a grammatically correct fashion.

   Added references to Business and Professions Code (BPC) section 6775, subdivision (a), section 6775.1, subdivision (a), section 6779, section 8780, subdivision (e), section 8780.1, subdivision (a), and section 8783.

   BPC section 6775, subdivision (a) allows the Board, upon a majority vote, to reprove, suspend or revoke the certificate of a professional engineer based upon any conviction of a crime substantially related to the qualifications, functions, and duties of a licensed professional engineer.

   BPC section 6775.1, subdivision (a) allows the Board, upon a majority vote, to revoke the certificate of an engineer-in-training based on conviction of a crime as defined in BPC section 480.

   BPC section 6779 specifies a plea or verdict of guilty, or a conviction following a plea of *nolo contendere* made to a charge substantially related to the qualifications, functions and duties of a professional engineer is deemed to be a conviction.

   BPC section 8780, subdivision (e) allows the Board, upon a majority vote, to reprove, suspend or revoke the license or certificate of a land surveyor based upon any conviction of a crime substantially related to the qualifications, functions, and duties of a land surveyor.

BPC section 8780.1, subdivision (a) allows the Board, upon a majority vote, to revoke the certificate of land surveyor-in-training based on conviction of a crime as defined in BPC section 480.

BPC section 8783 specifies a plea or verdict of guilty, or a conviction following a plea of *nolo contendere* made to a charge substantially related to the qualifications, functions and duties of a land surveyor is deemed to be a conviction.

These additions ensure section 416 completely enumerates the BPC sections in the relevant practice act that may relate to the concept of substantial relationship.

b. Subsection (b): Inserted “all of” before “the following criteria” to reflect the statutory requirement in BPC section 481, subdivision (b).

c. Subsection (b)(1) through (3): Made technical punctuation corrections.

d. Subsection (c)(1): Added the language “engineers-in-training and” to correctly identify the regulated population to which this subsection applies.

e. Subsection (c)(2): Added the language “land surveyors-in-training and professional “ to correctly identify the regulated population to which this subsection applies.

1. Section 418

a. Subsection (a): Made technical revisions to punctuation. Deleted the phrases “for licensure as” and “for authority to use the title” to eliminate redundancy in this subsection, as both phrases appear immediately before their deleted counterparts.

Revised the phrase “the applicant was convicted of a crime” to instead read “the applicant has been convicted of a crime” to conform the proposed regulation to the language used in BPC section 480, subdivision (a), as added by AB 2138.

Added references to BPC section 6779 and section 8783. BPC section 6779 refers proceedings relative to professional engineer licensing based on pleas and verdicts of guilty or convictions on pleas of *nolo contendere* for charges substantially related to the duties of a Professional Engineer; BPC section 8783 is an analogous regulation applicable to land surveyors.

This change is included to clarify the grounds upon which denial for an application may be based.

Struck “and is presently eligible for a license” because the meaning of the term “presently” could be unclear to the regulated public and the phrase was determined to be unnecessary given the other clarifying modifications to the proposal.

b. Subsection (b): Removed and restated the subsection language to clarify this subsection sets forth the rehabilitation criteria the Board will apply to applicants with a criminal conviction who have not completed the criminal sentence without a violation of parole or probation, applicants with a criminal conviction who did not make a showing of rehabilitation under subsection (a), if the denial is based on the ground that the applicant has been convicted of a crime, or, if the denial is based on the ground that the applicant has been subject to formal discipline by another licensing board for professional misconduct.

   Subsection (b) has been further modified to specify it applies to denials for applications for certification as an engineer-in-training or land surveyor-in-training, licensure as a professional engineer or professional land surveyor, and for use of the title “structural engineer” or “geotechnical engineer.”

   Subsection (b) has also been modified to specify it applies to actions taken under BPC section 480, section 6779 or section 8783.

   BPC section 6779 refers proceedings relative to professional engineer licensing based on pleas and verdicts of guilty or convictions on pleas of *nolo contendere* for charges substantially related to the duties of a Professional Engineer; BPC section 8783 is an analogous regulation applicable to land surveyors.

   These clarifications are necessary to inform the public, applicants, and Board staff that rehabilitation criteria will be considered for all matters that are grounds for denial under BPC sections 480, 6779, and 8783. The clarifications promote equity and fairness by ensuring all applicants will have the ability to submit rehabilitation evidence to the Board for its consideration, which is in keeping with the legislative intent of AB 2138.

c. Subsection (b)(2): Struck “under Section 480 of the code” because subsection (b) specifies it applies to denials under BPC section 480, so it

is unnecessarily duplicative to include the reference to BPC section 480 in subsection (b)(2).

d. Subsection (b)(1) through (3): Added "professional misconduct" for consistent use with the term in 16 CCR section 416 and to differentiate "professional misconduct" as a ground provided under new BPC section 480, subsection (a)(2), from other "acts."

e. Subsection (c): Made technical revisions to punctuation. Deleted the phrase "the authority to use the title" to eliminate redundancy in this subsection, as the phrase appears immediately before its deleted counterpart.

