

**TITLE 16. CEMETERY AND FUNERAL BUREAU  
DEPARTMENT OF CONSUMER AFFAIRS**

**INITIAL STATEMENT OF REASONS**

Hearing Date: Wednesday, April 8, 2020

Subject Matter of Proposed Regulations: Substantial Relationship and Rehabilitation Criteria for Applicants and Licensees

Section(s) Affected: Amend sections 2330 and 2331 of, and add sections 2330.1 and 2331.1 to, Division 23 (commencing with section 2300) of Title 16 of the California Code of Regulations (CCR).

Background and Statement of the Problem:

The Cemetery and Funeral Bureau (Bureau) licenses, regulates, and investigates consumer complaints against 13 different license categories in California, totaling approximately 13,500 licensees. These licensing categories include funeral establishments, funeral directors, embalmers, apprentice embalmers, cemetery brokers, cemetery broker branch, cemetery broker additional, cemetery salespersons, cremated remains disposers, crematories, crematory managers, hydrolysis facilities, cemetery managers, and private, nonreligious cemeteries. It is the Bureau's duty to enforce and administer the Cemetery and Funeral Act (Chapter 12 (commencing with section 7600) of Division 3 of the Business and Professions Code (BPC)) (Act). (BPC, section 7602(a)(2).) The Bureau is authorized to establish necessary rules and regulations for the enforcement of the Act and the laws subject to its jurisdiction. (BPC, section 7606.) The Bureau's authority to take disciplinary action against a licensee derives from the state's inherent power to regulate the use of property to preserve public health, morals, comfort, order, and safety. (*Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195, 1206.) BPC section 141 authorizes the Bureau to discipline a licensee on the basis of a disciplinary action taken by another state, by any agency of the federal government, or by another country for a substantially related act.

Substantial relationship criteria: In accordance with the statutory amendments implemented by Assembly Bill (AB) 2138 (Chiu, Chapter 995, Statutes of 2018), beginning July 1, 2020, BPC sections 481 and 493 will require the Bureau, when considering the denial, suspension, or revocation of a license based on a crime, to determine whether the crime is substantially related to the qualifications, functions, or duties of a licensee by using specified criteria, including the nature and gravity of the offense, the number of years elapsed since the date of the offense, and the nature and duties of a licensee. (BPC, section 481, subd. (b), as added by AB 2138, section 7; BPC, section 493, subd. (b), as added by AB 2138, section 13.) The substantial relationship requirement stems from the due process principle that a statute constitutionally can prohibit an individual from practicing a lawful profession only for reasons related to the

individual's fitness or competence to practice that profession. (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1137-1138.)

Rehabilitation criteria: In addition, BPC section 482 has required the Bureau to develop criteria to evaluate the rehabilitation of an applicant or licensee when considering the denial, suspension, or revocation of a license pursuant to BPC section 480 or 490. (BPC, section 482; see 16 CCR sections 1253, 1253.5, & 2331.) Beginning July 1, 2020, BPC section 482 will require the Bureau, when considering the denial, suspension, or revocation of a license based on a crime, professional misconduct, or act pursuant to BPC section 480 or 490, to consider whether the applicant or licensee is rehabilitated based on either: (1) having completed their criminal sentence without violating parole or probation; or (2) the Bureau's standard, previously adopted criteria for evaluating rehabilitation. (BPC, section 482, as added by AB 2138, section 9.) In the context of professional licensing decisions, the Supreme Court of California has held that, "[r]ehabilitation ... is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Additionally, the Legislature's "clear intent," in enacting AB 2138 was "to reduce licensing and employment barriers for people who are rehabilitated." (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.)

Existing regulations: Funeral- and embalming-related businesses and professions are regulated by the Bureau in Division 12 (commencing with section 1202) of Title 16 of the CCR (Funeral Regulations). Cemetery-related businesses and professions, cremation- or hydrolysis-related businesses or professions, and remains disposal are regulated in Division 23 (commencing with section 2300) of Title 16 of the CCR (Cemetery Regulations). 16 CCR section 2330 establishes the criteria for determining when a crime or act is substantially related to the qualifications, functions or duties of a cemetery broker or salesperson. 16 CCR section 2331 establishes the criteria for determining rehabilitation of an applicant or licensee when considering the denial, suspension, or revocation of a license under the Cemetery Regulations based on a crime or act, or whether to grant a petition for reinstatement of a license.

Problem statement: In order to comply with the mandates of AB 2138, the Bureau proposes to amend sections 2330 and 2331 of, and add sections 2330.1 and 2331.1 to, the Cemetery Regulations to adhere to these mandates and revise its substantial relationship and rehabilitation criteria. Further, the addition of section 2330.1 will establish criteria to aid the Bureau in determining if a conviction for a felony financial crime is directly and adversely related to the qualifications, functions, or duties of a licensee for the purposes of considering denials of applications under BPC section 480(a)(1)(B)(v).

## **SPECIFIC PURPOSE, ANTICIPATED BENEFIT, AND RATIONALE:**

### **Amend 16 CCR Section 2330 (Substantial Relationship Criteria)**

#### **Section 2330, subdivision (a)**

Purpose: 16 CCR section 2330 establishes the criteria for determining whether a crime or act is substantially related to the qualifications, functions, or duties of a cemetery broker or salesperson and therefore grounds for denial, suspension, or revocation of a license pursuant to BPC section 480 or 490. The purpose of amending 16 CCR section 2330, subdivision (a) is to: (1) expand the regulation to apply to all applicants or licensees under the Cemetery Regulations, not only cemetery brokers or salespersons; and (2) expand the regulation to also require the Bureau to apply these criteria in its evaluation of a disciplinary action taken by another state, by any agency of the federal government, or by another country as described in BPC section 141, because the substantially related acts that are the basis for those disciplinary actions may be grounds for disciplining a licensee pursuant to BPC section 141. This subdivision would also be amended to require the Bureau to apply these criteria in its evaluation of “professional misconduct,” because, beginning July 1, 2020, the Bureau will be expressly authorized to deny licenses based on such misconduct under BPC section 480. (BPC, section 480, subd. (a)(2), as added by AB 2138, section 4.) The Bureau proposes to amend “cemetery broker or salesperson,” to “licensee [under the Cemetery Regulations],” with “license” defined to have the same meaning as is provided in BPC section 23.7, which defines “license” to include registrations. Further amendments to this subdivision would reword and move to subdivision (c) the phrase, “[s]uch crimes or acts shall include but not be limited to those involving the following.” Additionally, subdivision (a), “conviction of a crime involving fiscal dishonesty,” and subdivision (b), “any violation of the provisions of Chapter 12, Division 3 of the Business and Professions Code,” are renumbered, reworded and moved to subdivision (c)(1) and (3).

Anticipated Benefits: The proposed revisions to 16 CCR section 2330, subdivision (a) would provide clarity to applicants and licensees under the Cemetery Regulations that the Bureau will apply the substantial relationship criteria in that section in its proceedings to deny, suspend, or revoke a license, as applicable, on the basis of a disciplinary action described in BPC section 141 or professional misconduct pursuant to BPC section 480, as added by section 4 of AB 2138. The proposal would also make aware relevant parties to any administrative appeal arising from a licensing decision (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s counsel) that when disciplining applicants or licensees for a criminal conviction, the Bureau is required to determine whether the act is substantially related to the qualifications, functions, or duties of a licensee under the Cemetery Regulations using the specified criteria. The proposed revision also removes the specific titles of the profession, “cemetery broker or salesperson,” and replaces it with the more general, “licensee [under the Cemetery Regulations],” to better capture all license categories, including registrations, that the Bureau regulates under the Cemetery Regulations and to ensure consistency in the Bureau’s licensing determinations.

**Rationale:** BPC section 141 authorizes the Bureau to discipline a licensee on the basis of a disciplinary action taken by another state, by any agency of the federal government, or by another country for a substantially related act. Beginning July 1, 2020, BPC section 480 will authorize the Bureau to deny a license application on the basis of substantially related professional misconduct that results in formal discipline by a licensing board or bureau in or outside of California. (BPC, section 480, subd. (a)(2), as added by AB 2138, section 4.) The regulation seeks to implement, interpret, and make specific BPC sections 141 and 480 by adding their relative provisions to the Bureau's substantial relationship criteria provision of the Cemetery Regulations. Accordingly, the proposal is necessary to provide the appropriate notice to applicants and licensees under the Cemetery Regulations that the substantial relationship criteria in 16 CCR section 2330 apply to determinations of whether disciplinary action taken by another state, by an agency of the federal government, or by another country, or professional misconduct, are grounds for license denial, suspension, or revocation, and to implement the requirements of BPC sections 141 and 480. The proposal is also necessary to consolidate into one regulation the criteria the Bureau will apply in evaluating whether a crime or other misconduct is substantially related to the qualifications, functions, or duties of a licensee under the Cemetery Regulations.

