

**TITLE 16. California Professional Fiduciaries Bureau
Department of Consumer Affairs**

FINAL STATEMENT OF REASONS

Request for Early Effective Date

As the provisions of AB 2138 go into effect July 1, 2020, the Bureau requests an effective date of July 1, 2020 to coincide with statute or as soon thereafter as approved.

Subject Matter of Proposed Regulations: Substantial Relationship and Rehabilitation Criteria

Section(s) Affected: The proposed regulatory action would amend Sections 4520, 4522, 4620, and 4622 of Title 16 of the California Code of Regulations (CCR), and add Section 4521 to Title 16 of the CCR.

Updated Information

The Initial Statement of Reasons is included in the file. The information contained therein is updated as follows:

The initial comment period for this rulemaking was intended to be from Friday, February 21, 2020, when this rulemaking was listed in the Notice Register, to Tuesday, April 7, 2020. The comment period was extended to April 27, 2020, due to not all parties being noticed properly. The notice of extension of the comment period was properly noticed to all interested parties on March 9, 2020. The hearing was held virtually, and a Notice of Virtual Hearing was issued on Thursday, April 16, 2020. No comments were received at the Virtual Hearing. During the initial comment period, the Professional Fiduciaries Bureau (Bureau) received one written comment. The Bureau received a second written comment on June 9, 2019 after the initial comment period had closed.

Prior to the submission of the final rulemaking to the Office of Administrative Law, the Bureau has made the following non-substantive changes to the proposed rulemaking:

1. 16 CCR Section 4520:
 - a. Subsection (a): Corrected the phrase “crime or professional misconduct” by adding a comma after the word “crime,” deleting the word “or” from the proposed text, adding a comma after the phrase “professional misconduct,” and reinserting the phrase “or act.” The phrase now reads “crime, professional misconduct, or act.” This corrects the unintended removal of the term “act” from the prior text.

- b. Subsection (a): Corrected the phrase “the qualifications, functions, or duties of a person holding a professional fiduciary license if to a substantial degree it evidences present or potential unfitness of a person holding such a license...” to read “the qualifications, functions, or duties of a professional fiduciary if to a substantial degree it evidences present or potential unfitness of a person holding a professional fiduciary license....”

These changes clarify the intended relationship between the qualifications, functions, and duties intrinsic to a professional fiduciary as opposed to those qualifications, functions, and duties as they relate to ‘a person.’ The purpose of the ‘substantial relationship’ inquiry is to determine whether the underlying factual basis is related to the role of professional fiduciary, and not to the person possessing the license.

The Bureau also changed the phrase “such a license” to “a professional fiduciary license.” This clarification is necessary because the phrase “professional fiduciary license” has been changed earlier in the same sentence, making the reference to “such a license” confusing.

- c. Subsection (b): Removed the word “licensed.” As noted above, the ‘qualifications, functions, or duties’ used as a basis for a determination of substantial relationship more accurately relate to the role of professional fiduciary, rather than the technical title of ‘licensed professional fiduciary.’
- d. Subsection (b): Inserted “all of” before “the following criteria” to reflect the statutory requirement in Business and Professions Code (BPC) section 481, subdivision (b).
- e. Subsection (b)(3): Removed the word “license.” Here, the phrase “nature and duties of a professional fiduciary license” may be confusing. It is unclear whether a ‘license’ would itself have a nature or duties. Similar to the changes made elsewhere regarding the use of the word ‘license,’ the Bureau has determined it clearer to delete the word, opting in favor to refer to ‘professional fiduciary’ instead.
- f. Subsection (c): Changed the phrase “crimes or professional misconduct” to “crimes, professional misconduct, or acts.” This corrects the unintended removal of the term “act” from the prior text.

- g. Note: The Bureau has removed a citation to Business and Professions Code section 141 after discussion with the Office of Administrative Law to clarify which sections of statute are properly listed in the Reference section of the Note.