   Revised the phrase "the license holder was convicted of a crime" to instead read "the license holder has been convicted of a crime" to conform the proposed regulation to the language used in subsection (a) and for grammatical clarity.

   Struck "and is presently eligible for a license" because this subsection applies to individuals who already hold a license ("license holders"), not to individuals applying for a license.

   Subsection (c) has also been modified to specify it applies to actions taken under BPC section 6775, subdivision (a), section 6775.1, subdivision (a), section 6779, section 8780, subdivision (e), section 8780.1, subdivision (a), or section 8783. The content of these sections is discussed above in this Final Statement of Reasons at section 1(a).

   These clarifications are necessary to inform the public, applicants, and Board staff that rehabilitation criteria will be considered for matters in which the disciplinary action is based on a conviction under the BPC sections referenced. The clarifications promote equity and fairness by ensuring all applicants will have the ability to submit rehabilitation evidence to the Board for its consideration, which is in keeping with the legislative intent of AB 2138 and the statutory requirements of BPC section 482.

f. Subsection (d) has been modified to remove and restate the subsection language to clarify this subsection sets forth the rehabilitation criteria the Board will apply to parties with a criminal conviction who have not completed the criminal sentence without a violation of parole or probation, applicants with a criminal conviction who did not make a showing of rehabilitation under subsection (c).

Subsection (d) differs from section 418, subsection (b) above because (b) refers to denials and (d) refers to suspensions and revocations. Accordingly, subsection (d) has been further modified to specify it applies to suspension or revocation of the certification an engineer-in-training or a land surveyor-in-training, the license of a professional engineer or a professional land surveyor, or the authority to use the title "structural engineer" or "geotechnical engineer."

Subsection (d) has also been modified to specify it applies to actions taken under BPC section 490, section 6775, subdivision (a), section 6775.1, subdivision (a), section 6779, section 8780, subdivision (e), section 8780, subdivision (a), or section 8783. BPC section 490 generally describes the ability of a Board to suspend or revoke a license on the ground that the licensee had been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. The remainder of the above-listed sections are described in this Final Statement of Reasons at section 1(a).

These clarifications are necessary to inform the public, applicants, and Board staff that rehabilitation criteria will be considered for matters in which the disciplinary action is based on a conviction under the BPC sections referenced. The clarifications promote equity and fairness by ensuring all applicants will have the ability to submit rehabilitation evidence to the Board for its consideration, which is in keeping with the legislative intent of AB 2138 and the statutory requirements of BPC section 482.

g. Subsections (d)(1) through (d)(3): The phrase "act(s) or" has been removed to clarify that these criteria apply only to crimes.

h. Subsection (d)(2): Struck "under Section 490 of the code" because subsection (d) specifies it applies to disciplinary actions taken under BPC section 490 , so it is unnecessarily duplicative to include the reference to BPC section 490 in subsection (d)(2).

i. Subsection (e): Made technical revisions to punctuation. Deleted the phrase "the authority to use the title" to eliminate redundancy in this subsection, as the phrase appears immediately before its deleted counterpart.

j. Subsection (e)(2): Deleted the phrase “licensee” and replaced with the phrase “license holder” to ensure usage consistency throughout the proposed text.

k. Authority and Reference: Made minor revisions to delete inapplicable authority sections and add relevant reference sections.

2. Section 3060

a. Subsection (a): inserted “certification of a geologist in training or”. The reference to this certification was inadvertently left out of the text as originally noticed; it was always the Board’s intent to include it. Issuance of this certification can be denied under BPC section 480 (see BPC section 7841.2). Additionally, this certification can be revoked or suspended pursuant to BPC section 7860.1. Furthermore, this certification was already referenced in 16 CCR section 3061 regarding the criteria for rehabilitation the Board must evaluate in considering the denying issuance of this certification under BPC section 480.

Subsection (a): Added conforming changes to the grammar of proposed section 3060 by changing the phrase “Section 141 or” to “Section 141,” which allows for the below changes to be made in a grammatically correct fashion.

Added references to BPC section 7860, subdivision (b)(1), section 7860.1, subdivision (a), and section 7863.

BPC section 7860, subdivision (b)(1) allows the Board, upon a majority vote, to reprove, suspend or revoke the certificate of a geologist or geophysicist based upon any conviction of a crime substantially related to the qualifications, functions, or duties of a geologist or geophysicist.

BPC section 7860.1, subdivision (a) allows the Board, upon a majority vote, to revoke the certificate of a geologist-in-training based on conviction of a crime as defined in BPC section 480.

BPC section 7863 specifies a plea or verdict of guilty, or a conviction following a plea of *nolo contendere* made to a charge substantially related to the qualifications, functions and duties of a geologist or geophysicist is deemed to be a conviction.

These additions ensure section 3060 completely enumerates the BPC sections in the relevant practice act that may relate to the concept of substantial relationship.

b. Subsection (b): Inserted “all of” before “the following criteria” to reflect the statutory requirement in BPC section 481, subdivision (b).

c. Subsection (b)(1) through (3): Made technical punctuation corrections.

d. Authority and Reference: Made minor revisions to add relevant reference sections.

