

TITLE 10. CALIFORNIA BUREAU OF REAL ESTATE

NOTICE OF MODIFIED TEXT FOR  
CRITERIA FOR REHABILITATION – SECS. 2911 and 2912  
ORIGINAL PUBLICATION ON OCTOBER 30, 2015

NOTICE IS HEREBY GIVEN

The Commissioner (“Commissioner”) of the Bureau of Real Estate (“CalBRE”) proposes to amend Sections 2911 and 2912 of the Regulations of the Real Estate Commissioner (Title 10, Chapter 6 of the California Code of Regulations) (“the Regulations”) after considering all comments, objections, and recommendations regarding the proposed action. This Notice is a republication, addressing an amendment to the proposal and affording an additional opportunity for public comment in consideration of an error in the previously published email contact address. Publication of this notice commences a 15-day public comment period.

AUTHORITY AND REFERENCE

Section 10080 of the Business and Professions Code (“the Code”) authorizes the Commissioner to adopt regulations that are reasonably necessary for the enforcement of the provisions of the Real Estate Law (Code Sections 10000 et. seq.). This proposal amends Sections 2911 and 2912 of the Regulations, in conformance with Section 482(a) and (b) of the Code.

PUBLIC HEARING

No request for a public hearing was received prior to 15 days before the close of the initial comment period.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Commissioner addressed as follows:

Regular Mail

Bureau of Real Estate  
Attn: Daniel E. Kehew, Sacramento Legal Office  
P.O. Box 137007  
Sacramento, CA 95813-7007

Electronic Mail

CalBRERegulations@dca.ca.gov

Facsimile

(916) 263-8767

**Comments may be submitted until 5:00 p.m., Monday, September 26, 2016.**

## INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW – SUMMARY OF CHANGE IN RESPONSE TO PUBLIC COMMENT

Among the comments received on the original proposal, one comment noted an unintended possible consequence in subdivisions 2911(a)(1)(C) and 2912(a)(1)(C) of the proposed regulations. These subdivisions address the start date of a minimum two year period during which a respondent must show a “clean record” as part of a demonstration of rehabilitation. In the original proposal where a respondent was not subject to incarceration, probation, or parole, the start of the two year period was the date on which the respondent’s most recent criminal conviction or license discipline order has been entered.

The comment received noted that the same unlawful act or acts may initiate both a criminal conviction and license discipline orders, and that the due process afforded for each of those events is often sequential, rather than overlapping. The result could be a significant delay following the actual wrongdoing and the start of the two year waiting period.

To address this concern, this modified proposal adds this sentence to both sections 2911(a)(1)(C) and 2912(a)(1)(C): *“Where the same act or acts resulted in both a conviction and an order or orders, the date of the earliest conviction or order will commence the two year period.”*

This addition is intended to mitigate the issue of sequentially occurring discipline actions by focusing on the result of the first disciplinary process, whether it was criminal or of a licensing nature.

Alternatively, the option of commencing the two year waiting period on the date of the unlawful acts was considered. Oftentimes, discipline is based upon an act that cannot be dated, or on a series of actions for which there is no specific final date. Also, where significant due process has been afforded a respondent, it may well be questioned whether the respondent is engaging in rehabilitative behavior prior to the imposition of discipline. Thus, the choice of the earliest conviction or order is a more easily established and reliable date for assessing actual rehabilitation.

INFORMATIVE DIGEST/PLAIN ENGLISH OVERVIEW – AS ORIGINALLY PUBLISHED

Sections 2911 and 2912 of the Regulations both explicitly state that they originate in Business and Professions Code (“the Code”) section 482. That statutory section reads:

*“Each board under the provisions of this code shall develop criteria to evaluate the rehabilitation of a person when:*

*(a) Considering the denial of a license by the board under Section 480; or*

*(b) Considering suspension or revocation of a license under Section 490.*

*Each board shall take into account all competent evidence of rehabilitation furnished by the applicant or licensee.” [Code section 482.]*

CalBRE’s resulting Criteria, embodied in the present versions of sections 2911 and 2912, largely mirror one another.<sup>1</sup> Each section provides a list of actions that an applicant or licensee may have taken during a specified time period, each of which would be an additional indicator that the applicant or licensee has overcome the issues that led to their conviction(s).