### **Section 2330, subdivision (b)**

**Purpose:** The purpose of adding 16 CCR section 2330, subdivision (b) is to implement AB 2138, adding BPC sections 481 and 493, which, beginning July 1, 2020, will require each board or bureau, when considering the denial, suspension, or revocation of a license based on a crime, to determine whether the crime is substantially related to the qualifications, functions, or duties of the professions regulated by that board or bureau by using specified criteria. (BPC, section 481, subd. (b), as added by AB 2138, section 7; BPC, section 493, subd. (b), as added by AB 2138, section 13.) Those criteria are as follows: (1) the nature and gravity of the offense; (2) the number of years elapsed since the date of the offense; and (3) the nature and duties of the profession. (*Id.*)

**Anticipated Benefits:** The proposed revisions to 16 CCR section 2330, subdivision (b) would provide clarity and transparency to applicants and licensees under the Cemetery Regulations by listing the specific criteria the Bureau must consider when making the substantial relationship determinations applicable to criminal convictions. The proposal would also make relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent's counsel) aware of the specific criteria used by the Bureau to determine whether a criminal conviction is substantially related to the qualifications, functions, or duties of a licensee under the Cemetery Regulations.

**Rationale:** BPC section 480 presently authorizes the Bureau to deny an application for licensure based on a crime or act that is substantially related to the qualifications, functions, or duties of a licensee. (BPC, section 480, subd. (a)(3)(B).) Likewise, BPC section 490 authorizes the Bureau to suspend or revoke a license on the basis that the licensee was convicted of a crime substantially related to the qualifications, functions, or duties of a licensee. (BPC, section 490,

subd. (a).) BPC section 481 has required the Bureau to develop criteria to help evaluate whether a crime or act was substantially related to the qualifications, functions, or duties of a licensee when considering the denial, suspension, or revocation of a license. (Beginning July 1, 2020, BPC section 481 will only require the Bureau to develop substantial relationship criteria regarding a crime, not a “crime or act.” (BPC section 481, subd. (a), as added by AB 2138, section 7.)) The Bureau established the criteria via regulations. (16 CCR sections 1253, 1253.5, & 2331.)

The Legislature’s clear intent in enacting AB 2138 was to reduce licensing and employment barriers for people who are rehabilitated. (*Moustafa v. Bureau of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1135.) Accordingly, in AB 2138, the Legislature amended BPC section 480 to limit the boards’ or bureaus’ ability to use prior criminal convictions or acts when denying licenses. Beginning July 1, 2020, boards and bureaus may not deny a license to an applicant because the applicant was convicted of a crime, or due to the acts underlying the conviction, if the applicant has a certificate of rehabilitation, was granted clemency, made a showing of rehabilitation, or the conviction was dismissed or expunged. (BPC, section 480, subds. (b) & (c), as added by AB 2138, section 4.)

Absent these circumstances, AB 2138 will permit boards and bureaus to deny a license when an applicant has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the regulated business or profession, and one of the following conditions exist:

- 1) the conviction occurred within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of: (a) a serious felony under Penal Code section 1192.7; (b) a registerable offense under Penal Code section 290, subdivision (d)(2) or (3)); or, (c) a felony financial crime that is directly and adversely related to the fiduciary qualifications, functions, or duties of a specified business or profession regulated by the Accountancy Board, Professional Fiduciaries Bureau, Contractors State License Board, Bureau of Security and Investigative Services, and Cemetery and Funeral Bureau;
- 2) the applicant is presently incarcerated for the crime; or
- 3) the applicant was released from incarceration for the crime within the seven years preceding the application date, except that the seven-year limitation does not apply if the applicant was convicted of: (a) a serious felony under Penal Code section 1192.7; (b) a registerable offense under Penal Code section 290, subdivision (d)(2) or (3)); or, (c) a felony financial crime that is directly and adversely related to the fiduciary qualifications, functions, or duties of specified businesses or professions regulated by the Accountancy Board, Professional Fiduciaries Bureau, Contractors State License Board, Bureau of Security and Investigative Services, and Cemetery and Funeral Bureau.

AB 2138 also specified three criteria that boards and bureaus must consider when evaluating whether a crime is “substantially related” to the regulated business or profession. The criteria “shall include all of the following: (1) The nature and gravity of the offense[;] (2) The number of years elapsed since the date of the offense[; and,] (3) The nature and duties of the profession in which the applicant seeks licensure or in which the licensee is licensed.” (BPC, section 481, subd. (b), as added by AB 2138, section 7; see also BPC, section 493, subd. (b), as added by AB 2138, section 13.) Accordingly, the proposed regulation lists each of these criteria for the Bureau to consider when making the substantial relationship determination regarding a crime under the Cemetery Regulations. This proposed addition is necessary to conform the regulation to statute, and to consolidate the Bureau’s substantial relationship criteria in one place.

### **Section 2330, subdivision (c)**

Purpose: The purpose of amending 16 CCR section 2330, subdivision (c) is to clarify that crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a Bureau licensee under the Cemetery Regulations include, but are not limited to, violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of the Act; conviction of any crime(s) or act(s) involving dishonesty, misrepresentation, fraud, deceit, stolen property, embezzlement, money laundering, theft, grand theft, larceny, burglary, robbery, identity theft, or obtaining money, labor, or property under false pretenses, and/or forgery or counterfeiting; and conviction of any other crime(s) or act(s) involving fiscal dishonesty. The proposal would also make minor technical revisions to this subdivision to accommodate the revisions made to subdivision (a).

Anticipated Benefits: The proposed revisions to 16 CCR section 2330, subdivision (c) would provide clarity to applicants and licensees under the Cemetery Regulations of the specific crimes, professional misconduct, or acts that are substantially related to the qualifications, functions, or duties of a Bureau licensee. The proposal would also make aware relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent’s counsel) that substantially related crimes, professional misconduct, and acts include the crimes, professional misconduct, or acts listed in subdivision (c).

Rationale: The current regulation provides that crimes or acts that are substantially related to the qualifications, functions, or duties of a cemetery broker or salesperson include conviction of a crime involving fiscal dishonesty and any violation of the provisions of the Act. The proposal would revise this provision to list “crimes, professional misconduct, or acts”—instead of “crimes or acts”—that are substantially related to the qualifications, functions, or duties of a licensee under the Cemetery Regulations—instead of a cemetery broker or salesperson—for the reasons discussed in this Initial Statement of Reasons (ISR) under the heading “Amend 16 CCR Section 2330 (Substantial Relationship Criteria)—Section 2330, subdivision (a)—Rationale,” above.

The listed crimes, professional misconduct, or acts would be as follows, for the following reasons:

(1) “Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision of the Act.”

A violation of the Act bears a substantial relationship to the qualifications, functions, or duties of a licensee under the Act because responsible licensees should have knowledge of and comply with the laws applicable to their profession. A licensee who violates or attempts to violate, directly or indirectly, or assists in or abets the violation of, or conspires to violate laws governing the cemetery professions has demonstrated a capacity for doing so in the future. (*Thorpe v. Board of Examiners* (1980) 104 Cal.App.3d 111, 116 (“[C]ertainly the willingness to violate the law which [a licensee] is licensed to administer for the public good makes them unfit to serve [citations].”).) This reasoning is supported by BPC sections 7703 and 7711.1, subdivision (a), which make “[v]iolation of any of the provisions of this [Act] or of the rules and regulations adopted pursuant to this [Act]” and “[v]iolating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of this chapter and any regulation adopted thereunder,” respectively, grounds for suspension or revocation of a license by operation of BPC section 7686. These sections represent a legislative determination that a violation of the Act is substantially related to the qualifications, functions, or duties of a licensee. (See *Walker v. Physical Therapy Bd. of California* (2017) 16 Cal.App.5th 1219, 1231-1232; *Sulla v. Board of Registered Nursing* (2012) 205 Cal.App.4th 1195, 1205-1206; *Medical Board v. Superior Court* (2003) 111 Cal.App.4th 163, 174; and *Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 774-775.)