2. 16 CCR Section 4522

- a. Subsection (a): Made technical revisions. 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” was unclear 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 Bureau 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), proceedings in which the denial is based on professional misconduct (as that term is used under new BPC section 480), and proceedings based on a disciplinary action as described in BPC section 141. These clarifications are necessary to inform the public, applicants, and Bureau staff that rehabilitation criteria will be considered for all matters, regardless of whether the grounds for stem from BPC section 480. The clarifications promote equity and fairness by ensuring all applicants will have the ability to submit rehabilitation evidence to the Bureau for its consideration, which is in keeping with the legislative intent of AB 2138. The clarifications also provide consistency with other DCA board regulations.
- c. Subsection (b): Removed the language “. The Bureau shall find that the applicant made a showing of rehabilitation if, after considering the following criteria, the Bureau finds that the applicant is rehabilitated.” This change is being made at the request of the Office of Administrative Law and to more clearly establish the relationship of the criteria to the Bureau’s evaluation by linking the sentence beginning “If the applicant” to the criteria directly.
- d. Subsection (b)(1): Replaced the word “severity” with the word “gravity.” This change is made at the request of the Office of Administrative Law and to establish consistency of language usage throughout the

proposed text. The word “gravity” is used in proposed sections 4520(b)(1), 4522 (a)(1), 4620(b)(1), 4622(a)(1), and 4622(b)(1).

- e. Subsection (b)(1) through (3): Added “professional misconduct” for consistent use with the term in CCR section 4520 and to differentiate “professional misconduct” as a ground provided under new BPC section 480, subsection (a)(2), from other “acts.” Added “disciplinary actions” for consistent use with the term in CCR section 1381(b) and BPC section 141 and to differentiate “disciplinary actions” as a ground for revocation or suspension provided under BPC section 141 from other “acts.”
- f. Subsection (b)(5): Replaced the phrase “subsections (a)(1)-(a)(5)” with “subsections (a)(1) through (a)(5)” to more clearly articulate that the phrase refers to a series of subsections, all of which are applicable. Changing a hyphen to the phrase “through (a)” shows the list is inclusive.
- g. Note: Added Authority reference to BPC section 481 to correctly identify the authority basis for this proposed language. Added a comma following the Authority citation to BPC section 482 for grammatical correctness. Deleted Reference citation to BPC section 475 upon review by the Office of Administrative Law to limit citations to the appropriate sections.

3. 16 CCR Section 4620

- a. Subsection (a): Subsection (a): Corrected the phrase “the qualifications, functions, or duties of a person holding a professional fiduciary license if to a substantial degree it evidences present or potential unfitness of a person holding such a license...” to read “the qualifications, functions, or duties of a professional fiduciary if to a substantial degree it evidences present or potential unfitness of a person holding a professional fiduciary license....”

These changes clarify the intended relationship between the qualifications, functions, and duties intrinsic to a professional fiduciary as opposed to those qualifications, functions, and duties as they relate to ‘a person.’ The purpose of the ‘substantial relationship’ inquiry is to determine whether the underlying factual basis is related to the role of professional fiduciary, and not to the person possessing the license.

The Bureau also changed the phrase “such a license” to “a professional fiduciary license.” This clarification is necessary because the phrase “professional fiduciary license” has been changed earlier in the same

sentence, making the reference to “such a license” confusing.

