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June 23, 2020

**Via Email**

California Department of Consumer Affairs  
Board of Accountancy  
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**RE: Comments in Response to Dept. of Consumer Affairs, Board of Accountancy  
California Regulatory Action Concerning the Implementation of AB 2138, Proposal to  
Amend Sections 98, 99, 99.1, and 99.2 of Article 13 of Division 1 of Title 16 of the  
California Code of Regulations**

Dear Melissa Winchell and Dominic Franzella:

Thank you for the opportunity to submit comments to the Department of Consumer Affairs (“DCA”), Board of Accountancy (“Board”) regarding proposed regulations to implement AB 2138.

Assembly Bill 2138 was authored by Assemblymembers David Chiu and Evan Low to help formerly incarcerated people have a fair chance at obtaining occupational licensure. AB 2138 was sponsored by the Anti-Recidivism Coalition, East Bay Community Law Center, Legal Services for Prisoners with Children, Root & Rebound and supported by a coalition of 50 organizations. Thanks to the passage of AB 2138 in 2018, the roughly 1 in 3 California adults or 8 million Californians with arrest or conviction records will face fewer barriers to employment and will help to fill the much needed occupational employment gaps in the State.

Formerly incarcerated workers strive to obtain permanent, stable, and living wage jobs; however around 30% of jobs require licensure, clearance, or oversight by a governing body. This oversight, while intended to protect public safety, disproportionately impacts people of color, low-income, and indigent communities of people. These communities have been disproportionately impacted by over-policing and over-criminalization resulting in contacts with law enforcement that bar these applicants from later obtaining the licensure they require to pursue employment under DCA’s regulation. Moreover, applicants have been deterred by the lengthy process, lack of clarity, and obstacles to obtaining licensure – problems that AB 2138 seeks to rectify to offer a fair chance to all people.

However, across the state of California, there are only a handful of organizations that support low-income and indigent people seeking occupational licensure. Licensure applicants look for help answering questions about general eligibility, the initial application, appeals, probationary and restricted licenses, and license revocations or suspensions. The lack of clarity in this process and lack of low-cost or free service providers, leads many people facing differing levels of adversity to give up entirely. We believe that our direct experience with clients who are undergoing this difficult process, along with our involvement in the drafting and passage of AB 2138, makes us equipped to understand the proper implementation of this bill.

The undersigned organizations commend the Board for its action to implement AB 2138 and thereby reduce discrimination against people of color in California, who are disproportionately denied job opportunities because of occupational licensing-related conviction background checks. We support amendments to Sections 98, 99, 99.1, and 99.2 of Article 13 of Division 1 of Title 16 of the California Code of Regulations to reflect the passage of Assembly Bill 2138, Chiu, but believe the proposed amendments should be clarified and go further in order to fully implement the intention and spirit of the AB 2138 text.

The proposed regulations leave some gaps in the regulatory scheme under the changes to CA Business and Professions Code sections 480, 481, 482, and 493 as modified by AB 2138. These proposed regulations fail to meet and implement CA B&P Code sections 480, 481, 482, and 493 and are not, as currently written, valid. The proposed regulations also fall short of the intent of the bill, which includes combating discrimination against people with records that have demonstrated rehabilitation and seek to establish themselves professionally.

Specifically, the proposed regulations do not comply with AB 2138 as follows:

- Section 99 lists certain crimes, professional misconduct, and acts and defines them as substantially related regardless of the time that has passed or the nature and gravity of the offense in contravention of AB 2138 Business and Professions Code section 481. AB 2138 allows the Board discretion to determine which crimes are substantially related on an individual basis.

This section fails to note that criminal history and the acts underlying a conviction 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 Business & Professions Code Section 480(b)-(d).

Further, we object to section 99(c)(4) as vague, overbroad, and unclear.

- The Board's rehabilitative criteria are set forth in CCR Section 99.1. Section 99.1(a)(2) states that an individual's criminal record is a criterion to be considered in determining an individual's rehabilitation. Section 99.1(a)(9) states that "the individual's history of violations" is a criterion to be considered in determining an individual's rehabilitation. (This same criteria also appears in the criteria used to assess administrative penalties in the CBA's Disciplinary Guidelines and Model Orders, 10th Edition 2019.) These criteria undermine the seven-year time limitation in AB 2138, where, except in certain

circumstances, the board may deny a license to an applicant only on the basis of certain actions that occurred within the preceding 7 years. Allowing the examination of an applicant's history of violations and their criminal record to determine rehabilitation subverts AB 2138.

