

**State of California
Office of Administrative Law**

In re:
Board of Barbering and Cosmetology

**Regulatory Action: Title 16
California Code of Regulations**

Adopt sections:
Amend sections: 974
Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2011-0418-01 S

SUMMARY OF REGULATORY ACTION

In this regulatory action, the Board of Barbering and Cosmetology (Board) proposed to amend section 974 in title 16 of the California Code of Regulations, a section which is entitled "Schedule of Administrative Fines." As amended, this regulation would set forth a listing of particular sections of the Business and Professions Code and of the Board's regulations the violation of which may cause the assessment of an administrative fine, provide a description for each of these statutory and regulatory categories of violation, set forth the amounts of the administrative fines in each category for the 1st violation, the 2nd violation and the 3rd violation, and then indicate whether an administrative fine in each category is waivable. The regulation implements Business and Professions Code sections 7406, 7407, and 7409.

DECISION

On May 24, 2011, the Office of Administrative Law (OAL) notified the Board of the disapproval of this regulatory action. The reasons for the disapproval were the following: (1) failure to comply with the "Clarity" standard of Government Code section 11349.1, (2) documents in the rulemaking file which are defective and failure to include all required documents in the rulemaking file, and (3) failure to comply with all required Administrative Procedure Act procedures.

DISCUSSION

Regulations adopted by the Board must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (Gov. Code, secs. 11340 through 11365). Any

regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA (Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Furthermore, Business and Professions Code section 7312, subdivision (a), specifically provides that the Board shall “[m]ake rules and regulations in aid or furtherance of [the Barbering and Cosmetology Act] in accordance with the Administrative Procedure Act.” (Emphasis added.) Consequently, before the proposed amendment to section 974 of title 16 of the California Code of Regulations (CCR) may become effective, the regulation and rulemaking record must be reviewed by OAL for compliance with the procedural requirements and substantive standards of the APA, in accordance with Government Code section 11349.1.

A. CLARITY

OAL must review regulations for compliance with the “Clarity” standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines “Clarity” as meaning “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The “Clarity” standard is further defined in section 16 of title 1 of the CCR, OAL’s regulation on “Clarity,” which provides the following:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:

- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
- (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
- (3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
- (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
- (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or
- (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be “directly affected” if they:

- (1) are legally required to comply with the regulation; or
- (2) are legally required to enforce the regulation; or
- (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or

- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

In this administrative fine schedule rulemaking, several of the provisions fail to comply with the "Clarity" standard. These provisions are discussed below:

1. Violations of Business and Professions Code section 7360 -- One of the categories of violations on the administrative fine schedule is for violations of Business and Professions Code section 7360, which is proposed to be listed on the schedule as follows: "7360. Mobile Unit – Residential/Entrance/Prohibited Use." (Emphasis added.) The reference to "Entrance" as part of the description is difficult to understand, since Business and Professions Code section 7360, regarding residential use of mobile units, contains no specific requirement or prohibition pertaining to an "entrance." This contrasts with Business and Professions Code section 7350, regarding residential use of "establishments," where there is a specific requirement that an establishment shall have a direct entrance separate and distinct from any entrance in connection with private quarters. Consequently, in the context of Business and Professions Code section 7360 violations, the reference in the description to "entrance" is potentially confusing and misleading to persons directly affected by the regulation (such as persons required to comply with the regulation and persons required to enforce the regulation).

2. Violations of Business and Professions Code section 7404(i) – One of the categories of violations on the administrative fine schedule is listed on the schedule as follows: "7404(i). Interference with Inspection." A review of Business and Professions Code section 7404(i) indicates that section 7404(i) pertains to unprofessional conduct for "[e]ngaging, outside of a licensed establishment and for compensation in any form whatever, in any practice for which a license is required under this chapter..." Section 7404(i) contains no reference to "interference with inspection." Consequently, the listing of "7404(i). Interference with Inspection" is difficult to understand and potentially confusing to persons directly affected by the regulation. Examining other subdivisions within Business and Professions Code section 7404, we note that subdivision (l) pertains to unprofessional conduct for "[r]efusal to permit or interference with an inspection authorized under this chapter." Perhaps the Board intended to refer to "7404(l)."

