

TITLE 16. ACUPUNCTURE BOARD

(Notice published 1/31/20)

NOTICE OF PROPOSED RULEMAKING

The Acupuncture Board (Board) proposes to adopt the proposed regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

The Board will hold a public hearing starting at **10:00 a.m. on March 17, 2020**, in the Sapphire Room, Room #285 located at 1747 North Market Blvd., 2nd Floor, Sacramento, CA 95834. The Sapphire Room is wheelchair accessible. At the hearing, any person may present statements or arguments orally or in writing relevant to the proposed action described in the Informative Digest. The Board requests, but does not require, that persons who make oral comments at the hearing also submit a written copy of their testimony at the hearing.

WRITTEN COMMENT PERIOD

Any interested person, or his/her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. Comments may also be submitted by facsimile (FAX) at (916) 928-2204 or by e-mail to acupuncture@dca.ca.gov. The written comment period closes on March 17, 2020. The Board will consider only comments received at the Board's office by that time. Submit comments to:

Alex Dodge, Policy Analyst
Acupuncture Board
1747 N. Market Blvd., Suite 180
Sacramento, CA 95834

AUTHORITY AND REFERENCE

Business and Professions Code (BPC) sections 481, 482, 493, and 4933 authorize the Board to adopt the proposed regulations. The proposed regulations implement, interpret, and make specific BPC sections 141, 480, 481, 482, 488, 489, 490, 493, 4938, 4944(a), 4955, subdivisions 4955(b), (h), and (j), 4955.1, 4955.2, and 4956.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Board licenses acupuncturists, who are licensed health care practitioners that provide health care services. (BPC, §§ 4926 and 4927.) Existing law (BPC, §§ 480 and 490) presently authorizes the Board to deny an application for licensure or discipline an acupuncturist based on a conviction for a crime or act substantially related to the licensed

business or profession. BPC 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 acupuncture profession. BPC section 482 requires the Board to develop criteria to evaluate an applicant's or licensee's rehabilitation when considering the denial or discipline of an acupuncture license. The Board has not 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 an acupuncture licensee.

Effective July 1, 2020, pursuant to the provisions of Assembly Bill 2138 (Stats. 2018, ch. 995) (hereafter, AB 2138), 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 adopt regulations consistent with this recently enacted legislation and to more accurately reflect the Board's authority to consider denials and discipline under these new criteria.

Effective July 1, 2020, BPC section 481, subsection (b) will require the Board's 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.
- The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.

The new regulations will also address other changes to law enacted by AB 2138. These proposed regulations include references to "professional misconduct;" this will be considered a legal basis for denial under BPC section 480, if a licensing board, inside or outside of California, subject the applicant to formal discipline that is substantially related to the qualifications, functions, or duties of the business or profession for which the present application is made. The proposed language will also add references to discipline pursuant to BPC 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. (BPC, §§ 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 or discipline.

Anticipated Benefits of the Proposed Regulation:

The proposed new regulations would place applicants and licensees on notice that the Board is statutorily authorized to deny, suspend, or revoke a license because of professional misconduct and discipline taken by another licensing board or jurisdiction. The proposal would also make relevant parties (e.g., the Office of the Attorney General, Office of Administrative Hearings, 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 acupuncture.

Specifically, AB 2138 was enacted to reduce licensing and employment barriers for people who are rehabilitated. These proposed new regulations 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 acupuncturists in the marketplace. Therefore, allowing for more health care providers to treat increasing numbers of California consumers.

Evaluation of Inconsistency/Incompatibility with Existing State Regulations:

During the process of developing these regulations, the Board conducted a search of any similar regulations on this topic and concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Board has made the following initial determinations:

Mandate on local agencies and school districts: None

Cost or savings to any state agency: None

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630: None

Other nondiscretionary cost or savings imposed on local agencies: None

Cost or savings in federal funding to the state: None

Cost impacts on a representative private person or business: The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Statewide adverse economic impact directly affecting businesses and individuals: None

Significant effect on housing costs: None

Business Impact:

This regulation will not have a significant statewide adverse economic impact directly affecting businesses. This initial determination is based on the following facts:

The Board has approximately 12,000 licensees for the current fiscal year. During fiscal year 2016-2017, the Board issued 534 licenses and denied one; in 2017-2018, the Board issued 452 licenses and denied three; and in the first half of 2018-2019, the Board has issued 172 licenses and denied zero. Therefore, the Board has denied fewer than one percent of all applicants over the past three fiscal years.