(2) “Conviction of any crime(s) or act(s) involving dishonesty, misrepresentation, fraud, deceit, stolen property, embezzlement, money laundering, theft, grand theft, larceny, burglary, robbery, identity theft, obtaining money, labor, or property under false pretenses, and/or forgery or counterfeiting.”

Crimes or acts involving dishonesty, misrepresentation, fraud, or deceit, and related crimes, including crimes or acts involving money laundering, obtaining money, labor, or property under false pretenses, and forgery or counterfeiting, are substantially related to the qualifications, functions, or duties of a licensee under the Act because “[h]onesty and integrity are deeply and daily involved in various aspects of the practice.” (*Golde v. Fox* (1979) 98 Cal.App.3d 167, 176 [referring to real estate brokers].) Licensees may have fiduciary responsibilities arising from their relationship to consumers or their receipt, deposit, and expenditure of funds that are required to be held in trust for the benefit of decedents. (See the discussion in this ISR under the next heading, below.) “Where the occupation is one wherein those following it act as the agents and representatives of others and in a more or less confidential and fiduciary capacity, it certainly can be fairly said that those pursuing it should have in a particular degree the qualifications of ‘honesty, truthfulness and good reputation.’” (*Id.* at 178.) In addition, licensees are also required to submit reports or file statements with the Bureau or other agencies (BPC, sections 7612.6, 7639.08(d), & 7672.7(a); HSC, section 7117(b)) and to comply with audits (BPC,

sections 7613.1, 7613.3, 7639.06(d), 7639.10(a)(8)(C), & 7672.6(a)(2); HSC, sections 8344, 8344.6, 8376(b), & 8747.5), “which demands utmost honesty in reporting.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 470.) The importance of honesty and integrity to the businesses regulated under the Act is evidenced by the many laws that require a licensee to make certain disclosures or disclaimers to consumers (BPC, sections 7054.1, 7614.9, & 7711.4; HSC, sections 8277, 8309, 8346.5, & 8741-8745; see also 16 CCR section 2333(f)) or that make a licensee subject to discipline or penalties for crimes or acts involving dishonesty, misrepresentation, fraud, or deceit, or related crimes (BPC, sections 7637.7, 7637.8, 7637.9, 7672.7(b)-(c), 7673.2, 7703, 7711.2(a)-(c), 7711.3(b), & 7715; HSC, sections 8746, 8780, & 8781). (*Golde v. Fox* (1979) 98 Cal.App.3d 167, at 176.)

Theft and related crimes or acts, including crimes or acts involving stolen property, embezzlement, grand theft, larceny, burglary, robbery, and identity theft are substantially related to the qualifications, functions, or duties of a licensee under the Act because a licensee committing such crimes or acts has demonstrated “an inability or unwillingness to follow the law.” (*Griffiths v. Superior Court* (2002) 96 Cal.App.4th 757, 771-772.) A capacity to violate laws against theft or related crimes or acts makes a licensee especially unfit to practice because licensees “hold positions of extreme trust and have access to the property of others.” (*Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119.) A licensee has unique access to the property of others, and unique opportunity to abuse that access, because many of the goods or services for which a licensee receives payment are for the benefit of a decedent. Consequently, there is little direct oversight to ensure the faithful use of a payment for the purpose received. In addition, a licensee may also be entrusted with custody of a decedent’s remains, which—in the case of cremation or hydrolysis—may be or become unidentifiable. Disregard for others’ feelings regarding their valuables, evidenced by a conviction for theft or related crimes or acts, may contribute to negligence, recklessness, or worse in the handling or identification of a decedent’s remains or the performance of services for the benefit of the decedent or “for the benefit and protection of the public by preserving, beautifying, and keeping cemeteries from becoming unkept and places of reproach and desolation in the communities in which they are situated.” (BPC, section 8776; see, e.g., BPC, sections 7673.1, 7685.2(c)(2), 7706, & 7711.1; HSC, sections 7050.5-7055, 7103(b), 8344, 8345, 8346, 8376(a), & 8378; 16 CCR section 2333.)

(3) “Conviction of any crime(s) or act(s) involving fiscal dishonesty[.]”

Crimes or acts involving fiscal dishonesty are substantially related to the qualifications, functions, or duties of a licensee under the Act for the same reasons discussed in the ISR under this heading at the beginning of paragraph (2), above.



**Add Section 2330.1 to Article 3 of Division 23 of Title 16 of the CCR (Criteria to Aid in Determining if Financial Crimes are Directly and Adversely Related to Fiduciary Qualifications, Functions, or Duties of a Cemetery Manager)**

Purpose: The purpose of adding 16 CCR section 2330.1 is to implement AB 2138, adding BPC section 480(a)(1)(B)(v), which, beginning July 1, 2020, will require the Bureau to adopt regulations to aid in determining, if an applicant for a cemetery manager license was convicted of a felony financial crime, whether the crime is directly and adversely related to the fiduciary qualifications, functions, or duties of a cemetery manager and therefore excluded from the statute of limitations, effective July 1, 2020, that, with certain exceptions, prevents the Bureau from denying a license based on a criminal conviction if the applicant was convicted or, if incarcerated, released from incarceration, more than seven years before the application date. (BPC, section 480, subd. (a)(1)(B)(v), as added by AB 2138, section 4.)

A licensed cemetery, including a cemetery authority, as defined in HSC section 7018, must designate a cemetery manager to “exercis[e] direct supervision and control over the operations, employees, and agents of the cemetery as is necessary to ensure full compliance with the applicable provisions of [the Business and Professions Code], the Health and Safety Code, and any regulations adopted thereto.” (BPC, section 7653.6; 16 CCR section 2326.1.)

A cemetery manager may have the following fiduciary responsibilities:

First, circumstances surrounding the sale of goods or services may create a “confidential relation” with a consumer. “Confidential and fiduciary relations are, in law, synonymous[.]” (*In re Cover’s Estate* (1922) 188 Cal. 133, 143.) A confidential relation arises when a consumer is especially vulnerable due to factors that may include, among others, advanced age or grief (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 273) or ignorance or inexperience (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 43; *Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 308; and *Champion v. Woods* (1889) 79 Cal. 7, 20), and the consumer reposes trust or confidence in another’s integrity with the other’s express or implied acceptance (*Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257, 270-271). Cemetery managers will frequently engage in business transactions with consumers who are grieving, of advanced age, or ignorant or inexperienced in the cemetery profession. A cemetery manager’s relative equanimity at these times, or superior knowledge and experience in the cemetery profession, may encourage vulnerable consumers to repose trust or confidence in the cemetery manager’s guidance. If the trust or confidence is accepted, a confidential relation arises, placing the cemetery manager in “a superior position to exert unique influence over the dependent party.” (*Id.* at 271.) In this relationship, a cemetery manager will have the fiduciary duty to “take no advantage from [their] acts relating to the interest of the [dependent] party without the latter’s knowledge or consent.” (*Bacon v. Soule* (1912) 19 Cal.App. 428, 434; see also *Cox v. Schnerr* (1916) 172 Cal. 371, 378-379.) The Legislature has memorialized this fiduciary duty in law by prohibiting cemetery managers from soliciting or receiving payment to make certain business referrals, as specified (BPC, sections 7701); requiring disclosure of, among other things, the prices of certain goods and

services (HSC, section 8277); requiring disclosure of the existence of any preneed agreement made by or on behalf of the decedent that is in the cemetery authority's possession (BPC, section 7614.9); requiring various other disclosures (BPC, sections 7711.2(d), (g), & (h) & 7711.4; HSC, sections 8309 & 8741-8745; see also 16 CCR 2333(f)); and authorizing discipline or imposing penalties for misrepresentation, fraud, and false or misleading statements (BPC, sections 7703, 7711.2(a)-(c), 7711.3(b), & 7715; HSC, sections 8746, 8780, & 8781).

Second, California law requires certain advance payments for cemetery maintenance, interment, or associated goods and services to be held in an endowment care trust fund for the benefit of the decedent (HSC, sections 8277(c)(2) & (4), 8725-8731, 8735, 8775(e), 8776, & 8779.5; 16 CCR section 2370). "A trust is a fiduciary relationship with respect to property in which the person holding legal title to the property—the trustee—has an equitable obligation to manage the property *for the benefit of another*—the beneficiary." (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1133-1134 [italics in original].) A cemetery manager, as representative of a cemetery authority, may be responsible for, among other things, establishing trusts, appointing trustees, or accepting and placing payments in trust (HSC, sections 8725, 8731-8735, 8738-8738.2, 8748, 8775, 8777, & 8779.5) and ensuring that cemetery goods and services are furnished, and trust funds are used, in compliance with the terms of the trust (HSC, sections 8726-8730, 8748, 8750, & 8775). The Legislature has recognized the fiduciary responsibilities arising from these tasks by requiring each cemetery authority to file reports on trust fund expenditures (BPC, section 7612.6); requiring audits of trust funds (BPC, sections 7613.1 & 7613.3; HSC, sections 8747.5); and imposing penalties for misuse of funds (BPC, sections 7703, 7711.2(e), & 7715; HSC, sections 8746 & 8785).