3. Violations of CCR, title 16, section 978 – One of the categories of violations on the administrative fine schedule is for violations of particular subsections of CCR, title 16, section 978 and is listed on the schedule as follows: "978. Minimum Equipment and Supplies." In connection with this category, the final regulation text as submitted to OAL for filing with the Secretary of State shows a fine for the 1st violation of \$50 but does not set forth any fine amounts for the 2nd and 3rd violations (the "2nd Violation" and "3rd Violation" boxes are blank for this category). This contrasts with all of the other categories on the schedule where amounts are listed under each "1st Violation," "2nd Violation," and "3rd Violation" column. The blank boxes for section 978 would make it difficult for directly affected persons to easily determine whether and in what amounts administrative fines may be assessed for 2nd and 3rd violations and could be a source of confusion, thereby raising a "Clarity" standard concern. In examining the modified regulation text for this rulemaking which was made available to the public during the "15-day notice" period (Tab VII of the rulemaking file), we note that the "978. Minimum Equipment and Supplies" category sets forth a 2nd violation amount of \$100 and a 3rd violation amount of \$150.

It is likely that the \$100 and \$150 amounts were inadvertently omitted for this category in the final regulation text, and, if that is the case, the inclusion of these amounts will resolve the “Clarity” standard concern.

The “978. Minimum Equipment and Supplies” category raises a second “Clarity” standard concern. In addition to this category, the administrative fine schedule sets forth four other categories involving CCR, title 16, section 978, which are listed as follows: (1) “978(a)(5). Insufficient Disinfectant in Container for Total Immersion,” (2) “978(a)(6). No Steam/Dry Heat Sterilizer for Electrolgy Instruments,” (3) “978(b). No Disinfectant Solution Available for Use,” and (4) “978(c). No Manufacturer-Labeled Container for Disinfectant.” All of the five section 978-related categories, in fact, pertain to the subject of “Minimum Equipment and Supplies,” and indeed “Minimum Equipment and Supplies” is the heading of section 978 as published in the CCR. The listing of “978. Minimum Equipment and Supplies” raises a “Clarity” standard concern in this context since this label is so broad that it could be construed to encompass violations of any subsection of section 978, including violations of subsections 978(a)(5), 978(a)(6), 978(b) and 978(c). The amounts of administrative fines are different (lower) under “978. Minimum Equipment and Supplies” than the fines under the sections 978(a)(5), 978(a)(6), 978(b) and 978(c) categories. In this context, there is potential for confusion and disagreements among directly affected persons regarding whether the lower fines under the broad label of “978. Minimum Equipment and Supplies” could potentially be applied to the section 978(a)(5), 978(a)(6), 978(b), and 978(c) violation situations. Examining the modified regulation text in Tab VII of the rulemaking file, it is evident that the “978. Minimum Equipment and Supplies” category was a consolidation of originally proposed separate categories for violations of sections 978(a)(1), 978(a)(2), 978(a)(3), and 978(a)(4) and was apparently intended to cover only those subsections of section 978. The “Clarity” standard problem would be remedied by being more specific and changing the broad language “978. Minimum Equipment and Supplies” to specifically identify the provisions intended to be covered – sections 978(a)(1), 978(a)(2), 978(a)(3) and 978(a)(4).

4. Violations of CCR, title 16, section 988 -- One of the categories of violations on the administrative fine schedule is for violations of CCR, title 16, section 988 and is listed on the schedule in the final regulation text as follows: “988. Creams, Powders and Cosmetics.” Examining section 988 as published in the CCR, that section has the heading “Liquids, Creams, Powders and Cosmetics” (emphasis added) and includes provisions relating to “liquids.” Although not a significant issue, the clarity of the description of the section 988 category would be improved if it were listed as “988. Liquids, Creams, Powders and Cosmetics” so as to better coincide with the referenced regulation. The omission of the word “Liquids” in the final regulation text may have been an inadvertent error as “Liquids” was included in the description of section 988 in the modified regulation text in Tab VII of the rulemaking file.

B. INCORRECT PROCEDURES (INCLUDING MISSING AND DEFECTIVE DOCUMENTS)

This administrative fine schedule rulemaking presents a number of problems relating to compliance with APA procedural requirements, including missing and defective documents required as part of the APA process. Each of these problem areas is discussed below.

