State of California
Office of Administrative Law

In re: **Board of Parole Hearings** **Regulatory Action:** **Title 15, California Code of Regulations** **Adopt sections: 2240** **Amend Sections:** **Repeal sections: 2240**	**NOTICE OF APPROVAL OF EMERGENCY REGULATORY ACTION** **Government Code Section: 11349.3** **OAL Matter Number: 2018-0307-02** **OAL Matter Type:** **Regular Resubmittal (SR)**

This rulemaking action repeals the existing regulation regarding Comprehensive Risk Assessments (CRAs) for life-term inmates who are eligible for parole consideration after having served their minimum terms and replaces it with a new CRA regulation. CRAs are used in life-term inmate parole hearings as evidence of an inmate's potential for future violence if released.

OAL approves this emergency regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 07/01/2018.

Date: April 17, 2018

Original Signed by: Dale P. Mentink
Dale P. Mentink
Senior Attorney

For: Debra M. Cornez
Director

Original: Jennifer Shaffer
Executive Officer

Copy: Heather McCray

BPH RN 16-01: RULEMKING FILE TABLE OF CONTENTS AND CERTIFICATION

Title 15 CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240
Comprehensive Risk Assessments

TABLE OF CONTENTS

ITEM

Binder 1

CONTINUTED ON NEXT PAGE

Binder 2

Binder 3

CERTIFICATION

The foregoing table of contents constitutes the Board of Parole Hearing's rulemaking file for the subject regulations. The rulemaking file as submitted is complete. The rulemaking record for the subject regulations was closed on April 11, 2018.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Sacrament, California, on April 11, 2018.

Signed:

Original signed by: Heather L. McCray
HEATHER L. MCCRAY
Assistant Chief Counsel
Board of Parole Hearings

BPH RN 16-01: NOTICE OF PROPOSED ACTION

TITLE 15 CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240
Comprehensive Risk Assessments
(*previously*: Psychological Risk Assessment for Life Inmates)

NOTICE IS HEREBY GIVEN that the Executive Officer of the Board of Parole Hearings (board), pursuant to the authority granted by Government Code section 12838.4 and Penal Code section 3052 and 5076.2, authorizes the board to adopt the proposed Amended Section 2240 of the California Code of Regulations (CCR), Title 15, Division 2, concerning Psychological Risk Assessment for Life Inmates.

AUTHORITY AND REFERENCE

Government Code section 12838.4 vests the board with all the powers, duties, responsibilities, obligation, liabilities, and jurisdiction of the Board of Prison Terms and Narcotic Addict Evaluation, which no longer exists.

Penal Code section 3052 vests with the board the authority to establish and enforce rules and regulations under which prisoners committed to state prison may be allowed to go upon parole outside of prison when eligible for parole.

Penal Code section 5076.2 requires the board promulgate, maintain, publish, and make available to the general public a compendium of its rules and regulations.

Penal Code Section 3041 requires the board minimum eligible parole for the purpose of reviewing and documenting.

Penal Code section 3041.5 establishes the requirements and conditions concerning parole denial and guidelines concerning

Penal Code section 3051 establishes the youth offender parole hearings and the procedures for reviewing the parole suitability of any prisoner who was under the age of 23 at the time of his or her controlling offense.

Penal Code section 11190 establishes the Western Interstate Corrections Compact, which provides for the development, and execution of programs, the co-operations for the confinement, treatment, and rehabilitation of offenders.

Penal Code section 11193 requires that any inmate under the jurisdiction of the California Department of Corrections and Rehabilitation, imprisoned in other state, shall be entitled to all hearings, within 120 days of the time and under the same standards, which are normally accorded to persons similarly sentenced who are confined in this state.

The California Court of Appeal (First Appellate District) case *In re Lugo* and *In re Rutherford* required a remedial plan to be agreed upon by all parties to reduce the parole hearing backlog and bring the board in compliance with state law. (*In re Lugo* (2008) 164 CalApp.4th 1522; *In re Rutherford*, Cal. Super. Ct., Marin County, No. SC135399A.)

The California Court of Appeal (Third Appellate District) case *Sherman-Bey v. Shaffer* found the language of prior section 2240(b) lacks clarity because the term "may use" was permissive and "actuarially derived and structured professional judgment" was not easily understood by laypersons. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.)

The Federal Eastern District Court of California case *Johnson v. Shaffer* approved a stipulated agreement between the parties requiring the discontinuation of subsequent risk assessments, replacement with comprehensive risk assessments, and a pre-hearing process through which inmates can object to factual errors. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].)

PUBLIC COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulations to the board. THE WRITTEN COMMENT PERIOD ON THIS PROPOSED REGULATORY ACTION WILL COMMENCE ON NOVEMBER 4, 2016, AND WILL CLOSE AT 5:00 P.M. ON DECEMBER 19, 2016. For comments to be considered by the board, they must be submitted in writing to the board's Contact Person identified in this Notice no later than the close of the comment period.

CONTACT PERSON

Please direct request for copies of the Initial Statement of Reasons, the Proposed Text of the Regulation, or other information upon which the rulemaking is based to:

Heather L. McCray, Senior Staff Attorney
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036
Phone: (916) 322-6729
Facsimile: (916) 322-3475
E-mail: BPH.Regulations@cdcr.ca.gov

If Heather McCray is unavailable, please contact Chief Counsel, Jennifer Neill at Jennifer.Neill@cdcr.ca.gov. In any such inquiries, please identify the action by using the board's regulation control number BPH RN 16-01.

NO PUBLIC HEARING SCHEDULED

The board has not scheduled a public hearing on this proposed regulatory action. However, the board will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period. Written or facsimile comments submitted during the prescribed comment period have the same significance and influence as oral comments presented at a public hearing.

If scheduled, the purpose of a public hearing would be to receive oral comments about the proposed regulations. It would not be a forum to debate the proposed regulations, and no decision regarding the permanent adoption of the proposed regulations would be rendered at a public hearing. The members of the board would not necessarily be present at a public hearing.

INFORMATIVE DEGEST/POLICY STATEMENT OVERVIEW

The Board of Parole Hearings (board) proposes to amend California Code of Regulations, title15, section 2240, which governs Comprehensive Risk Assessments (previously Psychological Risk Assessment for Life Inmates).

In 2006, the board formed the Forensic Assessment Division (FAD) Lifer Unit, comprised of psychologists who prepare risk assessments for use by hearing panels when determining an inmate's suitability for parole.

On April 20, 2012, the class action case *Johnson v. Shaffer* was filed, challenging the constitutionality of the protocol adopted by [the FAD] for use in the preparation of psychological evaluations to be considered in determining the suitability of class members for parole. On May26, 2016, the court approved the parties' negotiated settlement agreement. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].)

In 2014, while the *Johnson* case was still pending, the Sacramento County Superior Court determined that language in subdivision (d) of section 2240 was vague and confusing. This decision was upheld by the California Third District Court of Appeal. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.)

This proposed regulation package is necessary to implement, interpret, and comply with the court's decision ordering implementation of the *Johnson v. Shaffer* stipulated agreement, the court order in *Sherman-Bey v. Shaffer*, and Penal Code Sections 3041, 3041.5, 3051, 11190, and 11193. The amendments included in this proposed action are intended to clarify, and increase efficiency for, comprehensive risk assessments, which will better meet the needs for inmates subject to the board's parole authority as well as other stakeholders.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS:

Updating the language to require risk assessment tools to be "generally accepted" will benefit inmates, victims, hearing panels, and the public by ensuring that any instruments FAD psychologists use to assess risk have been deemed appropriate by the general psychology community. These amendments will also benefit all stakeholders by providing greater clarity about the requirements for these instruments.

Eliminating the shorter "Subsequent Risk Assessments" and instead mandating a new "Comprehensive Risk Assessment" every three years benefits all stakeholders. Since the hearing panels will have access to a more current and robust evaluation of the inmate's risk at every hearing, the panels will be better informed, which will assist them in reaching increasingly accurate decisions regarding an inmate's suitability. This will not only benefit inmates by ensuring that suitable inmates will be granted parole, but also benefit victims and the general public by ensuring that inmates who continue to pose an unreasonable risk to public safety are denied parole.

Developing the pre-hearing appeal process to lodge objections to factual errors in a comprehensive risk assessment prior to the hearing will similarly benefit multiple stakeholders. Allowing these issues to be resolved prior to a hearing will benefit inmates by ensuring that only accurate information is used during the hearing to assess the

inmate's current suitability for parole. Additionally, the pre-hearing process will reduce the number of postponements, which will benefit victims and all other hearing participants by reducing the number of wasted travel and appearances for hearings that ultimately do not go forward. Moreover, retaining an inmate's right to object to or clarify statements that the risk assessment attributed to the inmate or respond to any of the clinician's observations, opinions, or diagnoses ensures that hearing panels have the most accurate information possible when assessing an inmate's suitability for parole.

Finally, clarifying the FAD's authority with respect to inmates housed out of state will benefit out-of-state inmates by clarifying that they may be able to receive a risk assessment if licensing, confidentiality, and other restraints permit it, and the board exercises its discretion to prepare the assessment.

DETERMINATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING STATE REGULATIONS:

The board has determined that this proposed regulation is not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the board has concluded that these are the only regulations that concern the board's role and requirements in performing a Comprehensive Risk Assessment prior to the parole consideration hearing or parole reconsideration hearing for an inmate subject to the parole authority of the board.

DISCLOSURE REGARDING THE PROPOSED ACTION

Local Mandates:
The board has determined that the proposed action imposes no mandate upon local agencies or school districts.

Fiscal Impact Statement:
The board has made the following initial determinations:

- Cost to any local agency or school district which must be reimbursed in accordance with Government Code §§ 17500 through 17630: None
- Cost or savings to any state agency: None: In the prior fiscal year, the board requested and was granted position authority for three additional psychologist positions to meet the new requirements for Comprehensive Risk Assessments to be completed every three years instead of every five years. This means these new positions were established, but the board absorbed the costs with its

existing budget. Additionally, the board had no discretion under the court order with respect to increasing the frequency of the Comprehensive Risk Assessments. Therefore, the regulations regarding the increase in frequency necessitating the new positions are only codifying the board's current mandated process, and will not result in any additional discretionary costs or savings to the board.

- Other non-discretionary cost or savings imposed on local agencies: None
- Cost or savings in federal funding to the state: None

Significant Statewide Adverse Economic Impact on Business:
The board has determined that there is no significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Cost Impacts on Representative Private Persons or Businesses:
The board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Assessment of Effects on Job and/or Business Creation, Elimination or Expansion:
The board has determined that adoption of this regulation will not: (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing business within California; or (3) affect the expansion of businesses currently doing business within California. While three new psychologist positions were previously established to implement the increased frequency of the comprehensive risk assessments, as mandated by the court's order in Johnson v. Shaffer, the adoption of these regulations will not result in the creation or elimination of any additional jobs.

Effect on Housing Costs:
The board has made an initial determination that the proposed action will have no significant effect on housing costs because housing costs are not affected by the internal processes governing the board's role and requirements in performing a Comprehensive Risk Assessment prior to the parole consideration hearing or parole reconsideration hearing for an inmate subject to the parole authority of the board.

Small Business Determination:
The board has determined that the proposed regulation does not have a significant adverse economic impact on small business because small businesses are not affected by the internal processes governing the board's role and requirements in performing a Comprehensive Risk Assessment prior to the parole consideration hearing or parole reconsideration hearing for an inmate subject to the parole authority of the board.

RESULTS OF THE ECONOMIC IMPACT ANALYSYS/ASSESSMENT

The board concludes that it is (1) unlikely that the proposed regulations will create or eliminate any jobs in California, (2) unlikely that the proposed regulations will create any new business or eliminate any existing business, and (3) unlikely that the proposed regulations will result in the expansion of businesses currently doing business within the state.

Anticipated Benefits to the health and welfare of California residents, worker safety, and the state's environment:
As further explained in the Economic Impact Analysis, contained within the Initial Statement of Reasons, the proposed shift toward comprehensive risk assessments for regularly scheduled hearings, rather than the shorter subsequent risk assessments, will provide hearing officers charged with determining an inmate's suitability for parole with a greater understanding of the inmate's psychological features and their impact on his or her risk of violence. Additionally, the regulations increase protections to both victims and inmates by ensuring greater accuracy of risk assessments through newly implemented prehearing and at-hearing objection and clarification processes. This increased accuracy and hearing officers' enhanced understanding of an inmate's risk of violence when determining suitability will, in turn, promote both inmate rehabilitation and better protection of public safety.

CONSIDERATION OF ALTERNATIVES

The board must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to its attention, would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons, than the proposed regulatory action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. Interested parties are accordingly invited to present statements or arguments with respect to any alternatives to the proposed changes during the public comment period.

AVAILABILITY OF PROPOSED TEXT

The board will make the rulemaking file available to the public throughout the rulemaking process at its offices located at 1515 K Street, Suite 600, Sacramento, California. As of the date this Notice is published in the Office of Administrative Law's Notice Register, the rulemaking file consists of this Notice, Form 400 (Notice of Submission of Regulation), the Proposed Text of the Regulation and Initial Statement of Reasons. Copies of any of these documents may be obtained by contacting the board's

Contact Person identified in this notice at the mailing address, fax number, or email address listed above or by visiting the board's website at: http://www.cdcr.ca.gov/BOPH/reg_revisions.html.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the board may adopt the proposed regulations substantially as described in this Notice. If the board makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the board adopts the regulations as revised. Please send requests for copies of any modified regulation text to the attention of the Contact Person identified in this Notice or by visiting the board's website at the following web address: http://www.cdcr.ca.gov/BOPH/reg_revisions.html. If the board makes modifications, the board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting the board's Contact Person identified in this notice at the mailing address, phone number, fax number, or email address listed above or by visiting the board's website at: http://www.cdcr.ca.gov/BOPH/reg_revisions.html.

END

PROPOSED REGULATORY TEXT

Proposed additions are indicated by underline and deletions are indicated by ~~strikethrough~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER III. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

§ 2240.[Begin strikethrough] **~~Psychological~~** [End strikethrough] [Begin underline] **Comprehensive** [End underline] **Risk Assessments** [Begin strikethrough] **~~for Life Inmates.~~**[End strikethrough]

(a) [Begin strikethrough]~~Prior to a life inmate's initial parole consideration hearing, a Comprehensive Risk Assessment will be performed by a licensed psychologist employed by the Board of Parole Hearings, except as provided in subsection (g).~~[End strikethrough][Begin underline]Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. The psychologists shall consider the current relevance of any risk factors impacting an inmate's risk of violence. The psychologists shall incorporate standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence.[End underline][Begin strikethrough]
~~(1) In the case of a life inmate who has already had an initial parole consideration hearing but for whom a Comprehensive Risk Assessment has not been prepared, a Comprehensive Risk Assessment shall be performed prior to the inmate's next scheduled subsequent hearing, unless a psychological report was prepared prior to January 1, 2009.~~
~~(2) Psychological reports prepared prior to January 1, 2009 are valid for use for three years, or until used at a hearing that was conducted and completed after January 1, 2009, whichever is earlier. For purposes of this section, a completed hearing is one in which a decision on parole suitability has been rendered.~~

(b) ~~A Comprehensive Risk Assessment will be completed every five years. It will consist of both static and dynamic factors which may assist a hearing panel or the board in determining whether the inmate is suitable for parole. It may include, but is not limited to, an evaluation of the commitment offense, institutional programming, the inmate's past and present mental state, and risk factors from the prisoner's history. The Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence.~~[End strikethrough][Begin underline]When preparing a risk assessment under this section for a youth offender, the psychologist shall also take into consideration the youth factors described in Penal Code section 3051, subdivision (f)(1) and their mitigating effects.[End underline]

(c) [Begin strikethrough]~~In the five-year period after a Comprehensive Risk Assessment has been completed, life inmates who are due for a regularly scheduled parole consideration hearing will have a Subsequent Risk Assessment completed by~~

~~a licensed psychologist employed by the Board of~~ ~~Parole Hearings for use at the hearing. This will not apply to documentation hearings, cases~~ ~~coming before the board en banc, progress hearings, three year reviews of a five-year denial, rescission hearings, postponed hearings, waived hearings or hearings scheduled pursuant to court order, unless the board's chief psychologist or designee, in his or her discretion, determines a~~ ~~new assessment is appropriate under the individual circumstances of the inmate's case. The Subsequent Risk Assessment will address changes in the circumstances of the inmate's case,~~ ~~such as new programming, new disciplinary issues, changes in mental status, or changes in~~ ~~parole plans since the completion of the Comprehensive Risk Assessment. The Subsequent Risk Assessment will not include an opinion regarding the inmate's potential for future violence~~ ~~because it supplements, but does not replace, the Comprehensive Risk Assessment.~~ [End strikethrough][Begin underline]A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation, and reliable and valid principles and methods have been appropriately applied to the facts of the case. A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist.[End underline]

(d) [Begin strikethrough]~~The CDCR inmate appeal process does not apply to the psychological evaluations prepared~~ ~~by the board's psychologists. In every case where the hearing panel considers a psychological~~ ~~report, the inmate and his/her attorney, at the hearing, will have an opportunity to rebut or~~ ~~challenge the psychological report and its findings on the record. The hearing panel will~~ ~~determine, at its discretion, what evidentiary weight to give psychological reports.~~ [End strikethrough][Begin underline](1) Risk assessments shall be prepared for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings for inmates housed within the State of California if, on the date of the hearing, more than three years will have passed since the most recent risk assessment became final.
(2) The board may prepare a risk assessment for inmates housed outside of California. [End underline]

(e) [Begin strikethrough]~~If a hearing panel identifies a substantial error in a psychological report, as defined by an~~ ~~error which could affect the basis for the ultimate assessment of an inmate's potential for future~~ ~~violence, the board's chief psychologist or designee will review the report to determine if, at his~~ ~~or her discretion, a new report should be completed. If a new report is not completed, an~~ ~~explanation of the validity of the existing report shall be prepared.~~[End strikethrough][Begin underline](1) If an inmate or the inmate's attorney of record believes that a risk assessment contains a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of the hearing.
(2) For the purposes of this section, "factual error" is defined as an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation. Factual errors do not include disagreements with clinical observations, opinions, or diagnoses or clarifications regarding statements the risk assessment attributed to the inmate.
(3) The inmate or attorney of record shall address the written objection to "Attention: Chief Counsel / Risk Assessment Objection." Electronic messages sent after board

business hours or on a non-business day will be deemed received on the next business day.[End underline]

(f) [Begin strikethrough]If a hearing panel identifies at least three factual errors the board's chief psychologist or designee will review the report and determine, at his or her discretion, whether the errors invalidate the professional conclusions reached in the report, requiring a new report to be prepared, or whether the errors may be corrected without conducting a new evaluation.[End strikethrough][Begin underline](1) Upon receipt of a written objection to an alleged factual error in the risk assessment, or on the board's own referral, the Chief Counsel shall review the risk assessment and determine whether the risk assessment contains a factual error as alleged.
(2) Following the review, the Chief Counsel shall take one of the following actions:
(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and promptly provide a copy of the miscellaneous decision to the inmate or attorney of record when a decision is made, but in no case less than 10 days prior to the hearing.
(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist.[End underline]

(g) [Begin strikethrough]Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, may not receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states. If a psychological report is available, it may be considered by the panel for purpose of evaluating parole suitability at the panel's discretion only if it may be provided to the inmate without violating the laws and regulations of the state in which the inmate is housed.[End strikethrough](1)[Begin underline] Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment and opine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence. The Chief Psychologist shall prepare an addendum to the risk assessment documenting his or her opinion and notify the Chief Counsel of the addendum.
(2) Upon receipt of the Chief Psychologist's addendum, the Chief Counsel shall promptly, but in no case less than 10 days prior to the hearing, take one of the following actions:
(A) If the Chief Psychologist opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and provide a copy of the miscellaneous decision and Chief Psychologist's addendum to the inmate or attorney of record prior to the hearing.
If the Chief Psychologist opined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, order a new or revised risk assessment, postpone the hearing if appropriate under section 2253, subdivision (d) of these regulations, and provide a copy of the miscellaneous decision and Chief Psychologist's addendum to the inmate or attorney of record. Impacted risk assessments shall be permanently removed from the inmate's central file. [End underline]

(h) [Begin strikethrough]~~The provisions of this section shall not apply to medical parole hearings pursuant to Penal Code section 3550 or applications for sentence recall or resentencing pursuant to Penal Code section 1170.~~[End strikethrough][Begin underline]If the Chief Counsel receives a written objection to an alleged factual error in the risk assessment that is postmarked or electronically received less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this section no later than 10 days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist may complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel may refer the objection to the hearing panel for consideration. The Chief Counsel's decision not to respond to an untimely objection is not alone good cause for either a postponement or a waiver under section 2253 of these regulations.

(i)(1) If an inmate or the inmate's attorney of record raises an objection to an alleged factual error in a risk assessment for the first time at the hearing, the hearing panel shall first determine whether the inmate has demonstrated good cause for failing to submit a written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If good cause is established, the hearing panel shall consider the objection and proceed with either paragraph (3) or (4) of this subdivision.
(2) For the purpose of this subdivision, good cause is defined as an inmate's excused failure to timely object to the risk assessment earlier than he or she did.
(3) If the hearing panel determines the risk assessment may contain a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section.
(A) If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the alleged factual error, as well as any conclusions affected by the alleged factual error, and complete the hearing.
(B) If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing under section 2253, subdivision (d) of these regulations pending the review process described in subdivisions (f) and (g) of this section.
(4) If the hearing panel determines the risk assessment does not contain a factual error that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence, the presiding hearing officer shall overrule the objection and the hearing panel shall complete the hearing.

(j) Notwithstanding subdivision (i), an inmate shall have the opportunity at a hearing to object to or clarify any statements a risk assessment attributed to the inmate, or respond to any clinical observations, opinions, or diagnoses in a risk assessment.[End underline]

NOTE: Authority cited: Section 12838.4, Government Code; and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, [Begin underline] 3051, 11190, and 11193, [End underline] Penal Code [the C in Code is underlined]; [Begin underline] In re Lugo, (2008) 164 CalApp.4th 1522; In re Rutherford, Cal. Super. Ct., Marin County, No. SC135399A. [End underline]

BPH RN 16-01: INITIAL STATEMENT OF REASONS

TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240
Comprehensive Risk Assessments

INTRODUCTION:

Section 2240 governs the use of "Comprehensive Risk Assessments" for parole suitability hearings before the Board of Parole Hearings (board).

In 2006, the board formed the Forensic Assessment Division (FAD) Lifer Unit, comprised of psychologists who prepare risk assessments for use by hearing panels when determining an inmate's suitability for parole.

On April 20, 2012, the class action case *Johnson v. Shaffer* was filed, challenging the constitutionality of the protocol adopted by [the FAD] for use in the preparation of psychological evaluations to be considered in determining the suitability of class members for parole. On May 26, 2016, the court approved the parties' negotiated settlement agreement. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].)

In 2014, while the *Johnson* case was still pending, the Sacramento County Superior Court determined that language in subdivision (d) of section 2240 was vague and confusing. This decision was upheld by the California Third District Court of Appeal. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.)

This proposed regulation package is submitted to comply with the court orders in *Johnson* and *Sherman-Bey* so that the section governing comprehensive risk assessments is clearer, more efficient, and better meets the needs for inmates and stakeholders.

PROBLEM STATEMENT:

First, as currently written, section 2240(b) states in part, "Board of Parole Hearings psychologists may incorporate actuarially derived and structured professionals judgment approaches to evaluate an inmate's potential for future violence." However, in *Sherman-Bey*, the court held that the phrases providing that psychologists "may" use

the specific tools and that the tools used must be "actuarially derived" were vague and needed to be amended. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.) The regulation must be updated to effectuate this change.

Second, as currently written, section 2240 requires FAD psychologist to complete a "Comprehensive Risk Assessment" only when more than five years had passed since the inmate's last comprehensive risk assessment and to complete a shorter "Subsequent Risk Assessment" for any hearings scheduled in less than five years. However, the court-approved *Johnson* settlement agreement eliminated "Subsequent Risk Assessments" and requires instead that FAD psychologist complete a full "Comprehensive Risk Assessment" for any hearing scheduled more than three years from the date on which the last risk assessment was approved. The regulation must be updated to effectuate this change.

Third, as currently written, when an inmate or attorney wishes to challenge alleged errors in a risk assessment, section 2240(d) requires the inmate or attorney to raise the issue at the hearing because the inmate appeal process does not apply to risk assessments. However, the court approved *Johnson* settlement agreement required the board to develop an appeal process to allow inmates or their attorneys to "lodge timely written objections asserting factual errors…before their parole consideration hearing occurs." (*Johnson v. Shaffer* (E.D. Cal. October 2, 2015, No. 2:12-cv-1059, Doc. 79, page 5, paragraph 7.) The regulation must be updated to effectuate this change.

PURPOSE

The board of proposed to amend California code of Regulations, title 15, section 2240, as follows:

Subdivision (a) is *amended* to clarify that psychologists who administer Comprehensive Risk Assessments must be both licensed and employed by the board. Subdivision (a) also now clarifies the purpose of the risk assessment by using the *Kelly-Frye* standard of using "generally accepted" approaches when applying scientific evidence, previously contained in subdivision (b). The court noted "The Kelly-Frye language is the standard that California courts use in determining whether scientific evidence is admitted into a trial." (*People v. Kelly* (1976) 17 Cal.3d 24, 27.) This amendment clarifies that any tools, instruments, or approaches used by the psychologists must adhere be generally accepted in the psychology community.

Subsections (a)(1) and (a)(2) are *deleted* because the scheduling of new risk assessments is now covered in subdivision (d).

Subdivision (b) is *amended* to remove the scheduling language, which is now covered in subdivision (d) and to instead require risk assessments to consider the youth factors and their mitigating effects, in accordance with Penal Code section 3051, subdivision (f)(1), when completing a Comprehensive Risk Assessment for a qualified youth offender under Penal Code section 3051.

Subdivision (c) is *amended* to remove the requirements for Subsequent Risk Assessments and to instead provide guidelines for when the Chief Psychologist or Senior Psychologist may approve a Comprehensive Risk Assessment. This subdivision also clarifies the date on which a risk assessment becomes final.

Subdivision (d) is *amended* to remove the current process to challenge alleged errors in risk assessments, which is now covered in subdivisions (e) through (i). Instead, subsection (1) of this subdivision now clarifies that Comprehensive Risk Assessments will be scheduled for hearings if, on the date of the hearing, more than three years will have passed since the last risk assessment became final. Subdivision (g) was also relocated to become subsection (2) of this subdivision, and was re-worded to clarify that the board has the discretion to prepare risk assessments for inmate housed out of state but is not required to prepare one.

Subdivision (e) is *amended* to delete the prior requirement to raise any errors at a hearing and instead establishes the process through which an inmate, inmate's attorney of record, or prosecuting agency may challenge alleged factual errors in the comprehensive risk assessment prior to the hearing. This subdivision also provides the required deadlines for submission and defines the term "factual error" for the purpose of Section 2240 to provide greater clarity for all stakeholders. Finally, this subdivision provides instructions and timing for submitting pre-hearing objections to the board.

Subdivision (f) is *amended* to clarify the role of the Chief Counsel of the board or designee to determine whether an objection to a comprehensive risk assessment alleges a factual error and when to refer the objection to the Chief Psychologist of the board. This section also requires the Chief Counsel to promptly, but no later than 10 days prior to the hearing, provide a copy of the board's decision regarding the allegations if the inmate's objections fail to raise any factual errors. Prior requirements regarding factual errors were deleted and amended in subdivision (e).

Subdivision (g) is *amended* to remove the language regarding inmates housed out of state, which is now covered in subdivision (d)(2). This subdivision now clarifies the role of the Chief Psychologist of the board or designee to opine whether a factual error materially impacted the conclusions of the comprehensive risk assessment. Additionally, this subdivision requires the Chief Counsel to document his or her opinion in an addendum to the risk assessment. This subdivision also provides the description

and timing of the actions the Chief Counsel must take based upon the Chief Psychologist's determination, which includes promptly, but no later than 10 days prior to the hearing, providing a copy of the board's decision regarding the allegations as well as the risk assessment addendum documenting the opinion of the Chief Psychologist. This subdivision further requires impacted risk assessments to be permanently removed from an inmate's file.

Subdivision (h) is *amended* to remove the language exempting medical parole and recall and resentencing procedures from the risk assessment process. Instead, subdivision (d)(1) now clarifies that comprehensive risk assessments shall only be completed for initial parole consideration hearings, subsequent parole consideration hearings, and subsequent parole reconsideration hearings. Additionally, subdivision (h) now clarifies the board's process upon receiving an untimely pre-hearing objection to alleged errors in a comprehensive risk assessment.

Subdivision (i) is *added* to clarify the hearing panel's process upon receiving an objection to alleged factual errors in a comprehensive risk assessment on the day of the hearing. This section defines "good cause" for failing to timely raise objections to alleged factual errors. This section also provides guidance to the panel on the determination the panel must make when confronted with at-hearing objections, the actions the panel must take upon determining that a risk assessment may contain a factual error that materially impacted the clinician's conclusions regarding risk of violence, and the circumstances under which the panel may proceed with the hearing or which necessitate postponement.

Subdivision (j) is added to clarify that inmates still retain the ability to object to or clarify for the record any statements that the clinician attributed to the inmate in the risk assessment, or respond to any of the clinician's observations, opinions, or diagnoses, all of which were exempted from the definition of "factual error" in paragraph (e)(2).

NECESSITY:

Updating the language regarding the risk assessment instruments that the psychologists use to evaluate risk is necessary to comply with the court's requirement in Sherman-Bey to provide clearer guidance on issue. (Sherman-Bey v. Shaffer, 2016 WL 193508, Case No. C077499.) Specifically, the Sherman-Bey court took issue with the language "Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence," (emphasis added) previously contained in subdivision (b). The Sherman-Bey court found that the permissive nature of this statement, as well as the language "actuarially derived and structured professional judgment," was not sufficiently

clear. The board addressed both issues in amended subdivision (a). Replacing the permissive language “may” with mandatory language “shall” is necessary to clarify that FAD psychologists are mandated to comply with these requirements. Additionally, adopting language from the Kelly-Frye test, requiring that instruments used by FAD psychologists be “generally accepted” instruments for the purpose of assessing offenders’ future risk of violence, is necessary to ensure that instruments used are those that have been established in the psychology community as proper tools for this purpose. Moreover, clarifying this language is necessary to make the purpose of the risk assessments more easily understood by inmates, hearing panels, and other stakeholders.

The requirement for clinicians to consider the youth offender factors in Penal Code section 3051, subdivision (f)(1) when assessing a youth offender is necessary to comply with that statute. This section is also necessary to clarify that the clinician’s consideration should specifically focus on the mitigating effects of those factors.