Pursuant to BPC section 480(a)(1)(B)(v), the Bureau has determined, and the proposed regulation would provide, that a financial crime that is classified as a felony, including felony conspiracy or felony attempt to commit that crime, is directly and adversely related to the fiduciary qualifications, functions, or duties of a cemetery manager if it "involves dishonesty, misrepresentation, deceit, fraud, or theft that causes, is intended or expected to cause, or could reasonably be expected to cause, a direct financial benefit to oneself or another or financial harm to another." The proposed regulation would also enumerate, in 16 CCR section 2330.1, subdivision (b), specific felony financial crimes that the Bureau has determined are directly and adversely related to the fiduciary qualifications, functions, or duties of a cemetery manager. The proposed provisions of 16 CCR section 2330.1 would enable the Bureau to exclude an applicant who has been convicted of such crimes from licensure notwithstanding the seven-year statute of limitations described above. These provisions are necessary to ensure consumers are not preyed on during a time of emotional grief.

Anticipated Benefits: The proposed addition of 16 CCR section 2330.1 would provide clarity and transparency to applicants and licensees by (1) specifying the criteria the Bureau will consider to determine whether a felony financial crime is directly and adversely related to the fiduciary qualifications, functions, or duties of a cemetery manager, and may therefore be considered as grounds for denial of a cemetery manager license notwithstanding the seven-year statute of limitations described under the heading "Purpose," above; and (2) enumerating specific felony

financial crimes that the Bureau has determined are directly and adversely related. The proposal would also make aware relevant parties to any administrative appeal arising from a licensing denial based on the applicant's conviction of, or incarceration for, a felony financial crime more than seven years before the application date (e.g., the Deputy Attorney General, the Administrative Law Judge, respondent, and respondent's counsel) that the Bureau is required to determine that the crime is directly and adversely related to the fiduciary qualifications, functions, or duties of a cemetery manager using the specified criteria, or the crime must be enumerated in 16 CCR section 2330.1, subdivision (b).

Rationale: BPC section 480, subdivision (a)(1)(B)(v) authorizes the Bureau to deny an application for a cemetery manager license on the basis of a conviction of a felony financial crime, notwithstanding the seven-year statute of limitations described under the heading "Purpose," above, if the Bureau determines that the crime is directly and adversely related to the fiduciary qualifications, functions, or duties of a cemetery manager. The regulation seeks to implement, interpret, and make specific this statutory provision by specifying the criteria the Bureau will use to make this determination with regard to applicants for a cemetery manager license and enumerating specific felony financial crimes that the Bureau has determined are directly and adversely related.

The specified criteria would require the Bureau to consider a crime to be "directly and adversely related to the fiduciary qualifications, functions, or duties of a cemetery manager" if the crime "involves an act of dishonesty, misrepresentation, deceit, fraud, or theft that causes, is intended or expected to cause, or could reasonably be expected to cause, a direct financial benefit to oneself or another or financial harm to another." Accordingly, the specific crimes listed in 16 CCR section 2330.1, subdivision (b) involve acts of dishonesty, misrepresentation, deceit, or fraud (crimes relating to forging, stealing, mutilating, or falsifying judicial or public records or documents, falsifying evidence, bribing, influencing, intimidating, or threatening witnesses, money laundering or fraud, forgery or counterfeiting, false personation or cheats, or crimes against insured property or insurers) or theft (crimes relating to stealing, criminal profiteering, embezzlement, robbery, burglary, burglary or larcenous instruments or deadly weapons, larceny, extortion, or crimes against insured property or insurers).

A crime that meets these criteria, including the listed crimes, would be directly and adversely related to the fiduciary qualifications, functions, or duties of a cemetery manager for the following reasons:

- Cemetery managers are prohibited from committing acts of misrepresentation or fraud and making false or misleading statements. (BPC, sections 7703, 7711.2(a)-(c), 7711.3(b), & 7715; HSC, sections 8746, 8780, & 8781.) A cemetery manager who has committed crimes relating to money laundering or fraud, false personation or cheats, or crimes against insured property or insurers, or committed a similar act of dishonesty, misrepresentation, deceit, or fraud has demonstrated a capacity to commit those acts in the interest of financial gain or in circumstances that cause financial harm to another.
- Cemetery managers are prohibited from soliciting or receiving payment to make certain business referrals, as specified. (BPC, sections 7701.) They are also uniquely positioned

to “arrest[], attach[], detain[], or claim[] to detain any human remains for any debt or demand, or upon any pretended lien or charge,” a crime under HSC section 7053. A person who has committed a crime relating to bribing, influencing, intimidating, or threatening witnesses, or committed a similar act of dishonesty, misrepresentation, deceit, or fraud, has demonstrated a capacity to: (1) use leverage against others in the interest of financial gain; and (2) influence others to provide false or misleading information to a third party in the interest of financial gain or in circumstances that cause financial harm to another.

- Cemetery managers are required to disclose information to consumers that will enable consumers to make an informed decision regarding the purchase of goods or services. (BPC, sections 7614.9, 7711.2(d), (g), & (h), & 7711.4; HSC, sections 8277, 8309, & 8741-8745; see also 16 CCR sections 1258 & 2333(f).) A cemetery manager who has committed a crime relating to forging, stealing, mutilating, or falsifying judicial or public records or documents or falsifying evidence, or committed a similar act of dishonesty, misrepresentation, deceit, or fraud, has demonstrated a capacity to withhold information in the interest of financial gain or in circumstances that cause financial harm to another.
- Cemetery managers are prohibited from misusing trust funds. (BPC, sections 7703, 7711.2(e), & 7715; HSC, sections 8746 & 8785.) A cemetery manager who has committed crimes relating to stealing, criminal profiteering, embezzlement, robbery, burglary, burglary or larcenous instruments or deadly weapons, larceny, extortion, or crimes against insured property or insurers, or committed a similar act of theft, has demonstrated a capacity to misappropriate another’s funds in the interest of financial gain or in circumstances that cause financial harm to another.

The proposal is necessary to provide the appropriate notice to applicants for a cemetery manager license that conviction of a felony financial crime may be grounds for denial of that license regardless of whether the applicant was convicted of, or incarcerated for, that crime more than seven years before the application date. The proposal is also necessary to incorporate into one regulation the criteria the Bureau will use in evaluating whether a felony financial crime is directly and adversely related to the fiduciary qualifications, functions, or duties of a cemetery manager and the specific felony financial crimes that the Bureau has determined are directly and adversely related.

### **Amend 16 CCR Section 2331 (Rehabilitation Criteria for Denial of License)**

#### **Section 2331, subdivision (a)**

Purpose: The purpose of amending 16 CCR section 2331, subdivision (a) is to comply with the requirements of AB 2138, section 9, adding BPC section 482, subdivisions (a)(1) and (b)(1), which, beginning July 1, 2020, will require the Bureau, when considering the denial of a license based on a crime, to consider whether the applicant has made a showing of rehabilitation based on their having completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria that the Bureau must consider when evaluating an applicant in this category, the proposal would also provide a

special list of criteria for the Bureau to consider for applicants under the Cemetery Regulations. The list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Bureau to consider rehabilitation in the narrow context of an applicant with a criminal conviction who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards and bureaus under the Department of Consumer Affairs (DCA).

Anticipated Benefits: The proposed revisions to 16 CCR section 2331, subdivision (a) would provide transparency and clarity to applicants under the Cemetery Regulations with a criminal conviction who have completed their criminal sentence without a violation of parole or probation. Providing the special list of rehabilitation criteria would help those applicants understand the facts and documents to present to the Bureau to demonstrate their rehabilitation in denial proceedings. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant's counsel) in advocating for or against, or deciding upon, applicants who have criminal convictions and completed parole or probation without a violation, by listing the special rehabilitation criteria applicable to those applicants. The referencing of an application for a "license, as defined in Section 23.7 of the Code" would clarify that the term "license" includes all license categories the Bureau regulates, including registrations.