- b. Subsection (b): Removed the word “licensed.” As noted above, the ‘qualifications, functions, or duties’ used as a basis for a determination of substantial relationship more accurately relate to the role of professional fiduciary, rather than the technical title of ‘licensed professional fiduciary.’
- c. Subsection (b): Inserted “all of” before “the following criteria” to reflect the statutory requirement in Business and Professions Code (BPC) section 481, subdivision (b).
- d. Subsection (b)(3): Removed the word “license.” Here, the phrase “nature and duties of a professional fiduciary license” may be confusing. It is unclear whether a ‘license’ would itself have a nature or duties. Similar to the changes made elsewhere regarding the use of the word ‘license,’ the Bureau has determined it clearer to delete the word, opting in favor to refer to ‘professional fiduciary’ instead.
- e. Subsection (c)(1) through (c)(3): Added the phrase “related to and/or.” This phrase is designed to make consistent the terms used to define which crimes are considered substantially related. Subsections (c)(7) through (c)(13) of proposed regulation section 4520 use the term “involving,” whereas subsections (c)(1) through (c)(3) use the term “related to.” Combining the two ensures there is less confusion should any question arise about why the subsections do not share identical language.
- f. Subsection (c)(7) through (c)(13): Added the phrase “related to and/or.” As noted above this change ensures consistent wording with (c)(1) and (c)(3), as well as proposed section 4520, ensuring there is less confusion about the standards of relatedness used in describing crimes substantially related for the purposes of Bureau licensing decisions.
- g. Subsection (c)(7): Corrected capitalization of “section” to “Section” to ensure the word appears with capitalization throughout the regulation. This eliminates confusion about any difference in spelling or format in the regulations.
- h. Note: Added Reference citation to BPC section 141. BPC section 141 is added to appropriately cite the BPC section that allows the Bureau to take disciplinary action based on certain records outside California.

4. 16 CCR Section 4622

- a. Subsection (a): Removed the phrase “and is presently eligible for a license” because the meaning of the term “presently” was 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 Bureau 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) and proceedings based on a disciplinary action as described in BPC section 141. These clarifications are necessary to inform the public, applicants, and Bureau staff that rehabilitation criteria will be considered for all matters, regardless of whether the grounds for stem from BPC section 490.

Removed the language “. The Bureau shall find that the applicant made a showing of rehabilitation if, after considering the following criteria, the Bureau finds that the applicant is rehabilitated.” This change is being made at the request of the Office of Administrative Law and to more clearly establish the relationship of the criteria to the Bureau’s evaluation by linking the sentence beginning “If the applicant” to the criteria directly.

The clarifications promote equity and fairness by ensuring all applicants will have the ability to submit rehabilitation evidence to the Bureau for its consideration, which is in keeping with the legislative intent of AB 2138. The clarifications also provide consistency with other DCA board regulations.

- c. Subsection (b)(1) and (b)(3): Added the phrase “underlying act(s) in the disciplinary action.” This is meant to clarify that, in the circumstance a suspension or revocation action, where a prior disciplinary action forms the basis of the current action, it is the underlying act and not the ‘nature’ or ‘gravity’ of the process of a disciplinary action that is to be considered.
- d. Subsection (b)(5): Replaced the phrase “subsections (a)(1)-(a)(5)” with “subsections (a)(1) through (a)(5)” to more clearly articulate that the phrase refers to a series of subsections, all of which are applicable. Changing a hyphen to the phrase “through (a)” shows the list is inclusive.

- e. Note: Added Reference citation to BPC section 141. BPC section 482 does not confer rulemaking authority on the Bureau. Section 482 remains cited appropriately in the Reference section of the Note. BPC section 141 is added to appropriately cite the BPC section that allows the Bureau to take disciplinary action based on certain records outside California.

Removed Reference citations to BPC sections 475 and 480 and Penal Code Section 1203.4 after discussion upon review by the Office of Administrative Law to limit citations to the appropriate sections.

Local Mandate

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

Objections or Recommendations/Responses

The Bureau received a letter from Steven Lee dated April 22, 2020, on the Bureau's proposed regulations implementing Assembly Bill (AB) 2138. The Bureau also received a comment on June 9, 2020 from Carol Peters related to this rulemaking. Below is the Bureau's response to the comments made.

Comment 1 – Steven Lee

Comment Summary: The commenter believes the proposed regulation will heighten transparency of licensees regarding disclosure of out-of-state misconduct.

Response: The Bureau acknowledges this comment and thanks the commenter for their support. The Bureau agrees that the proposed regulation will heighten transparency regarding the criteria by which the Bureau will evaluate disciplinary actions taken by other entities, including agencies of other states or the federal government, as possible grounds for denial of licensure or disciplinary action by the Bureau. Because the comment is neither objecting to the proposal nor suggesting any changes, no further response is required. (See Government Code § 11346.9, subd. (a)(3).)

