FINAL STATEMENT OF REASONS

1) The Update to the Initial Statement of Reasons

There are no changes to the initial statement of reasons, which is hereby incorporated by reference with the exception of the following:

Chapter 1, Section B, Criteria for Rehabilitation (Denial, Suspension, Revocation, Reinstatement or Reduction of Penalty), subsection 1 has been changed. The original proposed text listed (a) through (b), followed by (2) through (6) of subsection (1) as a result of a formatting error. The error is being addressed in this rulemaking file by listing subsection (1)(a) through (f) correctly.

Chapter 1, Section C, Use of Occupational Licensing Guidelines, Subsection (1), Class A Crimes has been restated for clarity purposes. The last two sentences in the first paragraph have been moved to the center of the paragraph. The department finds that this action will not materially alter any requirements, right, responsibility, condition, prescription, or other regulatory element of any California Code of Regulations provision.

In Attachment I of the guidelines, existing language, Insurance Code Section 556, Presentation of False/Fraudulent Insurance Claim, has been repealed. The correct citation, Penal Code Section 550, Presentation of False/Fraudulent Insurance Claim, has been added. This change deletes regulatory provisions for which all statutory authority has been repealed, and the department finds that this action will not materially alter any requirements, right, responsibility, condition, prescription, or other regulatory element of any California Code of Regulations provision.

Not mentioned by Elizabeth H., ISOR did not list a rationale In Attachment I of the guidelines, Penal Code section 203**,** Mayhem, has been added because it is significantly related to occupational licensee duties as a Class A crime.

Not mentioned by Elizabeth H. ISOR did not list a rationale In Attachment I of the guidelines, the description of Penal Code section 209 has been amended to include Rape in the crime of Kidnapping. This term has been added to reflect changes in law.

Mentioned by Elizabeth H. In Attachment I of the guidelines, existing language, Penal Code 236, False Imprisonment has been deleted from the category of Class A crimes because it is not significantly related to occupational licensee duties as a Class A crime. Penal Code 236 has been added to the category of Class B crimes because it is significantly related to occupational licensee duties. *This language was sent to her as sample language for approval*

Not mentioned In Attachment I of the guidelines, existing language, Penal Code 332, has been deleted from the category of Class A crimes because it is not significantly related to occupational licensee duties as a Class A crime. Penal Code 332 has been added to the category of Class B crimes because it is significantly related to occupational licensee duties.

Not mentioned. In Attachment I of the guidelines, existing language, Penal Code section 466, Possession of Burglary Tools, has been deleted from the category of Class A crimes because it is not significantly related to occupational licensee duties as a Class A crime. Penal Code 466 has been added to the category of Class B crimes because it is significantly related to occupational licensee duties.

Not mentioned In Attachment I of the guidelines, existing language, Penal Code section 484, Theft, has been deleted from the category of Class A crimes because it is not significantly related to occupational licensee duties as a Class A crime. Penal Code 484 has been added to the category of Class B crimes because it is significantly related to occupational licensee duties.

M*entioned* In Attachment I of the guidelines, Penal Code section 530.5, Unauthorized Use of Personal Identifying Information (Identity Theft), has been added as a new crime in the Class A category because it is significantly related to occupational licensee duties as a Class A crime. In the Initial Statement of Reasons, a grammatical error was made and Penal Code 530 was listed as being introduced erroneously.

Mentioned by Elizabeth H. In Attachment I of the guidelines, existing language, Penal Code section 532, Make False Financial Statement, has been deleted because it is not significantly related to occupational licensee duties as a Class A crime. Penal Code 532 has been added to the category of Class B crimes because it is significantly related to occupational licensee duties. *Elizabeth, I made a grammatical error when I listed PC 532a in the B class of crimes. The Initial Statement of Reasons was accurate when I referred to PC 532.*

Not mentioned In Attachment I of the guidelines, Penal Code section 422, Making Terrorist Threats, has been added to the Class B category of crimes because it is significantly related to occupational licensee duties as a Class B crime. A statement in parenthesis has been added indicating the crime may also fall under the Class A category because it **may be significantly related to occupational licensee duties as a Class A crime.** Penal Code section 422 has been deleted from the Class C category because it is not significantly related to occupational licensee duties as a Class C crime.