3. Section 3061

a. Subsection (a): Moved references to certifications of geologists-in-training and specialty geologists to improve the clarity of this section. Made additional changes to subsection syntax to accommodate these changes.

Added reference to BPC section 7863, which specifies a plea or verdict of guilty, or a conviction following a plea of *nolo contendere* made to a charge substantially related to the qualifications, functions and duties of a geologist or geophysicist is deemed to be a conviction. This change is included to clarify the grounds upon which denial for an application may be based.

Revised the phrase “the applicant was convicted of a crime” to instead read “the applicant has been convicted of a crime” to conform the proposed regulation to the language used in BPC section 480, subdivision (a), as added by AB 2138.

Struck “and is presently eligible for a license” because the meaning of the term “presently” could be unclear to the regulated public and the phrase was determined to be unnecessary given the other clarifying modifications to the proposal.

b. Subsection (b): Removed and restated the subsection language to clarify this subsection sets forth the rehabilitation criteria the Board will apply to applicants with a criminal conviction who have not completed the criminal sentence without a violation of parole or probation, applicants with a criminal conviction who did not make a showing of rehabilitation under subsection (a), if the denial is based on the ground that the applicant has been convicted of a crime, or, if the denial is based on the ground that the

applicant has been subject to formal discipline by another licensing board for professional misconduct.

Subsection (b) has been further modified to specify it applies to denials for applications for certification as a geologist-in-training or licensure as a professional geologist, specialty geologist, professional geophysicist, or specialty geophysicist.

Subsection (b) has also been modified to specify it applies to actions taken under BPC section 480 or section 7863. BPC section 7863 is described above in this Final Statement of Reasons at section 4(a).

These clarifications are necessary to inform the public, applicants, and Board staff that rehabilitation criteria will be considered for all matters that are grounds for denial under BPC sections 480 and 7863. The clarifications promote equity and fairness by ensuring all applicants will have the ability to submit rehabilitation evidence to the Board for its consideration, which is in keeping with the legislative intent of AB 2138.

c. Subsection (b)(1) through (3): Added “professional misconduct” for consistent use with the term in 16 CCR section 3060 and to differentiate “professional misconduct” as a ground provided under new BPC section 480, subsection (a)(2), from other “acts.”

d. Subsection (b)(2): Struck “under Section 480 of the code” because subsection (b) specifies it applies to denials under BPC section 480, so it is unnecessarily duplicative to include the reference to BPC section 480 in subsection (b)(2).

e. Subsection (c): Moved references to certifications of geologists-in-training and specialty geologists to improve the clarity of this section. Made additional changes to subsection syntax to accommodate these changes.

Subsection (c) has also been modified to specify it applies to actions taken under BPC section 7860, subdivision (b)(1), section 7860.1, subdivision (a), and section 7863. The content of these sections is discussed above in this Final Statement of Reasons at section 3(a).

Revised the phrase “the license holder was convicted of a crime” to instead read “the license holder has been convicted of a crime” to conform the proposed regulation to the language used in subsection (a) and for grammatical clarity.

Struck “and is presently eligible for a license” because this subsection applies to individuals who already hold a license (“license holders”), not to individuals applying for a license.

These clarifications are necessary to inform the public, applicants, and Board staff that rehabilitation criteria will be considered for matters in which the disciplinary action is based on a conviction under the BPC sections referenced. The clarifications promote equity and fairness by ensuring all applicants will have the ability to submit rehabilitation evidence to the Board for its consideration, which is in keeping with the legislative intent of AB 2138 and the statutory requirements of BPC section 482.

f. Subsection (d) has been modified to remove and restate the subsection language to clarify this subsection sets forth the rehabilitation criteria the Board will apply to parties with a criminal conviction who have not completed the criminal sentence without a violation of parole or probation, applicants with a criminal conviction who did not make a showing of rehabilitation under subsection (c).

   Subsection (d) differs from section 3061, subsection (b) above because (b) refers to denials and (d) refers to suspensions and revocations. Accordingly, subsection (d) has been further modified to specify it applies to suspension or revocation of the certification of a geologist-in-training or the license of a professional geologist, a specialty geologist, a professional geophysicist, or a specialty geophysicist.

   Subsection (d) has also been modified to specify it applies to actions taken under BPC section 490, section 7860, subdivision (b)(1), section 7860.1, subdivision (a), or section 7863. BPC section 490 generally describes the ability of a Board to suspend or revoke a license on the ground that the licensee had been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued. The remainder of the above-listed sections are described in this Final Statement of Reasons at section 3(a).