Mandating a new comprehensive risk assessment for suitability and reconsideration hearings that occur three years from the last supervisory approval date is necessary to comply with the court ordered settlement agreement in *Johnson v. Shaffer*. (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) Additionally, though FAD psychologists previously spent significant time preparing the “Subsequent Risk Assessments,” these assessments provided no updated opinion on the inmate’s current risk of future violence. Consequently, the subsequent risk assessments often led to confusion on the inmate’s progress and were deemed to be unhelpful by inmates, panel members, and other stakeholders. Thus, this amendment is necessary to ensure that inmates, attorneys, and panels have access to recently updated risk assessments for every hearing, which provides important information to assist hearing panels in determining an inmate’s suitability for parole. This amendment further ensures that the resources of the FAD psychologists have been directed toward providing the most helpful services to the inmate and hearing panel.

Clarifying the board’s ability to complete risk assessments for out of state inmates was necessary to resolve an ambiguity in the prior wording of the regulation. The previous wording of this provision in prior subdivision (g) stated, “Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, *may not* receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states.” (Emphasis added.) This could be read to mean either (1) that the possibility existed that an out-of-state inmate would not receive a risk assessment due to licensing and other

restraints or (2) that out-of-state inmates were prohibited from receiving risk assessments due to those restraints.

The board needed to clarify that the board retained discretion to complete a risk assessment for an inmate housed out of state if licensing, confidentiality laws, and other restraints permitted.

Developing the pre-hearing appeal process for inmate or their attorneys to "lodge timely written objections asserting factual errors . . . before their parole consideration hearing occurs" is necessary to comply with the court-ordered settlement agreement in Johnson v. Shaffer. (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) Additionally, as currently written, the requirement for inmates and their attorneys to raise issues with a risk assessment only at the hearing has led to the postponement of multiple hearings because the hearing panel needed to refer alleged errors to the Chief Psychologist of the board prior to continuing with the hearing. This process resulted in the waste of any resources spent to schedule and prepare for that hearing. Thus, this amendment is necessary to create a process through which these issues may be resolved prior to hearings so that the board may reduce postponements and wasted resources.

In creating this pre-hearing appeal process, the board found it necessary to limit the pre-hearing objection process to factual errors that materially impact the risk assessment's conclusions regarding the inmate's risk of violence. The settlement agreement expressly limited this prehearing process to "factual errors." (*Johnson v. Shaffer* (E.D.Cal. May 26, 2016, No. 2:12-cv- 1059 KJM AC P) 2016 U.S. Dist., p. 5, line 7.) This is because the board can confirm or reject allegations of factual by reviewing available documentation or evidence provided by the inmate or attorney. However, because the process of amending or completing an entirely new risk assessment is costly and delays an inmate's hearing, this should only be ordered if the alleged error actually had a material impact on the clinician's conclusions regarding the inmate's risk of violence. With that in mind, the board further found that establishing a two-part process to screen out objections to risk assessments that fail to allege factual errors is necessary to ensure the most efficient use of the Chief Psychologist's resources.

Additionally, establishing the 30-day timeline is necessary to ensure that the board has sufficient time to adequately consider and respond to each pre-hearing objection prior to 10 days before the hearing to preserve the inmate's disclosure rights. However, since inmates may sometimes not obtain the information or documentation necessary to support an objection to a risk assessment until after the regulatory timelines for pre-hearing objections has passed, establishing processes for submitting late objections or for presenting objections at a hearing is necessary to preserve inmates' rights.

Requiring the inmate to have "good cause" for failing to raise the objection during the pre-hearing process is necessary to encourage the use of the pre-hearing process and limit the number of postponements and wasted resources due to at-hearing challenges that cannot be immediately resolved.

Finally, while the pre-hearing process was limited to the review of factual errors that materially impacted the risk assessment's conclusions regarding risk, the board found it necessary to preserve an inmate's ability to discuss other concerns exempted from the definition of factual error: statements a risk assessment attributed to the inmate or clinical observations, opinions, or diagnoses in a risk assessment. This process is necessary to ensure panels have the greatest possible understanding of the risk assessments during hearings to determine an inmate's suitability for parole. Since these clarifications and responses are resolved by determining the credibility of the inmate's assertions, they are more appropriately raised at the hearing where the panel may assess the credibility. Additionally, since these clarifications and responses are exempted from the pre-hearing review process, they may be raised at the hearing without a good cause requirement, notwithstanding subdivision (i).

ANTICIPATED BENEFITS:

Updating the language to require risk assessment tools to be "generally accepted" will benefit inmates, victims, hearing panels, and the public by ensuring that any instrument FAD psychologists use to assess risk have been deemed appropriate by the general psychology community. These amendments will also benefit all stakeholders by providing greater clarity about the requirements for these instruments.

Eliminating the shorter "Subsequent Risk Assessments" and instead mandating a new "Comprehensive Risk Assessment" every three years benefits all stakeholders. Since the hearing panels will have access to a more current and robust evaluation of the inmate's risk at every hearing, the panels will be better informed, which will assist them in reaching increasingly accurate decisions regarding an inmate's suitability. This will not only benefit inmates by ensuring that suitable inmates will be granted parole, but also benefit victims and the general public by ensuring that inmates who continue to pose an unreasonable risk to public safety are denied parole.

Developing the pre-hearing appeal process to lodge objections to factual errors in a comprehensive risk assessment prior to the hearing will similarly benefit multiple stakeholders. Allowing these issues to be resolved prior to a hearing will benefit inmates by ensuring that only accurate information is used during the hearing to assess the inmate's current suitability for parole. Additionally, the pre-hearing process will reduce the number of postponements, which will benefit victims and all other hearing

participants by reducing the number of wasted travel and appearances for hearings that ultimately do not go forward. Moreover, retaining an inmate's right to object to or clarify statements that the risk assessment attributed to the inmate or respond to any of the clinician's observations, opinions, or diagnoses ensures that hearing panels have the most accurate information possible when assessing an inmate's suitability for parole.

Finally, clarify the FAD's authority with respect to inmates housed out of state will benefit out-of-state inmates by clarifying that they may be able to receive a risk assessment if licensing, confidentiality, and other restraints permit and the board exercises its discretion to prepare the assessment.

DOCUMENTS RELIED UPON:

The board, in proposing amendments to these regulations, relied on the court's decision ordering implementation of the *Johnson v. Shaffer* stipulated agreement. (*Johnson v. Shaffer* (E.D. Cal. May26, 2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) The order is listed here pursuant to the order of the court. A copy of this order is attached to this initial statement of reasons as ATTACHMENT A. The board also relied on the court's order in *Sherman-Bey* requiring amendment of the language regarding the tools on which psychologists may rely. (*Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.) A copy of this opinion is attached to this initial statement of reasons as ATTACHMENT B.

The board has not identified nor has it relied upon any technical, theoretical, or empirical study report, or similar document not already included this section.

ECONOMIC IMPACT ANALYSIS:

Creation or Elimination of Jobs within the state of California

The proposed action is designed to bring the board's regulations into compliance with the *Johnsonv. Shaffer* settlement agreement and court order in *Sherman-Bey*. However, the board has determined that the proposed action will have no impact on the creation or elimination of jobs within the State of California. Specifically, the main substantive changes in this proposed action are replacing prior "subsequent risk assessments" with "comprehensive risk assessments" every three years and establishing a pre-hearing appeal process through which inmates may raise allegations of factual error in their risk assessments. The shift from SRAs to CRAs every three years increased the number of hours clinicians need to spend in their reviews of inmates who would otherwise have received the shorter SRA. Thus, with the increase in workload, in Fiscal Year 2015-

2016, the board requested and was granted position authority for three new psychologist positions, the funds for which were reallocated from the board's existing budget. However, the board had no discretion under the court order with respect to increasing the frequency of the Comprehensive Risk Assessments. Therefore, the regulations regarding the increase in frequency necessitating the new positions are only codifying the board's current mandated process, and will not result in the creation of any additional new jobs. Additionally, while the creation of the FAD pre-hearing appeal process for factual errors also requires additional work hours, this function has been absorbed by current staff positions and has not resulted in the creation of any additional jobs. Therefore, the adoption of this regulation is not resulting in the creation or any new jobs in California. No jobs in California have been eliminated as a result of these changes.

Creation of New or Elimination of Existing Businesses
Within the State of California

The proposed action is designed to bring the board's regulations into compliance with the *Johnson v. Shaffer* settlement agreement and court order in *Sherman-Bey*. This regulatory action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, because private businesses are not affected by the internal management of State prisons or the assessment of risk for an offender seeking parole. These proposed regulations will have no additional effect on the creation or elimination of businesses in California.

Expansion of Businesses within the State of California

The proposed action is designed to bring the board's regulations into compliance with the *Johnson v. Shaffer* settlement agreement and court order in *Sherman-Bey*. This regulatory action will not have a significant, statewide adverse economic impact directly affecting the expansion of business in California because private businesses are not affected by the internal management of State prisons or the assessment of risk for an offender seeking parole. These proposed regulations will have no additional effect on business expansion in California.

Anticipated Benefits of the Regulations

As explained above, the proposed shift toward comprehensive risk assessments for regularly scheduled hearings, rather than the shorter subsequent risk assessments, will provide hearing officers charged with determining an inmate's suitability for parole with a greater understanding of the inmate's psychological features and their impact on his

or her risk of violence. Additionally, the regulations increase protections to both victims and inmates by ensuring greater accuracy of risk assessments through newly implemented pre-hearing and at-hearing objection and clarification processes. This increased accuracy and hearing officers' enhanced understanding of an inmate's risk of violence when determining suitability will, in turn, promote both inmate rehabilitation and better protection of public safety.

ADDITIONAL FINDINGS:

The board has made an initial determination this regulatory action will not have a significant adverse economic impact on business. Neither the timing and requirements for risk assessments nor the process through which to submit objections to a risk assessment affects operation of businesses in California. No facts, evidence, documents, testimony, or other evidence to the contrary has been provided to or reviewed by the board.

The board has determined this action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.

The Board, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included above in the "Documents Relied Upon" section.

The board has determined that no alternative considered would be (1) more effective in carrying out the purpose of this action, (2) as effective and less burdensome to affected private persons than the action proposed, or (3) more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

END

BPH RN 16-01: NOTICE OF MODIFICATIONS TO TEXT OF PROPOSED REGULATIONS AND ADDITION OF DOCUMENTS AND INFORMATION TO RULEMAKING FILE

Title 15. CRIME PREVENTION AND CORRECTIONS
Division 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240
Comprehensive Risk Assessments
(*previously*: Psychological Risk Assessments for Life Inmates)

Modifications to Text of Proposed Regulations

Pursuant to the requirements of Government Code section 11346.8(c), and section 44 of Title 1 of the California Code of Regulations, the Board of Parole Hearings (board) is providing notice of changes made to proposed regulation section 2240, governing Comprehensive Risk Assessments. This section was the subject of a regulatory hearing held on January 18, 2017. These changes are in response to comments received regarding the proposed regulation as well as amendments to the *Johnson v. Shaffer* class action case. (*Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].)

If you have any comments regarding the proposed changes, the board will accept written comments between FRIDAY, DECEMBER 22, 2017, and MONDAY, JANUARY 8, 2018. All written comments must be submitted to the board no later than 5:00 p.m. on MONDAY, JANUARY 8, 2018, and must be addressed to:

Heather L. McCray, Assistant Chief Counsel
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036
Phone: (916) 322-6729
Facsimile: (916) 322-3475
E-mail: BPH.Regulations@cdcr.ca.gov

If Heather McCray is unavailable, please contact Chief Counsel, Jennifer Neill at Jennifer.Neill@cdcr.ca.gov. In any such inquiries, please identify the action by using the board's regulation control number BPH RN 16-01.

All written comments received by MONDAY, JANUARY 8, 2018, that pertain to the indicated amendments to the proposed regulations will be reviewed and responded to by the board in the Final Statement of Reasons as part of the compilation of the rulemaking file. Please limit your comments to the modifications to the text.

Addition of Documents and Information to Rulemaking File

Pursuant to the requirements of Government Code section 11346.8(d), 11346.9(a)(1), and 11347.1, the board is providing notice that documents and other information that the board has relied on in adopting the proposed regulations have been added to the rulemaking file and are available for public inspection and comment.

The documents and information added to the rulemaking file are as follows:

1. Laws and regulations relating to the practice of psychology. (*See* https://www.psychology.ca.gov/laws_regs/2016lawsregs.pdf .)
2. Information regarding the law/ethics examination to qualify for psychology licensure. (*See* https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=310&bulletinurl=.pdf .)
3. Information regarding psychologist license renewal requirement for self-certification of remaining abreast of changes to laws (statutes and regulations) and ethics. (*See* http://www.psychology.ca.gov/licensees/ce_faqs.shtml .)
4. Information regarding the APA ethics code governance only of its own members and not all California Psychology licensees. (*See* http://www.apa.org/ethics/code/principles.pdf .)
5. Guy, Kusaj, Packer, and Douglas (Nov. 3, 2014) *Law and Human Behavior: Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers*.
6. Campbell, French, and Gendreau (2009) *The Prediction of Violence in Adult Offenders: A Meta-Analytic Comparison of Instruments and Methods of Assessment*.
7. Yang, Wong, and Coid (2010) *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, Psychological Bulletin Vol. 136, No. 5, 740- 767.
8. Singh, Desmarais, Hurducas, et al. (Aug. 30, 2014) *International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries*, International Journal of Forensic Mental Health.
9. *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. *Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].
10. December 22, 2017 Supplement to the Initial Statement of Reasons filed with OAL on October 24, 2016.

These documents are available for public inspection at the board's office located at 1515 K Street, 6th Floor, Sacramento, CA from FRIDAY, DECEMBER 22, 2017, through MONDAY, JANUARY 8, 2018, between the hours of 9:00 a.m. and 5:00 p.m. If you have any comments regarding the documents and other information, written comments must be submitted to the board by 5:00 p.m. on MONDAY, JANUARY 8, 2018 to:

Heather L. McCray, Assistant Chief Counsel
Board of Parole Hearings
P.O. Box 4036
Sacramento, CA 95812-4036
Phone: (916) 322-6729
Facsimile: (916) 322-3475
E-mail: BPH.Regulations@cdcr.ca.gov

If Heather McCray is unavailable, please contact Chief Counsel, Jennifer Neill at Jennifer.Neill@cdcr.ca.gov. In any such inquiries, please identify the action by using the board's regulation control number BPH RN 16-01.

All written comments received by MONDAY, JANUARY 8, 2018, that pertain to the indicated amendments to the proposed regulations will be reviewed and responded to by the board in the Final Statement of Reasons as part of the compilation of the rulemaking file.

DATE OF NOTICE: DECEMBER 22, 2017

END

PROPOSED REGULATORY TEXT

ORIGINAL Proposed additions are indicated by single underline and deletions are indicated by single ~~strikethrough~~.

NEW Proposed additions are indicated by double underline and deletions are indicated by double ~~strikethrough~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER III. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

§ 2240. [Begin single strikethrough]~~**Psychological**~~ [End single strikethrough] **Comprehensive Risk Assessments** [Begin single strikethrough] ~~**for Life Inmates.**~~ [End single strikethrough]

(a) [Begin single strikethrough]~~Prior to a life inmate's initial parole consideration hearing, a Comprehensive Risk Assessment will be performed by a licensed psychologist employed by the Board of Parole Hearings, except as provided in subsection (g).~~ [End single strikethrough][Begin single underline]Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. [End single underline][Begin double strikethrough] ~~The p~~ [End double strikethrough][Begin single underline]Psychologists shall consider [End single underline][Begin double strikethrough]~~the current relevance of any~~ [End double strikethrough][Begin single underline]factors impacting an inmate's risk of violence[End single underline][Begin double underline], including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division.[End double underline][Begin single underline] The psychologists shall incorporate[End single underline][Begin double strikethrough]~~ standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence~~ [End double strikethrough][Begin double underline] structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals.[End double underline] [Begin single strikethrough]
~~(1) In the case of a life inmate who has already had an initial parole consideration hearing but for whom a Comprehensive Risk Assessment has not been prepared, a Comprehensive Risk Assessment shall be performed prior to the inmate's next scheduled subsequent hearing, unless a psychological report was prepared prior to January 1, 2009.~~
~~(2) Psychological reports prepared prior to January 1, 2009 are valid for use for three years, or until used at a hearing that was conducted and completed after January 1,~~

~~2009, whichever is earlier. For purposes of this section, a completed hearing is one in which a decision on parole suitability has been rendered.~~

(b) ~~A Comprehensive Risk Assessment will be completed every five years. It will consist of both static and dynamic factors which may assist a hearing panel or the board in determining whether the inmate is suitable for parole. It may include, but is not limited to, an evaluation of the commitment offense, institutional programming, the inmate's past and present mental state, and risk factors from the prisoner's history. The Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence~~ [End single strikethrough][Begin single underline] When preparing a risk assessment under this section for a youth offender[End single underline][[Begin double underline], as defined in Penal Code section 3051, subdivisions (a) and (h)][End double underline][Begin single underline], the psychologist shall also take into consideration the youth factors described in Penal Code section 3051, subdivision (f)(1) and their mitigating effects.[End single underline]

(c) [Begin single strikethrough]~~In the five-year period after a Comprehensive Risk Assessment has been completed, life inmates who are due for a regularly scheduled parole consideration hearing will have a Subsequent Risk Assessment completed by a licensed psychologist employed by the Board of Parole Hearings for use at the hearing. This will not apply to documentation hearings, cases coming before the board en banc, progress hearings, three year reviews of a five-year denial, rescission hearings, postponed hearings, waived hearings or hearings scheduled pursuant to court order, unless the board's chief psychologist or designee, in his or her discretion, determines a new assessment is appropriate under the individual circumstances of the inmate's case. The Subsequent Risk Assessment will address changes in the circumstances of the inmate's case, such as new programming, new disciplinary issues, changes in mental status, or changes in parole plans since the completion of the Comprehensive Risk Assessment. The Subsequent Risk Assessment will not include an opinion regarding the inmate's potential for future violence because it supplements, but does not replace, the Comprehensive Risk Assessment.~~[End single strikethrough][Begin double underline](1)[End double underline][Begin single underline] A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation[End single underline][Begin double strikethrough]~~, and reliable and valid principles and methods have been appropriately applied to the facts of the case~~[End double strikethrough][Begin double underline].
(2)[End double underline][Begin single underline] A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist. [End single underline]

(d) [Begin single strikethrough] ~~The CDCR inmate appeal process does not apply to the psychological evaluations prepared by the board's psychologists. In every case where~~

~~the hearing panel considers a psychological report, the inmate and his/her attorney, at the hearing, will have an opportunity to rebut or challenge the psychological report and its findings on the record. The hearing panel will determine, at its discretion, what evidentiary weight to give psychological reports.~~ [End single strikethrough][Begin single underline]<u>(1) Risk assessments shall be prepared for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings for inmates housed within the State of California if, on the date of the hearing, more than three years will have passed since the most recent risk assessment became final.
(2)</u>[End single underline][Begin double strikethrough]~~ The board may prepare a risk assessment for inmates housed outside of California~~[End double strikethrough][Begin double underline]<u> Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days prior to the date of the hearing</u>.[End double underline]

(e) [Begin single strikethrough]~~ If a hearing panel identifies a substantial error in a psychological report, as defined by an error which could affect the basis for the ultimate assessment of an inmate's potential for future violence, the board's chief psychologist or designee will review the report to determine if, at his or her discretion, a new report should be completed. If a new report is not completed, an explanation of the validity of the existing report shall be prepared.~~[End single strikethrough][Begin single underline]<u>(1) If an inmate or the inmate's attorney of record believes that a risk assessment contains a factual error</u>[End single underline][Begin double strikethrough and single underline]~~ that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence,~~[End of double strikethrough] [continue single underline]<u> the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of the hearing.</u>[End single underline][Begin double underline]<u> Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day</u>.[End double underline][Begin single underline]
<u>(2) For the purposes of this section, "factual error" is</u>[End single underline][Begin double strikethrough]~~ defined as an explicit finding about a~~[End double strikethrough][Begin double underline]<u>~~-~~an untrue </u>[End double underline][Begin single underline]<u>circumstance or event</u>[End single underline][Begin double strikethrough]~~ for which there is no reliable documentation or which is clearly refuted by other documentation~~[End double strikethrough][Begin single underline]<u>.</u>[End single underline][Begin double strikethrough]~~Factual errors do not include~~ [End double strikethrough][Begin double underline]<u>A </u>[End double underline][Begin single underline]<u>disagreement</u>[Begin double strikethrough]~~s~~ [End double strikethrough]<u>with clinical observations, opinions, or diagnoses </u>[End single underline][Begin double underline]<u>is not a factual error</u>[End double underline][Begin double strikethrough]~~ or clarifications regarding statements the risk assessment attributed to the inmate~~[End double strikethrough][Begin single underline]<u>.</u>
<u>(3) The inmate or attorney of record shall address the written objection to "Attention: Chief Counsel / Risk Assessment Objection."</u>[End single underline][Begin double strikethrough]~~ Electronic messages sent after board business hours or on a non-~~

~~business day will be deemed received on the next business day.~~ [End double strikethrough]

(f) [Begin single strikethrough]~~If a hearing panel identifies at least three factual errors the board's chief psychologist or designee will review the report and determine, at his or her discretion, whether the errors invalidate the professional conclusions reached in the report, requiring a new report to be prepared, or whether the errors may be corrected without conducting a new evaluation.~~[End single strikethrough][Begin single underline](1) Upon receipt of a written objection to an alleged factual error in the risk assessment, or on the board's own referral, the Chief Counsel shall review the risk assessment and[End single underline][Begin double strikethrough] ~~determine~~ [End double strikethrough][Begin double underline]evaluate [End double underline][Begin single underline] whether the risk assessment contains a factual error as alleged.
(2) Following the review, the Chief Counsel shall take one of the following actions:
(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and promptly provide a copy of the miscellaneous decision to the inmate or attorney of record when a decision is made, but in no case less than 10[End single underline] [Begin double underline] calendar [End double underline] [Begin single underline] days prior to the hearing.
(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist. [End single underline]

(g) [Begin single strikethrough]~~Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, may not receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states. If a psychological report is available, it may be considered by the panel for purpose of evaluating parole suitability at the panel's discretion only if it may be provided to the inmate without violating the laws and regulations of the state in which the inmate is housed.~~ [End single strikethrough][Begin single underline](1) Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment and opine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence. [End single underline][Begin double underline] Following the review, the Chief Psychologist shall promptly take one of the following actions:
(A) If the Chief Psychologist opines that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, [End double strikethrough][Begin double strikethrough] ~~I~~ [End double strikethrough][Begin single underline]the Chief Psychologist shall[End single underline][Begin double underline] direct that the risk assessment be revised to correct the factual errors, [End double underline][Begin single underline]prepare an addendum to the risk assessment documenting [End single underline][Begin double underline]the correction of the error and[End double underline][Begin single underline]his or her opinion [End single

underline][Begin double underline]that correcting the errors had no material impact on the risk assessment's conclusions,[End double underline][Begin single underline] and notify the Chief Counsel of the addendum.[End single underline][Begin double underline}
(B) If the Chief Psychologist opines that the factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Psychologist shall order a new or revised risk assessment, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion about the material impact of the errors on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.[End double underline][Begin single underline]
(2) Upon receipt of the Chief Psychologist's addendum, the Chief Counsel shall promptly, but in no case less than 10 [Begin double underline]calendar[End double underline, continue single underline] days prior to the hearing, take one of the following actions:
(A) If the Chief Psychologist opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall [Begin double strikethrough]~~overrule the objection,~~ [End double strikethrough][Begin single underline]issue a miscellaneous decision explaining the result of the review, and provide a copy of the miscellaneous decision[End single underline][Begin double underline], the revised risk assessment,[End double underline][Begin single underline] and [Begin double underline] the [End double underline][Begin single underline]Chief Psychologist's addendum to the inmate or attorney of record prior to the hearing.
(B) If the Chief Psychologist opined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, [End single underline][Begin double strikethrough and single underline]~~order a new or revised risk assessment,~~ [End double strikethrough][continue single underline]postpone the hearing if appropriate under section 2253, subdivision (d) of these regulations, and provide a copy of the miscellaneous decision.
[Begin double underline] the new or revised risk assessment, [End double underline, continue single underline] and Chief Psychologist's addendum to the inmate or attorney of record. [End single underline][Begin double underline]
(3) The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision, [End double underline][Begin double strikethrough]~~Impacted risk assessments shall be permanently removed~~ [End double strikethrough][Begin single underline]from the inmate's central file.[End single underline]

(h)[Begin single strikethrough] ~~The provisions of this section shall not apply to medical parole hearings pursuant to Penal Code section 3550 or applications for sentence recall or resentencing pursuant to Penal Code section 1170.~~[End single strikethrough][Begin single underline]If the Chief Counsel receives a written objection to an alleged factual error in the risk assessment that is postmarked or electronically received less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this

section no later than 10 [End single underline][Begin double underline]calendar [End double underline][Begin single underline]days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist [End single underline][Begin double strikethrough] ~~may~~ [End double strikethrough][Begin double underline]shall [End double underline][Begin single underline]complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel [End single underline][Begin double strikethrough] ~~may~~ [End double strikethrough][Begin double underline] shall [End double underline][Begin single underline]refer the objection to the hearing panel for consideration. The Chief Counsel's decision not to respond to an untimely objection is not alone good cause for either a postponement or a waiver under section 2253 of these regulations.

(i)(1) If an inmate or the inmate's attorney of record raises an objection to an alleged factual error in a risk assessment for the first time at the hearing [Begin double underline] or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section,[End double underline][Begin single underline] the hearing panel shall first determine whether the inmate has demonstrated good cause for failing to submit a written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If good cause is established, the hearing panel shall consider the objection and proceed with either paragraph ([Begin double strikethrough] ~~3~~ [End double strike through][Begin double underline] 2 [End double underline]) or ([Begin double strikethrough] ~~4~~ [End double strikethrough][Begin double underline] 3 [End double underline])[Begin single underline] of this subdivision.[End single underline][Begin double strikethrough]
~~(2) For the purpose of this subdivision, good cause is defined as an inmate's excused failure to timely object to the risk assessment earlier than he or she did.~~[End double strikethrough]
(~~3~~2) If the hearing panel determines the risk assessment may contain a factual error ~~that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence~~, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section.
(A) If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the alleged factual error, as well as any conclusions affected by the alleged factual error, and complete the hearing.
(B) If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing under section 2253, subdivision (d) of these regulations pending the review process described in subdivisions (f) and (g) of this section.
([Begin double strikethrough]~~4~~ [End double strikethrough][Begin double underline]3 [End double underline])[Begin single underline] If the hearing panel determines the risk assessment does not contain a factual error [End single underline][Begin double strikethrough and single underline] ~~that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence.~~[End double strikethrough][Continue

single underline] the presiding hearing officer shall overrule the objection and the hearing panel shall complete the hearing.

(j) Notwithstanding subdivision (i), an inmate shall have the opportunity at a hearing to object [Begin double strikethrough]~~to or clarify any statements a risk assessment attributed to the inmate,~~[End double strikethrough] [continue single underline]or respond to any clinical observations, opinions, or diagnoses in a risk assessment.[End single underline]

NOTE: Authority cited: Section 12838.4, Government Code; and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041, 3041.5,[Begin single underline] 3051, 11190, and 11193, [End single underline]Penal Code;[Begin double strike through] ~~In re Lugo, (2008) 164 CalApp.4th 1522; In re Rutherford, Cal. Super. Ct., Marin County, No.~~ SC135399A[End double strikethrough][Begin double underline]*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement]; *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.[End double underline]

BPH RN 16-01: SUPPLEMENT TO INITIAL STATEMENT OF REASONS

TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240
Comprehensive Risk Assessments

INTRODUCTION:

The Board of Parole Hearings (board) is issuing this supplement to the Initial Statement of Reasons (ISOR) for BPH Regulation Number (RN) 16-01 governing Comprehensive Risk Assessments to provide additional information regarding necessity of the proposed regulations and the documents relied on in reaching determinations about possible alternatives to these regulations.

PURPOSE:

As noted in the original Initial Statement of Reasons, the board proposes to amend California Code of Regulations, title 15, section 2240, as follows:

Subdivision (c) is *amended* to remove the requirements for Subsequent Risk Assessments and to instead provide guidelines for when the Chief Psychologist or Senior Psychologist may approve a Comprehensive Risk Assessment. This subdivision also clarifies that a Comprehensive Risk Assessment shall not become final until approved by a supervisor and establishes that the date on which a risk assessment becomes final is the date of supervisorial approval.

NECESSITY:

Requiring supervisorial approval before a Comprehensive Risk Assessment may be finalized is necessary for the board to conduct proper oversight and ensure that clinicians are properly administering these assessments and basing their clinical conclusions on sound psychological reasoning. Additionally, selecting the date of approval as the date on which a risk assessment becomes final is necessary to ensure both that (1) CRAs are not finalized before being reviewed and approved by a supervising clinician and (2) the date of the CRA's validity for the next three years runs from a date on which it was independently deemed satisfactory and approved by the supervising clinician.

DOCUMENTS RELIED UPON:

As noted in the original Initial Statement of Reasons, the board, in proposing amendments to these regulations, relied on the court's decision ordering implementation of the *Johnson v. Shaffer* stipulated agreement. (*Johnson v. Shaffer* (E.D.Cal. May 26,

2016, No. 2:12-cv-1059 KJM AC P) 2016 U.S. Dist.) The order is listed here pursuant to the order of the court. A copy of this order is attached to this initial statement of reasons as ATTACHMENT A. The board also relied on the court's order in *Sherman-Bey* requiring amendment of the language regarding the tools on which psychologists may rely. (*Sherman-Bey v. Shaffer,* 2016 WL 193508, Case No. C077499.) A copy of this opinion is attached to this initial statement of reasons as ATTACHMENT B.

In addition to the documents above, the Board relied on all of the following technical, theoretical, or empirical studies, reports, or documents in considering other alternatives to these regulations:

1. Laws and regulations relating to the practice of psychology. (*See* http://www.psychology.ca.gov/laws_regs/2016lawsregs.pdf.)
2. Information regarding the law/ethics examination to qualify for psychology licensure. (*See* https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=310&bulletinurl=.pdf.)
3. Information regarding psychologist license renewal requirement for self-certification of remaining abreast of changes to laws (statutes and regulations) and ethics. (*See* http://www.psychology.ca.gov/licensees/ce_faqs.shtml.)
4. Information regarding the APA ethics code governance only of its own members and not all California Psychology licensees. (*See* http://www.apa.org/ethics/code/principles.pdf.)
5. Guy, Kusaj, Packer, and Douglas (Nov. 3, 2014) *Law and Human Behavior: Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers*.
6. Campbell, French, and Gendreau (2009) *The Prediction of Violence in Adult Offenders: A Meta-Analytic Comparison of Instruments and Methods of Assessment*.
7. Yang, Wong, and Coid (2010) *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, Psychological Bulletin Vol. 136, No. 5, 740-767.
8. Singh, Desmarais, Hurducas, et al. (Aug. 30, 2014) *International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries*, International Journal of Forensic Mental Health.
9. *Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].
10. This Supplement to the Initial Statement of Reasons filed with OAL on October 24, 2016.