Since the Board has denied fewer than one percent 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 regulations will further assist in that effort through the adoption of standards designed to implement new substantial relationship and rehabilitation criteria. As a result, the Board anticipates that there will be fewer denials or disciplinary actions based upon criminal convictions and, therefore, no significant or statewide adverse economic impacts.

Effect on Small Business:

The Board has determined that the proposed regulation will not affect small businesses because the proposal is not of sufficient magnitude to positively or negatively affect businesses significantly. Historically, similar regulations adopted by the Board have resulted in fewer than one percent of all applicants being denied. Even assuming the number of denials or discipline would decrease (thus creating more licensed acupuncturists) because of these regulations, the Board believes that the forgoing data demonstrates that the decrease would not be significant enough to expand businesses who hire acupuncturists.

RESULTS OF ECONOMIC IMPACT ASSESSMENT/ANALYSIS:

The proposed new regulations will not create new jobs or businesses or eliminate existing jobs or businesses and will not affect the expansion of businesses currently doing business 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 have resulted in fewer than one percent of all applicants being denied. Even assuming the number of denials or discipline would decrease because of these new regulations, the Board believes that this data demonstrates that these regulations would not be significant enough to create or eliminate businesses who hire acupuncturists.

This regulatory proposal will benefit the health and welfare of California residents because by implementing criteria that emphasize rehabilitative efforts, the proposal 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 should lead to an increase in acupuncturists in the marketplace and, therefore, allow more medical providers to treat the increasing numbers of California health care consumers.

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

This regulatory proposal will not affect the State's environment because the proposal does not involve environmental issues. The proposal will add new 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.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative the Board considered, or that has otherwise been identified and brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed. Alternatively, the proposal would be as effective and less burdensome to affected private persons than the adopted regulations or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulation at the scheduled hearing or during the written comment period.

CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to:

Name: Alex Dodge
Address: 1747 N. Market Blvd., Suite 180
Sacramento, CA 95834

Telephone No.: (916) 515-5200
Fax No.: (916) 928-2204
E-Mail Address: acupuncture@dca.ca.gov

The backup contact person is:

Name: Ben Bodea
Address: 1747 N. Market Blvd., Suite 180
Sacramento, CA 95834

Telephone No.: (916) 515-5200
Fax No.: (916) 928-2204
E-Mail Address: acupuncture@dca.ca.gov

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS AND RULEMAKING FILE

The Board will have the entire rulemaking file available for inspection and copying, throughout the rulemaking process, at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this Notice of Proposed Action, the proposed Text of the regulations, the Initial Statement of Reasons, and other information which the rulemaking is based, including:

- Board's March 28 – 29, 2019 approved meeting minutes,
- Board meeting materials (number 10) from March 2019 Board meeting,
- Assembly Bill 2138 (as amended in Assembly April 2, 2018),
- Assembly Bill 2138 (as amended in Senate June 20, 2018),
- Assembly Bill 2138 (chapter 995, Statutes of 2018),
- Senate Committee on Business, Professions and Economic Development Analysis, dated June 18, 2018, and
- Assembly Floor Analysis, dated August 24, 2018.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, the Board may adopt the proposed regulations substantially as described in this notice. If the Board makes modifications which are sufficiently related to the originally proposed text, the Board will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Board adopts the regulation as revised. Please send requests for copies of any modified regulations to the attention of Kristine Brothers at the address indicated above. The Board will accept written comments on the modified regulation for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Alex Dodge at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulation in underline and strikeout can be accessed through our website at: https://www.acupuncture.ca.gov/about_us/dpoppp.shtml.