Not mentioned Penal Code section 653 has been amended to include Threat in the crime of Annoying Telephone Calls. This term has been added to reflect changes in law.

Mentioned In Attachment I of the guidelines, the definition of Crimes Equivalent to the Listed Class A, B or C Crimes is being deleted **because as written does not specify how the equivalent crimes are to be treated. A new definition of how to treat crimes equivalent to the crimes listed in Attachment I is given. This is necessary because .....we need to address applicants with similar out of state or federal???**

2) Imposition of Mandate on Local Agencies or School Districts

The department's regulatory action amending Section 440.04 in Article 6.1, Chapter 1, Division 1, of Title 13, California Code of Regulations, does not impose any mandate on local agencies or school districts and imposes (1) no cost or savings to any state agency, (2) no cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code, (3) no other nondiscretionary cost or savings to local agencies, and (4) no costs or savings in federal funding to the state. No studies or data were relied upon to make this determination.

3) Summary of Comments Received and Department Response

The proposal was noticed on February 16, 2007, and made available to the public from February 16, 2007 through April 2, 2007. The department received one electronic comment on the regulatory proposal dated February 27, 2007, from representative counsel for the Department of Housing and Community Development, Gerry Agerbek. The comments address 18 points related to existing and proposed language and are contained in Exhibit 7 of this rulemaking file. As a result of the comments ***two***??? non-substantial changes were made to the regulatory text. Chapter 1, Section C Use of Occupational Licensing Guidelines, Subsection (1) Class A Crimes has been restated for clarity purposes and an outdated Insurance Code reference was replaced with an accurate Penal Code reference. The commenter's points are addressed as individually and shown below verbatim.

Comment 1: This is basically describing a theft. See Comments in Class section regarding theft crimes.

The Department's Response:
Comment 1 references existing language that has not been amended within this rule making package. The comment addresses the fraudulent taking, obtaining, appropriating or retaining of funds, property, services or labor belonging to another person and notes that this language is basically describing a theft.

The comment is correct in that the definition of theft contained in subdivision (a) of Penal Code section 484 contains language similar to the language of Chapter 1, Criteria of Substantial Relationship, subdivision (1)(a). However, theft may be committed without fraud (see Civil Code sections 1571-1573) within the definition of section 484. The essence of why subsection (1)(a) forms the basis for the substantial relationship to the licensed activity is the use of fraud to obtain benefits belonging to another person.

Comment 2. What does "this rule" refer to? Does it refer back to "should almost always result…."? Does it refer to the "significant period of incarceration" section? Does it refer to the "failed to disclose conviction on the application section? This will create problems in enforcement with the ALJs because it is too vague as to what is intended.

The Department's Response:
Chapter 1, Criteria C, Use of Occupational Licensing Guidelines, Subsection (1), Class A Crimes was originally proposed to state: "Class A crimes, where there is a single conviction within the last five (5) years, should almost always result in the outright denial of an occupational license, even if terms and conditions of parole or probation have been complied with. If there was a significant period of incarceration, the department should consider the date of release from incarceration as the start of the time to evaluate the conviction and evidence of rehabilitation. Also, if the applicant has failed to disclose the conviction on the application, such failure to disclose is an independent wrongful act which should result in license denial. One of the few exceptions to <u>this rule</u> would be where the applicant has received a Penal Code section 1203.4 dismissal. In those cases, it would be appropriate to treat the conviction to be a Class B crime for evaluation purposes." (emphasis added)

This rule refers to the first sentence under Subsection 1, "Class A crimes, where there is a single conviction within the last five (5) years, should almost always result in the outright denial of an occupational license, even if terms and conditions of parole or probation have been complied with." The paragraph has been revised and reorganized to clarify this.

