

BOARD OF PODIATRIC MEDICINE

INITIAL STATEMENT OF REASONS

Hearing Date: January 15, 2020

Subject Matter of Proposed Regulations: Probation and Reinstatement of Suspended or Revoked Certificates, Substantial Relationship Criteria, and Criteria for Rehabilitation

Sections Affected: 1399.659, 1399.659.1, and 1399.659.2 of Article 1, Division 13.9 of title 16 of the California Code of Regulations

Specific Purpose of each adoption, amendment, or repeal:

Problems being addressed:

1. Effective January 1, 2018, the Podiatric Medical Board of California (Board or PMBC)¹ was created as an entity within the Department of Consumer Affairs independent of the jurisdiction of the Medical Board of California (MBC).² Currently, doctors of podiatric medicine (DPMs) are subject to MBC's regulations relating to licensing enforcement, which are set forth in Article 3 of Chapter 2 of title 16 of the California Code of Regulations (CCR). PMBC seeks to amend section 1399.659 of its regulations in Article 1, Division 13.9 of title 16 of the CCR to establish that DPMs, whose licenses have been subject to disciplinary action, will be subject to the regulations adopted by MBC relating to probation and reinstatement of suspended or revoked certificates, except where these provisions are in conflict or inconsistent with Article 1 of PMBC's regulations.
2. On September 30, 2018, California Governor Jerry Brown approved Assembly Bill 2138 (AB 2138) relating to licensing boards, bureaus, and commissions within the Department of Consumer Affairs. Effective July 1, 2020, PMBC is required to amend their existing regulations for use when considering the denial, suspension, or revocation of a license to determine whether a crime is substantially related to the practice of podiatric medicine, and to develop criteria to evaluate the rehabilitation of a person when considering the denial, suspension, or revocation of a license. As PMBC currently utilizes the enforcement regulations adopted by MBC, this rulemaking addresses the requirements of AB 2138 and establishes substantial relationship and rehabilitation criteria specifically for PMBC's licensed population.

¹ Effective July 1, 2019, Board of Podiatric Medicine (BPM) was renamed the Podiatric Medical Board of California (PMBC). (Bus. & Prof. Code, § 2460.)

² Senate Bill 798 (SB 798) (Hill, Chapter 775, Statutes of 2017) was enacted and created PMBC within the Department of Consumer Affairs, independent of MBC.

Anticipated benefits of this regulatory action:

Doctors of podiatric medicine (DPMs) are governed by many of the same laws and regulations applicable to medical doctors (MDs)³. This proposal would benefit the Board's licensees and the public by clarifying which regulations relating to probation and reinstatement of suspended or revoked certificates apply to DPMs. Specifically, this proposal would clarify that DPMs, whose licenses have been subject to disciplinary action, will be subject to the regulations adopted by the Medical Board of California (MBC) relating to probation and reinstatement of suspended or revoked certificates, except where these provisions are in conflict or inconsistent with Article 1 of PMBC's regulations.

Because PMBC has been using the substantial relationship and rehabilitation criteria of the MBC, this proposal would establish substantial relationship and rehabilitation criteria specifically developed for DPMs and clarify that DPMs will be subject to the substantial relationship and rehabilitation criteria developed by the PMBC rather than the MBC. This would benefit PMBC's licensees and the public by ensuring that licensees and consumers are aware which criteria will apply to DPMs when determining whether conduct is substantially related and when considering an individual's rehabilitation.

Specific Purpose/Factual Basis/Rationale:

1. PMBC proposes the following amendments to title 16 CCR section 1399.659 – Probation and Reinstatement of Suspended or Revoked Certificates:
 - a. Delete the title “Suspension and Revocation of Certificates to Practice Podiatric Medicine,” and replace with, “Probation and Reinstatement of Suspended or Revoked Certificates.” This change is necessary to so that the title of the regulation accurately reflects the subject matter.
 - b. Delete “Subchapter” and replace with the correct term, “Chapter.” This change is necessary to make the regulation accurate.
 - c. Delete “Chapter” and replace with the correct term, “Division.” This change is necessary to make the regulation accurate.
 - d. Delete “1360.2” so the text reflects that the first section of Article 3 of Chapter 2 of Division 13 commences with Section 1358, and make appropriate grammatical changes needed as a result of the proposed change. These

³ The Medical Practice Act, Business and Professions Code section 2000 et seq, governs licensed physicians and surgeons (persons authorized to use the initials “MD”), doctors of podiatric medicine (DPMs), and certain other specified medical professionals. Certain provisions of the Medical Practice Act are applicable only to certain licensees, as specifically identified in the Act. (For example, see Bus. and Prof. Code, § 2497.)