While Section 99.1 identifies other criteria that can demonstrate rehabilitation, providing more concrete examples and guidelines in these criteria could help the Board, applicants, and licensees. Please see number 5 below for examples of rehabilitation to expand the proposed regulations.

- Section 99.2 describes the criteria to evaluate directly and adversely related financial crimes related to the fiduciary qualifications, functions, or duties.

We urge you to incorporate the Department of Fair Employment and Housing (DFEH)'s regulations regarding consideration of criminal history in employment decisions found at Section 11017.1 of Article 2, Subchapter 2, Chapter 5, of Division 4.1, of Title 2 of the California Code of Regulations<sup>1</sup>. Specifically, Section 11017.1(e) states that a "criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job...and measure the person's fitness for the specific position(s)." A policy must be tailored and take into account the following factors: 1) the nature and gravity of the offense or conduct, 2) the time that has passed since the offense or conduct and/or the completion of the sentence, and 3) the nature of the job held or sought.

These factors are similar to the substantially related criteria. By not adding these factors to the directly and adversely related criteria, the Board sets up two different standards. The substantially related factors allow the Board discretion to evaluate a person whereas the directly and adversely related criteria remove all such discretion. The directly and adversely related section should include the above factors to allow for an assessment of the individual circumstances, the amount of time that has passed, and how the criminal history is related to the functions of a certified public accountant. In particular, the Board should only consider felony financial crimes that are directly and adversely tied to the qualifications, duties, and/or functions of a certified public accountant.

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<sup>1</sup> Cal. Code Regs. tit. 2, Section 11017.1 (2017).

Further, we urge the Board to incorporate the full extent of AB 2138 by including the following provisions:

1. The proposed regulations should include the 7 year washout period for consideration of convictions or discipline which are not statutorily considered serious felonies under the Cal. Penal Code. 1192.7. See Cal Business and Professions Code section 480(a).
2. The proposed 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. See Cal Business and Professions Code section 480(b)-(d).
3. The proposed regulations fail to include that the board shall not require an applicant to disclose any information or documentation regarding the applicant's criminal history. See Cal Business and Professions Code section 480(f)(2).
4. The proposed regulations fail to include that the board shall notify the applicant in writing if the applicant is denied or disqualified from licensure. The Board must provide procedures describing the process for the applicant to challenge the decision or to request reconsideration, that the applicant has a right to appeal the board's decision, and the process of requesting a complete conviction history. See Cal Business and Professions Code section 480(f)(3).
5. The intent of AB 2138 was not to incorporate mere probation or parole reports into the occupational licensing determinations. Merely looking to law enforcement will not adequately show how an applicant would do on the job. Rather, rehabilitation can and does take many forms that extend beyond mere law enforcement supervision. To better define rehabilitation, we recommend that the board provide examples of evidence of mitigating circumstances and rehabilitation efforts to assist both the Board and licensing applicants.

For instance, the Board should consider 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.

6. The proposed regulations fail to include any mention of requirements to obtain statistical information on the number of applicants with a criminal record who apply and receive notice of denial/disqualification of licensure, provided evidence of mitigation or rehabilitation, the final disposition of the application, and demographic information. See Cal Business and Professions Code section 480(g).

Adequate implementation of the changes to California Business and Professions Code sections 480, 481, 482, and 493 will go a long way toward restoring hope and opportunity for the nearly 1 in 3 California adults or 8 million Californians who have an arrest or conviction record. Thank you for your consideration.

If you have any questions regarding the content of these comments, please contact Faride Perez-Aucar (Root and Rebound) or Vinuta Naik (Community Legal Services in East Palo Alto).

Sincerely,

*/s/ Faride Perez-Aucar*

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**Organizations:**

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  
Drug Policy Alliance  
East Bay Community Law Center  
Legal Aid at Work  
Legal Aid Foundation of Los Angeles  
Legal Services for Prisoners with Children, All of Us or None  
Los Angeles Regional Reentry Project  
National Association of Social Workers, California Chapter  
National Employment Law Project  
REDF  
The Record Clearance Project, San Jose State University  
Root and Rebound  
Rubicon Programs  
Underground Scholars Initiative