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Attachment 1 in the Occupational Licensing Guidelines is a reference guide and cites Class A, Class B and Class C crimes. Comments 3 through 18 make reference to the list of crimes in Attachment 1.

Comment 3: Some District Attorneys will charge a shoplifting (petty theft) as a 459 P.C. Why should someone who is convicted of a misdemeanor 459 instead of a 484/488 be treated differently?

The Department's Response:
Comment 3 makes reference to existing language that has not been amended within this rule making package; Penal Code section 459, Burglary.

A conviction of a violation of Penal Code section 459 is a misdemeanor involving a commercial burglary, which involves proof of a separate element than a petty theft (a violation of Penal Code section 484/488), i.e. entry in a shop, store or building with the intent to commit a grand or petit larceny, so it may be treated differently. Furthermore, the punishment range enacted by the Legislature is more severe for misdemeanor burglary than for misdemeanor petty theft. Moreover, the Guidelines address the discretion that the department has in evaluating the differences between certain criminal convictions where it states under Chapter 1, B. Criteria for Rehabilitation (Denial, Suspension, Revocation, Reinstatement or Reduction of Penalty) that: (1) [w]hen considering a license denial, suspension, revocation, reinstatement or reduction in penalty, the department *will* consider the following criteria: (a) Nature and severity of the criminal conviction(s), act(s) or conduct. (Italics added for emphasis).

Comment 4: It would be a big mistake to classify this [484 P.C., Theft] as a Class B crime. It creates significant confusion as to other theft related offenses that are classified as Class A crimes. If the intent is to keep people out of the business who lie, steal, and cheat, by making this a Class B crime, it is akin to saying it is OK to steal a small amount. It is inconsistent with the language on page 5 section (1)(a) where it discuss theft related offenses being "substantially related" to the qualifications of the licensee.

The Department's Response:
Comment 4 makes reference to the department's proposal to delete Penal Code section 484 (the general theft definition) from the Class A Crimes list and retain Penal Code section 487 on the Class A Crimes list, which defines grand theft, a more serious conviction based on the punishment range given it by the Legislature. The department proposes to adopt Penal Code section 488, which defines petty theft, a less serious conviction based on the punishment range given it by the Legislature, in the Class B Crimes list. The Legislature has chosen to treat grand thefts more seriously than petty thefts. The criteria set out for Class B Crimes to which Penal Code section 488 has been added allow for a significant period of time within which such a conviction should preclude licensure. Moreover, the Guidelines address the discretion that the department has in evaluating certain criminal convictions where it states under Chapter 1, B. Criteria for Rehabilitation (Denial,

Suspension, Revocation, Reinstatement or Reduction of Penalty) that: (1) [w]hen considering a license denial, suspension, revocation, reinstatement or reduction in penalty, the department *will* consider the following criteria: (a) Nature and severity of the criminal conviction(s), act(s) or conduct. (Italics added for emphasis).

Comment 5: The only difference between a 484/488 and a 487 is the value of the item (i.e. greater than $400). The intent for the two crimes is the exact same; "the intent to permanently deprive." If the distinction is that a 487 is a felony and a 484/488 is a misdemeanor, what happens to the person who is convicted of a misdemeanor 487? Does that make it a class B crime?

The Department's Response:
Comment 5 makes reference to existing language that has not been amended within this rule making package. The comment addresses Penal Code section 487, Grand Theft, a Class A crime. See DMV response to Comment 4.

Comment 6: See Comment 5. Does the value of the stolen property matter (i.e. over $400)? Does it matter if the person is convicted of a felony or misdemeanor? If convicted of a misdemeanor or the value is less than $400, does that make it a Class B crime?