- changes are necessary to make the regulation accurate and grammatically correct.
- e. The language “except where those provisions are in conflict with or inconsistent with the provision of this article,” is being added to clarify that doctors of podiatric medicine, whose certificates have been subject to disciplinary action, will be subject to the provisions of Article 3 of Chapter 2 of Division 13 (commencing with Section 1358), except for those provisions that conflict or are inconsistent with Article 1 of Division 13.9 of PMBC’s regulations. This is necessary for DPMs to properly interpret the regulation when and if a conflict or inconsistency exists.
 - f. Under “Note: Authority cited,” the reference to Business and Professions Code Section “2018” is deleted as this is a reference to the rulemaking authority for the Medical Board (MBC), which no longer applies to PMBC. Section “2470” of the Business and Professions Code is added to reflect PMBC’s rulemaking authority.
 - g. Under “Note: [r]eference cited,” the reference to Business and Professions Code Section 2222 is added as it provides authority for PMBC to enforce and administer Article 12 of the Medical Practice Act as to doctors of podiatric medicine.
2. PMBC proposes to adopt title 16 CCR section 1399.659.1 – Substantial Relationship Criteria:

Section 1399.659.1(a)

As PMBC is no longer under the jurisdiction of MBC, PMBC is adopting a regulation to establish the criteria it will use when considering the denial, suspension, or revocation of a license to determine whether a crime, professional misconduct, or act is substantially related to the qualifications, functions or duties of a doctor of podiatric medicine consistent with its mandate that protection of the public is its highest priority in exercising its licensing, regulatory, and disciplinary functions, and to comply with the requirements of AB 2138.

The proposed language of this subdivision is modeled after MBC’s current substantial relationship regulation, section 1360 of title 16 of the California Code of Regulations (Section 1360), because PMBC is currently using it to determine substantial relationship. PMBC is proposing to incorporate much of the first sentence of Section 1360 into subdivision (a) of Section 1399.659.1.

Specifically, PMBC’s proposed language removes the references of “license” and “permit” from the first sentence of Section 1360 and maintains the reference to “certificate” as the term to identify the authority to practice podiatric medicine. Although the terms “license,” “permit,” and “certificate” mean the same thing, PMBC decided to use the term “certificate” because section 2472 of the Business

and Professions Code in the PMBC's practice act refers to a "certificate" to practice podiatric medicine, rather than "license" or "permit."⁴

Please note that the second sentence of Section 1360 is incorporated into Section 1399.659.1(c) and is discussed below.

Section 1399.659.1(b)

AB 2138 requires that the following specified criteria be included for determining whether a crime is substantially related to the qualifications, functions, or duties of the profession being regulated: (1) the nature and gravity of the offense; (2) the number of years elapsed since the offense occurred; and (3) the nature and duties of the profession. Further, boards will be prohibited from denying a license without considering evidence of rehabilitation submitted by an applicant. Therefore, PMBC's proposed regulation includes the required criteria referenced above.

Section 1399.659.1(c)

The second sentence of Section 1360 is incorporated into subdivision (c), with some modifications. PMBC has determined that certain conduct, including but not limited to, violating, attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of the Articles 12, 22, and 25 of the Medical Practice Act or any other state or federal laws governing the practice of podiatric medicine will be considered substantially related crimes, professional misconduct, or acts for the purposes of denial, suspension, or revocation of a license as these bear upon a person's present or potential unfitness to practice podiatric medicine in a manner consistent with the public health, safety, or welfare. Specifically, Article 12 describes conduct for which a licensee may be disciplined under the Medical Practice Act, which PMBC is charged with enforcing under Business and Professions Code section 2497; Article 22 is PMBC's practice act, which it is responsible for enforcing and administering; and Article 25 governs the recommendation of medical cannabis by licensed medical professionals. Therefore, it is reasonable that conduct that involves violating, attempting to violate, directly or indirectly, or assisting or abetting the violation of any of the provisions that PMBC is responsible for enforcing or administering are substantially related to the practice of podiatric medicine.