Rationale: Existing law requires boards and bureaus to develop criteria to evaluate the rehabilitation of an applicant when considering denial of a license, and to consider evidence of rehabilitation in making such decisions. (BPC, section 482, subd. (a).) Under existing law, a board or bureau may not deny an applicant a license based solely on a misdemeanor conviction, if the applicant meets the applicable requirements of the criteria of rehabilitation that the board or bureau develops. (BPC, section 480, subd. (b).)

Operative July 1, 2020, BPC section 480 will prohibit the Bureau from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or on the basis of the facts underlying a criminal conviction, if the applicant "made a showing of rehabilitation pursuant to Section 482." (BPC, section 480, subd. (b), as added by AB 2138, section 4.) In deciding whether to deny a license based on a criminal conviction, the Bureau must consider evidence of the applicant's rehabilitation, pursuant to the process established in the Act, or its regulations, and as directed under BPC section 482. (BPC, section 481, subd. (c), as added by AB 2138, section 7; see also BPC, section 493, subd. (b)(2), as added by AB 2138, section 13 ["A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation"].)

To implement AB 2138, it is necessary for the Bureau to revise its regulations that establish criteria for evaluating rehabilitation when deciding whether to deny a license based on a criminal conviction. (BPC, section 482, subds. (a)(1) & (b), as added by AB 2138, section 9.) In particular, relevant to the proposed revisions to 16 CCR section 2331, subdivision (a), the Bureau must decide whether an applicant under the Cemetery Regulations with a criminal

conviction “made a showing of rehabilitation,” based on their having completed the criminal sentence at issue without a violation of parole or probation. (BPC, section 482, subds. (a)(1) & (b)(1), as added by AB 2138, section 9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Bureau must consider when evaluating an applicant in this category. The extent to which a person complied with the terms of parole or probation is already a factor boards and bureaus often consider when evaluating rehabilitation, and it is currently considered by the Bureau in evaluating rehabilitation. (16 CCR section 2331, subd. (a)(4).) But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the Bureau must now consider whether an applicant who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

Accordingly, the proposal would specify the following special criteria for the Bureau to consider when making the determination that an applicant under the Cemetery Regulations with a criminal conviction who has successfully completed the criminal sentence without a violation of parole or probation has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the length(s) of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. The criteria are necessary to assist the Bureau in evaluating rehabilitation. Because BPC section 482, subdivisions (a)(1) and (b)(1) will require the Bureau to evaluate rehabilitation in the narrow context of an applicant with a criminal conviction who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and would provide to the Bureau information specific to the applicant’s criminal sentence and terms or conditions of parole or probation so that the Bureau knows the relevant criteria it must consider to make the determination as to the applicant’s rehabilitation. In addition, to provide uniformity with other DCA boards and bureaus, the proposed criteria were adopted by the Bureau pursuant to DCA’s recommended rehabilitation criteria.

The rationale for each criterion is as follows:

**Nature and gravity of the crime:** The Bureau must consider the nature and gravity of the crime because this is the offense against which the applicant’s rehabilitative efforts will be evaluated.

Length of the applicable parole or probation period: The Bureau would consider the length of the applicable parole or probation period because the length of time that the applicant served probation or parole without a violation is relevant to whether the applicant is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 [“a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice”].)

Modification of probation period: The Bureau must consider the extent to which the parole or probation period was shortened or lengthened, and the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the applicant is sufficiently rehabilitated.

Terms or conditions of parole or probation: The Bureau must consider the terms or conditions of parole or probation and the extent to which they bear on the applicant’s rehabilitation, because the actual parole or probation terms can inform the Bureau on whether the applicant is rehabilitated. For instance, in cases where an applicant was convicted of a crime involving alcohol, probation terms requiring the applicant to complete alcohol 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”].)

Modification of terms and conditions: The Bureau must consider the extent to which the terms or conditions of parole or probation were modified and the reason for modification, because this may be relevant to the Bureau’s determination. For instance, if correctional authorities removed terms of parole or probation due to the applicant’s good behavior, this would bear on the Bureau’s evaluation of the applicant’s rehabilitation and willingness to conform to the rules of licensure.

### **Section 2331, subdivision (b)**

Purpose: The purpose of amending 16 CCR section 2331, subdivision (b) is to comply with the requirements of AB 2138, section 9, adding BPC section 482, subdivisions (a)(1) and (b)(2), which, beginning July 1, 2020, will require the Bureau, when considering the denial of a license based on a crime or professional misconduct pursuant to BPC section 480, to consider whether the applicant has made a showing of rehabilitation if: (1) the applicant has not completed the criminal sentence at issue without a violation of parole or probation; (2) the Bureau does not find that the applicant made a sufficient showing of rehabilitation based on the special criteria in subdivision (a), discussed above; or (3) the application is subject to denial on a basis other than a crime, such as professional misconduct. (BPC, section 482, subds. (a)(1) & (b)(2), as added by AB 2138, section 9.)

As AB 2138 does not prescribe new rehabilitation criteria that the Bureau must consider when evaluating an applicant pursuant to BPC section 482, subdivisions (a)(1) and (b)(2), the proposal would also provide a specific, more comprehensive list of standard rehabilitation criteria for the Bureau to consider for applicants under the Cemetery Regulations, which is not limited to the applicable parole or probation. The list of criteria incorporates the special criteria from subdivision (a), discussed above, so that similarly-situated applicants have the opportunity to be evaluated by the Bureau under the same set of criteria. The revised list of standard rehabilitation criteria also anticipates that the Bureau may be considering “act(s)” that are the basis for the denial, since the Bureau may be evaluating the rehabilitation of an applicant where the ground for denial involves professional misconduct rather than a criminal conviction. This proposal is also intended to provide predictability in the application process and uniformity of rehabilitation criteria with other boards and bureaus under DCA.

Anticipated Benefits: The proposed revisions to 16 CCR section 2331, subdivision (b) would provide transparency and clarity to applicants under the Cemetery Regulations: (1) who have not completed their criminal sentence without a violation of parole or probation; (2) who have not made a sufficient showing of rehabilitation based on the special criteria in subdivision (a), discussed above; or (3) whose application is subject to denial on a basis other than a crime. Providing the revised list of standard rehabilitation criteria would help those applicants understand the facts and documents to present to the Bureau to demonstrate their rehabilitation in denial proceedings. The proposal would also assist relevant parties to any administrative appeal arising from a license denial (e.g., the Deputy Attorney General, the Administrative Law Judge, and the applicant’s counsel) in advocating for or against, or deciding upon, those applicants by listing the standard rehabilitation criteria applicable to those applicants.

Rationale: Existing law requires boards and bureaus to develop criteria to evaluate the rehabilitation of an applicant when considering denial of a license, and to consider evidence of rehabilitation in making such decisions. (BPC, section 482, subd. (a).) Under existing law, a board or bureau may not deny an applicant a license based solely on a misdemeanor conviction, if the applicant meets the applicable requirements of the criteria of rehabilitation that the board or bureau develops. (BPC, section 480, subd. (b).)

Operative July 1, 2020, BPC section 480 will prohibit the Bureau from denying a license on the basis that the applicant was convicted of a crime (a misdemeanor or felony), or on the basis of the facts underlying a criminal conviction, if the applicant “made a showing of rehabilitation pursuant to Section 482.” (BPC, section 480, subd. (b), as added by AB 2138, section 4.) In deciding whether to deny a license based on a criminal conviction, the Bureau must consider evidence of the applicant’s rehabilitation, pursuant to the process established in the Act, or its regulations, and as directed under BPC section 482. (BPC, section 481, subd. (c), as added by AB 2138, section 7; see also BPC, section 493, subd. (b)(2), as added by AB 2138, section 13 [“A board shall not categorically bar an applicant based solely on the type of conviction without considering evidence of rehabilitation”].)



To implement AB 2138, it is necessary for the Bureau to revise its regulations that establish criteria for evaluating rehabilitation when deciding whether to deny a license based on a criminal conviction. (BPC, section 482, subds. (a)(1) & (b), as added by AB 2138, section 9.) In particular, relevant to the proposed revisions to subdivision (b), the Bureau must decide whether an applicant under the Cemetery Regulations who does not have a clean parole or probation record, who has not “made a showing of rehabilitation” based on the special criteria in subdivision (a), discussed above, or whose application is subject to denial on a basis other than a crime is rehabilitated based on the Bureau’s standard criteria for evaluating applicants’ rehabilitation. (BPC, section 482, subds. (a)(1) & (b)(2), as added by AB 2138, section 9.) Beginning July 1, 2020, AB 2138 will also expressly authorize the Bureau to deny a license based on professional misconduct. (BPC, section 480, subd. (a)(2), as added by AB 2138, section 4.) Accordingly, it is necessary to amend the regulation to account for denials on this ground.