   These clarifications are necessary to inform the public, license holders, and Board staff that rehabilitation criteria will be considered for matters in which the disciplinary action is based on a conviction under the BPC sections referenced. The clarifications promote equity and fairness by ensuring all will have the ability to submit rehabilitation evidence to the

Board for its consideration, which is in keeping with the legislative intent of AB 2138 and the statutory requirements of BPC section 482.

g. Subsections (d)(1) through (d)(3): The phrase "act(s) or" has been removed to clarify that these criteria apply only to crimes.

h. Subsection (d)(2): Struck "under Section 490 of the code" because subsection (d) specifies it applies to disciplinary actions taken under BPC section 490, so it is unnecessarily duplicative to include the reference to BPC section 490 in subsection (d)(2).

i. Subsection (d)(5): Deleted the phrase "licensee" and replaced with the phrase "license holder" to ensure usage consistency throughout the proposed text.

j. Subsection (e): Deleted the phrase "licensee" and replaced with the phrase "license holder" to ensure usage consistency throughout the proposed text.

k. Subsection (f): Moved references to certifications of specialty geologists and specialty geophysicists to improve the clarity of this section. Made additional changes to subsection syntax to accommodate these changes.

l. Authority and Reference: Made minor revisions to add relevant reference sections.

The Board provided 15 days' notice of these modifications to the public for comment from April 29, 2020, through May 15, 2020. Two sets of comments were received from the same individual, as discussed below.

Following the close of the comment periods, the Board determined that non-substantive changes needed to be made to subsections (b)(8) and (d)(8) of 16 CCR sections 418 and 3061. Specifically, in subsection (b)(8), the phrase "subsections (a)(1)-(a)(5)" was replaced with the phrase "subsections (a)(1) through (a)(5)"; in subsection (d)(8), the phrase "subsections (c)(1)-(c)(5) was replaced with the phrase "subsections (c)(1) through (c)(5)." These changes were made to more clearly articulate that the phrase refers to a series of subsections, all of which are applicable. Changing a hyphen to the word "through" shows the list is inclusive.

Local Mandate

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

Business Impact

The Board has made a determination that the proposed amendments will not have a significant adverse economic impact on businesses as the regulations do not directly affect businesses. This determination is based on the purpose of AB 2138, which sought to reduce barriers to licensure for applicants and licensees with criminal histories or licensure discipline. It is also based on the fact that the Board licenses individuals, not businesses, and the proposed amendments affect only individuals who are applying for licensure or who are already licensed and who have been convicted of a crime or had disciplinary action taken against them in another jurisdiction.

Economic Impact Assessment

To the extent license applicants and licensees were convicted of a crime or were previously disciplined, 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 a minimal number (range - zero to two) initial applications 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 does not anticipate a fiscal impact to the state. Because the Board historically denies a minimal number (range – zero to two) of initial applications 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.

Anticipated Benefits of this Proposal

The Board has determined that this proposal may benefit individuals, who would have greater access to licensure, reduce criminal recidivism, and provide economic opportunity to California residents with a criminal history. The public may benefit from the proposal with increased access to licensed professionals, which may benefit the health, safety, and welfare of California's consumers. The regulatory proposal does not affect worker safety or the state's environment

Alternatives Determination

The Board has made an determination that no reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the regulation is proposed or would be as effective or less burdensome to affected private persons than the proposed regulation, or equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the laws being implemented or made specific.

Set forth below are the other alternatives to this proposal that were considered, and the reason each alternative was rejected.

- Option 1: To pursue a regulatory change that requires the Board to find rehabilitation if the applicant completed their terms of their criminal probation or parole. Courts give little weight to the fact that an applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole since they are under the direct supervision of correctional authorities and are required to behave in an exemplary fashion. As such, the Board believes that reviewing each individual on the basis of multiple criteria is the better indicator whether individuals are rehabilitated and not a danger to the public's health, safety, and welfare. For these reasons, the Board rejected this option.

- Option 2: Do nothing, meaning the Board would not adopt the regulations. The Board opted not to pursue this option because, pursuant to AB 2138, the Board is mandated to adopt proposed regulations by July 1, 2020.

Summary of Comments Received During the 45-day Comment Period

The proposed text was made available to the public for comment from March 13, 2020 to April 27, 2020. Two public comments were received during this comment period and are responded to below.

Objections or Recommendations/Responses

March 11, 2020, Comment from Ken Anderson

Comments were received from Ken Anderson, a Licensed Land Surveyor, via email. Mr. Anderson submitted the same set of comments twice on March 11, 2020. One set was submitted to the Board's Executive Officer; the other to a former Board employee at her new place of employment within DCA. Since the comments are the same, only those submitted to the Executive Officer are included.

Summary of Anderson Comment 1:
It is not clear why the Board, or its Executive Officer, is making these changes.

Board Response to Anderson Comment 1:
Insofar as the implication in Comment 1 is that the Board has not sufficiently explained the necessity for this rulemaking proposal, the Board refers to the Notice and the Initial Statement of Reasons, which both clearly explain that the Board's regulations relating to the substantial relationship criteria and the criteria for rehabilitation must be amended in order to conform with the changes made to statute by AB 2138 (Ch. 995, Stats.2018).

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

Summary of Anderson Comment 2:
It is not clear what is meant by the terms "professional misconduct" and "misconduct." Would "any" act considered professional misconduct give rise to an action to revoke a license? Examples should be given.

