

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:

DEPARTMENT OF FOOD AND  
AGRICULTURE

REGULATORY ACTION:  
Title 4, California Code of  
Regulations

AMEND SECTIONS 4800, 4801,  
AND 4802

DECISION OF DISAPPROVAL  
OF REGULATORY ACTION  
(Gov. Code, sec. 11349.3)

OAL File No. 2011-0120-01S

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**SUMMARY OF REGULATORY ACTION**

The Department of Food and Agriculture (DFA) proposed to amend sections 4800, 4801, and 4802 of title 4 of the California Code of Regulations to add new violations and remove others from the administrative civil penalty guidelines and make other amendments to reflect changes in the Business and Professions Code. On January 20, 2011, the DFA submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On March 4, 2011, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

**DECISION**

The Office of Administrative Law disapproved the above referenced regulatory action for the following reasons: failure to follow the correct procedure, failure to comply with the necessity and clarity standards of Government Code section 11349, and required documents included in the file were defective.

**DISCUSSION**

The adoption of regulations by the DFA must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for

compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

**1. THE REGULATION TEXT MADE AVAILABLE TO THE PUBLIC AND SUBMITTED TO OAL FOR REVIEW AND FILING WITH THE SECRETARY OF STATE CONTAINS CHANGES TO THE EXISTING CALIFORNIA CODE OF REGULATIONS THAT WERE NOT MADE AVAILABLE TO THE PUBLIC**

Subdivision (a) of Government Code section 11346.2 requires that an agency proposing to make changes to the California Code of Regulations make the proposed changes available to the public for comment:

Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

(a) A copy of the express terms of the proposed regulation.

...

(3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

The regulation text made available to the public with the notice of proposed action in this regulatory action contained a number of changes from the existing California Code of Regulations that were not shown in the regulation text in underline and strikeout as required by Government Code section 11346.2(a) or in another manner which might have alerted the public to the changes being proposed:

(a) The following two sentences in existing subdivision (c) of section 4800 of title 4 regarding the entry of judgment were omitted without any indication of their deletion:

Judgement shall be entered immediately by the clerk in conformity with the decision. No fees shall be charged by the clerk of the superior court for the performance of any official service required in connection with the entry of judgement pursuant to this section.

(b) The existing penalty guideline for violation of Business and Professions Code section 12024.1 in Table A in section 4802 of title 4 breaks the violation down as Moderate

or Serious based upon whether the overcharge is less than 5% or 5% or more. The text made available to the public with this regulatory action shows only a single entry of Category A for violation of Business and Professions Code section 12024.1 with no distinction in severity based upon the amount of the overcharge and no indication that the existing entry was being changed.

- (c) The term “algebraic” which appears in three places in the existing penalty guideline for violation of Business and Professions Code section 12024.2 in Table A in section 4802 of title 4 and the definition of the term which appears in a footnote to the existing table (“Algebraic overcharge is the total of overcharges in a purchase of multiple items, less the total of the undercharges.”) were omitted without any indication of their deletion.
- (d) The existing entry for violation of Business and Professions Code section 12532 in Table A in section 4802 of title 4 was omitted without being shown in strikeout.
- (e) The following items are missing underline or strikeout: the new word “proposed” in section 4800(a); the change in the title to section 4801; the new words “Neglect or Refusal to exhibit weighing or measuring device for inspection” in Table A in section 4802 for Business and Professions Code section 12018; the new words “per pound” in Table A in section 4802 for Business and Professions Code section 12024.55; the new word “Weighmaster” in Table A in section 4802 for Business and Professions Code section 12704; the new word “weighmaster” and existing word “party” in Table A in section 4802 for Business and Professions Code section 12712; the new word “weighmaster” in two places in Table A for section 4802 for Business and Professions Code section 12713; the new words “by a weighmaster” in Table A in section 4802 for Business and Professions Code section 12724; and Business and Professions Code section 12028 in the existing authority and reference citations for section 4802 of title 4 were omitted without being shown in strikeout.

The text of the regulations submitted to OAL with the Form STD 400 for review and filing with the Secretary of State with this regulatory action contains the same defects which must be corrected.