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Bureau must consider when evaluating an applicant pursuant to BPC section 482, subdivisions (a)(1) and (b)(2). Accordingly, the proposal would revise the Bureau’s existing rehabilitation criteria for applicants under the Cemetery Regulations by adding the criteria specified in subdivision (b) and making other minor revisions. Each of these criteria are designed to focus the Bureau’s evaluation on facts and circumstances relevant to an applicant’s rehabilitation, so that the Bureau knows the relevant criteria it must review to make the determination as to the applicant’s rehabilitation. In addition, to provide uniformity with other DCA boards and bureaus, the proposed criteria were adopted by the Bureau pursuant to DCA’s recommended rehabilitation criteria.

The rationale for each criterion is as follows:

**Nature and gravity of the crime or act:** The Bureau would consider the nature and gravity of the crime or act for the same reasons that this criterion is included among the special rehabilitation criteria in subdivision (a), discussed above. This is the offense or misconduct against which the Bureau will judge the applicant’s rehabilitation. This is also already an existing regulatory criterion. The Bureau proposes to amend “severity” to “gravity.” This is not a substantive change and would make the regulation internally consistent.

**Evidence of subsequent acts or crimes:** The Bureau would also consider evidence of acts or crimes committed after the act or crime that is the basis for denial. Such acts or crimes typically reflect additional misconduct by the applicant and bear on the Bureau’s decision regarding whether the applicant is sufficiently rehabilitated to be licensed and conform to the requirements of licensure. This is also already an existing regulatory criterion. The Bureau would omit “which also could be considered as grounds for denial [under BPC section 480]” from this criterion because, beginning July 1, 2020, BPC section 480 will no longer specify, as grounds for denial, acts that, if subsequently committed by an applicant, will nonetheless continue to be germane to an applicant’s potential for recidivism, including dishonest, fraudulent, or deceitful acts, or acts that would be grounds for suspension or revocation of a license. (Compare BPC, section 480,

subds. (a)(2) & (a)(3), as amended by AB 2138, section 3, to BPC, section 480, subd. (a), as added by AB 2138, section 4.) The proposal will enable the Bureau to consider these and other acts that are not specified in BPC section 480 but are germane to an applicant's potential for recidivism.

**Time elapsed:** The Bureau would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person's rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation.

**Compliance with sanctions:** The Bureau would consider whether the applicant complied with parole, probation, restitution or other sanctions imposed on the applicant. The Bureau proposes amending "The extent to which," to "Whether," but does not view this as a substantive change. The change would make this subdivision consistent with subdivision (a). This criterion is otherwise unchanged from existing regulation. The information embraced in this criterion bears on an applicant's rehabilitation in terms of the applicant's willingness to make amends for prior misconduct and willingness to conform to the rules of licensure. Accordingly, it is necessary for the Bureau to consider these elements to evaluate an applicant's reformation from prior misconduct.

**Criteria from new subdivision (a):** The Bureau would include the special rehabilitation criteria in subdivision (a), discussed above, as part of its revised list of standard rehabilitation criteria. This is necessary to ensure that all applicants convicted of a crime have the opportunity to be evaluated under the same set of rehabilitation criteria. For applicants that completed their criminal sentence without a violation of parole or probation, the Bureau would first evaluate their eligibility for licensure under the special criteria in subdivision (a). If the applicant did not demonstrate sufficient rehabilitation under the special criteria in subdivision (a), the Bureau would apply the other criteria in subdivision (b). For applicants with a criminal conviction that did not complete their criminal sentence without a violation of parole or probation, the Bureau would apply all of the standard criteria in subdivision (b), which incorporates the special criteria from subdivision (a). This way, similarly-situated applicants (those being considered for denial based on a criminal conviction) have the benefit of being evaluated by the same set of criteria.

**Evidence of rehabilitation submitted by applicant:** The Bureau would consider rehabilitation evidence the applicant submitted. The proposal would not change this criterion. Until July 1, 2020, the Bureau is required to consider such evidence under BPC section 482, subdivision (b). Beginning July 1, 2020, the Bureau will be required to consider such evidence under BPC section 481, subdivision (c). It is necessary to retain this requirement in order to consolidate the Bureau's rehabilitation criteria in one place.

**Add Section 2331.1 to Article 3 of Division 23 of Title 16 of the CCR (Rehabilitation Criteria for Suspension, Revocation, or Reinstatement of License)**

**Section 2331.1, subdivision (a)**

Purpose: The proposed action would split section 2331 into two sections and move former subdivisions (b) and (c) into new section 2331.1. The purpose of adding 16 CCR section 2331.1, subdivision (a) is to comply with the requirements of AB 2138, section 9, adding BPC section 482, subdivisions (a)(2) and (b)(1), which, beginning July 1, 2020, will require the Bureau, when considering the suspension or revocation of a license based on a crime pursuant to BPC section 490, to consider whether a licensee has made a showing of rehabilitation based on their having completed the criminal sentence at issue without a violation of parole or probation. As AB 2138 does not prescribe new rehabilitation criteria that the Bureau must consider when evaluating a licensee in this category, the proposal would also provide a special list of criteria for the Bureau to consider for licensees under the Cemetery Regulations. For uniformity purposes, the proposal would follow the same approach as discussed above regarding the criteria set forth in 16 CCR section 2331, subdivision (a). The list of criteria is narrow in scope and limited to considerations relevant to the crime and the criminal sentence, since AB 2138 requires the Bureau to consider rehabilitation in the narrow context of a licensee with a criminal conviction who completed the criminal sentence without a parole or probation violation. This proposal is also intended to provide predictability in the disciplinary process and uniformity of rehabilitation criteria with other boards and bureaus under DCA.

Anticipated Benefits: The proposed provisions of 16 CCR section 2331.1, subdivision (a) are intended to provide transparency and clarity to licensees under the Cemetery Regulations with a criminal conviction who have completed their criminal sentence without a violation of parole or probation. Providing the special list of rehabilitation criteria would help those licensees understand the facts and documents to present to the Bureau to demonstrate their rehabilitation in suspension or revocation proceedings. The proposal would also assist relevant parties to any administrative appeal arising from a suspension or revocation (e.g., the Deputy Attorney General, the Administrative Law Judge, and the licensee's counsel) in advocating for or against, or deciding upon, licensees who have criminal convictions and completed parole or probation without a violation, by listing the special rehabilitation criteria applicable to those licensees. The referencing of a "license, as defined in Section 23.7 of the Code" would clarify that the term "license" includes all license categories the Bureau regulates, including registrations.

Rationale: Existing law requires boards and bureaus to develop criteria to evaluate the rehabilitation of a licensee when considering suspending or revoking a license based on a crime pursuant to BPC section 490, and to consider evidence of rehabilitation in making such decisions. (BPC, section 482, subd. (b).) Beginning July 1, 2020, the Bureau must decide, when considering suspension or revocation of a license based on a crime pursuant to BPC section 490, whether the licensee has "made a showing of rehabilitation" based on their having completed the criminal sentence at issue without a violation of parole or probation. (BPC, section 482, subds. (a)(2) & (b)(1), as added by AB 2138, section 9.)

To implement AB 2138 and maintain consistency in how the Bureau evaluates rehabilitation evidence between denial proceedings and suspension or revocation proceedings, it is necessary for the Bureau to revise its regulations that establish criteria for evaluating rehabilitation when deciding whether to suspend or revoke a license based on a criminal conviction. (BPC, section 482, subs. (a)(2) & (b), as added by AB 2138, section 9.).

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Bureau must consider when evaluating a license pursuant to BPC section 482, subdivisions (a)(2) and (b)(1). The extent to which a person complied with the terms of parole or probation is already a factor boards and bureaus often consider when evaluating rehabilitation, and it is currently considered by the Bureau in evaluating rehabilitation. (16 CCR section 2331, subd. (b)(4).) But courts historically rejected the view that compliant applicants and licensees are, per se, rehabilitated: “The fact that a professional who has been found guilty of two serious felonies rigorously complies with the conditions of his probation does not necessarily prove anything but good sense.” (*Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461, 473; see also *In re Gossage* (2000) 23 Cal.4th 1080, 1099 [“Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a[n] . . . applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole”].) Nonetheless, under AB 2138, the Bureau must now consider whether a licensee who complied with the terms of parole or probation made a showing of rehabilitation sufficient for licensure, even without considering other standard rehabilitation criteria.