The Department's Response:
Comment 6 makes reference to existing language that has not been amended within this rule making package; Penal Code section 496, Receiving or Concealing Stolen Property. A conviction of Receiving or Concealing Stolen Property involves proof of elements which involve acts or conduct which the department believes warrants inclusion under the Class A Crimes List. The Legislature has chosen to treat Penal Code section 496 as a separately defined crime than Penal Code section 484 (the statute generally defining theft). Moreover, the Guidelines address the discretion that the department has in evaluating certain criminal convictions where it states under Chapter 1, B. Criteria for Rehabilitation (Denial, Suspension, Revocation, Reinstatement or Reduction of Penalty) that: (1) [w]hen considering a license denial, suspension, revocation, reinstatement or reduction in penalty, the department *will* consider the following criteria: (a) Nature and severity of the criminal conviction(s), act(s) or conduct. (Italics added for emphasis).

Comment 7: See Comment 5. Does the value of the embezzled property matter (i.e. over $400)? Does it matter if the person is convicted of a felony or misdemeanor? If convicted of a misdemeanor or the value is less than $400, does that make it a Class B crime?

The Department's Response:

Comment 7 makes reference to existing language that has not been amended within this rule making package. A conviction of Embezzlement (Penal Code section 503) involves proof of crime elements involving entrustment which the department believes warrants inclusion under the Class A Crimes List. Moreover, the Guidelines address the discretion that the department has in evaluating certain criminal convictions where it states under Chapter 1, B. Criteria for Rehabilitation (Denial, Suspension, Revocation, Reinstatement or Reduction of Penalty) that: (1) [w]hen considering a license denial, suspension, revocation, reinstatement or reduction in penalty, the department *will* consider the following criteria: (a) Nature and severity of the criminal conviction(s), act(s) or conduct. (Italics added for emphasis).

Comment 8: 484e (fraudulent use of access card) is somewhat like this section. 484e PC is the use of someone else's credit card, ATM card, etc. without the true owner's permission. Therefore, 484e is akin to 530.5, 484, and or 487 PC. If trying to analogize a 484e to one of the listed crimes, how does the agency make a distinction as to whether it should be a Class A or Class B crime since 484 and 488 PC are Class B crimes?

The Department's Response:
Comment 8 makes reference to Penal Code 530.5, Unauthorized Use Of Personal Identifying Information (Identity Theft), which is being adopted.

Penal Code section 484 is *not* on the Class B Crime List. As in our responses to Comments 6 and 7, a conviction of Penal Code section 530.5 (Unauthorized Use of Personal Identifying Information) involves separate proof of elements involving use of personal identifying information which the department believes warrants inclusion under the Class A Crimes list. Furthermore, the statute describing it as a criminal offense is set out in a separate Chapter in the Penal Code than the Chapter on Theft. Moreover, the Guidelines address the discretion that the department has in evaluating certain criminal convictions where it states under Chapter 1, B. Criteria for Rehabilitation (Denial, Suspension, Revocation, Reinstatement or Reduction of Penalty) that: (1) [w]hen considering a license denial, suspension, revocation, reinstatement or reduction in penalty, the department *will* consider the following criteria: (a) Nature and severity of the criminal conviction(s), act(s) or conduct. (Italics added for emphasis).

Comment 9: If the intent is to keep current thieves and liars out of the business, what about the scenario where an individual committed a petty theft as an 18 year old, say 20 years ago. At the age of 38 they commit another petty theft and get convicted of Penal Code section 666. Now they are applying for an occupational license at the age of 42 and have a four year old PC 666 on their record. Isn't the PC 666 more akin to a PC 484/488 that occurred 4 years ago? Yet, now they are

being treated differently than the petty thief would be who committed a first offense 4 years ago. If they both had the same rehabilitation criteria, the person with the PC 484/488 is more likely to get a license under these proposed guidelines since their offense would be considered a Class B offense. The intent for this offense is the same as for a PC 484 and 488 (Class B crimes) and for a PC 487 (Class A crime).