The board has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document not already included this section.

END

BPH RN 16-01: FINAL STATEMENT OF REASONS

TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240
Comprehensive Risk Assessments

UPDATE OF INITIAL STATEMENT OF REASONS:

During the 45-day public comment period regarding the Regulation Number (RN) 16-01, governing Comprehensive Risk Assessments, which ended on December 19, 2016, the Board of Parole Hearings ("board") received comments from 45 members of the public. One member of the public requested a public hearing, which the board held on Wednesday, January 18, 2017. At that hearing, the board received written comments from one member of the public and oral comments from three public speakers.

The board considered each public comment received regarding the Regulation Number (RN) 16-01, governing Comprehensive Risk Assessments. Additionally, the court in *Johnson v. Shaffer* issued a new court order mandating additional requirements for the proposed regulations. (*Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].) Following the comments and court order, the board made substantive amendments to the original proposed regulations. As explained in greater detail below under the section titled "Summary and Explanation of Amendments to Original Proposed Regulation Submitted for Re-notice on December 22, 2017," and the Updated Informative Digest, these amendments are sufficiently related to the subject matter of the originally proposed regulations. The board also declined several suggestions, the board's reasons for which are explained in greater detail below under the section titled "Summary and Response to Comments Received during the Notice Period of November 4, 2016, to December 19, 2016, and the Public Hearing Held on January 18, 2017."

The amended proposed regulations were publically presented at the board's Executive Board Meeting on December 18, 2017. Subsequently, on December 22, 2017, the board re-noticed the amended proposed regulations to all persons who submitted comments during the original public comment period and all persons on the board's registry who requested re-notifications. The re-notice further contained the list of all documents added to the rulemaking file. The comment period for the re-noticed amended regulations and documents added to the rulemaking file ran from December 22, 2017, to January 8, 2018.

The board considered each public comment received during the 15-day re-notice comment period. For reasons explained below in further detail under the section titled "Summary and Response to Comments Received during the Re-Notice Period of

December 22, 2017, to January 8, 2018," the board declined to make any further amendments to RN 16-01.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF NOVEMBER 4, 2016, TO DECEMBER 19, 2016, AND THE PUBLIC HEARING HELD ON JANUARY 18, 2017:

The board received written comments from a total of 45 members of the public (including 37 inmates) during the public comment period of November 4, 2016, through December 19, 2016. Each comment from the 45 commenters was individually identified with a unique identification ("ID") number as follows: 16-01-[the number of the commenter in order of receipt]-[the number of the comment in order of the comments received from that speaker]. (For example, the comment identified as 16-01-06-02 would indicate that comment was made in or by the sixth letter/speaker received and was the second comment from the author of that letter/speaker.) The board received a total of 192 individual comments from the 45 written commenters. The comment ID numbers for comments received during the public comment period ranged from 16-01-01-01 through 16-01-45-13. Tables containing the identification number for each comment along with the commenter's name, date of the comment, category of the comment, and the board's determinations regarding the comment are included in the comment tab. Additionally, copies of each correspondence are included in the comments tab.

The board also received comments from four members of the public during the public hearing on January 18, 2017. The board received a total of 18 individual comments from the four commenters during the public hearing. Three comments from one commenter were received by letter on the date of the hearing. The remaining 15 comments were received orally from three speakers at the hearing. Each comment from the four commenters was individually identified with a unique ID number: 16-01-[the number of the commenter in order of receipt]-[the number of the comment in order of the comments received from that speaker]. The comment ID numbers for comments received during the public hearing ranged from 16-01-46-01 through 16-01-49-05. Tables containing the identification number for each comment along with the commenter's name, date of the comment, category of the comment, and the board's determinations regarding the comment are included in the comment tab. Additionally, copies of the written correspondence as well as the verbatim transcript of the January 18, 2017, public hearing are also included in the comments tab.

Many of the comments raised similar issues or proposed amendments. Thus, the board will address each category of comment below and identify the specific comment ID numbers included in each category.

ISSUE 1: Standards of Professional Conduct

Comment ID Numbers: 16-01-01-03; 16-01-17-03; 16-01-17-04; 16-01-17-05; 16-01-17-06; 16-01-25-11; 16-01-28-03.

Sub-Issue 1. Several of these comments suggested the board expressly adopt a specific American Psychological Association Principle or Ethical Standard in its regulations to require the board's Forensic Assessment Division (FAD) psychologists to adhere to those principles or ethical standards in the completion of their Comprehensive Risk Assessments ("CRAs"). Two other comments expressed concern that the proposed regulation does not encourage or clarify which specific professional standards will apply to the psychologists conducting CRAs. One commenter expressed concern that clinicians can "say anything they want."

1. RESPONSE: DECLINED IN FULL AS BOTH OUTSIDE THE SCOPE OF THE CURRENT REGULATION AND UNNECESSARY

The board finds that these comments and proposals are outside the scope of this proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The psychologists completing these assessments are not entering clinician-patient relationships with the inmates whose assessments they conduct. Rather, the FAD psychologists operate as forensic psychology experts for the purpose of gathering and assessing information from the inmate and the inmate's record and forming opinions from that information regarding the inmate's current risk of committing any future violence. Thus, regulating any principles or ethical standards relating to clinician-patient relationships is outside the scope of this regulation.

To the extent that any of the proposed principles or ethical standards applies to forensic psychologists, the proposed regulation already addresses the requirements to which the FAD psychologists must adhere. Specifically, section 2240, subdivision (a), expressly requires any psychologist performing a CRA to be "licensed," meaning that the psychologist must have obtained a valid license to practice psychology within the state of California. This requirement necessarily means that any FAD clinician is already subject to all of the principles and ethical standards inherent in holding a license to practice psychology.

In California, psychologists are governed by laws and regulations relating to the practice of psychology. (*See* http://www.psychology.ca.gov/laws_regs/2016lawsregs.pdf.) Additionally, psychologist candidates must pass a law and ethics examination to qualify for licensure. (*See* https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=310&bulletinurl=.pdf.) When renewing psychologist licenses, "Licensees must check a box self-certifying that they have kept abreast of changes to laws (statutes and regulations) and ethics. (*See* http://www.psychology.ca.gov/licensees/ce_faqs.shtml.)

Therefore, the board finds no justification to incorporate into this regulation ethical practices that are already addressed in laws and regulations and enforced by the Board of Psychology, particularly when the ethics code referenced in the public comment applies only to members of a private professional organization. The board further finds it would be both unnecessarily duplicative and legally inappropriate for the board to

regulate ethical standards to apply to FAD psychologists when they are already bound by the standards to maintain their licenses. Thus, the board declines to adopt this amendment.

Sub-Issue 2. One commenter states that the regulations are unclear about which standards will be applied in any attempt at lodging an appeal under the proposed regulation subdivisions (e) and (f). The commenter appears to have concerns about whether the regulation, which is in part codifying the stipulated agreement in *Johnson v. Shaffer*, will be governed by California law, and appears confused about what legal standards will specifically govern the pre-hearing appeal process for factual errors. This commenter also seemed to suggest that the board should acknowledge California Evidence Code, sections 801 and 802 as governing these regulations.

2. RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the legal standards to be applied in the newly created pre-hearing appeal process for regulations. However, each of these comments is based on the commenter's misunderstanding of the legal standards established in the regulations and the governance of California law. Moreover, the commenter offered no alternatives to the current proposed text. Therefore, the board declines to make any further amendments based on these comments.

First, the commenter appears confused about the legal standards that will apply to pre-hearing appeal process for factual errors. However, the board's regulations already address the legal standards. Specifically, subdivision (e)(2) defines "factual error," which sets the legal definition that the board will be applying when evaluating whether an objection legally meets the requirements to be considered a factual error for the purpose of this process. Next, subdivision (f) establishes the process through which the Chief Counsel will make the legal determination regarding whether an objection meets the definition of factual error. If yes, subdivision (f) requires the Chief Counsel to refer the error to the Chief Psychologist; if not, subdivision (f) requires the Chief Counsel to overrule the objection. The board further notes that subdivision (g), as amended following the 45-day public comment period, now requires the Chief Psychologist to take steps to correct all errors referred by the Chief Counsel in addition to analyzing the clinical impact of those errors. Thus, the regulations already address the legal standards and process through which those standards will be applied to pre-hearing objections to alleged factual error.

Second, this commenter references the *Johnson v. Shaffer* stipulated agreement (*Johnson v. Shaffer* (E.D. Cal. October 2, 2015) No. 2:12-cv-1059, Doc. 83 [stipulated agreement]) and the language in that agreement stipulating that the agreement would be governed by California law. The commenter appears confused about what California laws would govern the appeal process enacted in these regulations to satisfy the requirements of the *Johnson* agreement, and appeared to suggest that California Evidence Code, sections 801 and 802 govern the regulations. The commenter appears to

have confused the laws which govern the agreement versus an agency's regulations. The language in the stipulated agreement requires the actual settlement reached in the class action case *Johnson v. Shaffer* to be governed by California law. The laws governing the proposed regulations remain the same as any other agency's regulations, meaning the regulations are governed by the California constitutional provisions, California statutes, and case law these regulations are interpreting as well as the California Administrative Procedure Act and other laws governing agency rulemaking.

Additionally, as explained below in ISSUE 4, Sub Issue (4) of the response to comments received during the original 45-day period, this commenter's reference to California Evidence Code, sections 801 and 802 is misplaced because these statutes are not appropriately applied to the risk assessment process. These sections specifically govern expert testimony at court hearings; whereas the risk assessments provide forensic analysis for consideration by a board hearing panel. Moreover, to any extent they do apply, these support the board's interpretation of the importance of distinguishing between fact and opinion. Thus, since this comment appears to have been based on the commenter's misunderstanding of the laws and standards that apply to this regulation and did not offer any alternatives, the board declines to make any further amendments as a result of this comment.

ISSUE 2: Recording of CRA Interviews

Comment ID Numbers: 16-01-02-01; 16-01-03-01; 16-01-04-01; 16-01-06-01; 16-01-08-01; 16-01-09-01; 16-01-10-01; 16-01-11-01; 16-01-12-01; 16-01-13-01; 16-01-14-01; 16-01-16-02; 16-01-18-01; 16-01-19-01; 16-01-22-01; 16-01-23-01; 16-01-24-01; 16-01-25-08; 16-01-26-01; 16-01-28-01; 16-01-30-02; 16-01-31-02; 16-01-32-01; 16-01-33-02; 16-01-34-01; 16-01-35-01; 16-01-26-01; 16-01-37-01; 16-01-38-01; 16-01-39-01; 16-01-40-01; 16-01-41-01; 16-01-42-01; 16-01-43-01; 16-01-44-01; 16-01-45-03; 16-01-46-01; 16-01-48-02; 16-01-49-02.

Each of these comments offered various arguments in favor of recording CRA interviews between inmates and the FAD psychologists assigned to complete their risk assessments. Some of the commenters suggested all CRA interviews be tape recorded, whereas others suggested the interviews be video recorded. Some commenters suggested CRA interviews be recorded only at the request of the inmate. Several commenters argued that recording CRA interviews was necessary to preserve transparency and enable inmates to resolve disputes about what was said during the interviews. Some commenters argued that recording CRA interviews was necessary to preserve equal protection or "truth in evidence" for inmates and to ensure error-free evaluations. Several commenters argued the board's stated reasoning for declining this amendment when originally raised, specifically the impact to the budget and the concern regarding a chilling effect on interviews, was invalid. One commenter suggested the impact to the budget and chilling effect would be minimal if recording was voluntary. One commenter specifically suggested recording CRA interviews with Blue Microphones Snowball (USB Microphone) to create .wav files. One commenter argued the board failed to provide a substantive response to this concern when it was initially raised by the

plaintiffs' attorneys in *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to how risk assessment interviews should be conducted in preparation for a psychologist completing a CRA. However, after substantive consideration, the board finds that recording CRA interviews would adversely impact the board's ability to fulfill its primary mission and is both unprecedented and unnecessary. Therefore, the board declines to adopt these proposed amendments.

The board considered audio recording or video recording all CRA interviews and transcribing either all or requested recordings, but for a variety of reasons ultimately determined it would not record CRA interviews. First, the board scheduled over 5,300 hearings during calendar year 2015 and, while not every hearing has a corresponding CRA interview, a substantial majority of hearings do have corresponding CRA interviews. The board projects approximately 3,624 CRAs will be completed in fiscal year 2017-2018. The cost to transcribe our hearings is $6.00 per page. Since each interview lasts an average of approximately two-and-a-half hours, the board determined that the average cost to transcribe a CRA interview would be approximately $744.00 per transcript based on the average number of pages from transcribed hearings that lasted approximately two-and-a-half hours. Multiplying the approximate cost for an average CRA interview transcript times the number of projected CRA interviews, the board calculated the approximate anticipated costs for transcribing CRA interviews to be approximately $2.7 million per year. Consequently, the board determined the resources required to record and transcribe each of these interviews would significantly increase state expenditures and would inevitably lead to an increase in the number of hearings being postponed for technical or mechanical issues with these recordings. The postponement of hearings would substantially affect the board's ability to carry out its primary function of providing timely hearings for these inmates.

The board also considered audio or video recording only those CRA interviews where the inmate requested recording and transcribing only those records where the inmate subsequently raised concerns with statements the risk assessment attributed to the inmate. As an initial matter, the board determined that limiting transcripts to only cases in which it is requested would likely still result in a high volume of transcripts since it is probable that many if not most inmates would request transcripts. Moreover, even if limited to inmates requesting recordings, the board still finds this would negatively impact the board's ability to carry out its primary function because it would fundamentally change the hearing process. Specifically, when an inmate raised concern with a clinician's wording of a statement attributed to the inmate, this requirement would substantially lengthen the hearing process. Based on the average transcription times for hearings, the request for a transcript would likely add 30 days to allow time for the transcription, and board staff would be required to timely review the CRA interview transcript, which would further add time to the process. Since the board cannot anticipate which inmates would request transcripts and which would not, the board would be required to substantially lengthen the pre-hearing process for all inmates on the chance that this additional time

was needed. The board is also concerned that recording the CRA interviews may elevate the importance of the wording of a CRA interview, rather than having the panels appropriately focus on the substance of the report as just one of many pieces of evidence to consider in weighing the inmate's current suitability for parole.

Furthermore, recording these interviews is unnecessary in light of the proposed amendments to these regulations. Specifically, the board's pre-hearing objection process in subdivisions (e) through (h) provides inmates with a mechanism for challenging perceived factual errors they find in their CRAs, which now also includes challenges to statements the CRA attributes to the inmate. This remedy obviates any need inmates have for recording their CRA interviews.

Moreover, after reviewing other forensic psychological evaluations, the board determined recording these assessments would be unprecedented. Specifically, in researching other forensic psychological reporting, both within and outside of parole functions, the board found no precedent for recording interviews that are conducted for forensic reports. Interviews are not recorded for mentally disordered offender evaluations, sexually violent predator evaluations, psychiatric hospital release evaluations, sanity evaluations, competency evaluations, or any other forensic psychological evaluations for use by a court. Rather, in those situations, a psychologist interviews the subject and drafts an expert report based on his or her findings. The expert report then becomes the official record of the expert's forensic opinions for use by the hearing officers. In its CRA process, the board follows the same process used in all other forensic psychological reporting processes.

Finally, the board has considered and addressed this issue on multiple occasions, including within the now-settled *Johnson v. Shaffer* litigation. Specifically, the board first considered this issue when reaching the stipulated settlement agreement on October 2, 2015. The board then reconsidered this issue and again addressed reasons for declining to adopt this amendment in responding to a letter from the *Johnson v. Shaffer* plaintiff attorney before first presenting these regulations for a board vote of adoption. Additionally, when plaintiffs' counsel again raised these issues at a public board meeting on August 15, 2016, the board opted to delay the vote on the regulation package for further consideration of this proposed amendment. Following additional reconsideration, the board newly addressed additional reasons for declining the amendment at the next public board meeting on September 19, 2016, after which the majority of the board members voted to adopt the regulation without this amendment. The minutes of this discussion and the board's vote are included in the rulemaking packet. The board then considered this issue one additional time in response to the public comment raising this request and, for the reasons stated above, the board declines these amendments. Notably, this issue was extensively litigated in the *Johnson v. Shaffer* case and, in its decision and order dated October 6, 2017, the *Johnson* court determined that recording of CRA interviews was not a component of the *Johnson* settlement agreement and, thus, was not required of the board. Thus, the board declines any further amendments based on these comments.

ISSUE 3: Concern Errors Will Remain in Risk Assessments

Comment ID Numbers: 16-01-04-04; 16-01-13-04; 16-01-15-03; 16-01-16-05; 16-01-18-03; 16-01-22-04; 16-01-26-04; 16-01-28-02; 16-01-28-09; 16-01-28-10; 16-01-30-01; 16-01-34-02; 16-01-35-03; 16-01-36-03; 16-01-37-04; 16-01-38-03; 16-01-39-04; 16-01-40-04; 16-01-41-04; 16-01-42-04; 16-01-43-04; 16-01-44-04; 16-01-45-08; 16-01-45-09.

Sub-Issue 1. Some of these comments expressed concern that the proposed regulation allows errors to remain in risk assessments, even after the errors are identified by the inmate, thus potentially perpetuating the error into future assessments and hearings. One commenter suggested that the board redact any identified errors from CRAs regardless of whether the errors were deemed materially impactful.

1. RESPONSE: IMPLEMENTED IN FULL

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of the pre-hearing CRA objection process for factual errors contemplated in the proposed regulation.

Under the original proposed regulations, only CRAs that were identified to have material errors were removed from the inmate's record. While the concern that this would perpetuate errors was unfounded because the regulation required other documentation of the error to permanently become part of the inmate's record, the board nonetheless considered these comments as well as the *Johnson v. Shaffer* court's October 6, 2017, order. After consideration, the board amended the proposed regulations to require that all errors, including even the most immaterial, be corrected in the CRAs and that the board be required to request removal of any CRA containing an error, regardless of its impact. Thus, the comments asking the board to remove the limitation on removing only CRAs with materially impactful errors was IMPLEMENTED.

Sub-Issue 2. Some commenters also expressed concern that the proposed regulation does not address errors identified in old risk assessments completed before the board's adoption of this proposed regulation. One commenter argued that the proposed regulation fails to include a provision regarding the "CRA Review Fact-Checking Process" and expressed concern that the proposed regulation does not require the board to investigate or respond to factual errors and do not require consideration of individual claims. This commenter also expressed concern that the proposed regulation only requires the Chief Counsel to review a CRA to determine whether an objection has raised a factual error.

2. RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of the pre-hearing CRA objection process for factual errors contemplated in the proposed regulation. These comments,

however, were all based on the commenters' misunderstanding of the proposed regulation and incorrect assertions about how they will be implemented. Therefore, the board declines to adopt these proposed amendments.

First, while the proposed regulation does not expressly address old risk assessments, the proposed regulations allow an inmate to (1) utilize the board's pre-hearing written objection process to challenge old risk assessment errors, (2) explain the past error during the interview with the current clinician for clarification or correction in the current CRA, and (3) utilize the board's at-hearing objection process to address factual errors in prior risk assessments (if the inmate has good cause for not raising them during the pre-hearing process). Thus, the proposed regulation allows inmates to address potential errors in old risk assessments.

With regard to the claim that the proposed regulation fails to include a provision regarding the "CRA Review Fact-Checking Process" and does not require the board to investigate or respond to factual errors or consider individual claims, the board does not understand this comment. To the extent the commenter is concerned the proposed regulation does not mandate a response by the board to pre-hearing or at-hearing objections, this concern is misplaced. The proposed regulation specifically requires the board to take action to resolve any timely submitted allegation of error, in accordance with the settlement agreement, which necessarily includes investigating whether the allegation raises a factual error. Moreover, the proposed regulation mandates the board act, if sufficient time allows, to resolve even untimely allegations, or, if sufficient time is not available, to refer those allegations to the hearing panel for resolution at the hearing. The proposed regulation also specifies the various actions available to hearing panels to resolve at-hearing objections.

One commenter also expressed concern that the proposed regulation only requires the Chief Counsel to review a CRA to determine whether an objection has raised a factual error. This is because the determination of whether an allegation meets the legal definition of "factual error" under the regulation is a legal determination, not a clinical one. If the CRA is found to contain a factual error, the determination of the clinical impact of that error is a clinical determination more appropriately made by the Chief Psychologist of the board, and not the Chief Counsel.

ISSUE 4: Definition of Factual Error

Comment ID Numbers: 16-01-02-02; 16-01-02-06; 16-01-04-02; 16-01-06-02; 16-01-08-02; 16-01-11-02; 16-01-13-02; 16-01-15-01; 16-01-16-01; 16-01-18-02; 16-01-19-02; 16-01-22-02; 16-01-25-09; 16-01-25-12; 16-01-26-02; 16-01-32-02; 16-01-35-02; 16-01-36-02; 16-01-37-02; 16-01-38-02; 16-01-39-02; 16-01-40-02; 16-01-41-02; 16-01-43-02; 16-01-44-02; 16-01-45-04; 16-01-45-05; 16-01-46-03; 16-01-48-03.

Each of these comments expressed concern with the board's proposed definition for the term "factual error" contained in the proposed regulation. To best explain the varying comments below, the board notes as an initial matter that the *Johnson v. Shaffer*

settlement specifically required the board to create a pre-hearing objection process for resolving alleged "factual errors." *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement]. To that end, the board was required to define the term "factual error" for this purpose.

To follow the court's mandate, the board attempted to distinguish issues that can be independently substantiated by supporting documentation in the record from those that cannot. The board categorized the issues inmates historically raised with their CRAs and determined that inmates generally raise concerns regarding: (1) the clinical observations, diagnoses, or opinions of the clinician who conducted the CRA, (2) statements the CRA attributed to the inmate, and (3) factual statements in the CRA that can be verified in the inmate's record as being incorrect. The board then determined that, when an inmate objects to a finding of fact in the CRA that is independently verifiable in the inmate's record or through documentation the inmate provides, these allegations best met the spirit of the specific words "factual error" selected in the *Johnson v. Shaffer* settlement agreement as well as current forensic practices in legal proceedings. Consequently, the board initially limited the definition of factual error for purposes of the board's pre-hearing CRA objection process to only those allegations challenging independently verifiable factual statements.

Following the initial public comment period, the comments identified for this issue each raised varying concerns with the board's definition of factual error, which fell into four sub-issues addressed below.

Sub-Issue 1. Some of these comments expressed concern with the board's proposed definition for the term "factual error" contained in the proposed regulation, arguing it was unnecessarily narrow because it screened out valid objections to statements the risk assessment attributes to the inmate. Some commenters suggested the board broaden the definition of "factual error" to include challenges to statements the risk assessment attributed to the inmate.

1. RESPONSE: IMPLEMENTED IN FULL

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's definition for the term "factual error" within in the proposed regulation. The board considered these comments.

In interpreting the words "factual error," the board originally excluded challenges to statements the CRA attributed to the inmate because the board initially determined presenting these arguments directly to the hearing panel would be a more appropriate remedy. However, after considering these comments and the court's October 6, 2017, order in *Johnson v. Shaffer*, the board amended the proposed regulations to delete the omission of objections to statements the CRA attributed to the inmate in the definition of factual error such that they are included in the board's pre-hearing objection process for factual errors. Thus, these comments were IMPLEMENTED.

Sub-Issue 2. Some of the comments expressed concern with the board's proposed definition for the term "factual error" arguing that the board's definition was unnecessarily

narrow because it screened out valid objections to clinical observations, opinions, or diagnoses. These commenters suggested the board broaden the definition to include any error or at least to include clinical observations, opinions, and diagnoses as "factual errors."

2. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's definition for the term "factual error" within in the proposed regulation. The board considered these comments; however, each of these comments is based on the commenters' misunderstanding of the reasoning behind the board's decision to separate factual errors for the purpose of the pre-hearing objection process from broader disagreements with clinical determinations, opinions, or diagnoses that may be raised and discussed by the inmate at a suitability hearing before the hearing panel. Therefore, after substantive consideration, the board declines to adopt these proposed amendments.

The board determined that issues involving clinical observations, diagnoses, or opinions of the clinician were all based on varying types of opinions from the clinician, namely the clinician's opinions about what he or she observed during the CRA interview, the clinician's diagnosis of any mental health issues, and the clinician's opinions on how to psychologically interpret various facts from the inmate's record and CRA interview to determine the inmate's level of insight or remorse, current way of thinking, and risk of committing future acts of violence. None of these are "facts" capable of being proved or disproved because they are understood to be opinions drawn by an expert based on his or her education and experience in the field. Thus, disagreements with clinical observations, diagnoses, or opinions of the clinician are not deemed "factual errors" subject to the pre-hearing written objection process. However, the board also recognized the need to make clear that inmates or their attorneys have an opportunity to provide clarifying information to the hearing panel so that the panel members may determine what weight, if any, to place on the clinician's expert opinions. Consequently, subdivision (j) expressly authorizes an inmate to raise concerns with, and provide clarifying information regarding, clinical observations, diagnoses, or opinions directly to the hearing panel at the inmate's hearing.

Sub-Issue 3. In addition to the first two sub-issues, comment 16-01-45-05 suggested that the definition of factual error should include disagreements with clinical diagnoses and expert opinions when they are directly based on obviously erroneous information.

3. RESPONSE: IMPLEMENTED IN FULL AS ALREADY ADDRESSED IN THE PROPOSED REGULATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to the board's definition for the term "factual error" within the proposed regulation. The board finds that this comment is based on the commenters' misunderstanding of the regulation; however, the board also determined that the outcome this commenter was seeking is already encompassed in the current proposed regulation.

Specifically, while the definition of factual error excludes challenges to clinical diagnoses and expert opinions, subdivision (g) clarifies that, if any clinical conclusions regarding an inmate's risk of violence were impacted by information deemed factually erroneous, the CRA must be amended or completely redone. Thus, this commenter's underlying concern regarding conclusions or opinions formed from erroneous information has already been addressed in the current proposed regulation. Therefore, the board finds any further amendments to address this commenter's concerns are unnecessary because the regulation already IMPLEMENTED these concerns in full.

Sub-Issue 4. Some commenters argued the board's definition of factual error was contrary to California Evidence Code sections 801 and 802 such that the pre-hearing process was rendered a "sham" and prohibited any meaningful redress. One commenter argued that forcing inmates to raise other errors during their hearings is unconstitutional because the inmate is forced to either raise the issue with an untrained lay person or forego any objection. This commenter further argued that the board's definition of factual error allowed for a denial of liberty based on a fraudulent record.

4. RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's definition for the term "factual error" within the proposed regulation. The board considered these comments; however, each of these comments is based on the commenters' misunderstanding of the reasoning behind the board's decision to separate factual errors for the purpose of the pre-hearing objection process from broader disagreements with clinical determinations, opinions, or diagnoses that may be raised and discussed by the inmate at a suitability hearing before the hearing panel. Therefore, the board declines to adopt these proposed amendments.

These commenters erroneously argue that the regulations violate the California Evidence Code sections 801 and 802. These statutes both govern the testimony of experts providing opinions on scientific evidence. These sections state in full:

> 801. If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.
> (Enacted by Stats. 1965, Ch. 299.)

802. A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based.
(Enacted by Stats. 1965, Ch. 299.)

As an initial matter, these sections are not appropriately applied to the risk assessment process because these sections specifically govern expert testimony at court hearings; whereas the risk assessments provide forensic analysis for consideration in an administrative proceeding. Even so, these Evidence Code provisions support the board's proposed regulations by confirming that persons considered experts in a field may issue opinions based on their area of expertise. Since licensed psychologists are experts in the field of psychology, these sections expressly permit them to issue opinions based on their expertise. The regulations, therefore, do not include clinician's expert opinions on an inmate's risk in the pre-hearing objection process for factual errors because opinions are not considered facts. Instead, the appropriate avenue for an inmate to challenge a clinician's opinion is with the hearing panel, which may then use its discretion to consider and rule on the inmate's objection.

Second, these commenters additionally argued that forcing inmates to raise issues with the hearing panel violated their constitutional rights to due process. Again, this argument fails as it is based on a misunderstanding of these regulations and the rights of due process. Specifically, challenges to factual errors in the risk assessment are properly delegated to the Chief Counsel to determine whether the allegation raises a factual error under the definition in the regulations, and then to the Chief Psychologist to determine the clinical impact of that error. However, challenges to an expert's opinion must be properly delegated to the hearing panel over the hearing at issue. Opinions are not facts that are true or untrue; they are conclusions reached by experts based on their specialized training and education, unique knowledge and skill, and the evidence they have considered. The purpose of an expert opinion is to assist the trier of fact in better understanding the issues in a case. Thus, an expert opinion cannot be "corrected" during a pre-hearing objection process. Rather, as previously noted, the appropriate avenue for an inmate to challenge a clinician's opinion is with the hearing panel, which may then exercise its discretion to consider and rule on the inmate's objection. Moreover, since the regulations expressly provide an appropriate remedy through which inmates may present arguments to challenge clinician's opinions in risk assessments, the regulations provide inmates with due process on this issue.
Finally, the board disagrees with the allegations that the definition of factual error renders the process a sham or allows hearings to be based on a fraudulent record. On the contrary, the regulation expressly provides a mechanism through which inmates can object to any factual errors, and requires that all errors confirmed by the board be corrected. Therefore, the board declines to makes any additional amendments based on these comments.

ISSUE 5: Timelines and Deadlines

Comment ID Numbers: 16-01-02-04; 16-01-04-03; 16-01-06-03; 16-01-06-04; 16-01-10-02; 16-01-11-03; 16-01-11-04; 16-01-12-02; 16-01-13-03; 16-01-15-02; 16-01-16-04; 16-01-18-04; 16-01-19-03; 16-01-19-04; 16-01-21-03; 16-01-22-03; 16-01-26-03; 16-01-28-04; 16-01-28-05; 16-01-36-04; 16-01-37-03; 16-01-39-03; 16-01-40-03; 16-01-41-03; 16-01-42-03; 16-01-43-03; 16-01-44-03; 16-01-45-06; 16-01-45-07; 16-01-46-02.

