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July 3, 2018

Anthony J. Portantino, Chair, and Members
Senate Appropriations Committee
State Capitol, Room 2206
Sacramento, CA 95814

Re: AB 2138 (Chiu and Low) – Oppose Unless Amended

Dear Chair Portantino:

On behalf of the Center for Public Interest Law (CPIL), I write respectfully to oppose AB 2138 (Chiu and Low) unless it is amended to provide Department of Consumer Affairs (DCA) boards, bureaus, and programs (“boards”) with the discretion to deny licenses to individuals who have previously been convicted of crimes of dishonesty. These crimes fall outside the Penal Code’s definition of “serious felonies,” yet they are of grave concern to millions of California patients and consumers.

For example, were this bill to become law, it would prohibit the California Board of Accountancy from denying a license to an applicant who was convicted of fraud and embezzlement crimes as sweeping as those committed by the late Bernie Madoff if he applied for a license immediately after completing a seven-year prison sentence.

Public protection is and must remain the statutory “paramount” priority of each of the DCA boards.¹ The professions licensed by DCA are licensed because after-the-fact damages are not enough to make a patient or consumer truly whole. Licensure is required to prevent harm in the first place.

Raiding someone’s pension fund, stealing someone’s life savings, overbilling for medical procedures, or prescribing unnecessary medical treatment to drive up fees—all of these intentional crimes of dishonesty can and do cause permanent harm to vulnerable patients and consumers. While CPIL certainly supports the laudable aim of this bill to give those convicted of crimes a second chance, as it stands now, the bill is almost literally, with respect, a license to steal, and unless amended, the bill will jeopardize consumer and patient protection in California.

The Center for Public Interest Law

CPIL is a nonprofit, nonpartisan, academic center of research, teaching, learning, and advocacy in regulatory and public interest law based at the University of San Diego School of Law. Since 1980, CPIL has studied the state’s regulation of business, professions, and trades, and monitors the

¹ See, e.g., Bus. & Prof. Code § 2001.1 (Medical Board), § 1601.2 (Dental Board), § 2708.1 (Board of Registered Nursing), § 2920.1 (Board of Psychology), § 5000.1 (Board of Accountancy).

activities of state occupational licensing agencies, including several of the boards under the umbrella of the DCA. CPIL's expertise has long been relied upon by the Legislature, the executive branch, and the courts where the regulation of licensed professions is concerned, particularly the licensees impacted by this proposed legislation.

AB 2138 Would Prohibit Boards from Denying Licenses to Individuals Convicted of Fraud

AB 2138 currently only allows DCA boards to deny an application for licensure if the applicant has been convicted at any time of a "serious felony" as defined in section 1192.7(c) of the Penal Code—***but that definition does not include felony crimes involving dishonesty***, including perjury, false statement, fraud, embezzlement, or false pretense, or other major abuses of trust that are known to be subject to recidivism and can certainly endanger consumers and patients. Thus, these boards—many of which license individuals who have the potential to impose significant irreparable harm on the public—would be, under the bill, precluded from exercising any expert discretion in denying a license to an applicant who committed a serious crime of dishonesty—no matter how many were hurt, no matter how badly, no matter how egregious the conduct—if the conviction occurred more than seven years prior to the date of the application.

Tying expert boards' hands this way is directly contrary to each board's public protection mission; indeed, it is contrary to the whole point of licensure.

The Seven-Year Window is Undefined and May Include Time While in Prison

Another significant problem with the bill as currently drafted is the fact that the term "preceding seven years" appears to ***run from the date of the conviction***, not ***from the date the sentence is fully completed***. See, e.g., proposed amendments to Business and Professions Code § 480(a)(1) in section two of the bill (permitting a board to deny a license on the grounds that has been convicted of a crime if "[t]he applicant has been convicted of a crime for which the applicant is presently incarcerated **or for which the conviction occurred within the preceding seven years.**") (Emphasis added).

Thus, as illustrated at the beginning of the letter, an applicant found guilty of epic felony fraud could immediately, and by law, be entitled to obtain a license the moment she is released from her seven-year prison sentence.

For the seven years to be a stand-in for proof of rehabilitation it cannot include jail time. The applicant must have been out of prison and not have been convicted of any misdemeanor or felony during the seven years for the passage of time solely to wipe out the prior conviction and entitle the person to a license, prior felonies notwithstanding.

Why exempt the Athletic Commission and the Bureau for Private Postsecondary Education?

AB 2138 would curiously exempt the Athletic Commission and the Bureau for Private Postsecondary Education from the provisions of the bill, but still strip all other DCA boards of any discretion to deny licensure to felons when the licensees of those other un-exempted boards, unlike the licensees of the Commission, are responsible for life and death, have access to opioids (e.g., physicians, pharmacists) or can steal life's savings (CPAs). Whatever the rationale for exempting just two these agencies may have been, it should apply to all boards and bureaus, especially those whose licensees pose far greater risk to patients and consumers than boxers and colleges.

CPIL's Suggested Amendments

CPIL accordingly recommends that the bill be amended as follows:

- 1) Amend the bill to similarly exempt crimes of dishonesty from the seven year window articulated in the bill so that, as with serious felonies, boards may deny licensure based on such convictions at any time.
- 2) Clarify that the “preceding seven years” referenced in § 480(a)(1) begins to run at the time the sentence for the crime is successfully completed, meaning when the individual is released from prison having completed the entirety of his or her sentence.

To address these concerns, we suggest amending proposed § 480(a)(1) as follows:

The applicant has been convicted of a crime for which the applicant is presently incarcerated or for which less than seven years have elapsed since the applicant has completed the entirety of his or her sentence for the conviction ~~occurred within the preceding seven years.~~ That seven-year period must not include a conviction of a felony or misdemeanor. However, Further, the preceding seven-year limitation shall not apply to a conviction for a serious felony, as defined in the Penal Code, or to a conviction for a felony that involved conduct defined in section 475, subdivisions (a)(1), (a)(3), and (a)(4) of the Business and Professions Code.²

- 3) For the crimes identified in section 475 above, establish a rebuttable presumption that boards may deny licenses to applicants who have been convicted of those crimes, but applicants may rebut that presumption if they can demonstrate rehabilitation and a showing that the public will not be at risk should they be granted a license.
- 4) Remove the exemption for the California State Athletic Commission and the Bureau of Private Postsecondary Education, and instead amend the bill to address the public policy concerns, whatever they may be, that led to these exemptions, so that those concerns are addressed throughout all of the DCA professions, including those that can cause death or financial ruin.

² Business and Professions Code § 475.

(a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:

(1) Knowingly making a false statement of material fact, or knowingly omitting to state a material fact, in an application for a license.

* * *

(3) Commission of any act involving dishonesty, fraud or deceit with the intent to substantially benefit himself or another, or substantially injure another.

(4) Commission of any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

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In this way, boards may more effectively comply with their public protection mandate while still maintaining discretion to grant a license to individuals who are seeking secure employment and who do not pose a risk to the public.

For these reasons, CPIL opposes AB 2138 unless it is amended so as not to require that licenses be issued to those who have been convicted of dishonestly and intentionally abusing the trust of patients and consumers no matter how egregious the harm caused.

Sincerely,

A handwritten signature in black ink, reading "Bridget Fogarty Gramme". The signature is written in a cursive, flowing style.

Bridget Fogarty Gramme
Administrative Director
Center for Public Interest Law
University of San Diego School of Law

cc. Hon. Evan Low, Chair, Assembly Business and Professions Committee
Hon. David Chiu
Dean Grafilo, Director, Department of Consumer Affairs