1. Missing documentation that the Board approved the final version of the regulation – The rulemaking file as submitted to OAL for review includes documentation that the members of the Board voted upon and approved the originally-noticed version of the administrative fine schedule regulation at the Board’s January 24, 2010 meeting (Tab V of the rulemaking file). However, subsequent to the 45-day comment period, the regulation text was modified and many of the changes were substantial in nature, generally involving the consolidation of administrative fine categories and the related adjustment of fine amounts. The Board staff noticed the modified regulation text with the substantial changes during the 15-day notice period (Tab VII of the rulemaking file).

The rulemaking file as submitted to OAL does not include documentation that the members of the Board voted upon and approved the final version of the regulation text with the substantial changes. Since the Board as the governing body is the entity granted the rulemaking authority in this matter (see Business and Professions Code sections 7312 and 7407), the rulemaking file must include documentation that the Board approved the final version of the regulation in all substantial respects. In this regard, Government Code section 11347.3, which sets forth the required contents of a rulemaking file, specifically requires in subdivision (b)(8) that the rulemaking file include: “A transcript, recording, or minutes of any public hearing connected with the adoption, amendment or repeal of the regulation.” The rulemaking file in this administrative fine schedule rulemaking needs to include the transcript, recording, or minutes of a public hearing (or hearings) where the Board approves the final version of the regulation text in all substantial respects (and after the Board considers any public comments received, although we note that to date no public comments have been received for consideration in connection with this rulemaking). We further note that Government Code section 11346.8, subdivision (a), provides in part: “The State agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation.”

2. Changes in fine amounts not properly noticed – Government Code section 11346.2, subdivision (a)(3), provides that with respect to the originally noticed regulation text (for the 45-day comment period): “The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.” In this administrative fine schedule rulemaking, the Board in its originally noticed regulation text generally properly utilized underline and strikeout to show the changes from the existing CCR text. However, in two instances, the amounts of administrative fines were changed without the changes being properly noticed in underline and strikeout, as follows:

(A) For the Business and Professions Code section 7349.1 category, under “1st Violation” the deletion of the existing “100” fine amount was not noticed in strikeout.

(B) For the CCR, title 16, section 982 category, under “1st Violation” the deletion of the existing “500” fine amount was not noticed in strikeout and the addition of the new “100” fine amount was not noticed in underline.

These two “notice” problems were not remedied in the subsequent 15-day notice of modified regulation text. In the event that the Board elects to correct the problems with this rulemaking

through a second notice of modified regulation text, these two noticing defects with respect to the originally noticed regulation text need to be remedied in the second modified regulation text.

3. Final regulation text not in compliance with CCR, title 1, section 8 – Section 8 of title 1 of the CCR sets forth the requirements for the “final text” of regulations submitted to OAL for filing with the Secretary of State. Section 8(b) provides: “The final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations....” While the final regulation text for this administrative fine schedule rulemaking accurately shows in underline and strikeout format many of the changes to the existing text of regulation section 974 (as currently printed in the CCR), there are a number of problems. These include:

(A) For the Business and Professions Code section 7349.1 category, the “1st Violation” column needs to show the deletion of the existing fine amount of “100” in strikeout.

(B) For the CCR, title 16, section 982 category, the “1st Violation” column needs to show the deletion of the existing fine amount “500” in strikeout and the addition of the new fine amount “100” in underline.

(C) For a number of categories, the final regulation text incorrectly shows in strikeout descriptive language and fine amounts which are not part of the existing text of the regulation as currently printed in the CCR. In general, these extra strikeout deletions appear to result from descriptive language and fine amounts which were proposed for addition to the existing CCR text during the original notice period (April 23, 2010 through June 7, 2010), but were later proposed for deletion during the subsequent notice period for the modified regulations (December 9, 2010 through January 3, 2011). For example, for the now deleted category “965(b). Establishment License Not Posted in Reception Area,” the deleted descriptive language “Establishment License Not Posted in Reception Area” and the deleted fine amount “50” in the “1st Violation” column should not be shown in the final regulation text as they are not in the existing printed CCR text. Similar problems relating to extra descriptive language and/or fine amounts incorrectly shown in the final regulation text as being deleted from the CCR are noted in connection with the following categories and former categories: sections 965(a), 965(c), 978(a)(1), 978(a)(2), 978(a)(3), 978(a)(4), 987(a), 987(b), 987(c), 988(a), 988(b), 988(c), 988(d), 990(a), 990(b), 990(c), 993(a), 993(b), 994(a), 994(b), 995(b), 995(c), 995(d), 995(e).