Comment 2 – Carol Peters

Comment Summary: The commenter raises several concerns regarding the proposed regulation. First, the commenter argues the term "Exonerated" needs to be defined in regulation to clarify its legal effect. Second, the commenter argues the California Attorney General needs greater training about the Fiduciary Duty and uses evidence of a case with which the commenter is familiar. Third, the commenter notes two cases of "mis-use" by the California Attorney General of its "prosecutorial discretion." Finally, the commenter suggests the Bureau "require all fiduciary matters to be heard in probate court" first.

Response: The Bureau rejects this comment. The comment was received outside the comment period for this rulemaking, which ended on April 27th, 2020. Moreover, the letter does not appear to relate to the subject matter of this proposal. The points made in the letter relate to the concept of ‘exoneration,’ which does not appear in the regulations in this proposal or in the underlying Business and Professions Code sections giving rise to it. To the extent that 16 CCR 4622 refers to “evidence of dismissal proceedings pursuant to Section 1203.4 of the Penal Code,” the Bureau is using the current legal terminology, sometimes referred to as *expungement* but not *exoneration*. That statute clearly states that a conviction exists but relief from the criminal penalties are granted. If a person had a conviction *vacated*, then it would no longer be in their criminal record and could not be used against them. The commenter further links to the Disciplinary Guidelines of the Notary Public, but such a review is not needed because the statute speaks for itself. The other points in the letter relate to the prosecutorial practices and training of the Office of the Attorney General, which is outside the scope of authority of the Bureau. Finally, the commenter’s suggestion relates to the procedural handling of ‘fiduciary matters’ as they relate to which entity should preside over them – again an issue outside the scope of this rulemaking. This rulemaking relates to the regulations covering consideration of ‘substantial relationship’ and rehabilitation criteria for denial, suspension, or revocation matters.

Nonduplication Statement - 1 CCR § 12

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

Economic Impact

To the extent license applicants and licensees were convicted of a crime or were previously disciplined, the proposed regulations could impact individual licensees by authorizing individuals with criminal convictions to obtain licensure by the Bureau, if their criminal convictions are not substantially related to the practice regulated by the Bureau, and the Bureau determines they have met the rehabilitative criteria, as established in the regulatory proposal.

However, because the Bureau historically denies zero initial applications per year, as specified, the Bureau does not anticipate an increase in the number of new initial licensees resulting from the proposed regulations, and this is not enough licensees to impact small businesses.

Fiscal Impact

The Bureau does not anticipate additional workload or costs resulting from the proposed regulations. Because the Bureau historically denies zero 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 proposed amendments would place applicants and licensees on notice that the Bureau is statutorily authorized to deny, suspend, or revoke a license on the basis of professional misconduct and discipline taken by another licensing board or bureau or another 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 Bureau uses the listed criteria to determine whether the crime, act, or professional misconduct is substantially related to the qualifications, functions, or duties of a professional fiduciary. 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, allowing for more health care providers to treat increasing numbers of California consumers.

Alternatives Determinations

The Bureau has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, 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 the proposed alternatives considered:

1. Not amend the regulation: This alternative was rejected because the Bureau 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 professional fiduciary profession in light of recent legislative amendments. AB 2138 requires the Bureau 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 Bureau regulations.

2. Explore Options for Simplifying Rehabilitation Criteria Related to Criminal Convictions: The Bureau 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 Bureau 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 customer population that professional fiduciaries serve, the Bureau 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 Bureau desired 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 professional fiduciaries in light of recent legislative amendments. AB 2138 requires the Bureau 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 Bureau regulations.

As stated under "Economic Impact," the Bureau does not anticipate the proposed regulatory action would have an adverse economic impact on small businesses. Therefore, no alternatives the Bureau considered would lessen that adverse economic impact.