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment before the changes are adopted:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. **If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.** Any written comments

received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. (Emphasis added.)

Section 44 of title 1 of the California Code of Regulations specifies how such sufficiently related changes are to be made available:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and
- (4) all persons who requested notification from the agency of the availability of such changes.

(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

Once the defects described above are properly illustrated, they need to be made available to the public as required by Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

## 2. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of the title 1 of the California Code of Regulations provides:

In order to meet the ‘necessity’ standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An 'expert' within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, "why" a regulation is needed and "how" this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The initial statement of reasons submitted with this regulatory action for the changes proposed for section 4802 provides:

This section provides the guidelines used by sealers of weights and measures to determine appropriate penalties for violations of the Business and Professions Code. The section was amended to remove from Table A references to those sections that have been repealed from the Business and Professions Code since the regulation went into effect in 1996. Additionally, it was amended to add penalty guidelines for those sections in the Business and Professions Code that were added since 1996 or were not included when the regulations went into effect in 1996....

The initial statement of reasons submitted with this regulatory action does not explain how the particular level of severity was assigned to the new Business and Professions Code violations added to the penalty guidelines, nor why the new entries for Business and Professions Code sections 12024 and 12024.2 were broken down in the manner they were. Also, the initial statement of reasons did not contain an explanation of why the entries for Business and Professions Code sections 12024.3 and 12509 were removed. These sections of the Business and Professions Code have not been repealed. The document providing the missing necessity must be made available to the public for at least 15 days prior to resubmission pursuant to Government Code section 11347.1.

Government Code section 11347.1 provides in part:

- (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.
- (b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:
  - (1) Persons who testified at the public hearing.
  - (2) Persons who submitted written comments at the public hearing.
  - (3) Persons whose comments were received by the agency during the public comment period.
  - (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.
- (c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency.

This document providing the missing necessity must also include an explanation of the need for the changes that were not made available to the public in the original submission and which changes are described above in issue #1.

### **3. CLARITY**

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The first line of existing subdivision (a) of section 4802 in title 4 provides that “...violation types are designated as ‘Serious,’ ‘Moderate,’ and ‘Minor,’” however, this terminology is not used consistently. Wherever these terms are referred to elsewhere in subdivisions (a) and (b) of section 4802, they will be changed by this regulatory action to “Category A,” “Category B,” and “Category C,” respectively. This internal inconsistent reference to the violation types would not be easily understood by those persons affected by the regulations.

**4. THE FISCAL IMPACT STATEMENT (STD. 399) SUBMITTED WITH THIS REGULATORY ACTION AS COMPLETED REQUIRES SIGNOFF FROM THE DEPARTMENT OF FINANCE**

Section 6615 of the State Administrative Manual (SAM), entitled “Estimates Which Require Department of Finance Action,” provides in part:

A state agency is not required in all instances to obtain concurrence of the DOF in its estimate of the fiscal impact of its proposed regulation on government agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- ...
- B.1-State Costs
- B.2-State Savings
- B.4-Other

The Fiscal Impact Statement (STD. 399) submitted with this regulatory action has box B.4, “Other,” checked without further explanation and is not approved by anyone from the Department of Finance as required by SAM section 6615.

**CONCLUSION**

For the reasons set forth above, OAL has disapproved this regulatory action. Please also note that: the final statement of reasons does not include a local mandate determination nor an adequate summary and response to the written comments submitted by the Southern California Agricultural Commissioners and Sealers Associations as required by Government Code section 11346.9 (a)(2) and (a)(3); the text of the regulations located in Tab B of the rulemaking record as the text of the regulations originally noticed to the public reportedly varies from the text actually made available to the public; and the written comments submitted by the Southern California Agricultural Commissioners and Sealers Associations end with the statement that “Proposed amendments are as shown in the attached document as provided”. If there was such an attachment submitted with this comment, it must be included in the rulemaking record. If you have any questions, please contact me at (916) 323-6808.

Date: March 4, 2011

**CRAIG TARPENNING**

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Decision of Disapproval  
OAL File No. 2011-0120-01 S

Original: Karen Ross  
cc: David Lazier