(D) On page one of the final regulation text, the phrase “Schedule of Administrative Fines” within subsection (a) and immediately above the table of administrative fines needs to be underlined as it is being added to the regulation as currently printed in the CCR.

4. Final statement of reasons – Government Code section 11346.9, subdivision (a), provides that an agency proposing regulations shall prepare and submit to OAL a “final statement of reasons.” In this administrative fine schedule rulemaking, the Board properly included a final statement of reasons which generally met the requirements of Government Code section 11346.9, subdivision (a), in Tab IX of the rulemaking file. The final statement of reasons does, however, raise one area of concern which requires a correction to the document. Page 2 of the final statement of reasons includes a heading which reads: “Summary of, and Responses to, Comments Received

During the 15-day Comment Period on Documents Added to the Rulemaking File.” (Emphasis added.) Following this heading, the final statement of reasons includes a statement confirming that “no comments were received” in connection with the 15-day comment period. In this rulemaking, the rulemaking file does not otherwise indicate that there was a 15-day comment period for “documents added to the rulemaking file.” See Government Code section 11347.1 pertaining to providing 15-day notice of documents relied upon which are added to the rulemaking file. Rather, Tab VII of the rulemaking file indicates that there was a 15-day notice period for the availability of modified regulation text, in accordance with Government Code section 11346.8, subdivision (c), and CCR, title 1, section 44. The heading on page 2 of the final statement of reasons was probably intended to be “Summary of, and Responses to, Comments Received During the 15-day Comment Period on the Modified Regulation Text,” and the “no comments were received” which follows would then confirm that no comments were received regarding the modified regulation text.

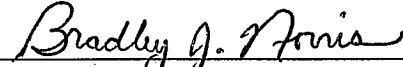
5. Updated informative digest – Government Code section 11346.9, subdivision (b), provides that an agency proposing regulations shall prepare and submit to OAL an “updated informative digest.” In this administrative fine schedule rulemaking, the Board properly included an updated informative digest in Tab VIII of the rulemaking file. The updated informative digest raises only one area of concern. The updated informative digest contains the following broad statement regarding revisions made to the administrative fine schedule: “Instead of assigning a separate fine for several subsections of Sections 965, 978, 987, 988, 990, 993, 994 and 995 of the California Code of Regulations, the Board now proposes to assign a single fine for any violation of Sections 965, 978, 987, 988, 990, 993, 994 and 995 regardless of the subsection violated.” (Emphasis added.) While this statement is accurate in most respects, it is not accurate with respect to section 978. For section 978, there remain separate violation categories on the administrative fine schedule with differing administrative fine amounts for subsections 978(a)(5), 978(a)(6), 978(b), and 978(c).

6. Form 400 – Section 6 of title 1 of the CCR requires that rulemaking agencies complete the Form 400 for the submission of regulations to OAL for publication and/or for transmittal to the Secretary of State. Section 6(b) specifies the required contents of the completed Form 400, including section 6(b)(6) which establishes the following content requirement for the Form 400: “if a statute requires that, prior to submitting the regulatory action to OAL, the rulemaking agency provide notice to another agency or entity of the regulatory action, or otherwise to submit the regulations to another agency or entity for review, consultation, approval, or concurrence, at any time prior to the submission of the regulations to OAL, the name of any and all such agencies or entities.” In connection with this administrative fine schedule rulemaking, the Std. 399 “Economic and Fiscal Impact Statement” form (in Tab X of the rulemaking file) required the approval/concurrence of the Department of Finance, pursuant to Government Code section 11346.5, subdivision (a)(6). The Board properly obtained the Department of Finance signature demonstrating approval/concurrence on its Std. 399 form. However, the Form 400 submitted with the final regulation text does not indicate in Section B.6. of that form that Department of Finance approval/concurrence was required. The box adjacent to “Department of Finance (Form STD. 399)(SAM §6660)” needs to be checked on the Form 400.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6225.

Date: May 25, 2011



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