Each of these comments expressed concern with timelines or deadlines established in the proposed regulation for the pre-hearing CRA objection process, or the lack of established timelines or deadlines. Specifically, the commenters raise three separate but related sub-issues:

Sub-Issue 1. Some commenters expressed concern that the regulation does not impose deadlines on the board for when CRAs must be issued to inmates and suggested imposing deadlines for CRAs to be completed and issued to inmates. One commenter requested the proposed regulation require CRAs to be issued to inmates six months before their hearing.

1. RESPONSE: IMPLEMENTED IN PART; DECLINED IN PART AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of timelines and deadlines relating to the pre-hearing CRA objection process. After considering these comments and the court's October 6, 2017, order in *Johnson v. Shaffer*, the board amended the proposed regulations to establish a requirement for the board to serve the completed CRAs on inmates at least 60 calendar days before their hearings. Thus, the comments requesting a deadline for CRA completion were IMPLEMENTED.

The board also considered the request to have CRAs completed and provided to inmates at least six months before the scheduled hearing date. The board determined that completing and submitting the CRAs six months ahead of the hearing was not possible given the increasing numbers of hearings coming before the board as the result of changes in legislation and pending litigation, including youth offender, elderly, and expanded medical parole hearings. Shifting the timeline forward by six months does not seem feasible in light of this increased volume of cases. Additionally, many hearings are required to be scheduled in less than six months due to court orders or changes in eligibility; thus, requiring CRAs to be provided at least six months ahead of the hearings would result in these hearings being significantly delayed. Instead, the board determined that distributing the CRA at least 60 days before the hearing, which provides inmates with a minimum of 30 days to review their CRAs and submit objections, was sufficient to ensure that inmates had enough time to submit their objections at least 30 calendar days before their scheduled hearings while also balancing the need to keep the CRAs as current as possible. Therefore, this request was declined.

Sub-Issue 2. Some commenters expressed concern that imposing a deadline for inmates to submit objections to factual errors at least 30 days before the hearings did not provide sufficient time for inmates to review their CRAs, consult with legal counsel, and submit objections. One commenter also expressed concern that the proposed regulation "screens out" an inmate's objections if not timely received.

2. RESPONSE: IMPLEMENTED IN PART; DECLINED IN PART BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of timelines and deadlines relating to the pre-hearing CRA objection process. However, the comments under this sub-issue were based on a misunderstanding of how the timelines and deadlines establishing for the pre-hearing CRA objection process will apply. Therefore, the board declines to adopt these proposed amendments.

As an initial matter, the establishment of a regulatory deadline by which pre-hearing CRA objections to factual errors would be considered "timely" was contemplated by the court-ordered settlement in *Johnson v. Shaffer*. Specifically, in creating the pre-hearing review process for factual errors, the court required the board's regulations to mandate the board to "provide a written response to *timely* objections." *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement], emphasis added. Thus, to give meaning to that requirement, the board needed to establish a deadline by which objections would be considered timely.

As explained above, the board established a 30-day deadline before which, if an inmate submits a CRA objection, the board is required to respond during the pre-hearing process. Given the board's current practice of completing and sending out CRAs at least 60 to 90 days or more before the hearing when possible, the 30-day deadline provides inmates and their attorneys with at least 30 days to provide their objections to the board's legal office. As explained above in Sub-Issue (1) of this issue, the board determined this was sufficient time for inmates and their attorneys to review the CRAs and submit their objections. The board is then required to respond promptly, but in no case less than 10 days before the hearing, meaning that when the inmate submits an objection on the 30-day deadline, the board must respond within 20 calendar days. The purpose of the deadline is to encourage inmates to submit their objections in a timely manner so that the board can complete the pre-hearing objection review process and resolve these issues before inmate's hearings whenever possible. Thus, the request for the board to delete or shorten the deadline for timely submissions was declined.

Moreover, as explained above, upon receiving an untimely objection, the original proposed regulation did not permit the board to ignore or automatically "screen out" the objection. Instead, the board also established a process for responding to untimely objections submitted after the 30-day deadline. Specifically, subdivision (h) of the original proposed regulations expressly required the Chief Counsel to determine whether sufficient time exists to complete the pre-hearing objection review and, if so, the Chief Counsel and Chief Psychologist had the discretion to complete the review. In its

disapproval decision dated November 8, 2017, the Office of Administrative Law noted that the discretionary wording of the original proposed regulation did not clarify how or when the Chief Counsel and Chief Psychologist would exercise that discretion. Therefore, the board determined that it needed to amend this section to clarify the board's practice that, when the Chief Counsel and Chief Psychologist determined that sufficient time existed to respond to an untimely objection, they were mandated to complete the response. Thus, the board IMPLEMENTED this amendment to alleviate the concern that untimely objections could be screened out.

The board further notes that, even if the Chief Counsel determined that sufficient time did not exist to complete the pre-hearing review, the original proposed regulation required the Chief Counsel to forward the inmate's or attorney's objections to the hearing panel for consideration at the hearing. If the inmate can establish "good cause" at the hearing by demonstrating that he or she had an excusable reason for failing to timely submit the objection, the hearing panel is required by subdivision (i) to complete the at-hearing objection process. Finally, even if the inmate is not able to demonstrate good cause for a late submission, the panel nevertheless has the discretion to hear and rule on the objection.

Sub-Issue 3. Some commenters expressed concern that, while inmates were required to submit their objections to factual errors at least 30 days before the hearing, the board had no requirement to respond promptly and instead was only required to respond 10 days before the hearing. Some of these commenters also argued that the proposed regulation allows the board to delay responses. One commenter argued that the requirement for the board to respond "promptly" does nothing to ensure this will happen.

3. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE PROPOSED REGULATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of timelines and deadlines relating to the pre-hearing CRA objection process. Because the board's current proposed regulation already contains requirements addressing this issue, the board has determined these requests are already IMPLEMENTED in full.

The main focus for each of these comments rests on a misunderstanding of the language contained in subdivisions (f) and (g) requiring the board to act "promptly." These two subdivisions expressly require that, when either the Chief Counsel or Chief Psychologist of the board is issuing a final decision on a CRA objection, they must submit the decision "promptly" after receipt. The 10-day requirement sets the final date by which a decision can be issued so that the final decision can be served on the inmate at least 10 days before the hearing, in accordance with the board's requirements in the California Code of Regulations, title 15, section 2247 disclosure rules. However, this end-date requirement does not permit the board to delay until 10 days before the hearing if such a delay would not be a prompt response. Rather, regardless of the date on which the inmate submits a timely CRA objection, the Chief Counsel or Chief Psychologist are required to respond promptly and to avoid delay.

Thus, if for example an inmate submitted a CRA objection substantially before the hearing, the board would be obligated to promptly review and process the response. The board would not be permitted to delay beginning the review of the objections until the final deadline. However, if an inmate submits a particularly lengthy objection 30 days before the hearing, which is the last day the objection would be considered timely, the board's regulation dictates that, regardless of what might normally have been considered a prompt reply, the board's response must be transmitted to the inmate and hearing parties by no later than 10 days before the hearing so that the response does not violate the disclosure requirements under section 2247.

One commenter expressed concern that the board's mandate to respond promptly does not actually require the board to do so. This comment was based on a misunderstanding of the effect of regulations, which once enacted have the force and effect of law. Upon enactment, the board will be obligated by this regulation to respond promptly to CRA objections. Thus, the board declines any further amendment.

ISSUE 6: 2010 Report from the Office of the
Inspector General and Other Prior Reports

Comment ID Numbers: 16-01-25-07; 16-01-39-07.

Both of these comments claimed that the board's proposed regulation fails to address issues identified in the 2010 Report from the Office of the Inspector General ("2010 OIG Report"). One comment specifically argued the proposed regulation fails to address (1) a lack of reliable data to determine the number of factual errors, (2) a lack of reliable data on the numbers of assessments at each risk level, (3) weak oversight for the FAD psychologists, and (4) insufficient training to panel members. This commenter further cited to a statement regarding previous perceptions of risk assessments from a 2007 California District Attorneys Association Notebook.

RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE CURRENT REGULATION AND BASED ON INCORRECT ASSERTIONS

The board finds that these comments and proposals are outside the scope of this proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The regulation was not designed to implement solutions for the issues identified in the 2010 OIG Report because these issues were already resolved through the board's 2011 Corrective Action Plan in response to this report.

Moreover, the assertion that the board failed to resolve the issues raised in the 2010 OIG Report is erroneous. Following the 2010 OIG Report, the board developed a Corrective Action Plan to address each of the issues raised in the 2010 OIG Report. This plan was closed as fully resolved on July 1, 2011. The board further notes that, while this was not the main purpose of this regulation, the proposed regulation from this rulemaking

package furthers the objectives of the 2010 OIG Report by creating a permanent process for addressing alleged factual errors contained in CRAs.

Additionally, one commenter referenced a 2007 California District Attorneys Association Notebook statement that low-risk assessments did nothing to help an inmate, but higher-risk assessments were detrimental to suitability. The board finds this 10-year-old opinion from an outside stakeholder irrelevant to current board practices, particularly in light of the significant changes in how risk assessments are completed since that time. Specifically, while the FAD began to administer risk assessments in early 2007, the FAD was not fully formed and functioning until 2009. Notably, many life inmates who were denied parole multiple times before 2007 were granted parole only after a FAD psychologist assessed their risk. Therefore, the board found this issue to be outside the scope of the current proposed regulation and based on inaccurate assertions, and consequently declines any further amendments based on this comment.

ISSUE 7: Oversight of FAD Psychologists

Comment ID Numbers: 16-01-04-06; 16-01-25-02; 16-01-28-08; 16-01-32-05; 16-01-33-01; 16-01-47-02; 16-01-49-05.

Each of these comments argued that the proposed regulation does not build in oversight or accountability for the FAD psychologists completing the CRAs. Specifically, the commenters raise three separate but related sub-issues:

Sub-Issue 1. Some of the commenters expressed concern that the regulation does not create any oversight for the psychologists conducting CRAs.

1. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE CURRENT PROPOSED REGULATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of oversight of psychologists completing CRAs by the board's Senior Psychologists. However, the board determined these comments were based on a misunderstanding of the oversight provision in the proposed regulation and that the issues raised in these comments have already been implemented by the current proposed regulation.

These comments fail to account for the language in subdivision (c) of the proposed regulation, which expressly established oversight of clinicians completing CRAs by Senior Psychologists or the Chief Psychologist of the board. Specifically, this subdivision originally stated in part: "A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation, and reliable and valid principles and methods have been appropriately applied to the facts of the case." This subdivision clarifies that no CRA will be considered final until it has been reviewed and approved by a supervisor. Therefore, this subdivision already establishes

oversight of the clinicians completing CRAs and has, thus, already been IMPLEMENTED in full.

The board notes, however, that to better clarify the supervision of the clinicians, the board amended subdivision (c) to remove the language "and reliable and valid principles and methods have been appropriately applied to the facts of the case." On November 8, 2017, OAL expressed concern that the terms "principles and methods" were unclear. Thus, since the main focus of the supervisorial oversight was to ensure that the risk assessments were based upon adequate scientific foundation, the board removed the language at issue to clarify the focus of the supervision.

Sub-Issue 2. Some commenters argued that the board was biased in favor of FAD psychologists and suggested that determinations regarding factual errors be handled by an independent agency.

2. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's establishment of who bears responsibility for review during each step in the pre-hearing CRA objection process. After substantive consideration, the board determined that contracting with an outside agency was unnecessary because the regulation already creates a process through which the determinations regarding factual errors are handled by a different division than the FAD within the board. Therefore, the board declines to adopt these proposed amendments.

As an initial matter, the board has no bias toward or against the clinicians completing CRAs for the board. Moreover, because the board is invested in ensuring that risk assessments contain the most accurate and supportable information possible, the proposed regulation establishes both a pre-hearing and at-hearing process through which inmates are able to address factual errors including disagreements with statements the CRA attributed to the inmate as well as disagreements with a clinician's observations, opinions, and diagnoses.

The main focus for each of these comments rests on a misunderstanding of the language creating the pre-hearing objection process. Specifically, subdivisions (e) through (h), which establish the board's pre-hearing objection process, bifurcate review between the Chief Counsel and Chief Psychologist of the board. The Chief Counsel is responsible for independently assessing whether an inmate's objection has raised a factual error as defined by the regulation. If so, the matter is then referred to the Chief Psychologist who independently assesses whether, in his or her opinion, that error materially impacted the clinician's conclusions regarding risk of violence in the CRA. This process ensures an unbiased review by requiring two reviewers separate from the authoring clinician to determine whether the inmate has identified an error in the CRA and whether that error materially impacted the conclusions.

Sub-Issue 3. Some commenters generally argued that the FAD is insulated from any oversight and generally requested the regulation require greater transparency in the trainings provided to FAD psychologists.

3. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE CURRENT REGULATION AND BASED ON INCORRECT ASSERTIONS

The board finds that these comments and proposals are outside the scope of this proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The proposed regulation does not address outside oversight or how the board will internally train FAD psychologists to complete their assignments; therefore, the board finds these comments outside the scope of this regulation and declines any further amendments based on these comments.

Moreover, as explained above in greater detail in response to ISSUE 6: 2010 Report from the Office of the Inspector General and Other Prior Reports (FSOR, pages 16-17), the assertion that FAD psychologists have no oversight is not accurate. First, as noted above, FAD psychologists are subject to oversight from Senior Psychologists and the Chief Psychologist, as indicated in the proposed regulation. Second, all CRA objections result in review by the board's Chief Counsel or a hearing panel. Moreover, all functions of the correctional system, including parole suitability hearings and their preparation, are subject to review by the Office of the Inspector General, as displayed in the 2010 OIG Report, and all FAD clinicians are licensed by the state's Board of Psychology. Thus, the FAD is not insulated from oversight as suggested in these comments.

ISSUE 8: Challenge to Duties Assigned

Comment ID Numbers: 16-01-02-03; 16-01-02-05; 16-01-25-10.

Each of these comments argued that assigning the responsibility for determining whether CRAs contain factual errors to the Chief Counsel for the pre-hearing objection process in proposed subdivisions (f) and (h), and to the hearing officers when errors are raised at hearings in proposed subdivisions (i) and (j), is unlawful because the Chief Counsel and hearing officers are not psychologists and not properly training to assess clinical reports. One comment further argued that assigning the responsibility to hearing officers of resolving inmate challenges to clinical observations, opinions, or diagnoses, or to statements the CRA attributed to the inmate, is similarly unlawful because hearing officers are also not properly trained to determine the veracity of risk assessments. None of the comments offered alternative suggestions to address their concerns.

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertain to the board's assignment of responsibility for resolving inmate objections to factual errors in CRAs within in the proposed regulation. However, all of these comments were based on the commenters' misunderstanding of the regulation and incorrect assertions about how it will be implemented. As explained below, the proposed regulation assigns duties to appropriate parties given their roles and expertise with the board. Therefore, the board declines to amend the proposed regulation regarding duties assigned.

The main focus for each of these comments rests on a misunderstanding of the language contained in these subdivisions assigning responsibilities to the Chief Counsel and hearing panel members. Specifically, subdivision (f) requires the Chief Counsel to review each CRA objection to determine "whether the risk assessment contains a factual error as alleged." The question at issue is whether the inmate's allegation and supporting documentation meet the legal definition of factual error established in the regulation, which requires a legal analysis appropriate for the Chief Counsel, not a clinical one. Once the Chief Counsel makes a legal determination that the inmate has raised a factual error, the Chief Counsel is then required to refer the clinical decision regarding the impact of that error to the Chief Psychologist. Likewise, subdivision (h) requires the Chief Counsel to determine upon receipt of an untimely CRA objection if there remains sufficient time to complete the pre-hearing process at least 10 days before the hearing. Again, this is a workload determination, not a clinical assessment, and is appropriate for the Chief Counsel of the board.

Similarly, the duties assigned to the hearing panel members are also appropriate. Subdivision (i) requires hearing panel members to determine (1) whether an inmate has demonstrated good cause, as defined in that subdivision, to raise an untimely allegation of factual error, (2) whether the CRA contains an alleged factual error that "may" materially impact the CRA's conclusions regarding risk of violence, and (3) whether, after disregarding any potential factual errors, the remaining evidence available to the panel is sufficient for the panel to reach a determination regarding the inmate's current suitability for parole. Determinations regarding good cause and the sufficiency of evidence to reach a decision both fall squarely within the duties of an administrative hearing panel. Moreover, the determination of whether a piece of evidence may contain a materially impactful factual error does not require a clinical assessment, but rather a determination in the hearing officers' opinions of whether the inmate has raised an allegation that could meet the legal definition of factual error and whether that error appears significant enough that it may have impacted the CRA's conclusions. Hearing officers are well trained to assess and weigh the significance of evidence. Thus, all of these duties are appropriately assigned to hearing panel members, who are ultimately responsible for determining an inmate's suitability for parole.

Additionally, subdivision (j) requires hearing panel members to consider an inmate's objections or clarifications regarding any clinical observations, opinions, or diagnoses in a CRA. Again, considering and weighing these objections and clarifications from inmates does not require a clinical analysis, but rather requires the panel to assess and weigh the credibility and relevance of the inmate's statements and determine how they affect the

panel's reliance on the CRA as a piece of evidence during the hearing. Thus, these duties are also appropriately assigned to the hearing panel members.

Notably, the board did amend subdivisions (g) and (h) to better clarify the duties and requirements of both the Chief Counsel and Chief Psychologist; however, none of these amendments altered the persons responsible for each step in this process.

ISSUE 9: Access to Psychologist Notes

Comment ID Number: 16-01-16-03.

This commenter argued that inmates, their attorneys, and their privately-retained psychologists should have access to the notes of the psychologist completing the CRA.

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to resolving allegations of error in CRAs. After substantive consideration, however, the board determined that this amendment is unprecedented, unnecessary, and would lead to potential confusion. Therefore, the board declines to adopt this proposed amendment.

As addressed above in ISSUE 2: Recording of CRA Interviews, the board found no precedent for disclosing an expert's notes associated with the preparation of a forensic report. A forensic psychologist's notes are not disclosed in mentally disordered offender evaluations, sexually violent predatory evaluations, psychiatric hospital release evaluations, sanity evaluations, competency evaluations, or any other forensic psychological evaluations for use by a court. As explained above, in those situations, a psychologist interviews the subject and drafts an expert report based on his or her findings. The expert report then becomes the official record of the expert's forensic opinions for use by the hearing officers. In its CRA process, the board follows the same process that is used in all other forensic psychological reporting processes. Furthermore, the board determined that disclosing the clinician's notes is unnecessary because the clinician has already included all relevant information from his or her notes in the final CRA. Finally, disclosing the clinician's notes would include disclosure of quantitative scores and ratings associated with proprietary structured risk assessment forms, which would be confusing to inmates and other non-clinicians.

ISSUE 10: Americans with Disabilities Act

Accommodations during CRA Interviews

Comment ID Numbers: 16-01-04-05; 16-01-13-05; 16-01-16-06; 16-01-22-05; 16-01-23-02; 16-01-26-05; 16-01-35-04; 16-01-37-05; 16-01-39-05; 16-01-40-05; 16-01-41-05; 16-01-42-05; 16-01-43-05; 16-01-44-05; 16-01-45-10.

These comments all expressed concern that the proposed regulation does not require Americans with Disabilities Act ("ADA") protections and accommodations to be provided

during CRA interviews. One commenter specifically suggested that the regulation should prohibit CRAs from assessing cognitively impaired inmates based on their ability to discuss issues beyond their capacity, should require foreign language speakers to have access to in-person interpreters at interviews, and should require CRA reports to be translated into a foreign language speaker's native language. This commenter further argued that the regulation should allow ADA accommodation failures to be grounds for objection.

RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE CURRENT REGULATION

The board finds these comments relevant to the regulation because they pertain to how CRA interviews will be conducted. The board determined, however, that ADA requirements fall outside the scope of the current regulation, which is meant to address the timing and requirements for CRAs as well as the processes through which to address issues in the CRAs. Americans with Disabilities Act accommodations and protections are already addressed in the Americans with Disabilities Act of 1990 104 Stat. 328, 42 U.S.C. §§ 12101 et seq., *Armstrong v. Davis* (9th Cir. 2001) 275 F.3d 849, the 2010 Armstrong II Amended Remedial Plan, and the California Code of Regulations, title 15, sections 2251.5, 2251.6, 2251.7, and 2252. Additionally, because these issues remain subject to court oversight and monitoring under the *Armstrong* class action case, any changes or amendments to these issues or regulations must be done through the class action and are more appropriately handled in a separate regulation package if deemed necessary. Therefore, the board declines to adopt these proposed amendments in this rulemaking package.

ISSUE 11: *Sherman-Bey* Requirements

Comment ID Number: 16-01-25-06.

This commenter argued the proposed regulation is still invalid because it does not meet the requirements of the court order in *Sherman-Bey v. Hoshino* (July 3, 2014) Sacramento Sup. Ct. Case No. 34-2011-80000970, Ruling on Submitted Matter.

RESPONSE: IMPLEMENTED IN FULL

The board finds this comment both relevant and within the scope of the regulation because it pertains to the board's attempt to correct the language previously deemed by the *Sherman-Bey* court to be unclear. After substantive consideration, the board initially determined that the language selected complies with the court requirements in *Sherman-Bey* and clarified the board's requirement concerning the use of psychological tools to complete CRAs. However, after reviewing the November 8, 2017, disapproval from the Office of Administrative Law, the board determined that additional changes could further clarify the types of tools that psychologists could use.

Specifically, the regulation removes the language "actuarially derived and structured professional judgment" and initially replaced it with the common and more well-known

court standard “standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate’s risk of violence.” For further clarity about the types of instruments to be used, the board amended this subdivision to require psychologists to incorporate “structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals.” This new language clarifies both the types of risk assessment instruments by giving specific examples and noting that the instruments must be commonly used by experts conducting these types of assessments. Thus, the board IMPLEMENTED this comment by clarifying the Sherman-Bey language at issue.

ISSUE 12: Compliance with
Administrative Procedure Act Requirements

Comment ID Numbers: 16-01-01-02; 16-01-21-01; 16-01-21-02; 16-01-25-03; 16-01-25-04; 16-01-25-05; 16-01-39-06; 16-01-45-01; 16-01-45-13.

Each of these commenters raised arguments as to why they felt the proposed regulation does not meet the California Administrative Procedure Act (“APA”) requirements found in Government Code section 11340 et seq. One commenter stated generally that the proposed regulation does not meet the requirements under the APA of necessity, authority, clarity, consistency, or reference to law, but did not explain why. One commenter claimed the regulations were not easily understood but did not explain why. Some commenters argued that the proposed regulation does not meet the necessity standard on the grounds that the board did not demonstrate necessity for conducting risk assessments for all prisoners appearing for suitability hearings and should not be conducting this task. This commenter further argued that the Initial Statement of Reasons for this proposed regulation misrepresented the nature and effects of the appeal process because the right to clarify objections to observations, opinions, diagnoses, or statements the CRA attributed to the inmate is defined "so narrowly" as to be meaningless. Another commenter claimed the proposed regulations did not explain the benefits to human health or welfare. Other commenters requested “clarity” on what constituted generally accepted tools and the definition of material impact. One commenter claimed the regulations fail to meet APA requirements because they did not cite to any empirical study.

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds these comments both relevant and within the scope of the regulation because they pertains to the procedures the board followed in promulgating its regulation package. After substantive consideration, the board determined it complied with all procedural requirements under the APA and none of the comments provided any suggestions on how to improve the clarity, authority, necessity, consistency, or reference of the proposed regulation. Therefore, the board declines to adopt these proposed amendments.

The commenter who generally argued that the proposed regulation does not meet the requirements under the APA of necessity, authority, clarity, consistency, or reference to law did not cite to any evidence to support this conclusion. The board notes that, in the Initial Statement of Reasons and Notice of Proposed Action filed concurrently with this proposed regulation, the board explained the necessity, authority, clarity, and consistency of the proposed regulation, and cited to all authority and reference laws, as required by the APA. With the exception of the necessity statements noted in the November 8, 2017 OAL disapproval and corrected in the supplemental Initial Statement of Reasons, the board disagrees with this commenter's general allegations.

The next contention, that the board should not have determined it is required to conduct risk assessments, fails to account for the regulations in place already mandating the board to complete CRAs for parole consideration hearings. Specifically, the California Code of Regulations, title 15, section 2240, the section amended by this proposed regulation, already required the board to complete CRAs for parole consideration hearings. Moreover, the court's order approving the parties' negotiated settlement agreement in *Johnson v. Shaffer*, requires the board to complete CRAs for parole consideration hearings every three years. (*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement].) Therefore, the board appropriately determined it is currently required to complete CRAs for parole suitability hearings.

The argument that the board misrepresented the nature and effects of the appeal process in the initial statement of reasons is similarly without merit. As mandated by the court-ordered stipulated agreement in *Johnson v. Shaffer*, the board defined the term "factual error" and developed a pre-hearing process through which inmates can seek redress for alleged factual errors in CRAs. However, because the board initially determined that statements in a CRA attributed to an inmate and disagreements with clinical observations, opinions, or diagnoses do not fall within the category of factual error, the board specifically created subdivision (j) through which the board preserves an inmate's ability to object to those issues at his or her hearing and provide the panel with any clarifications needed. Both processes were fully explained in the initial statement of reasons. Moreover, after reviewing public comments and the October 6, 2017 *Johnson* court order, the board amended the regulations to include statements in a CRA attributed to an inmate as factual errors.

Additionally, the board notes that it explained the benefits and necessity of the regulation provisions in both the Initial Statement of Reasons and the Notice of Proposed Action. The board is not required to rely on any empirical studies although the board subsequently added studies to the rulemaking record. Finally, the board notes that the requests for clarity did not offer any suggestions from which the board could make amendments.

Therefore, the board declines to make any further amendments based on these comments. However, some of the amendments the board did elect to make may clarify some of the issues raised by these commenters.

ISSUE 13: Fiscal Impact

Comment ID Number: 16-01-02-07.

This commenter argued that the current regulation will result in numerous lawsuits that will impact costs and savings to the State of California.

RESPONSE: DECLINED IN FULL BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to the fiscal impact of the regulation. However, the commenter misunderstands the application of the proposed regulation and how it meets the requirements of the *Johnson v. Shaffer* settlement agreement. Therefore, the board declines to adopt this proposed amendment.

This commenter essentially argues that the board failed to meet the requirements of the *Johnson v. Shaffer* settlement agreement and, therefore, the board will be subjected to numerous lawsuits successfully challenging the regulation. This argument is without merit. A review of the settlement agreement demonstrates that, on its face, the board met each requirement of the agreement pertaining to regulating the CRA process. The board eliminated subsequent risk assessments and reduced the number of years in which a new CRA must be prepared from five years to three years. The board defined "factual error," as instructed by the court, and established a pre-hearing appeal process for correcting factual errors. Moreover, the board established an at-hearing process allowing inmates to object to and clarify disagreements with a clinician's observations, opinions, or diagnoses. Therefore, the board appropriately did not factor in the hypothetical cost of unmeritorious lawsuits in the financial assessment for this proposed regulation, and this comment is declined.

ISSUE 14: Structure and Applied Weight for Youth Factors

Comment ID Numbers: 16-01-16-08; 16-01-47-06; 16-01-49-03.

These commenters all argued that the board should require any clinicians completing CRAs for inmates who qualify as "youth offenders" under Penal Code section 3051 to give "great weight" to the three youth factors: (1) the diminished culpability of juveniles as compared to that of adults, (2) the hallmark features of youth, and (3) any subsequent growth and increased maturity of the individual. The proposed regulation currently requires clinicians to consider those factors when completing CRAs for qualified youth offenders. Additionally, one commenter argued the regulation should provide greater structure on CRA discussions of the youth offender factors in the CRAs because they have not been standardized on how the factors are addressed.

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to subdivision (b) and the proposed requirement for clinicians to consider the youth factors when completing CRAs for qualified youth offenders. However, the proposed regulation as currently drafted mirrors the language of the governing statute, which dictates the weight that clinicians are expected to give to youth offender factors. Therefore, the board declines to adopt this proposed amendment.

Penal Code section 3051 established specific parole consideration laws for qualified youth offenders. Additionally, section 4801, subdivision (c), requires that, when weighing evidence for and against parole suitability for a youth offender, the hearing panels must give "great weight" to the youth factors listed above. However, when discussing the requirements for psychologists charged with clinically assessing future risk of violence for qualified youth offenders, section 3051, subdivision (f)(1) specifically states, "In assessing growth and maturity, psychological evaluations and risk assessment instruments, if used by the board, shall be administered by licensed psychologists employed by the board and shall take into consideration the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the individual." (Emphasis added.) In simultaneously enacting Penal Code sections 3051 and 4801, subdivision (c), in the same bill, the legislature created two distinct standards, one for psychologists clinically assessing future risk of violence and one for board hearing panels assessing an inmate's suitability for parole. (*See* Senate Bill 260 (Reg. Sess. 2013-2014).)

While these commenters argue that the board should require clinicians to give heavier weight to the youth offender factors in assessing risk of violence, the board does not agree. Board psychologists are professionally trained experts in administering forensic psychological tools that assess various aspects of an inmate's risk of violence, and in reviewing all relevant and reliable information in addition to the results of the tools to reach their own conclusions regarding the inmate's risk of future violence. Psychologists are further professionally trained to exercise expert judgment in determining the value of each piece of information in assessing that risk of violence. The governing statute requires board psychologists to "take into consideration" the three youth factors; it does not require them to give the factors "great weight." Had the Legislature intended clinicians to give the factors "great weight," it presumably would have used that term in the governing statute, as it did in Penal Code section 4801, subdivision (c). Therefore, the board declines to amend the proposed regulation as suggested because to do so would be inconsistent with the governing statute.

ISSUE 15: Limitations on Information Considered

Comment ID Number: 16-01-28-06.

This commenter argued that the language of subdivision (a) limits clinical review in risk assessments to only negative risk factors and does not allow consideration of all relevant reliable information, such as mitigating factors.

RESPONSE: IMPLEMENTED IN FULL

The board finds this comment both relevant and within the scope of the regulation because it pertains to the meaning of the language in subdivision (a) regarding what psychologists may consider. After substantive consideration, the board implemented this comment.

The main focus for this comment rests on the original language contained in subdivision (a), "The psychologists shall consider the current relevance of any risk factors impacting an inmate's risk of violence." This commenter expressed concern that focusing clinical review on "risk factors" limits the clinicians to only considering negative or aggravating factors. This is a misunderstanding of the original language. Specifically, nothing in the original proposed text limited clinicians from considering protective or mitigating factors that impacted the inmate's risk of violence. Rather, the language only mandated consideration of risk or aggravating factors.