3. PMBC proposes to adopt title 16 CCR section 1399.659.2 -- Criteria for Rehabilitation:

⁴ "The term 'license' means license, certificate, registration, or other means to engage in a business or profession regulated by this code or referred to in Section 1000 or 3600." (Bus. & Prof. Code, § 23.7.)

As PMBC is no longer under the jurisdiction of the MBC, PMBC is adopting a regulation to establish its criteria for rehabilitation. The proposed criteria is reflective of relevant case law that describes rehabilitation as “a state of mind.” (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) “While a candid admission of misconduct and a full acknowledgement of wrongdoing may be a necessary step in the process, it is only a first step. [...] a truer indication of rehabilitation will be presented if [the person] can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice [...]” (*In re Conflenti* (1981) 29 Cal.3d 120, 124-125.) In addition, persons “under the direct supervision of correctional authorities are required to behave in exemplary fashion [...]” (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.) With this in mind, the proposed criteria is intended to allow the Board to consider applications for licensure and suspensions or revocations of a license on a case-by-case basis weighing various mitigating and aggravating factors to gauge a person’s rehabilitation and to comply with the requirements of AB 2138.

Section 1399.659.2(a) and (c)

Subdivision (a) describes PMBC’s proposed criteria for rehabilitation for use when considering the denial of a license under section 480 of the Business and Professions Code for an applicant, who was convicted of a crime and completed their criminal sentence without violating parole or probation. Subdivision (c) describes PMBC’s proposed criteria for rehabilitation for use when considering the suspension or revocation of a license under section 490 of the Business and Professions Code on the ground that the applicant was convicted of a crime. The proposed criteria is intended to allow the Board to examine and balance, on a case-by-case basis, the severity of the crime with factors that are indicative of rehabilitation as described above.

- a. (a)(1) and (c)(1): It is necessary for PMBC to consider the nature and gravity of the crime(s) in determining the rehabilitation of an individual as this is the offense against which their rehabilitative efforts will be evaluated. The nature and gravity of the crime are relevant in evaluating whether and to what extent the crime is related to the practice of podiatric medicine, bear on whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare.
- b. (a)(2) and (c)(2): It is necessary for PMBC to consider the length(s) of the applicable parole or probation period(s) as this information reflects the seriousness of the crime committed by the individual from the perspective of the court and/or sentencing requirements, and is valuable information for PMBC in assessing whether the individual is sufficiently rehabilitated to

practice podiatric medicine in a manner consistent with the public health, safety and welfare.

- c. (a)(3) and (c)(3): It is necessary for PMBC to consider the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) for such modification as this reflects the extent to which the individual has complied with the terms of parole or probation and may be a reflection of the individual's conduct and general adherence to the law since sentencing. This information is relevant in determining whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare and whether he or she will comply with licensure requirements in the future.
- d. (a)(4) and (c)(4): It is necessary for PMBC to consider the terms or conditions of parole or probation and the extent to which they bear on the applicant's rehabilitation. The terms or conditions of parole or probation reflect the seriousness of the crime, the level of supervision the court determined was necessary for the individual based on the facts of the case, and is relevant in determining whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare. The terms of parole or probation may bear on the applicant's rehabilitation if they are specifically tailored to the crime. For example, if an individual was convicted of a crime involving alcohol or drugs, probation terms requiring the individual to complete alcohol or substance abuse treatment or participate in an alcohol abuse program would bear more heavily on the applicant's rehabilitation. (See *In re Billings* (1990) 50 Cal.3d 358, 368 ["An alcoholic's rehabilitation is almost universally predicated on a choice to confront his or her problem, followed by abstinence sustained through ongoing participation in a supportive program, such as Alcoholics Anonymous"].)
- e. (a)(5) and (c)(5): It is necessary for PMBC to consider the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for the modification, as this information provides valuable insight regarding the individual's compliance with the terms or conditions and is relevant in evaluating whether the individual will comply with licensure requirements in the future. This information is relevant in the Board's assessment of whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare.