Board Response to Anderson Comment 2:
The phrase "professional misconduct" is used in statute, specifically in BPC section 480(a)(2) [as will become operative on July 1, 2020]. This section further narrows the type of "professional misconduct" that is at issue; it is "professional misconduct" that 1) "would have been cause for discipline before the board for which the present application is made," and, 2) "is substantially related to the qualifications, functions, or duties of the business or profession." Additionally, it is unnecessary to provide a definition of words used in regulations when the words as used have the same general definitions as provided in dictionaries. For example, the Merriam-Webster Dictionary includes "intentional wrongdoing" and "improper behavior" in its definition of "misconduct," and Black's Law Dictionary includes "a dereliction from duty, injurious to another, on the part of one employed in a professional capacity" in its definition. Furthermore, subdivision (c) of 16 CCR sections 416 and 3060 provide information as to what types of actions shall be considered "substantially related crimes, professional misconduct, or acts." For all of these reasons, it is not necessary for the Board to provide a separate definition or a list of further examples of "professional misconduct" or "misconduct" in its regulations. Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

April 27, 2020, Comment from A New Way of Life Reentry Project and Others

Comments were also received, on April 27, 2020, from Faride Perez-Aucar, of Root and Rebound, and Vinuta Naik, of Community Legal Services in East Palo Alto, on behalf of 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 the Underground Scholars Initiative (referred to as "Organizations").

Summary of Organizations Comment 1 (Page 3 of letter, paragraph above bulleted items): This comment states that the proposed regulations leave some gaps in the

regulatory scheme pursuant to the changes to BPC sections 480, 481, 482, and 493 as modified by AB 2138. The comment states that the proposed regulations fail to fully 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.

Board Response to Organizations Comment 1: The purpose of the proposed regulations is to clarify substantial relationship criteria and criteria for rehabilitation, as required by AB 2138 (BPC section 481). Consistent with the requirements enacted by AB 2138, these regulations would adopt all of the following criteria, which would assist 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 the profession in which the applicant seeks licensure or in which the licensee is licensed.

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.

Summary of Organizations Comment 2 (Page 3 of letter, first bulleted item): The proposed regulations do not comply with AB 2138 because Sections 416(c) and 3060(c) state that certain acts and convictions are substantially related regardless of the time that has passed or the nature and gravity of the offense in contravention of AB 2138 (BPC section 481). AB 2138 allows the Board discretion to determine which crimes are substantially related on an individual basis. Moreover, these sections fail 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 BPC section 480(b)-(d).

Board Response to Organizations Comment 2: Subdivision (b) of Sections 416 and 3060 specifies that the Board, in determining whether a crime is substantially related, must consider the nature and gravity of the offense, the number of years that have elapsed, and the nature and duties of the profession in which the applicant is seeking licensure. It would be unnecessarily duplicative to include this same language in subdivision (c) of these same sections. Therefore, the Board is making no changes to the proposed regulations in response to this comment.

Summary of Organizations Comment 3 (Page 3 of letter, second bulleted item): The regulations do not comply with AB 2138 because Sections 418 and 3061 focus 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.

Board Response to Organizations Comment 3: As addressed more fully in the Board's response to Comment 8, Sections 418 and 3061 specify what evidence of rehabilitation the Board is required to consider; they do not prohibit the Board from considering other evidence as well. Furthermore, the sections include a provision that requires the Board to consider "any evidence of rehabilitation submitted by the applicant," thus permitting 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.

Summary of Organizations Comment 4 (Page 3 of letter, enumerated #1): This comment indicates that the proposed language should include the "7-year washout period" for consideration of convictions or discipline which are not statutorily considered serious felonies under Penal Code section 1192.7. (BPC section 480(a)(1), operative July 1, 2020.)

Board Response to Organizations Comment 4: Regulations should not indiscriminately incorporate statutory language. (Government (Gov.) Code section 11349(f).) The seven-year period during which the Board can deny a license for a conviction or formal discipline is fully described in BPC section 480(a)(1)(A) and (B), operative July 1, 2020. As this is already included in statute, adding this provision is duplicative of BPC 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.

Summary of Organizations Comment 5 (Page 3 of letter, enumerated #2): 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 section 480(b)-(d)).

Board Response to Organizations Comment 5: Regulations should not indiscriminately incorporate statutory language. (Gov. Code section 11349(f).) BPC section 480(c), operative 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), operative 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), operative 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.

Summary of Organizations Comment 6 (Page 4 of letter, enumerated #3): 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 section 480(f)(2)).

Board Response to Organizations Comment 6: Sections 418 and 3061 place requirements on the Board by specifying what evidence the Board must consider in determining rehabilitation; these sections do not place requirements on applicants to provide information to the Board. Furthermore, BPC section 480(f)(2), operative 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 BPC 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.

Summary of Organizations Comment 7 (Page 4 of letter, enumerated #4): 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 reconsideration, 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 section 480(f)(3)).

Board Response to Organizations Comment 7: These requirements are already set forth in statute and regulation. BPC sections 480(f)(3), 485 through 487, and 7855 (for geologists and geophysicists); 16 CCR section 429 (for engineers and land surveyors); and the Administrative Procedure Act, at Gov. 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 and regulations and, as such, it is unnecessary to include them in Sections 418 and 3061 (Gov. Code section 11349(f)). Accordingly, the Board is making no changes to the regulations in response to this comment.