After substantively considering this comment, however, the board elected to amend subdivision (a) to require clinicians to consider "any" factors impacting an inmate's risk of violence, including both aggravating and mitigating factors, such as those factors identified in sections 2281 and 2402 of the board regulations as tending to demonstrate an inmate's suitability or unsuitability for parole. Thus, this request was IMPLEMENTED.

ISSUE 16: Equal Treatment for Out-of-State Inmates

Comment ID Number: 16-01-49-04.

This commenter argued the current proposed regulation does not clarify how the board will deal with out-of-state housed inmates because the regulation only states those inmates "may" receive a psychological evaluation whereas inmates housed in California are required to receive those evaluations. This commenter argued the difference in treatment was not equal treatment under the law.

RESPONSE: IMPLEMENTED IN PART; DECLINED IN PART BECAUSE COMMENTS WERE BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment both relevant and within the scope of the regulation because it pertains to the proposed regulation's requirements for inmates housed out of state. Specifically, to the extent this comment relates to clarifying the requirements for inmates housed in California and those housed in other states, the board acknowledges that paragraph (d)(1) of the original proposed regulation required CRAs for inmates housed in California, whereas paragraph (d)(2) only permitted CRAs for inmates housed in other states. After reviewing OAL's November 8, 2017, disapproval and further evaluating the ability of the FAD clinicians to practice in other states, the board deleted paragraph (d)(2) regarding CRAs for inmates housed outside of California. This amendment resolves the clarity issue by deleting the unclear language regarding out-of-state inmates; therefore, this portion of these comments was IMPLEMENTED.

The additional comments, requesting the board to require CRAs for out of state inmates, must be declined. For inmates housed within the state, any clinician in the board's Forensic Assessment Division will necessarily possess the licensure required to interview and forensically assess that inmate's risk of future violence. However, other states may have different rules regarding the licensure required to perform forensic psychological evaluations on persons living within that state. Therefore, since the board cannot guarantee its ability to complete CRAs within the licensing rules of other state jurisdictions, the board cannot regulate a requirement to complete them in the event that the board was legally barred from doing so under that state's laws. The board notes that, under Penal Code sections 11190 and 11193, any inmate retains the right to request transfer back to California for his or her parole consideration hearing, which would trigger the board's requirement to complete a CRA for that inmate since the inmate would then be housed within California.

ISSUE 17: Request for Public Hearing

Comment ID Number: 16-01-07-01.

This commenter requested the board to hold a public hearing to accept further comment on this regulation package.

RESPONSE: IMPLEMENTED IN FULL

The board finds this comment both relevant and within the scope of the regulation because it pertains to a request for a public hearing under the APA. (See Govt. Code § 11346.5, subd. (a)(17).) This request was received by the board on November 22, 2016, which was at least 15 days before the close of the public comment period.

The board approved this request and held a public hearing for this regulation package on Wednesday, January 18, 2017, which was after the public comment period had closed. Therefore, this comment was IMPLEMENTED.

ISSUE 18: Request for Dates of Public Comment Period

Comment ID Number: 16-01-01-04.

This commenter requested information on the public comment period for this regulation package.

RESPONSE: DECLINED AS NOT CONTAINING A COMMENT CAPABLE OF RESULTING IN AMENDMENT; REQUEST WAS NONETHELESS GRANTED

The board fulfilled this request by submitting a copy of the Notice of Proposed Action containing this information to the commenter on November 15, 2016. This commenter subsequently provided additional public comment within the public comment period.

Therefore, no amendments were made from this comment, but the commenter's request was GRANTED.

ISSUE 19: Request for Tape Recordings of Parole Consideration Hearings

Comment ID Number: 16-01-24-02.

This commenter requested that inmates be allowed to receive tape recordings of their board hearings.

RESPONSE: DECLINED IN FULL AS NOT RELEVANT AND OUTSIDE THE SCOPE OF THE CURRENT REGULATION

The board finds this comment not relevant and not within the scope of the regulation because it does not pertain to comprehensive risk assessments and did not raise any suggestions or issues regarding the proposed regulation. Therefore, the board declines to adopt this proposed amendment.

ISSUE 20: Use of Specific Risk Assessment Tools

Comment ID Numbers: 16-01-13-06; 16-01-16-07; 16-01-25-01; 16-01-29-01; 16-01-29-03;16-01-47-03; 16-01-47-04; 16-01-47-05.

Sub-Issue 1. Some of these commenters raised various arguments regarding regulating the specific assessment tools the board's psychologists should be required to use in completing CRAs or recommending that the board require the psychologists to use certain recommended tools in the regulation.

1. RESPONSE: IMPLEMENTED IN PART; DECLINED IN PART AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant and within the scope of the regulation because they pertain to how a clinician will use a standard approach to assessing risk of violence with the CRAs, as required by subdivision (a) of the proposed regulation. After considering these comments as well as the November 8, 2017, OAL disapproval, the board elected to amend the regulations to clarify in subdivision (a) the types of risk assessment tools clinicians must use in conducting these evaluations. Therefore, these comments were IMPLEMENTED in part.

However, after consideration of these comments, the board declines to adopt all other suggestions regarding which tools the clinicians should use or other arguments for or against the board's current selected risk assessments because it would impair the board's ability to meet its other obligations under the same subdivision.

Specifically, after amendment, subdivision (a) of the proposed regulation mandates board psychologists to incorporate "structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess

risk of violence of incarcerated individuals." Each of the risk assessment tools and instruments used by board psychologists was selected after consulting with subject matter experts and soliciting input from stakeholders, public discussion of the strengths and limitations of the assessments, and extensive review of the scientific literature. Consequently, the risk assessment tools used by FAD clinicians have been determined to meet the requirement of being commonly used by other clinicians conducting similar violence risk assessments. The other suggestions for tools raised in these comments have not been deemed by the board to meet this requirement.

Moreover, the board still retains the discretion to update the tools and assessments used, should any future assessments become more commonly used for this purpose. The board notes that any future changes to the tools and instruments used by the board's clinicians would be done under the same process of seeking input from stakeholders, public discussion of the strengths and limitations of the assessments, and extensive review of the scientific literature. In addition, the board holds public meetings monthly at which any member of the public may speak on any topic, including risk assessment tools. Thus, these commenters, and the public in general, have the opportunity to provide input on tools currently used by the board and will have the opportunity to provide input on any future adoption or update of risk assessment tools used by the board. Therefore, the comments suggesting the board adopt specific tools or arguing against the tools currently used by the board are declined.

Sub-Issue 2. Some of these commenters raised various arguments expressing concern with the tools and instruments currently employed by board psychologists. Specifically, several commenters noted that the current risk assessment tools used by board psychologists have not been "validated" for use on the life inmate population. One commenter argued that the board should be required to state the limitations for these risk assessment tools including the base rate of recidivism and peer studies on validation.

2. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant because it subsequently updated the regulations to provide examples of the kinds of risk assessment tools the clinicians are mandated to use in completing CRAs. After consideration, the board finds that the commenters' rationale for raising these concerns is contrary to the scientific literature. Therefore, the board declines to adopt this proposed amendment.

Some commenters argued that the risk assessment tools and instruments used by board psychologists have never been "validated" for the life inmate population, only for the inmate population in general. That argument ignores two important factors.

First, to properly "validate" these tools on the life inmate (or more accurately, the long-term offender population, since not all offenders who have parole hearings are life inmates) the board would be required to conduct assessments on a random, but sufficiently large (statistically significant) sample of inmates ranging from the lowest to the highest levels of risk. The board would then be required to release all of those inmates into the community without any regard for each inmate's individual level of risk or current suitability for parole and then track them for a period of time to confirm whether inmates

assessed to be “high risk” engage in violence at a higher rate than those assessed to be “low risk.” Not only would such an action substantially endanger the public safety in direct contravention to the main mission of the board, but both the department and the board are legally prohibited from releasing inmates without legal authority to do so. No law authorizes the release of life inmates for this purpose. On the contrary, Penal Code section 3041 clearly mandates the board to provide hearings for life inmates for the purpose of determining whether that inmate is currently suitable for parole. Only upon a finding that the inmate is currently suitable may the board and CDCR release a life inmate from prison.

Second, multiple studies have been conducted on the specific instruments and tools currently used by board psychologists, which demonstrate the validity of using these risk assessment tools on the inmate population under the board’s jurisdiction and confirm that these are the most generally accepted forensic tools for assessing inmates’ potential risk of future violence, including long-term inmates:

- Campbell, French, and Gendreau (2009) conducted a meta-analysis of 88 studies from 1980 to 2006 that compared risk instruments and other psychological measures and their ability to predict general (primarily nonsexual) violence in adults. The HCR-20 and PCL-R were among the five instruments that generated the most predictive validity research with respect to violence. (Campbell, French, and Gendreau (2009) *The Prediction of Violence in Adult Offenders: A Meta-Analytic Comparison of Instruments and Methods of Assessment*.)
- Yang, Wong, and Coid (2010) conducted a meta-analysis of “nine commonly used risk assessment tools and their subscales to compare their predictive efficacies for violence. The effect sizes were extracted from 28 original reports published between 1999 and 2008, which assessed the predictive accuracy of more than one tool.” Authors concluded that “each of the three HCR-20 subscales demonstrated similar predictive effects compared with other instruments. The three subscales [used by the HCR-20] also appeared to have a synergistic effect. The overall predictive efficacy appeared higher when the subscales were combined, which is the way the tool was developed.” The authors cautioned “different tools are designed for different functions in addition to risk prediction. Tools with dynamic risk predictors can assess change in risk while those with static predictors cannot.” This sentiment fits well with the board’s selection of the HCR-20-V3 for use with long-term inmates. Unlike many risk instruments referenced in this meta-analysis, the HCR-20-V3 assesses dynamic/changeable risk predictors and current relevance of static/unchangeable predictors. (Yang, Wong, and Coid (2010) *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, Psychological Bulletin Vol. 136, No. 5, 740-767.)
- Singh, Desmarais, Hurducas, et al. (2014) surveyed members of 59 national and international organizations to examine methods of violence risk assessment across six continents and to compare the perceived utility of these methods by mental health and allied professionals. Surveys were completed by 2,135 respondents from 44 countries. The HCR-20 was the instrument most commonly used for conducting violence risk assessments, developing risk management

plans, and monitoring risk management plans. Given that users of [structure professional judgement] instruments [such as the HCR-20 that the board uses] rated them as very useful in the development and monitoring of risk management plans, assessors working in rehabilitation and recovery-focused settings may wish to consider adopting such tools." (Singh, Desmarais, Hurducas, et al. (Aug. 30, 2014) *International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries*, International Journal of Forensic Mental Health.)

- Guy, Kusaj, Packer, and Douglas (2014) examined the risk characteristics of 5,181 indeterminately sentenced inmates assessed by psychologists who administered the
  HCR-20, PCL-R, and LS-CMI and concluded that, in general, inmates obtained lower scores and ratings on these instruments than is typically observed in correctional settings. This is consistent with the scientific literature, which suggests that advanced age and long-term confinement generally lowers an inmate's potential risk of future violence. On the LS-CMI and PCL-R, for example, inmates obtained average total scores that were roughly one standard deviation below the mean relative to standardization sample norms. Similarly, most inmates were given a summary risk rating on the HCR-20 that reflected low to moderate risk and only 11.3% were rated high risk. Authors concluded this inmate sample was a "relatively Low risk" sample just as their average age and length of incarceration and estimated recidivism rates might suggest. All three instruments were associated with parole decision making and of the three the HCR-20, and particularly items that emphasize dynamic/changeable risk, had the most robust relationship with board decisions regarding future dangerousness and parole suitability. (Guy, Kusaj, Packer, and Douglas (Nov. 3, 2014) *Law and Human Behavior: Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers*.)

NOTE: Each of these studies is cited in the updated information digest, was noticed to the public in the re-notice dated December 22, 2017, and are attached as part of the rulemaking record.

Therefore, the arguments regarding the validity of the tools and instruments currently employed by the board psychologists are not supported by available published research and are contrary to standardized approaches for identifying, measuring, and categorizing an inmate's risk of violence that are generally accepted in the psychological community. The board further notes, as explained above, that each of the current tools and instruments used by the board were adopted following significant public discussion and input.

Finally, the board considered the suggestion to include statements regarding limitations of the risk assessment tools, but finds the suggestion to be unnecessary. CRAs already contain information in accordance with the *Johnson v. Shaffer* stipulated agreement qualifying the information contained in the reports by putting the information into greater context about recidivism generally. Thus, the board declines to adopt this suggestion.

ISSUE 21: New Proposed CRA Requirements

Comment ID Numbers: 16-01-06-05; 16-01-06-06; 16-01-27-01; 16-01-28-07; 16-01-30-03.

Each of these comments suggested imposing additional requirements during the CRA process.

Sub-Issue 1. One comment stated CRA interviews should be timed with a timer.

1. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds this comment relevant because it pertains to how CRA interviews will be conducted. However, the board determined that this comment is outside the scope of the proposed regulation, which governs the substance of CRAs and the processes for objecting to factual errors or clinical observations, opinions, and diagnoses. Nothing in this regulation sets any time limits or minimum time requirements on CRA interviews because doing so would be contrary to the requirement for clinicians to consider all of the factors pertaining to the individual inmate's risk of violence. Clinicians must have the flexibility to spend whatever is the appropriate amount of time to interview each inmate that is required to obtain all of the information they need to make those individual determinations. Thus, because timing interviews is outside the scope of this regulation, the board declines to adopt this amendment.

Sub-Issue 2. Another comment argued questions asked during a CRA interview should be easier to understand. Further, this comment expressed concern with an inmate's ability to comprehend interview questions.

2. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds this comment relevant because it again pertains to how CRA interviews will be conducted. However, the board determined that this comment is outside the scope of the proposed regulation, which governs the substance of CRAs and the processes for objecting to factual errors or clinical observations, opinions, and diagnoses. Nothing in this regulation establishes guidelines for how CRA interviews should be conducted or the types of questions that should be asked because doing so would be contrary to the requirement for clinicians to consider all of the factors pertaining to the individual inmate's risk of violence. Clinicians must have the flexibility to ask whatever questions are necessary to gather all of the information they need to make those individual determinations. Moreover, to the extent that this suggestion is attempting to raise ADA issues, as discussed above, those issues are more appropriately handled in a different regulation package. Thus, because the types of questions clinicians ask during CRA interviews is outside the scope of this regulation, the board declines to adopt this amendment.

Sub-Issue 3. One commenter stated the regulations should expressly require psychologists to consider elderly factors or other applicable mitigating factors in addition to the youth offender factors when conducting a risk assessment.

3. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE PROPOSED REGULATION

The board finds this comment relevant and within the scope of the regulation because it pertains to the substance of what information must be considered in a CRA. After considering this comment, the board determined that this suggestion was already included in the requirements of the regulation, both as originally written and as amended in the re-noticed text.

Specifically, subdivision (b) of this proposed regulation already mandated the clinicians to consider the youth factors for any qualified youth offender. Additionally, the original text of subdivision (a) required clinicians to consider any factors impacting an inmate's risk of violence. This necessarily includes youth factors, elderly factors, and any other factors mitigating an inmate's risk of violence since those impact the determination of risk. Moreover, as amended, the new proposed text of subdivision (a) clarifies that all factors must include the suitability (mitigating) and unsuitability (aggravating) factors that impact the inmate's risk of violence. Therefore, the board finds that this suggestion was already IMPLEMENTED in the proposed regulation and has been further clarified in the amendments.

Sub-Issue 4. One commenter argued that psychologists should be required to directly observe an inmate's interactions with others to determine social skills as part of the CRA process.

4. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds this comment relevant because it again pertains to how CRA interviews will be conducted. However, the board determined that this comment is outside the scope of the proposed regulation, which governs the substance of CRAs and the processes for objecting to factual errors or clinical observations, opinions, and diagnoses. Nothing in this regulation establishes guidelines for how clinicians should obtain information during CRA interviews, file reviews, or other information-gathering processes for use in conducting the CRAs because doing so would be contrary to the requirement for clinicians to consider all of the factors pertaining to the individual inmate's risk of violence. Clinicians are free to observe inmates or gather any other information within the scope of the risk assessment that the clinician finds relevant to the inmate's risk; however, direct observation of an inmate's social interactions may not be relevant in every case. Clinicians must have the flexibility to gather whatever information they need to make those individual determinations through interview questions, file reviews, or whatever other means are appropriate in each individual case. Thus, because the methods through which clinicians gather the information relevant to their CRAs is outside the scope of this regulation, the board declines to adopt this amendment.

Sub-Issue 5. One commenter argued that clinicians should explore questions and answers that lead to negative evaluations and clarify those questions for inmates.

4. RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds this comment relevant because it again pertains to how CRA interviews will be conducted. However, the board determined that this comment is outside the scope of the proposed regulation, which governs the substance of CRAs and the processes for objecting to factual errors or clinical observations, opinions, and diagnoses. Nothing in this regulation establishes guidelines for how clinicians should conduct their interviews or frame their questions. Clinicians must have the flexibility to use their expert training to determine the best way to frame their interview questions to obtain the information they need from the inmates. Thus, because the methods through which clinicians conduct interviews is outside the scope of this regulation, the board declines to adopt this amendment.

ISSUE 22: Statements Regarding Specific Inmate Cases

Comment ID Numbers: 16-01-17-02; 16-01-31-01; 16-01-32-04; 16-01-39-09; 16-01-45-12.

These commenters all raised concerns regarding specific objections to individual inmate comprehensive risk assessments.

RESPONSE: DECLINED IN FULL AS NOT RELEVANT AND OUTSIDE THE SCOPE OF THE CURRENT REGULATION

The board finds these comments not relevant and not within the scope of the regulation because they do not pertain to regulating the process or requirements for comprehensive risk assessments and do not raise any suggestions or issues regarding the proposed regulation. Specifically, each of these commenters raised individual issues pertaining to unique cases, but did not provide comments on specific portions of the regulation or recommendations for how they should be amended. Therefore, the board declines to adopt amendments to the proposed regulation based on these comments as they did not contain any recommended amendments.

ISSUE 23: Statements in General Support or Opposition

Comment ID Numbers: 16-01-01-01; 16-01-05-01; 16-01-07-02; 16-01-17-01; 16-01-20-01; 16-01-29-02; 16-01-32-03; 16-01-39-08; 16-01-45-02; 16-01-45-11; 16-01-47-01; 16-01-48-01; 16-01-48-04; 16-01-49-01.

These commenters all raised comments either generally supporting or opposing this regulation package.

RESPONSE: DECLINED IN FULL AS COMMENTS ARE IN GENERAL SUPPORT OR OPPOSITION

The board finds these comments are not relevant and not within the scope of the regulation because each of them only raised general support or opposition. Therefore, the board declines to adopt amendments to the proposed regulation based on these comments as they did not suggest any proposed amendments.

SUMMARY AND EXPLANATION OF AMENDMENTS TO ORIGINAL PROPOSED REGULATION SUBMITTED FOR RE-NOTICE ON DECEMBER 22, 2017:

1. Amended subdivision (a) to add language requiring FAD clinicians to clarify that clinicians completing CRAs must consider "factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division."

The original proposed text of subdivision (a) required psychologists to "consider the current relevance of any factors impacting an inmate's risk of violence" when preparing a comprehensive risk assessment (CRA) for use by a hearing panel. However, the Office of Administrative Law's (OAL's) disapproval decision dated November 8, 2017, expressed concern that the language was unclear about "what risk factors impacting an inmate's risk of violence are which psychologists must consider." Thus, on further review, the board determined that, to provide additional information about the types of factors the clinicians need to consider, the board should reference the factors of suitability and unsuitability already contained in the regulations. Thus, the board amended this sentence to require FAD clinicians to consider "factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division." This clarifies that, in addition to any other relevant or reliable evidence about risk of violence, the types of factors the clinicians must consider mirror the factors considered by hearing panels in assessing an inmate's suitability for parole. These changes were necessary to provide clearer guidance to clinicians and they benefits inmate and other stakeholders by clarifying the types of factors that should be considered when assessing an inmate's risk of violence.

2. Amended subdivision (a) to delete the text "the current relevance of any."

The board removed the text "the current relevance of any" because the board determined this language was unnecessary and redundant. Assessing an inmate's risk of violence necessarily requires the clinician to assess the current impact of that risk. Thus, the board determined that requiring clinicians to consider "the current relevance" of factors was already implied. Additionally, the intent of this subdivision was to require the clinicians to consider the factors themselves, not just their current relevance. Thus, the amendment to this sentence more accurately captures the intended requirement for the clinicians in reviewing evidence for the CRAs.

3. Amended subdivision (a) to specify the types of risk assessments clinicians must use when conducting CRAs by deleting the text "standardized approaches, generally

accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence" and adding the text "structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals" in its place.

The original proposed text of subdivision (a) required psychologists to incorporate "standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence" when preparing a comprehensive risk assessment for use by a hearing panel. In OAL's November 8, 2017 disapproval decision, however, OAL expressed concern that the language was unclear about how the board would determine what tools were generally accepted and by which psychological community. After review, the board removed the text "standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence" and replaced it with the text "structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals." These changes were necessary to clarify the kinds of assessments clinicians will use to assess risk by providing examples of the assessments used, and to ensure that any tool used by the board are the most commonly used assessments by the specific community of clinicians who conduct these same kinds of risk assessments. This clarification benefits all stakeholders by increasing public confidence in the risk assessment tools used because the board is ensuring they are the most commonly used among experts conducting these assessments.

4. Amended subdivision (b) to add "as defined in Penal Code section 3051, subdivisions (a) and (h)."

The original proposed text of subdivision (b) did not include text defining which inmates constitute a youth offender for whom a psychologist must take into consideration specified youth factors and their mitigating effects when preparing a risk assessment. On further review, the board determined it needed to clarify that this reference to "youth offenders" was meant to refer to the group of persons as defined in California's youth offender statute. Thus, the board added "as defined in Penal Code section 3051, subdivisions (a) and (h)" to clarify the intended meaning of "youth offender" in this subdivision. This change was necessary to ensure that inmates and other stakeholders understood that this subdivision specifically applies to person qualified as youth offenders under California's youth offender statute. This clarification benefits all stakeholders by reducing potential confusion on this issue.

5. Amended paragraph (c)(1) to delete the text ", and reliable and valid principles and methods have been appropriately applied to the facts of the case."

The original proposed text of paragraph (1) of subdivision (c) stated that, prior to being finalized, a risk assessment needs to be reviewed by the Chief Psychologist or a Senior Psychologist "to ensure that the psychologist's opinions are based upon adequate scientific foundation, and reliable and valid principles and methods have been appropriately applied to the facts of the case." In its November 8, 2017

disapproval decision, however, OAL expressed concern that the language was unclear about "principles and methods" were. Thus, the board removed the text "and reliable and valid principles and methods have been appropriately applied to the facts of the case" because the main focus of this requirement was for supervisors to ensure that assessments were based on adequate scientific foundation such that they warrant approval. This change was necessary to remove unclear language and the clarification will benefits stakeholders by focusing the regulation instead on the main goal of supervision.

6. Amended paragraph (d)(2) to delete the provision "The board may prepare a risk assessment for inmates housed outside of California," to remove the board's discretion to prepare risk assessments for out-of-state inmates.

The original proposed text of paragraph (2) of subdivision (d) stated the board "may prepare a risk assessment for inmates housed outside of California." In its November 8, 2017 disapproval decision, however, OAL expressed concern that the language was unclear about how the board would make determinations about when it could or could not conduct assessments for out-of-state inmates. Thus, the board deleted this original proposed text. This change is necessary to remove the problematic language.

7. Amended paragraph (d)(2) to add the provision "Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days before the date of the hearing," to establish a deadline by which the board must serve inmates with their completed CRAs.

The original proposed text did not include a deadline by which the board must complete, approve, and serve a risk assessment on an inmate. Following review of public comment received during the original public comment period as well as the *Johnson v. Shaffer* court's October 6, 2017 order, the board determined that establishing a deadline would benefit inmates and all other hearing participants by mandating that inmates be served with the risk assessment with sufficient time to review it prior to the hearing. Additionally, the deadline better ensures that inmates will receive their risk assessments with sufficient time to raise any objections to factual errors within the pre-hearing objection process. Thus, the original proposed text of paragraph (2) of subdivision (d) was replaced with the text "Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days prior to the date of the hearing." The board determined that 60 days was an appropriate deadline because it provides inmates 30 days to review the CRA and provide any objections to factual errors to the board a least 30 days prior to their hearings. This change was necessary to better protect inmate's abilities to use the pre-hearing process.

8. Amended paragraph (e)(1) to delete the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence," to broaden the category of factual errors inmates may raise during the pre-hearing objection process for factual errors.

The original proposed text of paragraph (1) of subdivision (e) permitted an inmate or inmate's attorney of record to send a written objection regarding alleged factual errors in a risk assessment to the Chief Counsel no less than 30 calendar days before a hearing. In the original proposed text, however, the inmate or inmate's attorney had to believe that the alleged factual errors were such that they materially impacted "the risk assessment's conclusions regarding the inmate's risk of violence." Following review of public comment received during the original public comment period as well as the *Johnson v. Shaffer* court's October 6, 2017 order, the board determined that inmates needed the ability to raise all factual errors, even non-material errors, to ensure the accuracy of the record available to the hearing panel members. Thus, the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence" was removed to allow inmates to raise all factual errors, regardless of the significance of their impact. This change was necessary to ensure the accuracy of the information in CRAs. Additionally, the change benefits all stakeholders because increasing the accuracy of the record increases confidence in the information on which hearing panels rely to assess the inmate's suitability for parole.

9. Amended paragraph (e)(1) to relocate the text "Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day" from paragraph (e)(3).

The text "Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day" was originally contained in paragraph (e)(3). However, the rest of this paragraph dealt with how written objections need to be addressed. The timing of objection submissions was instead discussed in paragraph (e)(1). Thus, since this text was more appropriately included with the other text discussing timing of submissions, the board found it necessary to relocate this text to paragraph (e)(1). This change will benefit all stakeholders by grouping all of the statutory rules and requirements about the timing of submitting CRA objections into a single paragraph.

10. Amended paragraph (e)(2) to replace the definition of factual error "an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation" with the new definition "an untrue circumstance or event."

The original proposed text of paragraph (2) of subdivision (e) defined "factual error" as "as explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation." Following review of public comment received during the original public comment period as well as the *Johnson v. Shaffer* court's October 6, 2017 order, the board determined that the original proposed definition had the potential to confuse inmates and other stakeholders. Thus, the text "defined as an explicit finding about a" and "for which there is no reliable documentation or which is clearly refuted by other documentation" was removed, and the text "an untrue" was added before "circumstance or event," such that the term factual error is now more simply defined as "an untrue circumstance or event." The board found the portions of the original definition it deleted were unnecessary because they are already incorporated by the concept of

the CRA finding being "untrue." This simpler definition was necessary to avoid potential confusion and benefits stakeholder by providing an easier to understand definition of this term.

11. Amended paragraph (e)(2) to delete the text excluding "clarifications regarding statements the risk assessment attributed to the inmate," from the definition of factual errors inmates may raise during the pre-hearing objection process for factual errors.

The original proposed text of paragraph (2) of subdivision (e) excluded "clarifications regarding statements the risk assessment attributed to the inmate" from the definition of "factual error" for the purpose of the board's pre-hearing objection process for factual errors. Instead, the board created a remedy under subdivision (j) for inmates to raise these concerns directly with the hearing panels at their hearings. Following review of public comment received during the original public comment period as well as the *Johnson v. Shaffer* court's October 6, 2017 order, the board elected to include objections to statements attributed to the inmate under the definition of factual errors. Thus, the text "or clarifications regarding statements the risk assessment attributed to the inmate" was removed from the exclusionary provision of the prior factual error definition. Consequently, these objections are now included in the board's pre-hearing objection process for factual errors and must be raised prior to the hearing absent good case. This amendment was necessary to bring the board into compliance with the Johnson court's October 6, 2017 order. Additionally, it benefits inmates by allowing these issues to be resolved prior to an inmate's hearing.

12. Amended paragraph (f)(1) to replace the word "determine" with "evaluate" for the duty of the Chief Counsel in this provision.

The original proposed text of paragraph (f)(1) required the Chief Counsel to "determine" whether a risk assessment contains a factual error as alleged when reviewing either a written objection to an alleged factual error in a risk assessment or a risk assessment referred by the board. On further review, the board determined that a more accurate description of the Chief Counsel's role at this step in the objection process was to evaluate whether a risk assessment contains a factual error. Then, following evaluation, the Chief Counsel can reach a determination about whether the allegation did raise a factual error, which dictates the Chief Counsel's next obligation. Thus, the text "determine" was removed and replaced with the text "evaluate." This amendment was necessary to more accurately describe the Chief's counsel's role during this step of the CRA objection review process, and the clarification benefits all stakeholders by clarifying that evaluation is required before the Chief Counsel may reach a decision.

13. Amended subparagraphs (f)(2)(A) and (g)(2)(A), and subdivision (h), to add the word "calendar" to the deadlines "10 calendar days" to clarify the timing of these provisions.

The original proposed text of subparagraph (A) of paragraph (2) of subdivision (f) required the Chief Counsel, after determining that a risk assessment does not contain a factual error as alleged, to provide a copy of the miscellaneous decision associated

with that determination to the inmate or attorney of record no less than “10 days” prior to a hearing. However, on further review, the board determined this cause potential ambiguity about whether the board intended this to be 10 calendar days (including weekends and holidays) or 10 business days (meaning only week days on which the board is open as a state agency). Thus, the text “calendar” was added between “10” and “days” to clarify that the Chief Counsel is required to provide a miscellaneous decision containing the results of the board’s review of the CRA objections promptly, but not later than 10 calendar days prior to the hearing. This amendment was necessary to clarify these deadlines and ensure they match the disclosure requirements contained in section 2247 of the board’s regulations. Additionally, these amendments benefit all stakeholders by ensuring that hearing parties know when to expect their decisions.

14. Amended paragraph (g)(1) to add subparagraphs (g)(1)(A) and (g)(1)(B) to clarify the duties and requirements of the Chief Psychologist on reviewing an error referred by the Chief Counsel. Subparagraph (g)(1)(A) established requirements when the Chief Psychologist deems the error to be immaterial and specifically still requires the error to be corrected in addition to other actions. Subparagraph (g)(1)(B) established requirements when the Chief Psychologist deems the error to have a material impact on the risk assessment’s conclusions and requires a new or revised risk assessment in addition to other actions. Amended subparagraph (g)(2)(B) to delete the provision requiring the Chief Counsel to “order a new or revised risk assessment.”