The Department's Response:
Comment 9 makes reference to Penal Code 666, Petty Theft With A Prior**,** which is being adopted.

There are various scenarios which can be speculated in which the appropriateness of listing Penal Code section 666 on the Class A Crime list can be questioned. However, the statute is designed to identify and punish recidivism among criminals which is what the department believes warrants its inclusion on the Class A Crimes list. Moreover, the Guidelines address the discretion that the department has in evaluating certain criminal convictions where it states under Chapter 1, B. Criteria for Rehabilitation (Denial, Suspension, Revocation, Reinstatement or Reduction of Penalty) that: (1) [w]hen considering a license denial, suspension, revocation, reinstatement or reduction in penalty, the department *will* consider the following criteria: (a) Nature and severity of the criminal conviction(s), act(s) or conduct. (Italics added for emphasis).

Comment 10: This code does not exist!! It was repealed in 1989. It should be 550 P.C. which is just another form of theft. If the value was less than $400, or convicted as a misdemeanor would this only be considered a Class B offense? This is another example of inconsistency with making 484/488 PC a Class B crime.

The Department's Response:
Comment 10 makes reference to existing language in the guidelines, Insurance Code section 556, which has not been proposed within this rule making package.

The department agrees and will substitute the statutory offense of Penal Code section 550 for the existing Insurance Code section 556. Based on the elements of the offense, the department believes it warrants inclusion on the Class A Crimes list. Moreover, the Guidelines address the discretion that the department has in evaluating certain criminal convictions where it states under Chapter 1, B. Criteria for Rehabilitation (Denial, Suspension, Revocation, Reinstatement or Reduction of Penalty) that: (1) [w]hen considering a license denial, suspension, revocation, reinstatement or reduction in penalty, the department *will* consider the following criteria: (a) Nature and severity of the criminal conviction(s), act(s) or conduct. (Italics added for emphasis).

Comment 11: How would a judge know whether this is a Class A or lass B crime? What makes it a Class A versus Class B? This is too vague.

The Department's Response:
Comment 11 makes reference to Vehicle Code section 20, Use of False Information on Documents to DMV or CHP, which is existing language that is not been proposed to be changed within this rule making package.

Under Chapter 1, C. Use of Occupational Licensing Guidelines, the Guidelines state that "Class A crimes are serious crimes involving moral turpitude which have a substantial connection or relationship to the duties of an occupational licensee" and "[l]ess serious crimes involving moral turpitude which have a substantial connection or relationship are listed in Attachment 1 as Class B crimes." The Guidelines address the discretion that the department has in evaluating certain criminal convictions where it states under Chapter 1, B. Criteria for Rehabilitation (Denial, Suspension, Revocation, Reinstatement or Reduction of Penalty) that "(1) [w]hen considering a license denial, suspension, revocation, reinstatement or reduction in penalty, the department *will* consider the following criteria: (a) Nature and severity of the criminal conviction(s), act(s) or conduct." (Italics added for emphasis).

Comment 12: This is not shown in the Class A Crime list. How would a judge know whether this is a Class A or Class B crime? What makes it a Class A versus Class B? This is too vague.

The Department's Response:
Comment 12 makes reference to Penal Code 422, Making Terrorist Threats, which is being adopted, See DMV's response to Comment 11.

Comment 13: Is this not akin to Identity Theft (530.5 PC)? Why make a distinction between the two?
The Department's Response:
Comment 13 makes reference to Penal Code 529, False Personation to Make Another Liable, which is existing language and has not been proposed to be changed within this rule making package. Penal Code section 530.5 involves unauthorized use of personal identifying information and mail theft while Penal Code section 529 involves performance of certain acts of false character. The Guidelines address the discretion that the Department has in evaluating certain criminal convictions where it states under Chapter 1, B. Criteria for Rehabilitation (Denial, Suspension, Revocation, Reinstatement or Reduction of Penalty) that: (1) [w]hen considering a license denial, suspension, revocation, reinstatement or reduction in penalty, the department *will* consider the following criteria: (a) Nature

and severity of the criminal conviction(s), act(s) or conduct. (Italics added for emphasis).