Summary of Organizations Comment 8 (Page 4 of letter, enumerated #5): 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 provide additional examples of evidence of mitigating circumstances and rehabilitation efforts, including considering 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.

Board Response to Organizations Comment 8: BPC section 482, operative 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 Sections 418 and 3061 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 Sections 418 and 3061 to help the Board determine whether sentence completion demonstrates rehabilitation. Criteria include the nature and severity 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, 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, licensee, or petitioner's rehabilitation, the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification of the terms or conditions. 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 to 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 well as any others as the applicant may choose. As the Board can and already does give serious consideration to these factors when considering whether an applicant, licensee, or petitioner 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.

Summary of Organizations Comment 9 (Pages 4 and 5 of the letter, enumerated #6): The comment states that the proposed regulations fail to state the requirements set forth in BPC section 480(g) 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.

Board Response to Organizations Comment 9: These requirements are already set forth in statute (BPC section 480(g)(2), operative July 1, 2020). Stating them in regulation would be duplicative of the statute (Gov. Code section 11349(f)). Accordingly, the Board is making no changes to the regulations in response to this comment.

Summary of Comments Received During the 15-day Comment Period

May 14, 2020, and June 22, 2020, Comments from David Woolley

Comments were received from David Woolley, Professional Land Surveyor, on May 14, 2020. In his comments, Mr. Woolley requested that the Board hold a public hearing on the regulatory proposal, and he also provided comments relating to the proposal. On June 22, 2020, Mr. Woolley submitted a second set of comments. Although the second set of comments were received after the close of the 15-day period, the Board deemed them to be in follow-up to his original comments and, insofar as they related to the rulemaking proposal itself, considered them along with the original set of comments.

Board Response to Woolley Request for Public Hearing:
Pursuant to the Administrative Procedure Act (Chapters 4, 4.5, and 5 of Part 1 of Division 3 of Title 2 of the Government Code), specifically Sections 11346.5(a)(17) and 11346.8(a), a member of the public may request that a hearing be held on the proposed text of a regulatory proposal if one is not initially scheduled. These laws require that such a request be submitted 15 days prior to the close of the 45-day public comment period. The 45-day public comment period for this proposal ended on April 27, 2020; therefore, a request for a hearing had to be submitted by April 13, 2020. Since Mr. Woolley did not submit his request for a hearing until May 14, 2020, his request for a hearing is not timely in accordance with the laws. Furthermore, there is nothing in the Administrative Procedure Act that requires the Board to hold a hearing to receive comments on modifications to the proposed text. As such, the Board will not hold a hearing on this regulatory proposal.

Summary of Woolley Comment 1a:
Mr. Woolley comments that the regulations do not provide definitions for the terms "crime," "professional misconduct," and "act" as used in subdivision (a) of 16 CCR sections 416 and 3060. He questions who will determine what these terms mean and states his belief that the regulations provide too much latitude to Board staff to determine the definitions of the terms. Mr. Woolley further claims that failing to provide definitions of these terms violates applicants' and licensees' due process rights.

Board Response to Woolley Comment 1a:
Although the terms "crime" and "act" are used in existing regulations and are, therefore, not technically related to the proposed modifications, the Board has still considered the portion of this comment related to those terms.

BPC section 481 requires the Board to "… develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the business or profession it regulates." [Emphasis added.] Furthermore, BPC sections 480 and 490, as well as the specific BPC sections referenced in 16 CCR sections 416 and 3060, indicate that the Board may deny issuing a license or take disciplinary action against a license if the person has been convicted of a "crime" that is substantially related to the qualifications, functions, and duties of the profession. Additionally, BPC section 480 [as will become operative on July 1, 2020] provides certain limitations on the types of crimes that may be considered. 16 CCR sections 416 and 3060, which were originally adopted in accordance with BPC section 481 and are being amended to conform to the statutory changes being made of BPC sections 480 and 481, provide information as to what types of actions shall be considered "substantially related crimes." For all of these reasons, it is not necessary for the Board to provide a separate definition or a list of further examples of what is meant by the term "crime" in its regulations.

The Board is allowed to consider acts that may be the underlying basis of a conviction, as long the conviction has not been dismissed under certain specific sections of the Penal Code or a comparable dismissal or expungement. 16 CCR sections 416 and 3060 further limit what acts the Board may consider by specifying certain sections of the BPC under which the Board may deny issuing a license or take disciplinary action against a license and by indicating that the act must be substantially related to the qualifications, functions, and duties of the profession. 16 CCR sections 416 and 3060 provide information as to what types of actions will be considered as "substantially related acts." For all of these reasons, it is not necessary for the Board to provide a separate definition or a list of further examples of what is meant by the term "act" in its regulations.