The original proposed text of paragraph (g)(1) required the Chief Psychologist, after opining whether a factual error referred by the Chief Counsel materially impacted the conclusion of a risk assessment, to prepare an addendum to the risk assessment documenting his or her opinion and notify the Chief Counsel of the addendum. Following review of the public comments, the board determined that the regulation did not fully explain all of the requirements for the Chief Psychologist following his or her review. For example, if the Chief Psychologist opined that a factual error did not materially impact a risk assessment’s conclusions regarding an inmate’s risk of violence, the original proposed text did not require the Chief Psychologist to take any actions to correct the error. Additionally, the original text did not identify the specific actions the Chief Psychologist must take after opining that a factual error did materially impact a risk assessment’s conclusions. Further, if the Chief Psychologist opined that a factual error had a material impact, the original text only required the Chief Psychologist to prepare an addendum. The determination of whether to order a new risk assessment was assigned to the Chief Counsel.

Thus, the text “Following the review, the Chief Psychologist shall promptly take one of the following actions” was added. Additionally, subparagraph (1)(A) was added to require that, if the Chief Psychologist opines a factual error did not materially impact the risk assessment’s conclusions, the Chief Psychologist must take all of the following steps: “direct that the risk assessment be revised to correct the factual errors, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion that correcting the errors had no material impact on the risk assessment’s conclusions, and notify the Chief Counsel of the addendum.” Similarly, subparagraph (1)(B) was added to require that, if the Chief Psychologist

opines a factual error did materially impact the risk assessment's conclusions the Chief Psychologist must take all of the following steps: "order a new or revised risk assessment, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion about the material impact of the errors on the risk assessment's conclusions, and notify the Chief Counsel of the addendum." Finally, subparagraph (g)(2)(b) was amended to delete the requirement for the Chief Counsel to "order a new or revised risk assessment," because this duty was reassigned to the Chief Psychologist as explained above.

These amendments were necessary to clarify for stakeholders the complete CRA objection process regardless of whether the Chief Psychologist finds an error to be materially impactful. They were also necessary to ensure that all errors, even non-material errors, were corrected and fully documented in the risk assessment to increase the accuracy of the inmate's records. Moreover, the board determined that the decision regarding whether an error required a new or revised risk assessment was a clinical determination, not a legal one, and thus was more appropriately assigned to the Chief Psychologist than Chief Counsel.

The amendments also benefit inmates by ensuring that any objections deemed by the Chief Counsel to raise factual errors must be corrected following referral to and review by the Chief Psychologist, and that the determination about the most clinically appropriate means of correcting the error is made by the board's clinical expert, the Chief Psychologist. The amendments also clarify for all stakeholders the complete CRA objection process and how the board's determinations will be documented in both situations following the Chief Psychologist's review.

15. Amended subparagraph (g)(2)(A) to delete the provision requiring the Chief Counsel to "overrule the objection" when the Chief Psychologist found it to be immaterial since the amendments to subparagraph (g)(1)(A) now require the board to take action to correct these errors.

The original proposed text of subparagraph (g)(2)(A) required the Chief Counsel to overrule an objection to an alleged factual error in a risk assessment after receiving an addendum from the Chief Psychologist in which he or she opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence. As explained in Item 14, following review of the public comments, the board determined that all errors required correction to increase the accuracy of the inmate's records. Thus, the text "overrule the objection" was removed. Removing this text was necessary to harmonize this subparagraph the board's amendments in Item 14 to require correction of all errors, including non-material errors. This amendment was also necessary to harmonize with the board's determination that the decision about how best to correct a factual error, including non-material errors, was more appropriately assigned to the Chief Psychologist. As noted above, this amendment benefit inmates by ensuring all errors are corrected and documented to increase the accuracy of the record for the hearing.

16. Amended subparagraph (g)(2)(A) to add the text "the revised risk assessment" to the documents the Chief Counsel is required to provide to the inmate or attorney who

raised immaterial errors, and amended subparagraph (g)(2)(B) to add the text "the new or revised risk assessment" to the documents the Chief Counsel is now required to provide to the inmate or attorney who raised material factual errors.

The original proposed text of subparagraph (g)(2)(A) did not require the Chief Counsel to provide a copy of a revised risk assessment to an inmate or attorney if the Chief Psychologist determined a factual error had no material impact. As explained above in Item 14, however, the board determined that all identified errors should be corrected, even immaterial errors. Since this amendment in turn requires the board to prepare a revised risk assessment in every case where the Chief Counsel determines that objections raise factual errors, the board needed to add a corresponding amendment requiring the Chief Counsel to provide a copy of the revised risk assessment along with any other documentation of the board's decision. Thus, the text "the revised risk assessment" was added to the list of documents the Chief Counsel is required to provide to the inmate or attorney following correction of any identified factual errors the Chief Psychologist found to be immaterial.

Similarly, the original proposed text of subparagraph (g)(2)(B) did not require the Chief Counsel to provide a copy of the new or revised risk assessment to an inmate or attorney after the Chief Psychologist determined a factual error materially impacted the clinician's conclusions and the CRA was corrected. The board determined that, to mirror the requirements of subparagraph (g)(2)(B) and ensure the inmates received a copy of the new or revised CRA after raising material errors, this subparagraph should be amended similarly to (g)(2)(A) to clarify this requirement. Thus, the text "the new or revised risk assessment" was added to the list of documents the Chief Counsel is required to provide to the inmate or attorney after the Chief Psychologist deemed an identified error to have a material impact and ordered a new or revised risk assessments.

These amendments were necessary to maintain consistency with the new requirements in subparagraph (g)(1)(A) requiring correction of immaterial factual errors and subparagraph (g)(1)(B) requiring the Chief Psychologist to order a new or revised risk assessment following a determination that a factual error had material impact. These amendments benefit inmate by ensuring they receive copies or their revised or new CRAs any time the board determines that their objections have raised factual errors.

17. Amended paragraph (g)(3) to replace the text "Impacted risk assessments shall be permanently removed from the inmate's central file" with "The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision, from the inmate's central file."

The original proposed text of paragraph (g)(3) required CRAs containing materially impactful errors to be "permanently removed" from an inmate's central file. As discussed in the amendments made in Item 14, the board determined that all errors should be corrected. Thus, under the new amendments, all identified factual errors will result in a revised or new risk assessment. Thus, the board determined that it

needed to amend this subparagraph to address the removal all revised or replaced risk assessments. Additionally, after further review, the board determined that it has no legal authority to add or remove documents from an inmate's central file. That authority lies only with the department in accordance with Penal Code section 2081.5. Thus, the board's authority is limited to issuing a request to the department for the removal of these documents. This paragraph required revision to clarify the board's authority and requirements. Thus, the text "Impacted risk assessments shall be permanently removed" was replaced with the text: "The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised under paragraph (1)(B) of this subdivision from the inmate's central file."

This amendment was necessary to ensure that the board exercised its authority to initiate removal of any CRAs that are revised or replaced from an inmate's central file to increase the accuracy of the information available to hearing panels. The amendment was also necessary to clarify the board's role in initiating the removal of these documents in accordance with the limitations on the board's authority respecting an inmate's central file. This amendment benefits inmates by ensuring that the board initiate removal of any revised or replaced CRA. It also benefits all stakeholders by better clarifying the board's role in the process of initiating removal.

18. Amended subdivision (h) to replace the word "may" with "shall" to clarify (1) that the Chief Counsel and Chief Psychologist are mandated, not just permitted, to complete the review process before a hearing if the Chief Counsel has determined that sufficient time exists to complete the review process before a hearing for an untimely submitted pre-hearing CRA objection, and (2) that the Chief Counsel is mandated, not just permitted, to refer an objection to the hearing panel for consideration if he or she determined insufficient time exists to complete the review process before a hearing for an untimely submitted pre-hearing CRA objection.

The original proposed text of subdivision (h) gave the Chief Counsel and Chief Psychologist discretion regarding whether to complete the review process before a hearing after the Chief Counsel determines sufficient time exists to complete the review process for a CRA objection postmarked or electronically received less than 30 days prior to a hearing. However, OAL's November 8, 2017 disapproval decision expressed concern about how the Chief Counsel and Chief Psychologist would determine whether to complete the review process for untimely objections when sufficient time remained before the hearing, or whether to refer the objections to the panel when insufficient time remained to respond. In reviewing this concern, the board determined that this subdivision did not accurately capture the requirement the board intended to place on the Chief Counsel and Chief Psychologist. The board's intent was to grant the Chief Counsel discretion to determine, from a workload perspective, whether sufficient time remained to complete the CRA objection process at least 10 calendar days prior to the hearing. If the Chief Counsel determined sufficient time remained, the board intended to mandate the Chief Counsel and Chief Psychologist complete the process at least 10 days prior to the hearing. If, on the other hand, the Chief Counsel determined insufficient time remained, the board intended to mandate the Chief Counsel to refer the untimely objections to the hearing panel for its

determination as to whether the inmate had good cause for failing to timely raise the objections. Thus, the text "may" was changed to "shall" for both of the above obligations to clarify that these actions are required, not just permissive.

These amendments are necessary to clarify the board's intention to mandate completion of the CRA objection process or referral to the panel, depending on the Chief Counsel's determination regarding whether sufficient time remained to respond at least 10 calendar days prior to the hearing. These amendments benefit inmates by mandating a board action following the Chief Counsel's decision and clarifying those actions.

19. Amended subdivision (i) to add the text "or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section" to clarify that this subdivision governing untimely hearings also applies to untimely objections referred by the Chief Counsel.

The original proposed text of paragraph (i)(1) only required a hearing panel to determine whether an inmate demonstrated good cause for failing to submit a written objection 30 or more calendar days before a hearing if the inmate or attorney of record raised an objection to an alleged factual error in a risk assessment for the first time at the hearing. After further review, the board determined this language appeared to exclude untimely objections referred by the Chief Counsel to the hearing panel under subdivision (i). The board intended paragraph (i)(1) to require the hearing panel to determine good cause for any untimely objections to factual errors before the panel, including those objections referred by the Chief Counsel under subdivision (h). To clarify this intention, the board determined that it should amend this paragraph to expressly state that referrals from the Chief Counsel were included in this provision. Thus, the board added "or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section."

This amendment was necessary to clarify the board's intent for hearing panels to determine whether good cause existed for untimely objections referred by the Chief Counsel. This amendment benefits inmates by ensuring that untimely objections submitted pre-hearing and referred to the hearing panel will still be reviewed for good cause.

20. Amended subdivision (i) to delete original paragraph (i)(2) containing a definition for good cause to remove unclear language. Other paragraphs were renumbered within this subdivision and the internal references in paragraph (i)(1) were amended consistent with this renumbering.

The original proposed text of paragraph (i)(2) defined good cause for purposes of subdivision (i) as "an inmate's excused failure to timely object to the risk assessment earlier than he or she did." However, OAL expressed concern with the clarity of this definition. The board elected to delete the definition after determining the additional language was unnecessary. Thus, paragraph (i)(2) was removed from the proposed regulation, the remaining paragraphs in this subdivision were renumbered, and the internal references within paragraph (i)(1) were adjusted to correspond to the

renumbering. These amendments were necessary to resolve any ambiguity arising from the board's prior definition of good cause. Instead, the panel will retain discretion to determine whether and how an inmate raising untimely objections has good cause. The amendments will benefit inmates by removing any specific restrictions about good cause and allowing them to raise any arguments regarding the good cause for their untimely objections for the panel's consideration.

21. Amended new paragraphs (i)(2) and (i)(3) (previously (i)(3) and (i)(4)) to delete the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence."

The original proposed text of the paragraphs originally numbered as (i)(3) and (i)(4), now numbered as paragraphs (i)(2) and (i)(3), respectively, limited the scope of untimely factual errors a hearing panel must consider to only those errors the panel determined could potentially have a material impact on the risk assessment's conclusions regarding the inmate's risk of violence. As explained above in item 14, however, the board subsequently determined that all identified errors should be corrected in an inmate's record. To best ensure this goal, the board determined these subdivisions required amendment to both require panels to refer any possible errors back to the Chief Counsel and Chief Psychologist and disregard those possible errors if moving forward with the hearing. Thus, the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence" was removed from the text of new proposed paragraphs (i)(2) and (i)(3).

This amendment was necessary to retain consistency with the amendments discussed in Item 14. The amendment benefits inmates by expanding the scope of possible factual errors a hearing panel must refer to the Chief Counsel and Chief Psychologist and must disregard if proceeding with the hearing. The amendments also benefit all stakeholders by furthering the board's goal of increasing the accuracy of inmates' records.

22. Amended subdivision (j) to delete "to or clarify any statements a risk assessment attributed to the inmate," from the at-hearing objection process since this objections are now included as factual errors under the amendments to paragraph (e)(2), which means that they must be raised during the pre-hearing objection process and not in the at-hearing process.

The original proposed text of subdivision (j) required the inmate have the opportunity at a hearing to object to or clarify statements a risk assessment attributed to an inmate. As discussed in Item 11, however, following public comment and the *Johnson v. Shaffer* court's October 6, 2017 order, the board elected to redefine "factual error" to include disagreements with statements the CRA attributes to the inmate. Because these types of objections are now included in the pre-hearing process for factual error, these objections no longer require the at-hearing remedy. Thus, the text "to or clarify any statements a risk assessment attributed to the inmate" and a comma following the text was removed from the at-hearing objection process in subdivision (j). This amendment was necessary to retain consistency with the amendments made in Item

11. The amendment benefits all stakeholders by resolving these issues prior to the hearing to increase the accuracy of the information before the hearing panels.

23. Amended the reference note to delete references to *In re Lugo*, (2008) 164 Cal.App.4th 1522 and *In re Rutherford*, Cal. Super. Ct., Marin County, No. SC135399A. Also amended this note to add references to *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement] and *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499.

The original proposed text included *In re Lugo*, (2008) 164 Cal.App.4th 1522 and *In re Rutherford*, Cal. Super. Ct., Marin County, No. SC135399A as references the board was implementing, interpreting, or making specific by adopting the regulation. The board initially referenced these cases because they contained the court's original references to the requirement for CRAs. After reviewing OAL's November 8, 2017 disapproval letter, however, the board determined it was not actually interpreting, implementing, or making specific the orders from these cases. Instead, the board was implementing the requirements of the *Johnson v. Shaffer* and *Sherman-Bey* court orders. Thus, the references to "In re Lugo, (2008) 164 CalApp.4th 1522 [and] In re Rutherford, Cal. Super. Ct., Marin County, No. SC135399A" were removed from the reference list, and references to "*Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement] [and] *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499" were added. These amendments were necessary to more accurately reflect the legal sources the board was interpreting, implementing, and making specific. The amendments benefit all stakeholders by providing them with more accurate references to the sources of these regulations.

Following the initial 45-day public comment period, the board also elected to make the following non-substantial and sufficiently-related amendments to its proposed regulation for section 2240:

1. Amended subdivision (a) to delete the word "The" and capitalize the letter "P" in the word "Psychologists" in subdivision (a).

2. Amended subdivision (c) by dividing it into paragraphs (1) and (2), with paragraph (1) retaining all of the originally proposed text of subdivision (c) except for the last sentence, which was relocated to paragraph (2).

3. Amended paragraph (e)(2) to replace "Factual errors do not include" with "is not a factual error."

4. Amended paragraph (e)(2) to add the word "A" and replace "disagreements" with the singular version of that word.

5. Amended subparagraph (g)(1)(A) to delete the capitalization of the word "the."

6. Amended subparagraph (g)(2)(A) to add the word “the” before “Chief Psychologist’s addendum.”

All of these amendments were made to increase the readability of these regulations and will benefit all stakeholders by making the regulations easier to understand for all members of the public.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY RE- NOTICE PERIOD FROM DECEMBER 22, 2017, THROUGH JANUARY 8, 2018:

After issuing re-notice of the above changes on December 22, 2017, the board explained that it would accept public comment on the regulations from that date through and including January 8, 2018, for a total of 18 days.

The board received written comments from a total of 11 members of the public (including six inmates) during the re-notice public comment period of December 22, 2017, through January 8, 2018. As before, each comment from the 11 commenters was individually identified with a unique identification (“ID”) number as follows: 16-01-[the number of the commenter in order of receipt]-[the number of the comment in order of the comments received from that speaker]. The numbering of the commenters began with 50, since we had received comments from 49 commenters in the original comment period. Thus, for example, the comment identified as 16-01-50-03 would indicate that comment was contained in the fiftieth letter received and was the third comment from the author of that letter. The board received a total of 89 individual comments from the 11 written commenters. The comment ID numbers for comments received during the public comment period ranged from 16-01-50-01 through 16-01-60-16. Tables containing the identification number for each comment along with the commenter’s name, date of the comment, category of the comment, and the board’s determinations regarding the comment are included in the comments tab. Additionally, copies of each correspondence are included in the comments tab.

Many of the comments raised similar issues or proposed amendments. Thus, the board will address each category of comment below and identify the specific comment ID numbers included in each category.

As a brief note, the board determined that the letter identified as 16-01-55 was written by the same author as, and was substantially identical to, the letter identified as 16-01-51. Therefore, these comments were addressed under the individual comment ID numbers labeled in letter 16-01-51.

ISSUE 1: Comments Not Directed Towards Re-Notice Text

Comment ID Numbers: 16-01-51-03; 16-01-51-06; 16-01-52-05; 16-01-54-02; 16-01-54-06; 16-01-56-02; 16-01-56-03; 16-01-56-05; 16-01-58-02; 16-01-58-07; 16-01-58-10; 16-01-58-11; 16-01-58-20; 16-01-59-01; 16-01-59-03; 16-01-59-04;

16-01-59-05; 16-01-59-06; 16-01-59-08; 16-01-60-04; 16-01-60-06; 16-01-60-08; 16-01-60-12; 16-01-60-13; 16-01-60-14.

These comments were related to the original text of the regulations, but not specifically related to the changes in the re-notice text.

RESPONSE: DECLINED IN FULL AS COMMENTS ARE NOT RELEVANT TO THE RE-NOTICE LANGUAGE

The board finds these comments are not relevant to the re-notice changes made to the proposed regulatory text. Only comments specifically directed to the proposed action in the re-notice text will be given a response. (Gov. Code § 11346.8, subd. (c).)

As explained in greater detail above, the re-notice textual changes were related to: (1) factors considered by psychologists when preparing comprehensive risk assessments; (2) structured risk assessment instruments used by psychologists when preparing comprehensive risk assessments; (3) defining a youth offender for the purpose of this section; (4) how the Chief Psychologist or a Senior Psychologist reviews a risk assessment before finalizing; (5) the deadline for a risk assessment to be completed, approved, and served on an inmate; (6) the pre-hearing process for objecting to an alleged factual error in a risk assessment; (7) redefining factual error; (8) the Chief Counsel's review of a risk assessment containing an alleged factual error and applicable pre-hearing deadlines; (9) the actions available to the Chief Psychologist after reviewing a risk assessment that was referred by the Chief Counsel; (10) the actions available to the Chief Counsel upon receipt of a risk assessment addendum from the Chief Psychologist and applicable pre-hearing deadlines; (11) the board's requirement to request permanent removal by the department of specified risk assessments; (12) the timeline and process for review of an objection to an alleged factual error that is raised through written objection to the Chief Counsel less than 30 calendar days before a hearing; (13) the definition of good cause; (14) the degree of factual error necessary in a risk assessment for a hearing panel to either refer a risk assessment to the Chief Counsel for review or overrule an objection and complete a hearing; (15) objections an inmate may raise for the first time at a hearing; and (16) references to the laws the board is implementing, interpreting, or making specific by adopting the regulations.

None of the comments listed above were specifically directed to any of the proposed actions in the re-notice text because they were related to: (1) psychologist accountability; (2) the weight given by psychologists to post-conviction achievements; (3) an impartiality requirement on psychologists; (4) the recording and transcription of risk assessment interviews; (5) the training of individuals making determinations on risk assessment validity; (6) the degree of consideration psychologists must give to youth offender factors when preparing a risk assessment for a youth offender; (7) a requirement that clinicians make a written inventory of everything youth offenders provide related to the youth offender factors; (8) inmate rights pertaining to plausible denials; (9) the definition of a clinical opinion; (10) repercussions of the board's failure to address a timely objection; (11) the timeline for the board to correct errors in a risk assessment that were found to be factual errors by a hearing panel; (12) the date rationale for selecting when a risk assessment becomes final; (13) claiming that the definition of factual error should not

exclude clinical observations, opinions, or diagnoses; (14) requiring psychologists to list raw data obtained from using a structured risk assessment instrument on an inmate within the CRA; (15) the need for supervising psychologists to document disapprovals and amendments during reviews; (16) addressing ADA issues involving risk assessments and assessment interviews; (17) whether anti-social personality disorder is a valid diagnosis or should be eliminated, and (18) the language that should be included in CRAs based on the *Johnson v. Shaffer* October 6, 2017, court order.

Thus, the board declines to adopt amendments to the proposed regulation based on any of these comments as they did not suggest any proposed amendments to the re-noticed text. The board notes that many of these comments were raised by other commenters during the 45-day comment period. Commenters may find applicable responses to the issues raised during the 15-day comment period in the board's responses to comments made during the 45-day comment period.

ISSUE 2: Comments in General Support or Opposition

Comment ID Numbers: 16-01-52-01; 16-01-53-01; 16-01-54-01; 16-01-56-01; 16-01-57-01.

These commenters all raised comments either generally supporting or opposing this regulation package.

RESPONSE: DECLINED IN FULL AS COMMENTS ARE IN GENERAL SUPPORT OR OPPOSITION

The board finds these comments are not relevant and not within the scope of the regulation because each of them only raised general support or opposition. Only comments specifically directed at the proposed action or the procedures followed in proposing or adopting the action will be given a response. (Gov. Code § 11346.9, subd. (a)(3).) The board declines to amend the proposed regulation based on these comments as they did not suggest any specific changes for implementation.

Additionally, one commenter claimed he has not received updates on the *Johnson v. Shaffer* class action and would like to be kept informed of the proceedings. The commenter should contact the class action plaintiffs' counsel for the requested updates.

ISSUE 3: Removal of CRAs Containing Errors

Comment ID Numbers: 16-01-50-01; 16-01-50-02; 16-01-50-03; 16-01-53-02; 16-01-53-03; 16-01-53-04; 16-01-53-05; 16-01-54-04; 16-01-58-09; 16-01-58-17; 16-01-60-09.

These commenters all raised comments pertaining to the board's amendment to the text in paragraph (i)(3), in which the board deleted the language "Impacted risk assessments shall be permanently removed" [from the inmate's central file] and replaced it with the language "The board shall request that the department permanently remove any risk

assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision" [from the inmate's central file].

Sub-Issue 1. One commenter argued that the new language is less clear than the prior language and questions the board's reasons for this amendment, but did not suggest any alternatives.

1. RESPONSE: DECLINED IN FULL BECAUSE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION AND DID NOT CONTAIN A COMMENT CAPABLE OF RESULTING IN AMENDMENT

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (i)(3). However, because the commenter did not offer any other alternatives to this proposed amendment, the board is not able to respond to this comment by making any amendments. Rather, the board explained earlier in this Final Statement of Reasons the rationale for making this amendment.

Notably, the board disagrees with the assertion that the new proposed amendment is less clear. The new language more clearly explains the board's role in the process of removing CRAs containing errors from an inmate's file. Specifically, as explained above in greater detail, under Penal Code section 2081.5, the board has no lawful authority to add or remove any documents from an inmate's central file. That power rests solely with the department. In the prior regulation, the text of this paragraph vaguely stated that risk assessments with errors shall be removed without explaining the actual requirement or role of the board in carrying out that process. Under the new amendments, the proposed regulation clarifies that the board must submit the request to the department for the removal of a CRA deemed to contain an error. Thus, this amendment clarifies the actual step the board must take to initiate this process. The process by which the department responds to the board's request is under the purview of the department and, as such, can only be regulated by the department in Division 3 of this title. The board has no legal authority to regulate the department's processes; therefore, this comment is declined.

Sub-Issue 2. Some commenters suggested that the regulations contain a requirement for the board to verify removal of the risk assessment, and that this should be required before the inmate's next scheduled hearing. One commenter argued that requesting removal of a risk assessment without verification is meaningless. Some commenters also argued that the board should regulate a requirement to retain the board's request to the department.

2. RESPONSE: DECLINED IN PART AS OUTSIDE THE SCOPE OF THE BOARD'S LAWFUL AUTHORITY; DECLINED IN PART AFTER SUBSTANTIVE CONSIDERATION.

The board finds the comments suggesting the board must confirm the department's removal of erroneous risk assessments relevant as they pertain to the board's amendment to paragraph (g)(3); however, the suggestions are outside the scope of the board's lawful authority. Specifically, as explained above in further detail, Penal Code section 2081.5 clarifies that an inmate's case records are under the custody of the department. Therefore, since the board has no lawful authority to add or remove documents from an inmate's record, the board amended this section to clarify that its role in the process of removal is to submit the request to the department for permanent removal of these documents.

The board further finds the comments suggesting the board retain records of its requests to be relevant and within the scope of this regulation because they pertain to the board's amendment to paragraph (g)(3). After substantive consideration, the board finds this amendment to be unnecessary because the process through which the board accomplishes this requirement, including how the board documents the completion of the request process or how the board retains its records, is more appropriately classified as internal management. Specifically, the request and record retention processes have no impact on the rights or interests of the persons subject to these regulations, namely inmates, because the manner in which the board completes the request process or stores its records does not impact whether the request is made. Rather, the board is required to ensure the impact to the inmates, which is requesting that the department remove the erroneous document from the inmate's central file, is completed. How the board accomplishes this is not appropriate for regulation because the board needs to retain flexibility to (1) determine the most effective way to complete the request process and (2) update that process as needed to accommodate future changes to technology or the department's or board's electronic tracking systems. Thus, the board declines to adopt this suggestion.

Sub-Issue 3. One commenter argues that the amendments to paragraph (i)(3) are unclear about the criteria a hearing panel will use to overrule a factual error at the hearing and how that will impact the removal of a CRA with a factual error now that removal no longer requires the error to be material.

3. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (i)(3). Because the commenter did not offer any other alternatives to this proposed amendment, the board is not able to respond to this comment by making any amendments. Rather, the board explained above in greater detail the reasons for making this amendment.

Additionally, subdivision (i) already clarifies the process a hearing panel must take when hearing objections raised at a hearing. Specifically, under paragraph (i)(2), if a hearing panel determines there is even a possibility that a CRA contains a factual error, the panel is obligated to refer that error to the Chief Counsel and Chief Psychologist and may only

continue forward with holding the hearing if that panel determines that sufficient other evidence exists to evaluate the inmate's suitability without any reliance on the identified error or any affected conclusions. The panel may only overrule the objection if the panel finds the objection does not raise a factual error in the CRA. Therefore, the board declines any further amendments based on this comment.

Sub-Issue 4. One commenter suggested that error-filled reports must be removed from a prisoner's files. Another commenter suggested that all errors, including non-material errors, be removed from the files.

4. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE PROPOSED REGULATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the board's amendment to paragraph (g)(3). After review, the board finds this comment is already included in the amended text. Specifically, the board amended the language limiting removal of CRAs to only those containing materially impactful errors and replaced it with language requiring the board to request the department to remove any CRA with any identified error, since the board is now required to correct each error even when the error is immaterial. Therefore, the current proposed regulation already IMPLEMENTED this request in full.

ISSUE 4: Standards of Professional Conduct

Comment ID Numbers: 16-01-51-01; 16-01-51-02.

These comments raised issues with the licensing and ethics requirements of the psychologists completing the CRAs. Specifically, this commenter suggested that, in the regulations, the board indicate who the licensing authority is for forensic psychologists. This commenter further suggested that BPH clinicians should be obligated by regulation to (a) comply with a clear and transparent code of professional ethics that conforms to basic professional principles of accuracy, truthfulness, and integrity, (b) avoid misrepresenting facts, and (c) safeguard the welfare and rights of the inmates.

RESPONSE: DENIED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds these comments are marginally relevant to the amendments the board made regarding the type of information the clinicians must consider when completing CRAs and the standards of review by their supervisors. However, as noted in the board response to ISSUE 1 of the comments submitted during the original 45-day public comment period, the board finds these comments outside the scope of this regulation as well as unnecessary.

Specifically, as explained in **ISSUE 1: Standard of Professional Conduct** (FSOR, pages 2-5) of the comments received during the board's original 45-day public comments, subdivision (a) expressly requires any psychologist performing a CRA to be

"licensed," meaning that the psychologist must have obtained a valid license to practice psychology within the state of California. This requirement necessarily means that any FAD clinician is already subject to all of the principles and ethical standards inherent in holding a license to practice psychology. Since these principles and ethical standards have already been developed and are under the jurisdiction of the California Board of Psychology, which monitors clinicians licensed in California, it is inappropriate and outside the board's lawful authority to regulate different ethical standards for forensic clinicians employed by this agency. Therefore, the board declines to adopt these amendments.

ISSUE 5: Oversight of FAD Clinicians

Comment ID Numbers: 16-01-51-04.

This commenter suggests adding the language "which is not obsolete, or based upon an obsolete record" into subdivision (c) governing supervisor review of the risk assessments. This commenter further suggests defining obsolete as "more than 50 (fifty) years out of date unless it resulted in a criminal conviction for murder, armed robbery or kidnapping."

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment relevant and within the scope of this regulation because it offers additional suggestions about the board's amendment to subdivision (c). However, after substantive consideration, the board finds that this suggestion is unnecessary and already addressed in subdivision (a). Specifically, subdivision (a) directs FAD clinicians completing CRAs to specifically consider factors "impacting" an inmate's risk of violence. Any information that was actually "obsolete," meaning it had no impact on the inmate's risk, is already excluded from subdivision (a). Moreover, to the extent that information more than fifty years old remains relevant because of additional current factors pertaining to an inmate, excluding this information would cause the clinician to actually violate subdivision (a) by failing to consider it. Thus, the board declines to make any further amendments as a result of this comment.

ISSUE 6: Definition of Factual Error

Comment ID Numbers: 16-01-52-02; 16-01-52-06; 16-01-56-04; 16-01-58-01; 16-01-58-03; 16-01-59-07; 16-01-60-11.

These commenters all raised comments pertaining to the board's amendment to the text in paragraph (e)(2), in which the board amended the definition of factual error from "For the purposes of this section, 'factual error' is defined as an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation. Factual errors do not include disagreements with clinical observations, opinions, or diagnoses or clarifications regarding statements the risk assessment attributed to the inmate," to "For the purposes of this section, 'factual error' is an untrue circumstance or event. A disagreement with clinical observations, opinions, or diagnoses is not a factual error."

Sub-Issue 1. One commenter objected to the definition of factual error because the commenter believed it prevented all objections containing disagreements with clinical observations, opinions, or diagnoses.

1. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). However, the board finds that the commenter misunderstands the regulation.