Accordingly, the proposal would specify the following special criteria for the Bureau to consider when making the determination that the licensee under the Cemetery Regulations with a criminal conviction who has successfully completed the criminal sentence without a violation of parole or probation has made a showing of rehabilitation: (1) the nature and gravity of the crime(s); (2) the length(s) of the applicable parole or probation period(s); (3) the extent to which the applicable parole or probation period was shortened or lengthened, and the reason(s) the period was modified; (4) the terms or conditions of parole or probation and the extent to which they bear on the licensee’s rehabilitation; and (5) the extent to which the terms or conditions of parole or probation were modified, and the reason(s) for modification. The criteria are necessary to assist the Bureau in evaluating rehabilitation. Because BPC section 482, subdivisions (a)(2) and (b)(1) will require the Bureau to evaluate rehabilitation in the narrow context of a licensee with a criminal conviction who completed the criminal sentence without violating parole or probation, each of these criteria are narrow in scope and would provide to the Bureau information specific to the licensee’s criminal sentence and terms or conditions of parole or probation, so that the Bureau knows the relevant criteria it must consider to make the determination as to the licensee’s rehabilitation. In addition, to provide consistency with how the Bureau considers rehabilitation criteria, and uniformity with other DCA boards and bureaus, the proposed criteria were adopted by the Bureau pursuant to DCA’s recommended rehabilitation criteria.

The rationale for each criterion is as follows:

**Nature and gravity of the crime:** The Bureau must consider the nature and gravity of the crime because this is the offense against which the licensee's rehabilitative efforts will be evaluated.

**Length of the applicable parole or probation period:** The Bureau would consider the length of the applicable parole or probation period because the length of time that the licensee served probation or parole without a violation is relevant to whether the licensee is rehabilitated and will comply with licensure requirements in the future. (See *In re Conflenti* (1981) 29 Cal.3d 120, 124-125 ["a truer indication of rehabilitation will be presented if petitioner can demonstrate by his sustained conduct over an extended period of time that he is once again fit to practice"].)

**Modification of probation period:** The Bureau must consider the extent to which the parole or probation period was shortened or lengthened, and the reason for any change, because such periods can be shortened or lengthened for good or bad conduct, and this may bear on whether the licensee is sufficiently rehabilitated.

**Terms or conditions of parole or probation:** The Bureau must consider the terms or conditions of parole or probation and the extent to which they bear on the licensee's rehabilitation, because the actual parole or probation terms can inform the Bureau on whether the licensee is rehabilitated. For instance, in cases where a licensee was convicted of a crime involving alcohol, probation terms requiring the licensee to complete alcohol abuse treatment or participate in an alcohol abuse program would bear more heavily on the licensee'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"].)

**Modification of terms and conditions:** The Bureau must consider the extent to which the terms or conditions of parole or probation were modified and the reason for modification, because this may be relevant to the Bureau's determination. For instance, if correctional authorities removed terms of parole or probation due to the licensee's good behavior, this would bear on the Bureau's evaluation of the licensee's rehabilitation and willingness to conform to the rules of licensure.

### **Section 2331.1, subdivision (b)**

**Purpose:** The purpose of adding 16 CCR section 2331.1, subdivision (b) is to conform this subdivision, setting forth the standard rehabilitation criteria applicable in suspension and revocation proceedings under the Cemetery Regulations, with the changes the Bureau proposes in 16 CCR section 2331, subdivision (b) to implement BPC section 482, subdivisions (a)(1) and (b)(2), setting forth the standard rehabilitation criteria applicable in denial proceedings under the Cemetery Regulations. Beginning July 1, 2020, BPC section 482, subdivisions (a)(2) and (b)(2), like subdivisions (a)(1) and (b)(2), will require the Bureau, when considering the

suspension or revocation of a license based on a crime pursuant to BPC section 490, to consider whether a licensee has made a showing of rehabilitation if: (1) a licensee has not completed the criminal sentence at issue without a violation of parole or probation; or (2) the Bureau does not find that the licensee made a sufficient showing of rehabilitation based on the special criteria in subdivision (a), discussed above. (BPC, section 482, subds. (a)(2) & (b)(2), as added by AB 2138, section 9.) Because the Bureau may also suspend or revoke a license based on something other than a crime, such as a disciplinary action taken by another state, by an agency of the federal government, or by another country, as described in BPC section 141, the proposal would clarify that the Bureau's standard rehabilitation criteria will also be applied in those proceedings.

As AB 2138 does not prescribe new rehabilitation criteria that the Bureau must consider when evaluating a licensee pursuant to BPC section 482, subdivisions (a)(2) and (b)(2), the proposal would provide a specific, more comprehensive list of standard rehabilitation criteria for the Bureau to consider for licensees under the Cemetery Regulations, which is not limited to the person's parole or probation. The list of criteria is mostly unchanged from existing regulation, and it anticipates that the Bureau may be considering "act(s)" that are the basis for suspension or revocation, since the Bureau may, for instance, be evaluating the rehabilitation of a licensee where the ground for suspension or revocation involves a disciplinary action taken by another state, by an agency of the federal government, or by another country. The list of criteria incorporates the special criteria from subdivision (a), discussed above, so that similarly-situated licensees have the opportunity to be evaluated by the Bureau under the same set of criteria. This proposal is also intended to provide predictability and consistency in the licensing and disciplinary process and uniformity of rehabilitation criteria with other boards and bureaus under DCA. Thus, the proposal would follow the same approach as 16 CCR section 2331, subdivision (b), discussed above.

Anticipated Benefits: The proposed provisions of 16 CCR section 2331.1, subdivision (b) would provide transparency and clarity to licensees under the Cemetery Regulations who: (1) have not completed their criminal sentence without a violation of parole or probation; (2) have not made a sufficient showing of rehabilitation based on the special criteria in subdivision (a), discussed above; or (3) whose license is subject to suspension or revocation on a basis other than a crime. Providing the revised list of standard rehabilitation criteria would help those licensees understand the facts and documents to present to the Bureau to demonstrate their rehabilitation in suspension or revocation proceedings. The proposal would also assist relevant parties to any administrative appeal arising from a suspension or revocation (e.g., the Deputy Attorney General, the Administrative Law Judge, and the licensee's counsel) in advocating for or against, or deciding upon, those licensees, by listing rehabilitation criteria applicable to those licensees.

Rationale: Existing law requires boards and bureaus to develop criteria to evaluate the rehabilitation of a licensee when considering suspending or revoking a license based on a crime pursuant to BPC section 490, and to consider evidence of rehabilitation in making such decisions. (BPC, section 482, subd. (b).) Operative July 1, 2020, the Bureau must decide, when considering suspension or revocation of a license based on a crime pursuant to BPC section

490, whether a licensee who does not have a clean parole or probation record or who has not “made a showing of rehabilitation” based on the special criteria in subdivision (a), discussed above, has made a showing of rehabilitation based on the standard rehabilitation criteria developed by the Bureau. (BPC, section 482, subds. (a)(2) & (b)(2), as added by AB 2138, section 9.)

To implement AB 2138 and maintain consistency in how the Bureau evaluates rehabilitation between denial proceedings and suspension or revocation proceedings, it is necessary for the Bureau to revise its regulations that establish criteria for evaluating rehabilitation when deciding whether to suspend or revoke a license based on a criminal conviction. (BPC, section 482, subds. (a)(2) & (b), as added by AB 2138, section 9.)

Unlike the substantial relationship criteria, AB 2138 does not prescribe new rehabilitation criteria that the Bureau must consider when evaluating a licensee pursuant to BPC section 482, subdivisions (a)(2) and (b)(2). Accordingly, the proposal would revise the Bureau’s existing rehabilitation criteria under the Cemetery Regulations by adding the criteria specified in 16 CCR section 2331.1, subdivision (a) and making other minor revisions. Each of these criteria is designed to focus the Bureau’s evaluation on facts and circumstances relevant to a licensee’s rehabilitation, so that the Bureau knows the relevant criteria it must review to make the determination as to the licensee’s rehabilitation. In addition, to provide uniformity with other DCA boards and bureaus, the proposed criteria were adopted by the Bureau pursuant to DCA’s recommended rehabilitation criteria.