The Criteria do not function as a “scorecard,” with satisfaction of some specific number or combination of conditions resulting in a favorable decision for the applicant or licensee. Instead, the applicant or licensee is encouraged to accomplish and prove to the Commissioner as many of these conditions as may apply to his or her own situation. Then, as indicated in the final sentence of the statute quoted above, the Commissioner takes all competent evidence of rehabilitation into consideration. That evidence is weighed against the evidence regarding the conviction(s) or act(s) that underlie the application denial or licensing discipline.

The core of each regulation has remained unchanged for decades, although small amendments have been made. Most recently, in 2010, the Commissioner added subdivisions (o) and (p) to section 2911 in response to the adoption of the SAFE Act (Code section 10166.01 et seq.), which imposed a national standard relating to licensing of mortgage loan originators.

This proposal makes the following amendments to the existing criteria:

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<sup>1</sup> Because the two existing Criteria for Rehabilitation sections largely duplicate one another, most of the amendments of this proposal are word-for-word duplicated in both sections. Rather than repetitively address 2911 and 2912, this discussion will distinctly note where only one of the two regulations sections is being amended.

- Adds language allowing consideration of the nature and severity of the applicant’s or licensee’s conviction(s) or act(s). The lack of such language was highlighted by *Singh v. Davi* (211 Cal.App.4th 141 (2012)), precipitating this proposal.
- Adds language to make explicit the holding of *In re Gossage* (23 Cal.4th 1080 (2000)) regarding the appropriate date at which rehabilitation begins.
- Adds language ensuring that the applicant or licensee has not retained funds that belong to a harmed party, even where the harmed party cannot be located.
- Eliminates unnecessary limitations on the use of expungement to demonstrate rehabilitation.
- Makes explicit the statutory requirement [Code section 482] of “competent” evidence—direct documentary evidence and impartial testimony from persons other than the applicant/licensee—to support factual findings of rehabilitation.
- Adds language in section 2911(o) and (p), in order to conform with the statutory language and intent of Code section 10166.051.

DETERMINATION OF CONSISTENCY/COMPATIBILITY WITH EXISTING STATE REGULATIONS

The Commissioner has determined that these proposed regulations are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Commissioner has concluded that these are the only State of California regulations relating to the subject of rehabilitation for those subject to denial of a real estate license application or petition, or rehabilitation where a licensee is subject to license discipline.

PURPOSE, BENEFITS, AND GOALS OF THIS AMENDMENT

CalBRE’s statutorily stated purpose is public protection, and the Criteria for Rehabilitation play a key role in service of that purpose. Where a licensee or applicant with a criminal record comes before the Real Estate Commissioner, seeking the benefit of continued licensure or a new license – and the significant level of public trust that license entails – the Real Estate Commissioner must ensure that the risk to the public is minimal. The Criteria codify a clear standard of post-conviction behaviors that give strong indicators of a person’s capacity not just to behave well, but to atone for wrongdoing and rebuild the trust of his or her community.

The need for amendment was precipitated by the holding in *Singh v. Davi* (211 Cal.App.4th 141 (2012)), which highlighted a specific weakness in the existing Criteria. Practical experience has identified other problematic issues in the Criteria that should be addressed. This amendment will correct all those issues. Candidates for rehabilitation will have a clearer “road map” to licensure, and those who cannot meet

the strengthened standard will be subject to license discipline or denial of their application. Both these results will generate greater public protection.

### NECESSITY OF THIS AMENDMENT

While the *Singh* decision stands, uncorrected by regulatory action, the Real Estate Commissioner cannot consider the nature and severity of the respondent's offenses when determining whether the rehabilitation presented is sufficient to protect the public. The most egregious of felonies is equivalent to a misdemeanor, and the same is true in reverse.

This reality for CalBRE stands in contrast to the standard employed by most other licensing bodies in California<sup>2</sup>, which include provisions allowing consideration of the nature and severity of the crime(s) and/or act(s) committed by the applicant or licensee. When surveying the standards applied by other licensing bodies, CalBRE staff noted another protection embodied in those Criteria, specifically, the Contractors State Licensing Board's incorporation<sup>3</sup> of the *In re Gossage* holding regarding the date upon which rehabilitation begins. *In re Gossage* is also relevant and applicable to the public protection function of CalBRE. That additional protection is incorporated into this proposal.