Under subdivisions (e) and (j), the exclusion of objections containing disagreements with clinical observations, opinions, or diagnoses are limited to the pre-hearing objection process for factual errors. In accordance with the *Johnson v. Shaffer* stipulated agreement, the board was mandated to create a process allowing inmates to challenge factual errors in their CRAs before their hearings. The purpose of this process is to give the board the opportunity to revise any factually incorrect information in the CRA before the report is reviewed by the hearing panel. In contrast, expert opinions, including observations and diagnoses, by nature, are not "facts" capable of being confirmed and corrected. Rather, they are conclusions the expert has drawn based on their expertise, education, experience, skills, and analysis of the facts they have considered. Therefore, objections based on disagreements with the clinician's expert observations, opinions, or diagnoses are not appropriately included in the objection process for factual errors as there is nothing for the board to confirm or correct. Instead, these objections are more appropriately heard and considered by the hearing panels, which can use their discretion to determine whether the inmate's arguments about their disagreements with the clinical opinions have merit. Therefore, the board appropriately placed the inmate's remedy to raise disagreements with the clinician's expert observations, opinions, or diagnoses in subdivision (j) governing the board's at-hearing CRA objection process. Since this remedy is already included in the regulations, in contrast to this commenter's assertions, the board declines any further amendments based on this comment.

Sub-Issue 2. One commenter objected to the definition of factual error because the commenter believed it provided no meaningful appeal process for inmates to challenge statements attributed to the inmate.

2. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). The board finds the commenter misunderstands the regulation.

Specifically, as originally written, the board's proposed regulations included statements attributed to the inmate under the board's at-hearing objection process under subdivision (j) because the board felt these objections were more appropriately considered by the hearing panel. However, following the original public comment period and the *Johnson v. Shaffer* court's October 6, 2017, order, the board elected to shift consideration of these objections to the pre-hearing objection process for factual errors under subdivisions (e) through (h) rather than the at-hearing process. Consequently, the board deleted the language in paragraph (e)(2) excluding objections to statements attributed to the inmate from the definition of factual error so that these objections would now be included in the definition of factual error. Additionally, since these objections are now handled under the pre-hearing objection process, the board deleted the language referencing these objections in subdivision (j) because these objections should no longer be raised for the first time at the hearing unless the inmate has good cause for failing to raise them during the pre-hearing process. Thus, since this remedy is already included in the regulations, in contrast to this commenter's assertions, the board declines any further amendments based on this comment.

Sub-Issue 3. One commenter argued that the amended regulations contain no provision for identifying and addressing factual errors that were previously screened out under the board's prior definition for factual errors in the original proposed regulations. The commenter further claimed these objections were left without remedy.

3. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). The board finds the commenter misunderstands the regulation.

As explained above, in contrast to this commenter's assertions, the proposed regulations as original written contained remedies for objections to statements the CRA attributed to the risk assessment. The remedy was to raise them for consideration at the hearing. Thus, while these objections were screened out when raised during the pre-hearing objection process, the board's responses informed the inmate of his right to raise these objections during the hearing. The amendments to subdivisions (e) and (j) only change the timing of when the objections must be raised from at the hearing to during the pre-hearing process. Thus, since this comment was based on a misunderstanding of the original and amended text of the regulation, the board declines to make any further amendments based on this comment.

Sub-Issue 4. One commenter argued that the amended definition of factual error is flawed because circumstances and events cannot be "untrue," only the statements made about them. This commenter suggested revision to a "factually untrue statement about a circumstance or event."

4. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). The board substantively considered this comment.

While the board understands the commenter's reasoning behind this suggestion, the board finds the amendment to be unnecessary at this time because the current language adequately conveys the board's intention of confirming whether the CRA's findings about a circumstance or event are true or untrue. Thus, after substantive consideration, the board declines to adopt this amendment at this time.

Sub-Issue 5. Some commenters argued that the amended definition of factual error does not comport with California Evidence Code sections 801 or 802 because they give clinicians the ability to say anything they want with absolute immunity from error.

5. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). The board finds the commenter misunderstands the regulation and the laws cited.

As explained above in ISSUE 4 Definition of Factual Error, Sub-issue (4) (FSOR, pages 11-12) of the response to comments received during the original 45-day period, these statutes are not appropriately applied to the risk assessment process because these sections specifically govern expert testimony at court hearings; whereas the risk assessments provide forensic analysis for consideration by a board hearing panel. Moreover, to any extent they did, these support the board's interpretation of the importance of distinguishing between fact and opinion. Finally, the board disagrees that the amended definition of factual error permits clinicians to say anything with immunity from error; in contrast, the amended proposed regulations expressly establish a pre-hearing objection process though which inmates and their attorneys may challenge and correct any factual errors. Thus, since this comment appears to have been based on the commenter's misunderstanding of the regulation and the statutes cited, the board declines to make any further amendments as a result of this comment.

Sub-Issue 6. One commenter objected to the definition of factual error's exclusion of disagreements with clinical observations, opinions, or diagnoses because the commenter was concerned that CRAs include erroneous characterizations of prior risk assessments or focus on negative information over positive information.

6. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the reasons for the board's amendment to paragraph (e)(2). However, the board finds that the commenter misunderstands the regulation.

To the extent this comment is concerned about CRAs stating incorrect information about opinions rendered in prior risk assessments for an inmate, this would be an "untrue circumstance or event" since the CRA would be stating as a fact that a prior risk assessment stated an opinion that the prior assessment did not actually state. Thus, the board would consider this a factual error within the meaning of this regulation. Since this remedy is already included in the regulations, the board declines any further amendments based on this comment.

To the extent this comment is concerned about CRAs in which the clinician has used his or her education and expert training in psychology to determine that negative information in an inmate's record is more relevant and probative to the determination of that inmate's risk of violence than the positive information in that inmate's record, this kind of determination falls squarely within the professional expertise of the licensed clinicians that conduct these assessments. Thus, as previously discussed in Sub Issue 1, these determinations are not errors, but the proper exercise of the clinician's expert judgment. Therefore, the appropriate remedy for inmates with concerns about these kinds of expert opinions is to discuss their concerns directly with the hearing panel at their hearings, and the board declines any further amendments based on this comment.

ISSUE 7: Compliance with
Administrative Procedure Act Requirements

Comment ID Numbers: 16-01-52-03; 16-01-52-04; 16-01-52-08; 16-01-56-06; 16-01-57-02; 16-01-58-12; 16-01-58-14; 16-01-58-15; 16-01-58-18; 16-01-58-19.

These comments all raised concerns that the board's re-noticed text or documents did not meet APA requirements.

Sub-Issue 1. One commenter generally claimed the regulations cannot be easily understood but did not identify any text requiring amendment. This commenter further argued the record fails to demonstrate evidence of necessity and that the regulations were unclear regarding the standards to be applied to CRA appeals. Another commenter argued the amendments to subdivision (h) remained unclear because the regulations did not identify how the board would determine whether sufficient time existed to address an untimely objection pre-hearing. Another commenter generally argued the APA requires regulations to be specific, but did not identify any specific problems with the current text.

1. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds each of these comments relevant and within the scope of this regulation because they raise questions about the board's compliance with the APA in its re-noticed text. However, after substantive consideration, the board disagrees with each of these comments. Moreover, none of the comments offered any alternative suggestions.

Specifically, following the board's consideration of each of these comments, the board finds that it has already addressed the necessity for these regulations in the Initial

Statement of Reasons and Supplemental Initial Statement of Reasons, in accordance with the APA. Additionally, in the absence of any specific identified problems with the text of the regulations, the board disagrees that the regulations are not easily understood or that the CRA appeal standards are unclear. The board also finds that the regulations are specific in accordance with the APA. Finally, as explained above in greater detail, the board amended subdivision (h) to remove the unclear language and retained discretion where necessary to determine whether sufficient time exists to address an untimely pre-hearing objection based on the length and complexity of the allegations. Therefore, the board declines any further amendments based on these comments.

Sub-Issue 2. One commenter argued that the board did not personally respond to her prior comments, despite that her comments were addressed in the board's prior rulemaking submission. Another commenter argued that the regulations were unclear regarding (1) what other factors clinicians may consider beside the suitability and unsuitability factors in subdivision (a), (2) how clinicians will make determinations about these factors when they have no legal training, and (3) how the board will make determinations about whether to conduct CRAs for out-of-state inmates. These comments also raised APA-related issues by questioning the board's reasons for deleting the prior definition of good cause and the provision in subdivision (j) allowing inmates to challenge statements attributed by the CRA to the inmate during the hearing.

2. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds each of these comments relevant and within the scope of this regulation because they raise questions about the board's compliance with the APA in its re-noticed text. However, the board finds each of these comments demonstrate a misunderstanding of the regulation or the board's requirements under the APA. Therefore, the board declines to make any further amendments based on any of these comments.

Specifically, the board is not required to personally respond to each individual commenter under the APA; rather the board is required to address each comment in the Final Statement of Reasons. The board has met that obligation.

Additionally, the board disagrees that the amended text in subdivision (a) regarding the factors to be considered by clinicians conducting CRAs is unclear because the reference to the suitability factors contained in another portion of the regulations was meant to serve as a list of some of the factors that the clinicians should consider. This was added in to provide greater clarity on this issue, in accordance with the OAL November 8, 2017, disapproval. Moreover, the regulation contains no requirement for clinicians to make legal determinations. Rather, the regulation clarifies that clinicians must consider factors impacting an inmate's risk of violence, including, but not limited to, the types of factors listed in the referenced suitability and unsuitability regulations. This reference was intended to provide examples of the kinds of factors the clinicians should consider.

The board further disagrees that the amended text in subdivision (d) is unclear about how the board will handle out-of-state inmates. As explained above in greater detail, the board

deleted the language in original paragraph (d)(2) regarding out of state inmates to eliminate the unclear language.

Finally, the board finds that it met APA requirements by explaining the reasons for its amendments to the good cause definition and the inmate's at-hearing objection process in this document, as well as the necessity for these amendments. Therefore, the board declines any further amendments based on these comments.

ISSUE 8: CRA Objection Process

Comment ID Numbers: 16-01-52-07; 16-01-54-05; 16-01-60-16.

These comments all raised issues with the board's amended text in subdivisions (e), (f), (g), and (i) regarding the pre-hearing and at-hearing objection process for factual errors in the CRA.

Sub-Issue 1. One commenter claimed that subdivisions (f)(1) and (i)(1) allow untrained laypersons, meaning the Chief Counsel and hearing panel members, to make determinations about CRAs, which the commenter believes is practicing psychology without a license.

1. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment does not appear to be relevant to any of the board's re-noticed amendments to the text regarding the pre-hearing CRA objection process. However, because the board made unrelated changes to these sections, which this commenter may have been referring to, the board has elected to respond to this comment. The board finds the comment demonstrates a misunderstanding of the regulation and its effect.

As explained in ISSUE 8: Challenges to Duties Assigned (FSOR, page 19-20) of the comments received during the board's original 45-day public comments, subdivision (f) requires the Chief Counsel to review each CRA objection to determine "whether the risk assessment contains a factual error as alleged," which requires a legal analysis appropriate for the Chief Counsel, not a clinical one. Similarly, subdivision (i) requires hearing panel members to determine (1) whether an inmate has demonstrated good cause, as defined in that subdivision, to raise an untimely allegation of factual error, (2) whether the CRA contains an alleged factual error that "may" materially impact the CRA's conclusions regarding risk of violence, and (3) whether, after disregarding any potential factual errors, the remaining evidence available to the panel is sufficient for the panel to reach a determination regarding the inmate's current suitability for parole, each of which fall squarely within the duties of an administrative hearing panel. Thus, these duties are not clinical duties, but legal and administrative determinations appropriately assigned to the Chief Counsel and hearing panel members. Therefore, the board declines any further amendments based on this comment.

Sub-Issue 2. One commenter generally claimed the hearing panels should have greater authority to immediately address objections and correct irregularities in a fair manner and not prejudicially.

2. RESPONSE: DECLINED IN FULL BECAUSE THE COMMENT WAS BASED ON A MISUNDERSTANDING OF THE LAW OR INCORRECT ASSERTIONS ABOUT ITS APPLICATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the board's re-noticed text regarding the pre-hearing CRA objection process. The board finds the comment demonstrates a misunderstanding of the regulation and its effect.

Specifically, the original and amended text under subdivision (i) already provides hearing panels with substantial authority to address any identified errors in a risk assessment. Inmates who raise timely pre-hearing objections under subdivisions (e), (f), and (g) will have their objections ruled on and, if appropriate, corrected for the hearing panels before their hearings. Inmates who fail to raise timely pre-hearing objections may still raise objections to factual errors at their hearings if they can demonstrate good cause for failing to raise them timely. Moreover, subdivision (i) allows hearing panels to bypass the good cause standard and hear untimely objections without good cause at the panel's discretion. Additionally, the amendments to subdivision (i) now require the panels to address all factual errors, not just those deemed potentially material. Finally, the panel is also required under subdivision (j) to address any disagreements with clinical observations, opinions, or diagnoses. Thus, the board finds that this comment was based on a misunderstanding of the panel's authority to address errors and the board declines to make further amendments.

Sub-Issue 3. One commenter argued that, when the Chief Psychologist is reviewing a referred factual error, the Chief Psychologist should not limit review to material impact on risk of violence, but should also review for impact on any conclusion that could impact the board's decision to grant, such as insight or minimization.

3. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment relevant and within the scope of this regulation because it raises questions about the board's re-noticed text regarding the pre-hearing CRA objection process. The board substantively considered this comment.

The board finds that the regulation as amended does not preclude the Chief Psychologist from considering impact on other conclusions. Rather, it just requires the consideration of impact on risk of violence since this has the most direct applicability to an inmate's suitability for parole. Additionally, any other conclusions, such as insight or minimization, that actually impact the overall conclusion regarding an inmate's risk of violence would fall within information impacting that overall risk. Thus, the board declines to adopt this suggestion.

ISSUE 9: Use of Specified Risk Assessment Tools

Comment ID Numbers: 16-01-57-03; 16-01-57-04; 16-01-57-05; 16-01-58-13; 16-01-59-02; 16-01-60-01; 16-01-60-02; 16-01-60-03; 16-01-60-07; 16-01-60-15.

These commenters all raised issues concerning the amended text in subdivision (a) and the addition of the references to the two example risk assessment tools, the HCR-20-V3 and STATIC-99R. Specifically, these commenters questioned the appropriateness of each of these tools, and one commenter claimed that the HCR-20-V3 was not an "actuarial assessment." Several commenters raised concern that these two risk assessment tools had not been "validated" on the life inmate population, the population of inmates with lower IQs, the population of inmates with underlying mental illnesses, the population of inmates with other mental or cognitive disabilities, or the population of inmates who had not committed new offenses for the past several years. One commenter suggested the regulations be amended to require risk assessment tools be validated for specific populations before their use on those populations and that subdivision (c) regarding supervisorial review should be amended to require reviewing clinicians to verify the CRA was conducted using only a validated risk assessment tool. Another commenter argued that the Static-99R was less accurate for predicting risk in non-Caucasian inmates and contradicts youth offender case law because the creators of that tool actually warn against using it on youth. This commenter recommended instead the California Static Risk Assessment (CSRA). One commenter argued that the board should refrain from listing specific tools in the regulations because this limits the board's ability to adopt the use of better tools in the future. Finally, one commenter claims the regulations should allow an inmate to challenge the use of an inappropriate assessment instrument.

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant and within the scope of this regulation because they raise issues with the board's re-noticed text regarding subdivision (a), specifically referencing examples of risk assessments for use by the clinicians completing CRAs. However, after substantive consideration, the board declines to make any further amendments based on these comments.

As fully explained under ISSUE 20, Sub-issue (2) of the comments submitted during the original 45-day comment period, the board has no legal mechanism through which to "validate" any risk assessment tools on the populations under the board's jurisdiction and, even if it did, to do so would substantially threaten public safety. Specifically, validation would require the board to release inmates who were unsuitable for parole, meaning they continue to pose a current unreasonable risk of danger to the community. Moreover, the instruments currently used by FAD clinicians have been thoroughly tested and studied by the community of psychologists assessing risk of violence in inmates, and they are the most commonly used risk assessments tools in this community across the country. Finally, the board notes that the references to the HCR-20-V3 and STATIC-99R are meant as examples of the kinds of risk assessments the board will use, not as mandates to use only these two tools. Therefore, the board declines all of the comments challenging the references to these two risk assessment tools.

ISSUE 10: Limitations on Information Considered

Comment ID Numbers: 16-01-51-05; 16-01-57-06; 16-01-57-07; 16-01-57-08; 16-01-59-09.

These comments all raise concerns and suggestions relating to the board's amendment to subdivision (a) referencing factors contained in sections 2281 and 2402 of the board's regulations as examples of the types of factors CRA clinicians should consider when assessing the inmate's risk of violence. These commenters objected to incorporating these factors into CRA clinician's assessments because they felt these factors conflicted with youth offender laws, were unreliable as predictors of danger, included consideration of outdated juvenile records, are overly narrow, failed to include cultural factors such as age or mental disorder, and unfairly reference mental illness as a factor of potential aggravation. One commenter suggested amending this subdivision to limit the scope of reliance on mental illness. Finally, one commenter requested that clinicians be mandated to give sufficient credit to inmates for their positive post-conviction achievements and laudatory accomplishments including chronos and certificates earned.

RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant and within the scope of the regulation because they pertain to the board's amendments to subdivision (a). The board substantively considered these comments.

The board finds that amendments based on these concerns are unnecessary. The reference to these regulations in subdivision (a) was added following the November 8, 2017, OAL disapproval letter in an attempt to further clarify the kinds of factors that CRA clinicians must consider when assessing the inmate's risk. However, the amended proposed subdivision makes clear that (1) CRA clinicians are not limited to considering only these factors, rather they are meant to clarify for clinicians, inmates, and the public the kinds of factors the clinicians will consider, and (2) the clinicians are still mandated to consider all information that impacts the inmate's risk of violence. Clinicians are experts trained in determining which psychological, mental health, cultural, personal, and other factors and information bears relevance to evaluating the risk of violence an inmate presents. Consequently, the board disagrees that the reference to these regulations overly narrows the information a clinician may consider or causes clinicians to consider inappropriate information. Moreover, to the extent that these comments are suggesting that ADA accommodations be added into these regulations, or have ADA concerns with the board's current suitability and unsuitability regulations and their connection to mental health issues, these requests were already addressed in ISSUE 10: Americans with Disabilities Act Accommodations during CRA Interviews (FSOR, page 21) of the comments received during the board's original 45-day public comments, where the board explained that ADA issues are outside the scope of these regulations and are more appropriately addressed in separate regulations. Finally, the modified text of subdivision (a) already requires clinicians to consider any factor that has an impact, either positive or negative, on the inmate's risk of violence and specifically references as guidance the board's regulations on factors of both suitability and unsuitability. Thus, mandating clinicians to give credit to positive post-conviction achievements is unnecessary because

the regulation, as amended, already addresses this. Therefore, the board declines to make any further amendments based on these comments.

ISSUE 11: Timelines and Deadlines

Comment ID Number: 16-01-58-04; 16-01-58-05; 16-01-58-06; 16-01-58-08; 16-01-58-16; 16-01-60-10.

These comments all raised issues with the board's amended text regarding timelines or deadlines established in the regulations.

Sub-Issue 1. Two commenters argued the 60-day deadline established in the re-noticed text to serve the approved CRA on the inmate was inadequate and one commenter requested 90 days instead. These commenters specifically expressed concern that, because state-appointed inmate attorneys are required to meet with their clients at least 45 days prior to the hearings to preserve the inmate's ability to submit a timely request for waiver at least 45 days before the hearing, this only provided the inmate's attorney with 15 days to review the CRA, meet with his or her client, and make any determinations necessary regarding the appropriateness of a waiver request.

1. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds these comments relevant and within the scope of this regulation because they raise an alternate suggestion about the board's re-noticed text establishing a deadline by which CRAs must be served on the inmates. The board substantively considered this suggestion.

After consideration, the board determined that 60 calendar days was a reasonable final deadline to establish for serving the CRA on the inmates. While the board strives to serve these documents on the inmates as quickly as possible and, in many cases, is serving the inmates 90 or more days before their hearings, multiple factors exist that sometimes require the board to schedule hearings quickly. For example, court orders, continued hearings, legislative changes, and shifts in credit earning from new proposition requirements have all resulted, within the past year, in the board being required to schedule hearings on the next available calendars. Requiring the board to serve all CRAs at least 90 days before the hearing would not give the board sufficient time to assign it to a clinician and complete the CRA in a timely manner. This would ultimately result in the board being required to delay multiple hearings because the board would need additional lead time to reschedule them in accordance with victim and prosecutor notification laws.

The board further notes that the CRA is one piece of evidence before the hearing panel and is based on other evidence in the inmate's file along with the clinician's interview of the inmate. Inmate counsel has full access to all other non-confidential information in the inmate's central file, which in most cases is adequate to determine whether waiver is necessary. Moreover, in 2017, only 31% of the board's hearings were initial parole hearings, meaning that in the other 69% of the hearings, the attorney would also have had access to the prior risk assessments. The prior assessments would have provided

additional information about what to expect in the current risk assessment. Additionally, the board reiterates that the 60-day deadline is a final deadline, which means that in most cases, the attorneys will be receiving the CRAs prior to 60 days before the scheduled hearing. Finally, the board notes that, even if the attorney receives the CRA on the 60th day before the hearing, 15 calendar days should still be sufficient time for the attorney to review the document, meet or confer by phone with the client, and determine whether a waiver is appropriate. Notably, the inmate and attorney would still have another 15 calendar days beyond that time to submit any objections to the CRA, since those are not required until the 30th day before the hearing. Thus, since the board determined that a 60-day deadline is both realistic and reasonable as a final deadline to serve the CRA on the inmate, the board declines to adopt this suggestion.

Sub-Issue 2. One commenter argued that the 10-day deadline for a decision is unreasonably tight.

2. RESPONSE: IMPLEMENTED IN FULL AS ALREADY INCLUDED IN THE PROPOSED REGULATION

The board finds this comment relevant and within the scope of the regulation because it pertains to the board's deadline for issuing a decision regarding an alleged factual error in a risk assessment. The board has determined that the commenter's concern regarding the timeliness of the board's decision on written objections to alleged factual errors in risk assessments is already addressed and IMPLEMENTED in the proposed regulation.

Under subdivisions (f) and (g), the board is required to act "promptly" to issue a final decision on a CRA objection. This requirement is imposed on both the Chief Counsel and the Chief Psychologist throughout the CRA objection process. The 10-calendar-day requirement sets the final date by which a decision can be issued so that the final decision can be served on the inmate at least 10 calendar days before a hearing, in accordance with the board's requirements in the California Code of Regulations, title 15, section 2247 disclosure rules. This end-date requirement does not permit the board to delay until 10 calendar days before a hearing if such a delay would not be a prompt response. Rather, regardless of the date on which the inmate submits a timely CRA objection, the Chief Counsel and Chief Psychologist are required to respond promptly and to avoid delay.

Thus, if for example an inmate submitted a CRA objection substantially before the hearing, the board would be obligated to promptly review and process the response. The board would not be permitted to delay beginning the review of the objections until the final deadline. However, if an inmate submits a particularly lengthy objection 30 days before the hearing, which is the last day the objection would be considered timely, the board's regulation dictates that, regardless of what might normally have been considered a prompt reply, the board's response must be transmitted to the inmate and hearing parties by no later than 10 days before the hearing so that the response does not violate the disclosure requirements under section 2247. Therefore, the board finds that the current amended regulations already IMPLEMENTED requirements to alleviate this concern.

Sub-Issue 3. One commenter argued that the regulation should mandate state-appointed inmate attorneys to meet with their clients at least 60 days prior to the hearing, and should mandate the attorneys meet with their clients a second time after the board responds to CRA objections.

3. RESPONSE: DECLINED IN FULL AS NOT RELEVANT AND OUTSIDE THE SCOPE OF THE REGULATION

The board finds these comments not relevant and outside the scope of the proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The proposed regulation does not address how state-appointed inmate attorneys should represent their clients. Therefore, the board declines any further amendments based on this comment.

Sub-Issue 4. One commenter argued that the establishment of the date on which a CRA is considered "final" in paragraph (c)(2) of the regulations should be amended from the date on which the CRA is first approved by the Chief Psychologist or a Senior Psychologist to the date on which the authoring clinician completes the interview with the inmate.

4. RESPONSE: DECLINED IN FULL AFTER SUBSTANTIVE CONSIDERATION

The board finds this comment does not appear to raise questions about the board's re-noticed amendments to the text regarding the pre-hearing CRA objection process as this requirement was unchanged from the original language. However, because the board offered additional information in the Supplement to the Initial Statement of Reasons referencing this section to explain why a different requirement was necessary, the board has elected to consider this issue. After substantive consideration, the board declines to adopt this amendment.

Under the proposed regulations, the board has decided that it will consider CRAs to be valid for three years from the date on which the CRA has been deemed final. Thus, it is necessary for the board to establish the date on which this report is considered to be final. Setting that date to be the date of the clinician's interview with the inmate would not be appropriate because the interview is only one of the steps the clinician must take to properly assess the inmate's risk of violence. The clinician must review the inmate's entire record, complete the risk assessment tools, and then use his or her clinical judgment to evaluate all of the information gained from all of those sources and reach clinical conclusions about the inmate's risk of violence. Moreover, as explained in the Supplement to the Initial Statement of Reasons, requiring supervisorial approval is necessary for the board to conduct proper oversight and ensure that clinicians are properly administering these assessments and basing their clinical conclusions on sound psychological reasoning. Therefore, the board determined that only when a clinician has (1) completed each of these above steps, (2) fully written out his or her complete risk assessment report, and (3) received the supervisorial approval verifying that the opinions the clinician reached in the report are based upon adequate scientific foundation should

that report be considered final and valid. Thus, the board declines to adopt this amendment.

ISSUE 12: Training Issues for FAD Clinicians

Comment ID Numbers: 16-01-54-03; 16-01-59-10; 16-01-60-05.

These comments stated the regulations needed to require psychologists receive training on clinical and anthropological knowledge about other cultures, the impact of CDCR policies and procedures on prison life for people with disabilities, and administering the tools used in preparing a risk assessment.

RESPONSE: DECLINED IN FULL AS OUTSIDE THE SCOPE OF THE REGULATION

The board finds these comments outside the scope of the proposed regulation. The purpose of the proposed regulation is to establish the board's requirements and procedures for completing CRAs for use by hearing officers in assessing an inmate's suitability for parole during parole consideration hearings. The proposed regulation does not address how the board will internally train FAD psychologists to complete their assignments. Thus, the board declines to adopt this amendment.

ISSUE 13: Statements Regarding Specific Inmate Cases

Comment ID Numbers: 16-01-52-09.

This comment raised concerns regarding specific objections to his individual CRA.

RESPONSE: DECLINED IN FULL AS NOT RELEVANT AND OUTSIDE THE SCOPE OF THE CURRENT REGULATION

The board finds this comment not relevant and outside the scope of the regulation because it does not pertain to regulating the process or requirements for comprehensive risk assessments and does not raise any suggestions or issues regarding the proposed regulation. Therefore, the board declines to adopt amendments to the proposed regulation based on this comment.

UPDATED FISCAL AND ECONOMIC IMPACT:

The board initially submitted its final Form 399 Fiscal and Economic Impact Statement to the Department of Finance, which signed it on September 20, 2017, in preparation for the board to submit the original proposed regulations. Following that submission, the board amended the regulations and submitted the amended regulations for re-notice on December 22, 2017. None of the amendments have any further fiscal impact because they only relate to re-wording legal definitions or requirements and clarifying deadlines.

None of these changes have any impact on the resources or staff the board will need to carry out these functions. Therefore, the September 20, 2017, Fiscal and Economic Impact Statement remains current and accurate.

LOCAL MANDATE DETERMINATION:

The board has determined this action imposes no mandates on local agencies or school districts, nor does it impose a mandate that requires reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.

ALTERNATIVES THAT WOULD LESSEN ANY ADVERSE ECONOMIC IMPACT ON SMALL BUSINESSES:

No alternatives were proposed to the board that would lessen any adverse economic impact on small businesses.

ALTERNATIVES DETERMINATION:

The board has determined that no alternative considered would be either more effective in carrying out the purpose of this action, as effective and less burdensome to affected private persons than the action proposed, or more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The amendments adopted by the board are the only regulation provisions identified by the board that accomplish the goal of bringing this regulation into compliance with the court orders in *Johnson v. Shaffer* and *In re Sherman-Bey*, as described in the Initial Statement of Reasons. Except as set forth and discussed in the summary and responses to comments, no other alternatives have been proposed or otherwise brought to the board's attention.

END

BPH RN 16-01: UPDATED INFORMATIVE DIGEST

TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER 3. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

Amendment of Section 2240
Comprehensive Risk Assessments

As explained in greater detail in the Final Statement of Reasons, following the initial 45-day public comment period, the board elected to make the following substantial and sufficiently-related amendments to its proposed regulation for section 2240 submitted for re-notice on December 22, 2017:

1. Amended subdivision (a) to add language requiring FAD clinicians to clarify that clinicians completing CRAs must consider "factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division."

2. Amended subdivision (a) to delete the text "the current relevance of any" as unnecessary and redundant.

3. Amended subdivision (a) to specify the types of risk assessments clinicians must use when conducting CRAs by deleting the text "standardized approaches, generally accepted in the psychological community, to identify, measure, and categorize the inmate's risk of violence" and adding the text "structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals" in its place.

4. Amended subdivision (b) to add "as defined in Penal Code section 3051, subdivisions (a) and (h)," to further define which inmates are considered youth offenders under this subdivision.

5. Amended paragraph (c)(1) to delete the text ", and reliable and valid principles and methods have been appropriately applied to the facts of the case," to remove the unclear reference to "principles and methods."

6. Amended paragraph (d)(2) to delete the provision "The board may prepare a risk assessment for inmates housed outside of California," to remove the board's discretion to prepare risk assessments for out-of-state inmates.

7. Amended paragraph (d)(2) to add the provision "Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days before

the date of the hearing," to establish a deadline by which the board must serve inmates with their completed CRAs.

8. Amended paragraph (e)(1) to delete the text "that materially impacts the risk assessment's conclusions regarding the inmate's risk of violence," to broaden the category of factual errors inmates may raise during the pre-hearing objection process for factual errors.

9. Amended paragraph (e)(1) to relocate the text "Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day" from paragraph (e)(3) to this paragraph because it was more closely related to the discussion of when inmates and attorneys must submit their objections contained in paragraph (e)(1).

10. Amended paragraph (e)(2) to replace the definition of factual error "an explicit finding about a circumstance or event for which there is no reliable documentation or which is clearly refuted by other documentation" with the new definition "an untrue circumstance or event," to broaden what may be considered a factual error.

11. Amended paragraph (e)(2) to delete the text excluding "clarifications regarding statements the risk assessment attributed to the inmate," from the definition of factual error to further broaden the category of factual errors inmates may raise during the pre-hearing objection process for factual errors.