The rationale for each criterion is as follows:

Nature and gravity of the crime or act: The Bureau would consider the nature and gravity of the crime or act for the same reasons that this criterion is included among the special rehabilitation criteria in subdivision (a), discussed above. This is the offense or misconduct against which the Bureau will judge the licensee’s rehabilitation. This is already an existing regulatory criterion. The Bureau proposes to amend “severity” to “gravity” and “offense” to “crime.” These are not substantive changes and would make the regulation internally consistent.

The total criminal record: The Bureau would also consider evidence of the licensee’s total criminal record. This is an existing regulatory criterion. It is necessary for the Bureau to consider the licensee’s total criminal record because additional prior or subsequent misconduct by the licensee is relevant to the Bureau’s decision regarding whether the licensee is sufficiently rehabilitated to be licensed and the licensee’s willingness to conform to the requirements of licensure.

Time elapsed: The Bureau would consider the time that elapsed since commission of the prior crimes or misconduct. The passage of time bears on a person’s rehabilitation and, accordingly, it is necessary to consider this criterion in evaluating rehabilitation. This criterion has not changed substantively from existing regulation.

Compliance with sanctions: The Bureau would consider whether the licensee complied with parole, probation, restitution or other sanctions imposed on the licensee. This is an existing regulatory criterion. The information embraced in this criterion bears on a licensee's rehabilitation in terms of the licensee's willingness to make amends for prior misconduct and to conform to the rules of licensure. Accordingly, it is necessary for the Bureau to consider these elements to evaluate a licensee's reformation from prior misconduct.

Criteria from new subdivision (a): The Bureau would include the special rehabilitation criteria in subdivision (a), discussed above, as part of its standard rehabilitation criteria. This is necessary to ensure that all licensees convicted of a crime have the opportunity to be evaluated under the same set of rehabilitation criteria. For licensees that completed their criminal sentence without a violation of parole or probation, the Bureau would first evaluate their eligibility for licensure under the special criteria in subdivision (a). If the licensee did not demonstrate sufficient rehabilitation under the special criteria in subdivision (a), the Bureau would apply the other criteria in subdivision (b). For licensees that did not complete their criminal parole or probation without a violation, the Bureau would apply all of the standard criteria in subdivision (b), which incorporates the special criteria from subdivision (a). This way, similarly-situated licensees (those whose licenses are being considered for suspension or revocation based on a criminal conviction) have the benefit of being evaluated by the same criteria.

Evidence of dismissal proceedings: The Bureau would consider evidence that a licensee's criminal conviction was dismissed pursuant to Penal Code section 1203.4. This is an existing regulatory requirement, and it is necessary to consider dismissal proceedings because they are relevant to the Bureau's evaluation of whether a licensee is rehabilitated. 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.)

Evidence of rehabilitation submitted by licensee: The Bureau would consider rehabilitation evidence the licensee submitted. This is an existing regulatory criterion. Until July 1, 2020, the Bureau is required to consider such evidence under BPC section 482, subdivision (b). Beginning July 1, 2020, the Bureau will be required to consider such evidence under BPC 481, subdivision (c). It is necessary to retain this requirement in order to maintain consistency between the Bureau's evaluation of rehabilitation in denial proceedings and suspension or revocation proceedings.

### **Section 2331.1, subdivision (c)**

Purpose: The purpose of adding 16 CCR section 2331.1, subdivision (c) is to conform this subdivision, specifying the rehabilitation criteria applicable in reinstatement proceedings under the Cemetery Regulations, with the changes the Bureau proposes in 16 CCR section 2331.1, subdivisions (a) and (b) to implement BPC section 482, subdivisions (a)(2) and (b), setting forth



the rehabilitation criteria applicable in suspension and rehabilitation proceedings under the Cemetery Regulations.

**Anticipated Benefits:** The proposed provisions of 16 CCR section 2331.1, subdivision (c) would provide transparency and clarity to petitioners for reinstatement of a license under the Cemetery Regulations. Referencing the lists of rehabilitation criteria the Bureau proposes in 16 CCR section 2331.1, subdivisions (a) and (b) as criteria the Bureau will apply in reinstatement proceedings would help those petitioners understand the facts and documents to present to the Bureau to demonstrate their rehabilitation in those proceedings. The proposal would also assist relevant parties to any administrative appeal arising from denial of a petition for reinstatement (e.g., the Deputy Attorney General, the Administrative Law Judge, and the petitioner’s counsel) in advocating for or against, or deciding upon, those petitioners, by specifying the rehabilitation criteria applicable to those petitioners.

**Rationale:** Existing law requires boards and bureaus to develop criteria to evaluate the rehabilitation of a licensee when considering denying, suspending, or revoking a license based on a crime pursuant to BPC section 490, and to consider evidence of rehabilitation in making such decisions. (BPC, section 482.) Operative July 1, 2020, the Bureau must decide, when considering suspension or revocation of a license based on a crime pursuant to BPC section 490, whether the licensee has “made a showing of rehabilitation” based on either: (1) having completed their criminal sentence without a violation of parole or probation; or (2) the Bureau’s standard criteria for evaluating the rehabilitation of applicants. (BPC, section 482, subds. (a)(2) & (b), as added by AB 2138, section 9.) The lists of rehabilitation criteria the Bureau proposes in subdivisions (a) and (b) would implement this requirement.

Currently, 16 CCR section 2331, subdivision (c) requires the Bureau, when considering a petition for reinstatement of a license, to consider the same rehabilitation criteria that the Bureau uses in suspension and revocation proceedings. To implement AB 2138 and maintain consistency in how the Bureau evaluates rehabilitation evidence between suspension and revocation proceedings and reinstatement proceedings, the proposal would redesignate this provision as subdivision (c) of 16 CCR section 2331.1 and reference the lists of rehabilitation criteria the Bureau proposes in 16 CCR section 2331.1, subdivisions (a) and (b) as the criteria the Bureau will apply in reinstatement proceedings.

### **Underlying Data**

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

1. AB 2138 (Chiu, Chapter 995, Statutes of 2018)

### **Business Impact**

The proposed regulations will not have a significant adverse economic impact on businesses as the regulations do not directly affect businesses. This initial determination is based on the

purpose of AB 2138, which sought to reduce barriers to licensure for applicants and licensees with criminal histories or licensure discipline. The Bureau anticipates that the proposed regulations will impact businesses to the extent that individual applicants and licensees are able to be licensed or retain licensure under the proposal. The Bureau does not know how many applicants will gain or retain licensure but does not anticipate the number to significantly impact businesses. The types of businesses impacted from the proposed regulations range from private businesses to corporations that own crematories and/or cemeteries.

### **Economic Impact Assessment**

This regulatory proposal will have the following effects:

- It will not create or eliminate jobs within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure. The Bureau does not know how many applicants will gain licensure under the proposal, but does not anticipate the number to be significant – in the past four fiscal years, the Bureau denied eleven applicants licensure based upon their criminal history. It is unknown how many potential applicants did not apply because they were aware that their criminal history would disqualify them from licensure under current law. Whether or not additional applicants now receiving licenses will spur additional job growth is speculative.
- It will not create new businesses or eliminate existing business within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- It will not affect the expansion of businesses currently doing business within the State of California because the regulations are aimed at reducing barriers to licensure and make it easier for applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- This regulatory proposal may benefit the health and welfare of California residents by providing increased access to licensed professionals, because the regulations are aimed at reducing barriers to licensure and make it easier for applicants and licensees with criminal histories or licensure discipline to obtain and maintain licensure.
- This regulatory proposal does not affect worker safety because it establishes criteria, based upon recent statutory mandates for licensure following the applicant's or licensee's criminal conviction. It does not involve worker safety.
- This regulatory proposal does not affect the state's environment because it only regulates applicants and licensees and their qualifications for licensure following a criminal conviction or disciplinary action. It does not involve environmental issues.

### **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 regulation is proposed or would be as effective or less burdensome to affected private persons than the proposed regulation, or 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 that were considered and the reason the alternative was rejected or adopted:

- Option 1: To pursue a regulatory change that requires the Bureau to find rehabilitation if the applicant or licensee completed the terms of their criminal probation or parole. Courts give little weight to the fact that an applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole since they are under the direct supervision of correctional authorities and are required to behave in an exemplary fashion. As such, the Bureau believes that reviewing each individual on the basis of multiple criteria is the better indicator whether individuals are rehabilitated and not a danger to the public's health, safety, and welfare. For these reasons, the Bureau rejected this option.
- Option 2: To do nothing, meaning the Bureau would not adopt the regulations. The Bureau opted not to pursue this option because per AB 2138, the Bureau is mandated to adopt proposed regulations by July 1, 2020.