### AVAILABILITY OF MODIFIED TEXT

The text of any modified regulation, unless the modification is only non-substantial or solely grammatical in nature, will be made available to the public at least 15 days prior to the date CalBRE adopts the regulation(s). A request for a copy of any modified regulation(s) should be addressed to the contact person designated below. The Commissioner will accept written comments on the modified regulation(s) for 15 days after the date on which they are made available. The Commissioner may thereafter adopt, amend or repeal the foregoing proposal substantially as set forth above without further notice.

### AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS/INTERNET ACCESS

The express terms of the proposed action may be obtained upon request from the Sacramento offices of CalBRE. An initial statement of reasons for the proposed action containing all the information upon which the proposal is based is available from the contact person designated below. These documents are also available at CalBRE's website at [www.bre.ca.gov](http://www.bre.ca.gov). As required by the Administrative Procedure Act, CalBRE's

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<sup>2</sup> Some examples: The Medical Board addresses the nature and severity of the crime in its Regulations at 16 CCR 1309(a); the Board of Professional Engineers and Land Surveyors at 16 CCR 418(a)(1); the Contractors State Licensing Board at 16 CCR 869(a)(2)(A). One notable exception is the Bureau of Real Estate Appraisers ("BREA"), whose Criteria for Rehabilitation appear in the California Code of Regulations, Title 10, Section 3723. BREA's Criteria were modeled on CalBRE's Criteria and suffer the same fault identified by *Singh*.

<sup>3</sup> See 16 CCR 869(a)(1)(A) and (B).

Sacramento Legal Office maintains the rulemaking file. The rulemaking file is available for public inspection at the Bureau of Real Estate, 1651 Exposition Boulevard, Sacramento, California.

### AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the Final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the website listed above.

### CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Commissioner must determine that no reasonable alternative he considered, or that has otherwise been identified and brought to the attention of CalBRE, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

### RESULTS OF THE ECONOMIC IMPACT ANALYSIS/ASSESSMENT (Pursuant to Government Code Section 11346.3(b))

The Commissioner has conducted an Economic Impact Assessment, and that document is relied upon in reaching these results:

- The proposal does not affect the creation or elimination of the number of jobs available within the State of California. The proposal only relates to individuals' eligibility for licensure.
- The proposal does not affect the creation of new businesses or the elimination of existing businesses within the State of California.
- The proposal does not affect the expansion of businesses currently doing business within the State of California.
- The proposal will not adversely affect the health and welfare of California residents, worker safety, or the State's environment. The proposal directly impacts those individuals already subject to license discipline or denial of an application under the Real Estate Law. Indirectly, the public will benefit via a strengthened public protection standard.

### INITIAL DETERMINATIONS

The Commissioner has made an initial determination that the proposed regulatory action:

- Will have no fiscal impact on the Bureau of Real Estate. (Statement of Determination required by Government Code section 11346.5(a)(6).)
- Does not create a cost nor impose a mandate (nondiscretionary cost or savings) on local agencies or school districts, or a mandate that is required to

be reimbursed pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code. (Statements of Determination required by Government Code section 11346.5(a)(6).)

- Does not create a cost or savings to any state agency as well as federal funding to the state. (Statement of Determination required by Government Code section 11346.5(a)(6).)
- Does not have an effect on housing costs.
- Does not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

#### COST IMPACTS ON REPRESENTATIVE PRIVATE PERSON OR BUSINESS

The Commissioner is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

#### EFFECT ON SMALL BUSINESS

The Commissioner has determined that there is no fiscal impact to small businesses resulting from this proposed regulatory amendment because the amendments serve only to clarify and reinforce post-conviction standards for real estate licensees and license applicants, rather than impose a substantial change in those standards.

#### CONTACT PERSON

Inquiries concerning this action may be directed to Daniel Kehew at (916) 263-8681, or via email at CalBRERegulations@dca.ca.gov. The backup contact person is Mary Clarke at (916) 263-7303.

Dated: September 9, 2016  
Sacramento, California

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Daniel E. Kehew  
Real Estate Counsel  
Sacramento Legal Office