

**INITIAL STATEMENT OF REASONS  
PROPOSED AMENDMENT TO TITLE 10, CHAPTER 6  
“CRITERIA FOR REHABILITATION,” SECTIONS 2911 and 2912**

This regulations proposal updates and modifies the Criteria for Rehabilitation (“the Criteria”) used by the Bureau of Real Estate (“CalBRE”). Where an applicant for a real estate license or a current real estate licensee has suffered a criminal conviction, the Criteria offer categories of relevant facts that the applicant or licensee may offer as evidence to demonstrate that he or she has changed, brought his or her life back under control, and presents little risk of re-offending. In the simplest terms, the Criteria offer such an applicant or licensee a “road map” to overcoming the conviction(s) on his or her record and regaining good standing to hold a real estate license.

The Criteria are set out in the Regulations of the Real Estate Commissioner (Title 10, Chapter 6 of the California Code of Regulations) (“the Regulations”), sections 2911 and 2912. Section 2911 lists the Criteria relating to rehabilitation of an applicant for a license; the same section also applies to an application for reinstatement of a license. Section 2912 lists the Criteria relating to rehabilitation of a licensee, for use in a license discipline action.

**BACKGROUND**

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

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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.

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.

#### PUBLIC PROBLEM, ADMINISTRATIVE REQUIREMENT, OR OTHER CONDITION OR CIRCUMSTANCE THAT THESE AMENDMENTS ARE INTENDED TO ADDRESS

This proposal seeks to address a weakness and several needed clarifications in the existing Criteria for Rehabilitation and thus improve the public protection function of the Criteria. 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. Other flaws exist, resulting in this list of issues requiring amendment:

- Lack of explicit emphasis on 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. The present evidence requirements are often misunderstood by respondents who do not have legal counsel.
- Lack of language to make explicit the holding of *In re Gossage* (23 Cal.4th 1080 (2000)) regarding the appropriate start time for substantive rehabilitation.
- The lack of language (highlighted by *Singh*) allowing consideration of the nature and severity of the applicant’s or licensee’s conviction(s) or act(s) resulting in license discipline.

- The lack of 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.
- Unnecessary limitations on the use of expungement to demonstrate rehabilitation.
- The need for language in current subdivisions 2911(o) and (p), in order to conform with the statutory language and intent of Code section 10166.051.

## PURPOSE, BENEFITS, AND GOALS OF THIS AMENDMENT

CalBRE’s statutorily stated purpose is public protection. (See Section 10050.1 of the Code). 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 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.

As noted above, *Singh* identified a weakness in the Criteria’s standards, and practical experience has identified other issues in the Criteria that should be addressed. This amendment will correct all those issues, as follows:

- Proposed subdivision (a)(1) codifies the holding of *In re Gossage* (23 Cal.4th 1080 (2000)) regarding the appropriate date at which rehabilitation begins.
- Proposed subdivision (a)(2) addresses the holding in *Singh* by explicitly allowing consideration of the nature and severity of the applicant’s or licensee’s conviction or convictions, and other relevant aggravating factors, when determining whether an appropriate amount of time has passed to ensure rehabilitation.
- Proposed subdivision (a)(3) ensures that the applicant or licensee has not retained funds that belong to a harmed party, even where the harmed party presently cannot be located.
- In Section 2911, proposed subdivision (a)(4) allows consideration of expungement for any criminal conviction.
- Proposed subdivision (b) defines “competent evidence” and ensures that unsupported testimony of the applicant or licensee is not the sole evidence for a finding of rehabilitation.

- In Section 2911, proposed subdivision (c) incorporates and updates the language in current subdivisions 2911(o) and (p) to conform with the statutory language and intent of Code section 10166.051.

With these amendments, 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.

Regarding the proposed definition of “competent evidence” within subdivision (b), further comment on the Commissioner’s rationale for this clarification is warranted. We explicitly note and highlight: ***The intent of this subdivision is to encourage respondents to develop and produce substantive evidence to support their testimony regarding rehabilitation.***

Currently, too many respondents present little or no evidence of rehabilitation except for their own testimony. (Notably, the situation is much improved where respondents are represented by legal counsel.) This occurs despite the fact that most of the Criteria for Rehabilitation lend themselves to documentation, or to the favorable testimony of acquaintances, neighbors, associates and employers. When the sole evidence in favor of rehabilitation is respondent’s testimony, resulting proposed decisions are unsatisfactory to the Commissioner or the respondent.

The Administrative Procedure Act’s section on admissibility of evidence (Government Code section 11513) allows relatively broad admissibility of evidence. ***This proposal does not address the admissibility of evidence.*** Further, it is up to the administrative law judge who hears the matter to assess the credibility of the witness. (*Mullen v. Dept. of Real Estate* (1988) 204 Cal.App.3d 295, 301.) ***This proposal does not address respondent’s credibility.***

Rather, this proposed language highlights existing precedent regarding the relative weight of the uncorroborated, but still admissible, testimonial evidence of the respondent regarding the subject of rehabilitation alone. “In reaching a fair conclusion on the question of reformation in such a matter, the favorable testimony of acquaintances, neighbors, associates and employers with reference to their observation of the [licensee subject to discipline] should weigh *heavily* in the scale of justice.” [Emphasis added.] (*In re Andreani* (1939) 14 Cal.2d 736, 749-750.) The court’s crediting of “heavy” weight to community testimony must come in contrast to the weight of some other evidence. Where personal development issues are concerned, the only other likely evidence—often the only evidence offered—is the respondent’s own

testimony. Correspondingly, the Commissioner proposes to make the “light” weight of respondent’s uncorroborated rehabilitation testimony explicit within these regulations.