Section 1399.659.2(b)

Subdivision (b) describes PMBC's proposed criteria for rehabilitation when the

applicant:

- (1) was convicted of a crime and violated parole or probation for that conviction; **or**
- (2) was subject to formal discipline by another licensing board within the preceding seven years from the date of application for PMBC licensure that was based on professional misconduct that is substantially related to the qualifications, functions, or duties of a doctor podiatric medicine, and would have been cause for discipline by PMBC; **or**
- (3) was convicted of a crime and did not violate parole or probation, but did not make a showing of rehabilitation using the criteria in subdivision (a).

The proposed criteria is intended to allow the Board to further examine and balance, on a case-by-case basis, the severity of the crime or professional misconduct that led to formal discipline by another licensing board within the preceding seven years, with factors that are indicative of rehabilitation as described above.

- a. (b)(1): It is necessary for PMBC to consider the nature and gravity of the act(s) or crime(s) under consideration as grounds for denial as this information is relevant in evaluating whether and to what extent the conduct is related to the practice of podiatric medicine and bears on whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare.
- b. (b)(2): It is necessary for PMBC to consider the evidence of any act(s) or crime(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial under Section 480 of the Code because such evidence may reflect whether the applicant is sufficiently rehabilitated. For example, evidence of criminal conduct subsequent to the act(s) or crime(s) under consideration may indicate that the applicant would not comply with the requirements of licensure, and evidence of lawful conduct may indicate a level of rehabilitation. This information is relevant in the Board's assessment of whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare.
- c. (b)(3): It is necessary for PMBC to consider the time that has elapsed since commission of the act(s) or crime(s) referred to in paragraph (1) or (2). The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This information is relevant in the Board's assessment of whether the individual is sufficiently rehabilitated to practice podiatric

medicine in a manner consistent with the public health, safety and welfare.

- d. (b)(4): It is necessary for PMBC to consider whether the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant. This information in this criterion bears on an individual's rehabilitation in terms of their willingness to make amends from prior misconduct and to conform to the rules of licensure. Accordingly, it is necessary for the Board to consider these elements to evaluate a licensee's reformation from prior misconduct. This information is relevant in the Board's assessment of whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare.
- e. (b)(5): It is necessary for PMBC to consider the criteria in subsection (a)(1)-(5), as applicable, because such criteria is relevant in evaluating an individual's rehabilitation for the reasons specified in (a)(1)-(5), above. Further, this information bears on an individual's rehabilitation in terms of their willingness to make amends for prior misconduct, conform to the law, and the extent to which they have reformed from prior misconduct. This information is relevant in the Board's assessment of whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare.
- f. (b)(6): It is necessary for PMBC to consider evidence, if any, of rehabilitation submitted by the applicant as it is relevant in assessing whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare and allows the individual to provide evidence of rehabilitation that is not otherwise addressed in the Board's criteria.

Section 1399.659.2(d)

Subdivision (d) describes PMBC's proposed criteria for rehabilitation when the licensee:

- (1) was convicted of a crime and violated parole or probation for that conviction; **or**
- (2) was convicted of a crime and did not violate parole or probation, but did not make a showing of rehabilitation using the criteria in subdivision (c).

The proposed criteria is intended to allow the Board to further examine and balance, on a case-by-case basis, the severity of the crime, with factors that are indicative of rehabilitation as described above.

- a. (d)(1): It is necessary for PMBC to consider the nature or gravity of the act(s) or crime(s) in determining the rehabilitation of a licensee as this is the offense against which their rehabilitative efforts will be evaluated. The nature and gravity of the crime are relevant in evaluating whether and to what extent the crime is related to the practice of podiatric medicine and bear on whether the licensee is sufficiently rehabilitated. This information is relevant in the Board's assessment of whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare.
- b. (d)(2): It is necessary for PMBC to consider the licensee's total criminal record as this information is relevant to the Board's decision regarding whether the licensee is sufficiently rehabilitated to practice podiatric medicine consistent with the public health, safety and welfare and their willingness to conform to the requirements of licensure.
- c. (d)(3): The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This information is relevant in the Board's assessment of whether the individual is sufficiently rehabilitated to practice podiatric medicine in a manner consistent with the public health, safety and welfare.
- d. (d)(4): It is necessary for PMBC to consider whether the individual has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against them. This information bears on an individual's rehabilitation in terms of their willingness to make amends from prior misconduct and to conform to the rules of licensure. As such, it is necessary for the Board to consider these elements to evaluate a licensee's reformation from prior misconduct and determine whether they are sufficiently rehabilitated to practice podiatric medicine consistent with the public health, safety and welfare.
- e. (d)(5): It is necessary for PMBC to consider evidence of dismissal proceedings pursuant to Section 1203.4 of the Penal Code as it is relevant to the Board's evaluation of whether a licensee is sufficiently rehabilitated to practice podiatric medicine consistent with the public health, safety and welfare. The word "expungement" would be amended to "dismissal," but this is not a substantive change. Dismissal is simply a more accurate description of the proceedings conducted under Penal Code section 1203.4. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1129, fn.5.)
- f. (d)(6): It is necessary for PMBC to consider evidence, if any, of