The phrase "professional misconduct" is used in statute, specifically in BPC section 480(a)(2) [as will become operative on July 1, 2020]. This section further narrows the type of "professional misconduct" that is at issue; it is "professional misconduct" that 1) "would have been cause for discipline before the board for which the present application is made," and, 2) "is substantially related to the qualifications, functions, or duties of the business or profession." Additionally, it is unnecessary to provide a definition of words used in regulations when the words as used have the same general definitions as provided in dictionaries. For example, the Merriam-Webster Dictionary includes "intentional wrongdoing" and "improper behavior" in its definition of "misconduct," and Black's Law Dictionary includes "a dereliction from duty, injurious to another, on the part of one employed in a professional capacity" in its definition. Furthermore, subdivision (c) of 16 CCR sections 416 and 3060 provide information as to what types of actions shall be considered "substantially related crimes, professional misconduct, or acts." For all of these reasons, it is not necessary for the Board to provide a separate definition or a list of further examples of "professional misconduct" or "misconduct" in its regulations.

With regard to Mr. Woolley's arguments regarding "due process," his concerns with the definitions of terms are not a "due process" issue. If the Board denies issuing a license, the applicant has the right to appeal that denial by requesting a formal hearing that is conducted under the provisions of the Administrative Procedure Act (Chapters 4, 4.5, and 5 of Part 1 of Division 3 of Title 2 of the Government Code). Likewise, if the Board pursues disciplinary action against a license, the licensee has the right to a formal hearing that is conducted under the provisions of the Administrative Procedure Act.

In his follow-up comments on June 22, 2020, Mr. Woolley states that, based on the above response, the Board has misinterpreted his comments relating to "due process" for licensees as relating only to due process on the part of the Board. He states that his objection has to do with the licensee's criminal due process rights including the right of the licensee to have a fair criminal trial and have time to appeal a conviction before

being subject to Board discipline. He states that the text does not consistently use the phrase "conviction of a crime" rather than just "crime."

The Board has no authority to address due process rights afforded in criminal matters and whether those rights have been violated in a criminal proceeding. Insofar as there is concern with the use of the term "crime," rather than the phrase "conviction of a crime," 16 CCR sections 416 and 3060 indicate that they apply when the Board is considering denying to issue a license or taking disciplinary action against a licensee pursuant to certain specified BPC sections. The BPC sections that pertain to crimes require that there be a conviction in order for the Board to take action under those sections (see, for example, subdivision (a) of BPC section 6775, which states in pertinent part "… conviction of a crime …," or subdivision (a) of BPC section 480, which states in pertinent part "… convicted of a crime …"). Furthermore, BPC section 481 requires the Board to "… develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially related to the qualifications, functions, or duties of the business or profession it regulates." [Emphasis added.] 16 CCR sections 416 and 3060 address this criterion by indicating when a "crime" is considered "substantially related." For all of these reasons, it is unnecessary to use the phrase "conviction of a crime" rather than the term "crime."

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

Summary of Woolley Comment 1b:
Mr. Woolley comments that the regulations, by using only the terms "crime," "professional misconduct," or "act" do not specify that there must be a conviction of a crime in order for the Board to deny issuing a license or taking disciplinary action against a licensee. He also states that the phrase "… include, but are not limited to, the following …," as used in subdivision (c) of 16 CCR sections 416 and 3060, is too broad and provides too much leeway to Board staff to include anything it wants to include. Mr. Woolley again states that this fails to provide due process for an applicant or licensee.

Board Response to Woolley Comment 1b:
The Board rejects this comment. As indicated in the Board Response to Woolley Comment 1a, 16 CCR sections 416 and 3060 indicate that they apply when the Board is considering denying to issue a license or taking disciplinary action against a licensee pursuant to certain specified BPC sections. The BPC sections that pertain to crimes require that there be a conviction in order for the Board to take action under those sections (see, for example, subdivision (a) of BPC section 6775, which states in pertinent part "… conviction of a crime …," or subdivision (a) of BPC section 480, which states in pertinent part "… convicted of a crime …"). Furthermore, BPC section 481 requires the Board to "… develop criteria to aid it, when considering the denial, suspension, or revocation of a license, to determine whether a crime is substantially

related to the qualifications, functions, or duties of the business or profession it regulates." [Emphasis added.] 16 CCR sections 416 and 3060 address this criteria by indicating when a "crime" is considered "substantially related." For all of these reasons, it is unnecessary to use the phrase "conviction of a crime" rather than the term "crime."

The phrase "… include, but are not limited to, the following …" is existing language that has been included in 16 CCR sections 416 and 3060 since they were initially adopted in the 1970s. The Board is not proposing to change this phrase. As such, it does not convey any additional authority to the Board or its staff than already exists.

With regard to Mr. Woolley's arguments regarding "due process," as indicated in the Board Response to Woolley Comment 1a, his concerns with the definitions of terms are not a "due process" issue. If the Board denies issuing a license, the applicant has the right to appeal that denial by requesting a formal hearing that is conducted under the administrative adjudication provisions of the Administrative Procedure Act (Chapters 4, 4.5, and 5 of Part 1 of Division 3 of Title 2 of the Government Code). Likewise, if the Board pursues disciplinary action against a license, the licensee has the right to a formal hearing that is conducted under the provisions of the Administrative Procedure Act.