Comment 14: This was struck from the Class A list. How would a judge know whether this is a Class A or lass B crime? What makes it a Class A versus Class B? This is too vague.

The Department's Response:
Comment 14 makes reference to Penal Code 532a, Making False Financial Statement, which is being adopted. See DMV's response to Comment 11.

Comment 15: This was struck from the Class A list. How would a judge know whether this is a Class A or Class B crime? What makes it a Class A versus Class B? This is too vague.

The Department's Response:
Comment 15 makes reference to Penal Code 537, Defrauding Providers of Food, Fuel, Services, or Accommodations, which is existing language and has not been proposed to be changed within this rule making package. See DMV's response to Comment 11.

Comment 16: See comment 11. How would a judge know whether this is a Class A or Class B crime? What makes it a Class A versus Class B? This is too vague.

The Department's Response:
Comment 16 makes reference to Vehicle Code section 20, Use False Information on Documents to DMV or CHP, which is existing language and has not been proposed to be changed within this rule making package. See DMV's response to Comment 11.

Comment 17: Excellent catch all!!

The Department's Response:
Comment 17 makes reference to the closing notation in Attachment 1 which is being adopted and states: Crimes with the same offense elements of Class A, B, or C crimes listed above committed in the State of California, another jurisdiction, either federal or outside the State of California, or identical to or substantially similar to the above listed Class crimes will be treated the same for purposes of evaluation under the Guidelines.

The Department agrees with Comment 17.

Comment 18: Making convictions for 484 and 488 PC Class B crimes, creates a lot of ambiguity and inconsistency for the other theft offenses that are assigned a different code section. How would a judge know whether to treat something as a Class A or Class B offense? Is the distinction is [sic] based on the value of the item or service that is the object of the theft having a value of $400 or less? Should a judge make the decision based on whether the person is convicted of a misdemeanor or a felony? Sentences for misdemeanor criminal convictions of 484 versus 487 are typically not significantly different. The same logic applies if a person is charged and convicted of 459 PC (burglary) for what amounts to a shoplifting offense. Avoid the ambiguity and inconsistency by making 484 and 488 PC convictions Class A offenses. If the licensee or applicant is truly rehabilitated, they can plead their case to the judge who has the discretion to give them a probationary license. Protect the consumer. Make it harder for the liars, cheats, and thieves to get an occupational license. A theft is a theft and they should all be treated similarly.

The Department's Response:
Comment 18 makes reference to the classification of crimes into Class A or Class B. Penal Code section 484 is *not* on the Class B Crime List. See, also, DMV's response to Comment 11.

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4) Document(s) Incorporated by Reference

Section 440.04 specifies the Occupational Licensing and Disciplinary Guidelines, (Rev. 11/2007) shall be used in reaching a decision on a licensing or disciplinary action under Division 5 of the Vehicle Code and the Administrative Procedure Act. The revision date has been changed to reflect the final formatted version of the guidelines. The strikeout and underlining have been removed to provide a reader friendly version of the guidelines. This guideline is being incorporated by reference since it is impractical and cumbersome to publish in the California Code of Regulations a form that will only be used for a specified purpose.

- Occupational Licensing & Disciplinary Guidelines (Rev. 11/2007)

These guidelines were made available during the public comment period upon request by electronic mail or by phoning the Regulations Analyst at 916-657-9001, as listed in the Public Notice. These documents are reasonably available to the affected public from a commonly known or specified source.

5) Determination of Alternatives

No reasonable alternative considered by the department, or that has otherwise been identified and brought to the attention of the department, would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective and less burdensome to affected private persons than the proposed regulations. During the rulemaking process no alternative that would lessen the adverse economic impact on small business was submitted.