rehabilitation submitted by the individual as it is relevant in assessing whether the individual is sufficiently rehabilitated to practice podiatry consistent with the public health, safety and welfare and allows the individual to provide evidence of rehabilitation that is not otherwise addressed in the Board's criteria.

Section 1399.659.2(e)

The purpose of subdivision (e) is to clarify that, in considering petitions for reinstatement, PMBC will evaluate evidence of rehabilitation submitted by the petitioner using the criteria in subdivision (a). The proposed criteria is intended to allow the Board to examine and balance, on a case-by-case basis, the severity of the crime with factors that are indicative of rehabilitation as described above.

An individual seeking reinstatement bears the burden of proving by clear and convincing evidence they are entitled to have their license restored, and must present strong proof of rehabilitation sufficient to overcome the former adverse determination. (*Flanzer v. Board of Dental Examiners* (1990) 220 Cal.App.3d 1392, 1398; *Housman v. Board of Medical Examiners* (1948) 84 Cal.App.2d 308, 315.) This information is relevant in assessing whether the individual is sufficiently rehabilitated to be reinstated to practice podiatric medicine consistent with the public health, safety and welfare.

Consumer Protection:

Public protection is the highest priority for the Podiatric Medical Board in exercising its licensing, regulatory, and disciplinary functions. This proposal protects consumers by adopting regulations relating to licensing and discipline of doctors of podiatric medicine that provide consumers with additional access to care while carefully evaluating a person's present or potential unfitness to practice podiatric medicine in a manner consistent with the public health, safety or welfare.

Underlying Data

Technical, theoretical, or empirical studies, or documents relied upon:

- Podiatric Medical Board Meeting Minutes, March 1, 2019 Meeting (Unapproved)
- Assembly Bill 2138 (Chiu & Low, Chapter 775, Statutes of 2018)

Business Impact

This regulation will not have a significant adverse economic impact on businesses. There is no anticipated financial impact on any business or commercial entity. There are no additional requirements that will have a significant impact on any of the stakeholders involved, other than to perhaps give those with a criminal history broader range of

career opportunities.

Economic Impact Assessment

This regulatory proposal will have the following effects:

- These regulations may create jobs within the State of California because they may result in additional doctors of podiatric medicine in California, some of whom may open a podiatric clinic or other business related to podiatry and hire employees.
- These regulations will not eliminate jobs within the State of California because there are no added costs or fees, and no mandated requirements that will result in additional financial burdens.
- These regulations will not create new businesses or eliminate existing businesses because there are no added costs or fees, and no mandated requirements that will impact businesses.
- These regulations may affect the expansion of businesses currently doing business in the state because these regulations may result in additional doctors of podiatric medicine in California and some of those may choose to open a podiatric clinic or other business related to podiatry. One of the purposes of AB 2138 is to reduce licensing and employment barriers for people who are rehabilitated.
- These regulations may benefit the health and welfare of California residents and worker safety because they may result in additional licensed doctors of podiatric medicine and therefore greater access to podiatric care.
- These regulations will not affect the state's environment because they unrelated to the environment.

Specific Technologies or Equipment

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

Consideration of Alternatives

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the action is proposed or would be as effective or less burdensome to affected private persons and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives which were considered and the reasons each alternative was rejected:

Alternative No. 1: Do not pursue regulations. This alternative was rejected because PMBC has been mandated by AB 2138 to develop regulations pursuant to the legislation, effective July 1, 2020.