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

Summary of Woolley Comment 1c:
Mr. Woolley states that the inclusion of "the number of years elapsed since the date of the offense" in subdivision (b) of 16 CCR sections 416 and 3060 is vague and does not consider statutes of limitations. Mr. Woolley also asks how far back the Board will consider, whether any deference is given to statutes of limitations, and whether statutes of limitations were considered in the development of these regulations.

Board Response to Woolley Comment 1c:
By including reference to the number of years that have elapsed since the date of the offense as one of the items the Board must consider in determining the substantial relationship, the Board is implementing the new statutory requirements of BPC section 481 [as will become effective July 1, 2020]. In enacting new requirements for what boards must consider in determining the substantial relationship, the Legislature intentionally chose to include qualitative factors, such as the nature and gravity of the offense; the time that has elapsed since the offense occurred; and the nature and duties of the profession. If the intent of the Legislature was to require these be considered as quantitative factors, it would have specified the level of gravity or the exact number of years. The purpose of these regulations is to implement statute in the manner intended by the Legislature in enacting the statute. In this case, that intent is to allow the Board to consider qualitative factors, rather than quantitative factors.

With regard to Mr. Woolley's reference to a statute of limitations, if that statute of limitations for a criminal offense has expired, then the crime would not be prosecuted. However, the Board could still consider the underlying act, giving due consideration to the factors specified in statute and regulation as to whether that act was substantially related. Furthermore, there is no statute of limitations that would bar the Board from taking disciplinary action against a licensee. Statutes of limitations pertaining to civil litigation, as referenced in the legal opinion Mr. Woolley included with his comments, have no bearing on this regulatory proposal.

For all of these reasons, it is unnecessary to specify a quantitative amount for "the number of years that have elapsed since the date of the offense" since it is intended to be a qualitative factor that must be considered. Accordingly, the Board is making no changes to the proposed regulations in response to this comment.

Summary of Woolley Comment 2:
Mr. Woolley reiterates his belief that the terms "crimes," "professional misconduct," and "acts" should be defined in the regulations, as he addressed in Comment 1a.

Board Response to Woolley Comment 2:
Insofar as Mr. Woolley raises no new issues in his Comment 2, the Board rejects this comment for the reasons described in Board Response to Woolley Comment 1a and is making no changes to the proposed regulations in response to this comment.

Summary of Woolley Comments 3 and 4:
Mr. Woolley states in Comment 3 that the proposed amendments broaden the authority of the Board and the Board's Executive Officer and are, therefore, underground regulations. In Comment 4 ("Conclusion"), Mr. Woolley asks the Board to stop the process to amend its regulations as proposed.

Board Response to Woolley Comments 3 and 4:
Mr. Woolley is correct that regulations implement and make specific statute but cannot exceed the authority provided by statute. The proposed amendments to these regulations do not do that. They conform existing regulations regarding the substantial relationship criteria and the criteria for rehabilitation to amendments made to the enabling and authorizing statutes by AB 2138 and are consistent with the intent of the Legislature in enacting those statutes. In proposing to amend its regulations, the Board has followed, and is continuing to follow, the requirements of the Administrative Procedure Act (Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code) that govern the adoption and amendment of regulations by providing the public with written notices of the proposed changes with justifications for the changes, by allowing the public to submit comments on the proposal, and by considering and responding to those comments before taking final action to adopt the changes.

Accordingly, the Board is making no changes to the regulations in response to these comments, nor will it cease pursuing this regulatory proposal.

Nonduplication Statement - 1 CCR § 12

As stated throughout the Initial and Final Statements of Reasons, the proposed regulations partially duplicate or overlap several state statutes amended by the passage of AB 2138. In particular, AB 2138 amended BPC sections 480 (grounds upon which a board can deny a license for applicants convicted of a crime or subject to formal discipline by a licensing board), 481 (the criteria boards can apply in determining if a crime bears a substantial relationship to the qualifications, functions, or duties of the profession a board regulates), 482 (the rehabilitation criteria a board must consider when considering the denial, suspension, or revocation of a license due to conviction of a crime), and 493 (the evidentiary effect of a conviction and criteria for determining if a crime has a substantial relationship to the profession). By repeating key language from these statutes within these regulations, the steps the Board will take, and the reasoning it will apply, the regulations become significantly clearer and will better guide Board members, parties, administrative law judges, attorneys, and individuals with criminal convictions.

The changes made by AB 2138 and these regulations are directly applicable to individuals convicted of a crime who seek licensure, and to licensees who are convicted of a crime. As these regulations implement, interpret, and make specific how the laws amended by AB 2138 will be enforced by the Board, some duplication or overlap is necessary to ensure that the steps the Board must follow and the reasoning the Board must apply is clear and consistent with statute. The partial duplication or overlap with the statutes amended by AB 2138 are thus necessary to effectively implement the new standards in a way that satisfies the “clarity” standard of Government Code section 11349.1, subdivision (a)(3).