We re-emphasize that the respondent’s testimony is not condemned to “light” weight. The submission of any other direct evidence in support of respondent’s specific assertions adds weight to that testimony. Again, the Commissioner’s hope is to encourage a fuller, more complete record on which to base his decision.

## 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 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.

The Commissioner chose to address other weaknesses identified via practical experience: inclusion of a definition of “competent evidence” (explained above) and a specific prompt to respondents regarding the State’s escheat law.

Finally, the Commissioner must amend subdivisions 2911(o) and (p) to conform to the statutory language and intent of Code section 10166.051. Section 10166.051 went into effect in 2011, one year after the initial adoption of the SAFE Act (appearing in Code sections 10166.1 et seq.). Section 10166.051 moderates the SAFE Act’s initial strict prohibitions regarding convictions, reflected in subdivisions 2911(o) and (p).

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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 (“BRE”), whose Criteria for Rehabilitation appear in the California Code of Regulations, Title 10, Section 3723. BRE’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).

## ALTERNATIVES CONSIDERED

- **Alternative: Make no change:** The existing standard does provide some protection to the public. *Reason for rejection:* The Commissioner believes that sound public protection is served through the ability to adapt the standard of rehabilitation to the nature and severity of the crime. Although a minimum of two years time passing from the termination of parole or probation is needed, in many cases the nature and severity of the crime(s) and/or act(s) calls for more than two years of good behavior to demonstrate rehabilitation.
- **Alternative: Apply a higher, uniform standard to all.** Other licensing bodies, such as the Contractors State Licensing Board, begin with a minimum passage of time that is significantly greater than CalBRE's standard. CalBRE could adopt a longer length of time as its minimum, without increasing the time only where the nature and severity of a serious crime warrants such an increase. *Reason for rejection:* The Commissioner, recognizing the range of behaviors that result in convictions, believes that a uniformly high standard would be unfair to applicants and licensees who have suffered lesser convictions. There are many instances where the present minimum of two years is sufficient for a finding on that aspect of rehabilitation.

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

CalBRE 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.

## TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Commissioner did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the amendment of these regulation sections. The Commissioner did research the other existing rehabilitation standards within California's regulations, as described in part within Footnote 2 of this Statement.

## ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD BE AS EFFECTIVE AND LESS BURDENSOME TO PRIVATE PERSONS

The alternatives to this regulation are described above, along with the reasons why the selected option was preferred. Because these amendments result in the most effective standards for rehabilitation while preserving fairness for the applicant/licensee, the Commissioner finds that no alternatives he has considered would be (1) more effective in carrying out the purpose of the proposed regulation change or (2) would be as effective and less burdensome to affected private persons than the proposed regulation change.

## ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES

The alternatives to this regulation are described above, along with the reasons why the selected option was preferred. Because these amendments provide the needed correction identified in *Singh*, as described, without adding any additional significant burden on the applicant/licensee, this amendment has no adverse economic impact on small businesses. The Commissioner finds that no alternatives he has considered would have less economic impact on small businesses.

## CRITERIA FOR REHABILITATION AMENDMENTS ECONOMIC IMPACT ANALYSIS/ASSESSMENT DOCUMENT

Government Code Section 11346.3(b) requires specified assessment regarding a regulations proposal's impacts on creation or elimination of jobs, creation or elimination of businesses, expansion of businesses, and the benefits to health and welfare of residents, worker safety, and the state environment.

Individually, these are the changes proposed and their likely impacts:

- Codification of the holding of *In re Gossage* (23 Cal.4th 1080 (2000)) regarding the appropriate date at which rehabilitation begins:
  - No relevant impacts as this holding is already applicable law.
- Addressing the holding in *Singh v. Davi* (211 Cal.App.4th 141 (2012)) by explicitly allowing consideration of the nature and severity of the applicant's or licensee's conviction or convictions, and other relevant aggravating factors, when determining whether an appropriate amount of time has passed to ensure rehabilitation:
  - This will have no impact on the demand for activity by licensees, so no impact on jobs or businesses.
  - This will improve the public protection standards of the Bureau's work.
- Ensuring that the applicant or licensee has not retained funds that belong to a harmed party, even where the harmed party presently cannot be located:
  - This will have no impact on the demand for activity by licensees, so no impact on jobs or businesses.
  - This will improve the public protection standards of the Bureau's work.
- Allowing consideration of expungement for any criminal convictions of license applicants:
  - This will have no impact on the demand for activity by licensees, so no impact on jobs or businesses.
  - This will improve the public protection standards by adding modest further incentive for convicted persons to seek expungement.
- Defining "competent evidence" and ensuring that unsupported testimony of the respondent is not the sole evidence for a finding of rehabilitation:
  - This will have no impact on the demand for activity by licensees, so no impact on jobs or businesses.
  - This will improve the public protection standards of the Bureau's work.
- Update of language in current subdivisions 2911(o) and (p) to conform with the statutory language and intent of Code section 10166.051
  - No relevant impacts as this standard is already applicable law.

CRITERIA FOR REHABILITATION AMENDMENTS  
ECONOMIC IMPACT ANALYSIS/ASSESSMENT DOCUMENT  
(continued)

Upon reviewing this analysis, the Commissioner concludes (and will state in the Notice and Initial Statement of Reasons):

- 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.