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August 18, 2020

Via Email

Department of Real Estate
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RE: Comments in Response to Department of Real Estate Regulatory Action Concerning the Implementation of AB 2138, Proposal to Amend Sections 2910 and 2910.5 of Regulations of the Real Estate Commissioner of Title 10 of Chapter 6 of the California Code of Regulations

Dear Daniel E. Kehew:

Thank you for the opportunity to submit comments to the Department of Real Estate (“DRE”), 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 the DRE’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 DRE 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 2910 and 2910.5 of Regulations of the Real Estate Commissioner Title 10, Chapter 6 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 2910 fails to note that the DRE may deny a license only if the criminal / formal disciplinary history occurred within the preceding seven years from the date of application. See Business and Professions Code section 480(a).
- Moreover, section 2910 fails 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 Business and Professions Code section 480(b)-(d).
- The current language in section 2910.5(b) is not tailored to allow for an assessment of the individual circumstances or whether the violation is related to the functions of a real estate licensee. **In particular, the DRE should only consider crimes that are directly and adversely tied to the qualifications, duties, and/or functions of real estate licensure.** The current list of substantially related crimes, professional misconduct, or acts as laid out in section 2910.5(b) are overbroad.
- 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. 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 DRE sets up two different standards. The substantially related factors allow the DRE 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 DRE should only consider felony financial crimes that are directly and adversely tied to the qualifications, duties, and/or functions of real estate licensure.

Further, we urge the DRE 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 should include that the DRE 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 should include that the DRE shall notify the applicant in writing if the applicant is denied or disqualified from licensure. The DRE 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 DRE's decision, and the process of requesting a complete conviction history. See Cal. Business and Professions Code section 480(f)(3).

5. We commend the DRE for defining rehabilitation criteria in section 2911 and we recommend that the DRE add the following criteria to existing section 2911:
 - Volunteer service;
 - Successful employment in a related field;
 - A history of work experience in an employment social enterprise;
 - Unpaid work in the community; 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

/s/ Vinuta Naik

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Organizations:

A New Way of Life Reentry Project
Anchor of Hope International Ministries, Inc.
Californians for Safety and Justice
Center for Employment Opportunities
Center for Living and Learning
Chrysalis

Community Legal Services in East Palo Alto
Criminal Justice Clinic, UC Irvine School of Law
Drug Policy Alliance
East Bay Community Law Center
Homeboy Industries
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
Project 180
REDF
The Record Clearance Project, San Jose State University
Root and Rebound
Rubicon Programs
The Access Project
Underground Scholars Initiative