12. Amended paragraph (f)(1) to replace the word "determine" with "evaluate" as this word more accurately captured the duty of the Chief Counsel in this provision.

13. Amended subparagraphs (f)(2)(A) and (g)(2)(A), and subdivision (h), to add the word "calendar" to the deadlines "10 calendar days" to clarify the timing of these provisions.

14. Amended paragraph (g)(1) to add subparagraphs (g)(1)(A) and (g)(1)(B) to clarify the duties and requirements of the Chief Psychologist on reviewing an error referred by the Chief Counsel. Subparagraph (g)(1)(A) established requirements when the Chief Psychologist deems the error to be immaterial and specifically still requires the error to be corrected in addition to other actions. Subparagraph (g)(1)(B) established requirements when the Chief Psychologist deems the error to have a material impact on the risk assessment's conclusions and requires a new or revised risk assessment in addition to other actions. Amended subparagraph (g)(2)(B) to delete the provision requiring the Chief Counsel to "order a new or revised risk assessment" as this duty required a clinical determination and was thus deemed more appropriately handled by the Chief Psychologist in subparagraph (g)(1)(B).

15. Amended subparagraph (g)(2)(A) to delete the provision requiring the Chief Counsel to "overrule the objection" when the Chief Psychologist found it to be immaterial since the amendments to subparagraph (g)(1)(A) now require the board to take action to correct these errors.

16. Amended subparagraph (g)(2)(A) to add the text “the revised risk assessment” to the documents the Chief Counsel is required to provide to the inmate or attorney who raised immaterial errors, and amended subparagraph (g)(2)(B) to add the text “the new or revised risk assessment” to the documents the Chief Counsel is now required to provide to the inmate or attorney who raised material factual errors. These amendments were intended to correspond with the new requirements in subparagraph (g)(1)(A) requiring correction of immaterial factual errors and subparagraph (g)(1)(B) requiring the Chief Psychologist to order a new or revised risk assessment following a determination that a factual error had a material impact.

17. Amended paragraph (g)(3) to replace the text “Impacted risk assessments shall be permanently removed from the inmate’s central file” with “The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision, from the inmate’s central file” because the board determined that it has no legal authority to add or remove documents from an inmate’s central file. That authority lies only with the department in accordance with Penal Code section 2081.5. Thus, the board’s authority is limited to issuing a request to the department for the removal of these documents.

18. Amended subdivision (h) to replace the word “may” with “shall” to clarify (1) that the Chief Counsel and Chief Psychologist are mandated, not just permitted, to complete the review process before a hearing if the Chief Counsel has determined that sufficient time exists to complete the review process before a hearing for an untimely submitted pre-hearing CRA objection, and (2) that the Chief Counsel is mandated, not just permitted, to refer an objection to the hearing panel for consideration if he or she determined insufficient time exists to complete the review process before a hearing for an untimely submitted pre-hearing CRA objection.

19. Amended subdivision (i) to add the text “or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section” to clarify that this subdivision governing untimely hearings also applies to untimely objections referred by the Chief Counsel.

20. Amended subdivision (i) to delete original paragraph (i)(2) containing a definition for good cause to remove unclear language. Other paragraphs were renumbered within this subdivision and the internal references in paragraph (i)(1) were amended consistent with this renumbering.

21. Amended new paragraphs (i)(2) and (i)(3) (previously (i)(3) and (i)(4)) to delete the text “that materially impacts the risk assessment’s conclusions regarding the inmate’s risk of violence” to expand the scope of factual errors a hearing panel must consider when hearing an inmate’s at-hearing objections. Following this change, hearing panels must also consider and respond to identified non-material errors.

22. Amended subdivision (j) to delete "to or clarify any statements a risk assessment attributed to the inmate," from the at-hearing objection process since this objections are now included as factual errors under the amendments to paragraph (e)(2), which means that they must be raised during the pre-hearing objection process and not in the at-hearing process.

23. Amended the reference note to delete references to *In re Lugo*, (2008) 164 Cal.App.4th 1522 and *In re Rutherford*, Cal. Super. Ct., Marin County, No. SC135399A since the board determined it was not actually implementing, interpreting, or making specific requirements from these cases. Also, amended this note to add references to *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement] and *Sherman-Bey v. Shaffer*, 2016 WL 193508, Case No. C077499, because these proposed regulations were implementing and interpreting these two court orders.

Next, as explained in greater detail in the Final Statement of Reasons, following the initial 45-day public comment period, the board elected to make the following non-substantive amendments to its proposed regulation for section 2240:

1. Amended subdivision (a) to delete the word "The" and capitalize the letter "P" in the word "Psychologists" in subdivision (a).

2. Amended subdivision (c) by dividing it into paragraphs (1) and (2), with paragraph (1) retaining all of the originally proposed text of subdivision (c) except for the last sentence, which was relocated to paragraph (2).

3. Amended paragraph (e)(2) to replace "Factual errors do not include" with "is not a factual error."

4. Amended paragraph (e)(2) to add the word "A" and replace "disagreements" with the singular version of that word.

5. Amended subparagraph (g)(1)(A) to delete the capitalization of the word "the."

6. Amended subparagraph (g)(2)(A) to add the word "the" before "Chief Psychologist's addendum."

Each of these amendments was made available for public inspection during normal business hours from December 22, 2017, through January 8, 2018 and was noticed to the public in the December 22, 2017 Notice of Modifications to Text of Proposed Regulations and Addition of Documents and Information to the Rulemaking File, as stated in the Statement of 15-Day Notice of Availability of Modified Text. There have been no other changes in the laws related to the proposed action or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action.

The board, in making the above changes and declining any additional amendments to these regulations, relied on all of the following technical, theoretical, or empirical studies, reports, or documents:

1) Laws and regulations relating to the practice of psychology. (*See* http://www.psychology.ca.gov/laws_regs/2016lawsregs.pdf)
2) Information regarding the law/ethics examination to qualify for psychology licensure. (*See* https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=310&bulletinurl=.pdf)
3) Information regarding psychologist license renewal requirement for self-certification of remaining abreast of changes to laws (statutes and regulations) and ethics. (*See* http://www.psychology.ca.gov/licensees/ce_faqs.shtml)
4) Information regarding the APA ethics code governance only of its own members and not all California Psychology licensees. (*See* http://www.apa.org/ethics/code/principles.pdf)
5) Guy, Kusaj, Packer, and Douglas (Nov. 3, 2014) *Law and Human Behavior: Influence of the HCR-20, LS/CMI, and PCL-R on Decisions About Parole Suitability Among Lifers*.
6) Campbell, French, and Gendreau (2009) *The Prediction of Violence in Adult Offenders: A Meta-Analytic Comparison of Instruments and Methods of Assessment*.
7) Yang, Wong, and Coid (2010) *The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools*, Psychological Bulletin Vol. 136, No. 5, 740-767.
8) Singh, Desmarais, Hurducas, et al. (Aug. 30, 2014) *International Perspectives on the Practical Application of Violence Risk Assessment: A Global Survey of 44 Countries*, International Journal of Forensic Mental Health.
9) *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. *Johnson v. Shaffer* (E.D. Cal. October 6, 2017) No. 2:12-cv-1059, Doc. 186 [order requiring amendments to proposed regulations].
10) December 22, 2017 Supplement to the Initial Statement of Reasons filed with OAL on October 24, 2016.

Each of these additional documents was listed in the board's December 22, 2017 Notice of Modifications to Text of Proposed Regulations and Addition of Documents and Information to the Rulemaking File. These documents made available for public inspection during normal business hours from December 22, 2017, through January 8, 2018.

The board, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document that is not already identified in the complete rulemaking file for BPH RN 16-01.

BPH 16-01: STATEMENT OF MAILING NOTICE

(Section 86 of Title 1 of the California Code of Regulations)

The Board of Parole Hearings has complied with the provisions of Government Code section 11346.4, subdivision (a)(1) through (4), regarding the mailing of the notice of proposed regulatory action. All required notices were mailed no later than October 28, 2016, or faxed by no later than October 28, 2016, which was at least 45 days prior to the end of the public comment period. Additionally, the board posted copies of the notice, initial statement of reasons, proposed text, and economic impact statement (Form 399) on the board's website at http://www.cdcr.ca.gov/BOPH/reg_revisions.html, by no later than November 4, 2016.

A Public Hearing was held on January 18, 2017, in accordance with a request received in public comment at least 15 days prior to the end of the public comment period. All required notices for this hearing were mailed no later than January 5, 2017, or faxed by no later than January 5, 2017, which was at least 13 days prior to the date of the public hearing. Additionally, the board posted copies of the notice for the public hearing along with the board's agenda for this hearing on the board's website at http://www.cdcr.ca.gov/BOPH/reg_revisions.html, by no later than January 6, 2017.

Dated: Original dated: 3/07/2017

Original Signed by: Heather L. McCray
HEATHER L. MCCRAY
Assistant Chief Counsel
Board of Parole Hearings

STATEMENT OF 15 DAY NOTICE

OF AVAILABILITY OF MODIFIED TEXT

(Section 44 of Title 1 of the California Code of Regulations and Section 11347.1 of the Government Code)

Modifications were made to the text of the regulations originally noticed to the public on November 4, 2016. There were 49 persons who fell within the categories listed in subsections (a)(1) through (4) of section 44 of Title 1 of the CCR and to whom notice of the availability of the modified text had to be mailed. Notice of the availability of the modified text and the modified text were mailed to these 49 persons, as well as all individuals in the Board of Prole Hearing's notice registry, on December 22, 2017. Additionally, notice of the availability of the modified text and documents/information added to the rulemaking file, as well as the modified text, were available to the public from December 22, 2017 through January 8, 2018, at the Board's office at 1515 K Street, Suite 600, Sacramento, CA, on the Board's website at http://www.cdcr.ca.gov/BOPH/reg_revisions.html, and at each institution. Additionally, paper copies of all of the documents relied on were made available to the public for review at the Board's office at the above address from December 22, 2017 through January 8, 2018. The public comment period for the modified text was from December 22, 2017 through January 8, 2018.

Dated: Original dated: 4/11/2018

Original Signed by: Heather L. McCray
HEATHER L. MCCRAY
Assistant Chief Counsel
Board of Parole Hearings

State of California – Department of Finance

ECONOMIC AND FISCAL IMPACT STATEMENT (REGULATIONS AND ORDERS)

Std. 399 (Rev. 12/2013)

ECONOMIC IMPACT STATEMENT

Department Name: Board of Parole Hearings
Contact Person: Heather L. McCray
Email Address: HeatherMcCray@cdcr.ca.gov
Telephone Number: (916) 322-6729
Descriptive Title from Notice Register or Form 400: **Comprehensive Risk Assessment**
Notice File Number: **[Blank]**

A. ESTIMATED PRIVATE SECTOR COST IMPACTS

Include calculations and assumptions in the rulemaking record

1. Check the appropriate box(es) below to indicate whether this regulation:
   [Checked] g. Impacts individuals

If any box in Items a through g is checked, complete this economic impact Statement. If box in Item 1.h. is checked, complete the Fiscal Impact Statement as appropriate.

2. The Board of Parole Hearings estimates that the economic impact of this regulation (which includes the fiscal impact) is: **[Checked]** Below $10 million.

3. Enter the total number of businesses impacted: **[Blank]**

   Describe the types of businesses (Include nonprofits): **[Blank]**

   Enter the number of percentage of total businesses impacted that are small businesses: **[Blank]**

4. Enter the number of Businesses that will be created: **[Blank]** eliminated [Blank] explain: **[Blank]**

5. Indicate the geographic extent of impacts: Statewide, Local or regional (list areas): **[Blank]**

6. Enter the number of jobs created: [Blank] and eliminated: **[Blank]**

   Describe the types of jobs or occupations impacted: **[Response]** No private sector jobs were created or eliminated.

7. Will the regulations affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here? **[Checked]** No

B. ESTIMATE COSTS

Include calculations and assumptions in the rulemaking record.

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over tis lifetime? [1a through 1c enter amount for initial and annual cost if applicable: **[Blank]**

   1d. Describe other economic costs that may occur**: [Response]** No change (decrease or increase) of costs anticipated for private sector businesses or individuals as a result of these regulations.

2. If multiple industries are impacted, enter the share of total costs for each industry **[N/A]**.

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. Include the dollar costs do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted. **[N/A]**

4. Will this regulation directly impact housing costs? **[Checked]** No

5. Are there comparable Federal regulations? **[Checked]** No

   Explain the need for State regulation given the existence or absence of Federal regulation**: [Blank]**

   Enter any additional costs to businesses and/or individuals that may be due to State – Federal differences: **[Blank]**

C. ESTIMATED BENEFITS

Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.

1. Briefly summarize the benefits of the regulation, which may include among others, the health and welfare of California residents, worker safety and the State's environment: **[Response]** Ensure greater accuracy of risk assessments, which will increase BPH hearing officers; understanding of an inmate's current risk of violence. This will result in more informed decision-making in parole hearings, which will benefit public safety.

2. Are the benefits the result of: specific statutory requirements or goals developed by the agency based on broad statutory authority? **[Checked]** Specific statutory requirements. Explain: **[Response]** These regulations are clarifying and interpreting specific requirements from the Johnson and Sherman-Bey court orders.

3. What are the total statewide benefits from this regulation over its lifetime? **[Response]** Impact is non-monetary.

4. Briefly describe any expansion of businesses currently doing business within the State of California that would result from this regulation: **[Response]** None

D. ALTERNATIVES TO THE REGULATION

Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: **[Response]** The BPH was mandated to increase the timing of its risk assessment and establish a prehearing objection process for factual errors. Various alternate methods were considered, but as described in the FSOR, BPH determined these regulation best meet the requirements.

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered: **[Response]** Alternative 1: Benefit $ 0, Cost $2.7 million/year.

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: **[Response]** The Main alternative method considered was recording of CRA interviews with clinicians. However, it would not have resulted in a benefit and would have cost over $2.7 million/year.

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? **[Checked]** Yes, Explain: **[Response]** All standards are performance standards.

E. MAJOR REGULATIONS

Include calculations and assumptions in the rulemaking record

California Environmental Protection Agency (Cal/EPA) boards, offices and departments are required to submit the following (per Health and Safety Code Section 57005). Otherwise, skip to E4.

1. Will the estimated costs of this regulation to California business enterprises exceed $10 million? **[Checked]** No

If Yes, Complete E2. and E3
If No, skip to E4

2. Briefly describe each alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed: **[Blank**]

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio: **[Blank]**

4. Will the regulation subject to OAL review have an estimated economic impact to business enterprises and individuals located in or doing business in California exceeding $50 million in any 12 month period between the date the major regulations is estimated to be filed with the Secretary of State through 12 months after the major regulation is estimated to be fully implemented? **[Checked]** No

5. Briefly describe the following:

   The increase or decrease of investment in the State: **[Response]** None. The board established new state government positions but absorbed the cost with its existing budget. Therefore, there was no increase or decrease of investment in the state.

   The incentive for innovation in products, materials or processes: **[N/A]**

   The benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency: **[Response]** Increase in safety to both victims and the general public by increasing accuracy of parole decision making; increase in benefit to inmates paroling.

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT

Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.

1. Additional expenditures in the current State Fiscal Year which are reimbursable by the State.(Approximate) (Pursuant to Section 6 of Article XIII B of the California Constitution and Section 17500 et seq. of the Government Code). **[Not checked]**

2. Additional expenditures (in the current State Fiscal Year which are Not reimbursable by the State.(Approximate) (Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code). **[Not checked]**

3. Annual Savings. (approximate): **[Not checked]**

4. No additional costs or savings. This regulation makes only technical, non-substantive or clarifying changes to current law regulations. **[Not checked]**

5. No fiscal impact exists. This regulation does not affect any local entity or program. **[Checked]**

6. Other. Explain: **[Not checked]**

B. FISCAL EFFECT ON STATE GOVERNMENT

Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.

1. Additional expenditures in the current State Fiscal Year. (Approximate): **[Checked]** $504,404 per year. See attached.

   It is anticipated that State agencies will:
   Box 1a. **[Checked]** Absorb these additional costs within their existing budgets and resources.

2. Savings in the current State Fiscal Year. (Approximate): **[Not checked]**

3. No fiscal impact exists. This regulation does not affect any State agency or program. **[Not checked]**

4. Other. Explain: **[Not checked]**

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS

Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.

1. Additional expenditures in the current State Fiscal Year. (Approximate): **[Not checked]**

2. Saving in the current State Fiscal Year. (Approximate): **[Not checked]**

3. No fiscal impact exists. This regulation does not affect any federally funded State agency or program. **[Checked]**

4. Other. Explain: **[Not checked]**

FISCAL OFFICER SIGNATURE

Original Signed by: Sandra D. Maciel
Date of signature: 09/19/2017

The signature attests that the agency has completed the STD 399 according to the instructions in SAM section 6601-6616 and understands the impacts of the proposed rulemaking, State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.

AGENCY SECRETARY

Original Signed by: Scott Kernan
Date of signature: 09/20/2017

DEPARTMENT OF FINANCE PROGRAM BUDGET MANAGER:

Original Signed by: Unreadable signature.
Date of signature: 09/20/2017

BPH 16-01: ATTACHMENT TO FORM 399
FISCAL AND ECONOMIC IMPACT STATEMENT

Attachment to:
Fiscal Impact Statement, Section B. Fiscal Effect on State Government, Paragraph 1.

Position authority requests are made when the board already has determined how to allocate the funds for these positions from its current budget. These requests do not result in any change to the state's budget. Rather, position authority requests to the Department of Finance are solely for the purpose of seeking authority to establish the positions and reallocate funds from the agency's existing budget to fund the positions.

In Budget Change Proposal Request 5225-281-BCP-BR-2015-A1, submitted in Fiscal Year 2015-2016 under the description "Board of Parole Hearings Court Order Workload," the board requested and was subsequently granted position authority for three clinical psychologists at an annual cost of approximately $504,404.00. The purpose of this request was to "allow the Board to conduct Comprehensive Risk Assessments every three years and eliminate Subsequent Risk Assessments, which is one of the amendments mandated by the *Johnson v. Shaffer* Stipulated Settlement Agreement these regulations seek to effectuate.

As noted above, the original request for these positions was submitted and approved for a prior fiscal year (FY 2015-2016) following the mandates of the *Johnson v. Shaffer* Stipulated Settlement Agreement, and in anticipation of these regulations. No new budget change proposals have been submitted or required to implement the amendments from these proposed regulations during either the fiscal year in which this package was originally filed (FY 2016-2017) or the fiscal year in which the final rulemaking package is being submitted (FY 2017-2018). Thus, while these positions will continue to cost approximately $504,404.00 per year for the next two fiscal years, the board has continued to absorb the cost of the three clinical psychologist positions within its existing budget and will continue to do so in future fiscal years.

BPH 16-01: FINAL PROPOSED REGULATORY TEXT

ALL FINAL Proposed additions are indicated by single underline and deletions are indicated by single ~~strikethrough~~.

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 15. CRIME PREVENTION AND CORRECTIONS
DIVISION 2. BOARD OF PAROLE HEARINGS
CHAPTER III. PAROLE RELEASE
ARTICLE 2. INFORMATION CONSIDERED

§ 2240. [Begin strikethrough] ~~Psychological~~ [End Strikethrough] [Begin underline] Comprehensive [End underline]Risk Assessments [Begin strikethrough] ~~for Life Inmates~~. [End strikethrough]

(a) [Begin strikethrough]~~Prior to a life inmate's initial parole consideration hearing, a Comprehensive Risk Assessment will be performed by a licensed psychologist employed by the Board of Parole Hearings, except as provided in subsection (g).~~[End strikethrough] [Begin underline] Licensed psychologists employed by the Board of Parole Hearings shall prepare comprehensive risk assessments for use by hearing panels. Psychologists shall consider factors impacting an inmate's risk of violence, including but not limited to factors of suitability and unsuitability listed in subdivisions (c) and (d) of sections 2281 and 2402 of this division. The psychologists shall incorporate structured risk assessment instruments like the HCR-20-V3 and STATIC-99R that are commonly used by mental health professionals who assess risk of violence of incarcerated individuals. [End underline] [Begin strikethrough] ~~(1) In the case of a life inmate who has already had an initial parole consideration hearing but for whom a Comprehensive Risk Assessment has not been prepared, a Comprehensive Risk Assessment shall be performed prior to the inmate's next scheduled subsequent hearing, unless a psychological report was prepared prior to January 1, 2009.~~
~~(2) Psychological reports prepared prior to January 1, 2009 are valid for use for three years, or until used at a hearing that was conducted and completed after January 1, 2009, whichever is earlier. For purposes of this section, a completed hearing is one in which a decision on parole suitability has been rendered.~~[End strikethrough]

(b) [Begin strikethrough] ~~A Comprehensive Risk Assessment will be completed every five years. It will consist of both static and dynamic factors which may assist a hearing panel or the board in determining whether the inmate is suitable for parole. It may include, but is not limited to, an evaluation of the commitment offense, institutional programming, the inmate's past and present mental state, and risk factors from the prisoner's history. The Comprehensive Risk Assessment will provide the clinician's opinion, based on the available data, of the inmate's potential for future violence. Board of Parole Hearings psychologists may incorporate actuarially derived and structured professional judgment approaches to evaluate an inmate's potential for future violence.~~[End strikethrough] [Begin underline] When preparing a risk assessment under

this section for a youth offender, as defined in Penal Code section 3051, subdivisions (a) and (h), the psychologist shall also take into consideration the youth factors described in Penal Code section 3051, subdivision (f)(1) and their mitigating effects.[End underline]

(c) [Begin strikethrough]~~In the five-year period after a Comprehensive Risk Assessment has been completed, life inmates who are due for a regularly scheduled parole consideration hearing will have a Subsequent Risk Assessment completed by a licensed psychologist employed by the Board of Parole Hearings for use at the hearing. This will not apply to documentation hearings, cases coming before the board en banc, progress hearings, three year reviews of a five-year denial, rescission hearings, postponed hearings, waived hearings or hearings scheduled pursuant to court order, unless the board's chief psychologist or designee, in his or her discretion, determines a new assessment is appropriate under the individual circumstances of the inmate's case. The Subsequent Risk Assessment will address changes in the circumstances of the inmate's case, such as new programming, new disciplinary issues, changes in mental status, or changes in parole plans since the completion of the Comprehensive Risk Assessment. The Subsequent Risk Assessment will not include an opinion regarding the inmate's potential for future violence because it supplements, but does not replace, the Comprehensive Risk Assessment.~~[End strikethrough] [Begin underline](1) A risk assessment shall not be finalized until the Chief Psychologist or a Senior Psychologist has reviewed the risk assessment to ensure that the psychologist's opinions are based upon adequate scientific foundation.
(2) A risk assessment shall become final on the date on which it is first approved by the Chief Psychologist or a Senior Psychologist.[End underline]

(d) [Begin strikethrough] ~~The CDCR inmate appeal process does not apply to the psychological evaluations prepared by the board's psychologists. In every case where the hearing panel considers a psychological report, the inmate and his/her attorney, at the hearing, will have an opportunity to rebut or challenge the psychological report and its findings on the record. The hearing panel will determine, at its discretion, what evidentiary weight to give psychological reports.~~[End strikethrough] [Begin underline] (1) Risk assessments shall be prepared for all initial and subsequent parole consideration hearings and all subsequent parole reconsideration hearings for inmates housed within the State of California if, on the date of the hearing, more than three years will have passed since the most recent risk assessment became final.
(2) Risk assessments shall be completed, approved, and served on the inmate no later than 60 calendar days prior to the date of the hearing. [End underline]

(e) [Begin strikethrough]~~If a hearing panel identifies a substantial error in a psychological report, as defined by an error which could affect the basis for the ultimate assessment of an inmate's potential for future violence, the board's chief psychologist or designee will review the report to determine if, at his or her discretion, a new report should be completed. If a new report is not completed, an explanation of the validity of the existing report shall be prepared.~~[End strikethrough] [Begin underline] (1) If an inmate or the inmate's attorney of record believes that a risk assessment contains a

factual error, the inmate or attorney of record may send a written objection regarding the alleged factual error to the Chief Counsel of the board, postmarked or electronically received no less than 30 calendar days before the date of the hearing. Electronic messages sent after board business hours or on a non-business day will be deemed received on the next business day.
(2) For the purposes of this section, "factual error" is an untrue circumstance or event. A disagreement with clinical observations, opinions, or diagnoses is not a factual error.
(3) The inmate or attorney of record shall address the written objection to "Attention: Chief Counsel / Risk Assessment Objection." [End underline]

(f) [Begin strikethrough] ~~If a hearing panel identifies at least three factual errors the board's chief psychologist or designee will review the report and determine, at his or her discretion, whether the errors invalidate the professional conclusions reached in the report, requiring a new report to be prepared, or whether the errors may be corrected without conducting a new evaluation.~~ [End strikethrough] [Begin underline] (1) Upon receipt of a written objection to an alleged factual error in the risk assessment, or on the board's own referral, the Chief Counsel shall review the risk assessment and evaluate whether the risk assessment contains a factual error as alleged.
(2) Following the review, the Chief Counsel shall take one of the following actions:
(A) If the Chief Counsel determines that the risk assessment does not contain a factual error as alleged, the Chief Counsel shall overrule the objection, issue a miscellaneous decision explaining the result of the review, and promptly provide a copy of the miscellaneous decision to the inmate or attorney of record when a decision is made, but in no case less than 10 calendar days prior to the hearing.
(B) If the Chief Counsel determines that the risk assessment contains a factual error as alleged, the Chief Counsel shall refer the matter to the Chief Psychologist.[End underline]

(g) [Begin strikethrough] ~~Life inmates who reside in a state other than California, including those under the Interstate Compact Agreement, may not receive a Comprehensive Risk Assessment, Subsequent Risk Assessment or other psychological evaluation for the purpose of evaluating parole suitability due to restraints imposed by other state's licensing requirements, rules of professional responsibility for psychologists and variations in confidentiality laws among the states. If a psychological report is available, it may be considered by the panel for purpose of evaluating parole suitability at the panel's discretion only if it may be provided to the inmate without violating the laws and regulations of the state in which the inmate is housed.~~[End strikethrough] [Begin underline] (1) Upon referral from the Chief Counsel, the Chief Psychologist shall review the risk assessment and opine whether the identified factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence. Following the review, the Chief Psychologist shall promptly take one of the following actions:
(A) If the Chief Psychologist opines that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Psychologist shall direct that the risk assessment be revised to correct the factual errors, prepare an addendum to the risk assessment documenting the correction of the

error and his or her opinion that correcting the errors had no material impact on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.
(B) If the Chief Psychologist opines that the factual error materially impacted the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Psychologist shall order a new or revised risk assessment, prepare an addendum to the risk assessment documenting the correction of the error and his or her opinion about the material impact of the errors on the risk assessment's conclusions, and notify the Chief Counsel of the addendum.
(2) Upon receipt of the Chief Psychologist's addendum, the Chief Counsel shall promptly, but in no case less than 10 calendar days prior to the hearing, take one of the following actions:
(A) If the Chief Psychologist opined that the factual error did not materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, and provide a copy of the miscellaneous decision, the revised risk assessment, and the Chief Psychologist's addendum to the inmate or attorney of record prior to the hearing.
(B) If the Chief Psychologist opined that the factual error did materially impact the risk assessment's conclusions regarding the inmate's risk of violence, the Chief Counsel shall issue a miscellaneous decision explaining the result of the review, postpone the hearing if appropriate under section 2253, subdivision (d) of these regulations, and provide a copy of the miscellaneous decision, the new or revised risk assessment, and Chief Psychologist's addendum to the inmate or attorney of record.
(3) The board shall request that the department permanently remove any risk assessments that are revised under paragraph (1)(A) of this subdivision, or revised or redone under paragraph (1)(B) of this subdivision, from the inmate's central file.[End underline]

(h) [Begin strikethrough] ~~The provisions of this section shall not apply to medical parole hearings pursuant to Penal Code section 3550 or applications for sentence recall or resentencing pursuant to Penal Code section 1170.~~[End strikethrough] [Begin underline] If the Chief Counsel receives a written objection to an alleged factual error in the risk assessment that is postmarked or electronically received less than 30 calendar days before the hearing, the Chief Counsel shall determine whether sufficient time exists to complete the review process described in subdivisions (f) and (g) of this section no later than 10 calendar days prior to the hearing. If the Chief Counsel determines that sufficient time exists, the Chief Counsel and Chief Psychologist shall complete the review process in the time remaining before the hearing. If the Chief Counsel determines that insufficient time exists, the Chief Counsel shall refer the objection to the hearing panel for consideration. The Chief Counsel's decision not to respond to an untimely objection is not alone good cause for either a postponement or a waiver under section 2253 of these regulations.

(i)(1) If an inmate or the inmate's attorney of record raises an objection to an alleged factual error in a risk assessment for the first time at the hearing or the Chief Counsel has referred an objection to the hearing panel under subdivision (h) of this section, the hearing panel shall first determine whether the inmate has demonstrated good cause for

failing to submit a written objection 30 or more calendar days before the hearing. If the inmate has not demonstrated good cause, the presiding hearing officer may overrule the objection on that basis alone. If good cause is established, the hearing panel shall consider the objection and proceed with either paragraph (2) or (3) of this subdivision.
(2) If the hearing panel determines the risk assessment may contain a factual error, the presiding hearing officer shall identify each alleged factual error in question and refer the risk assessment to the Chief Counsel for review under subdivision (f) of this section.
(A) If other evidence before the hearing panel is sufficient to evaluate the inmate's suitability for parole, the hearing panel shall disregard the alleged factual error, as well as any conclusions affected by the alleged factual error, and complete the hearing.
(B) If other evidence before the hearing panel is insufficient to evaluate the inmate's suitability for parole, the presiding hearing officer shall postpone the hearing under section 2253, subdivision (d) of these regulations pending the review process described in subdivisions (f) and (g) of this section.
(3) If the hearing panel determines the risk assessment does not contain a factual error, the presiding hearing officer shall overrule the objection and the hearing panel shall complete the hearing.

(j) Notwithstanding subdivision (i), an inmate shall have the opportunity at a hearing to object or respond to any clinical observations, opinions, or diagnoses in a risk assessment.[End underline]

NOTE: Authority cited: Section 12838.4, Government Code; and Sections 3052 and 5076.2, Penal Code. Reference: Sections 3041, 3041.5, [Begin underline]3051, 11190, and 11193, [End underline] Penal Code [Begin underline]; *Johnson v. Shaffer* (E.D. Cal. May 26, 2016) No. 2:12-cv-1059, Doc. 167 [order approving stipulated agreement]; *Sherman-Bey v. Shaffer,* 2016 WL 193508, Case No. C077499. [End underline]