State of California
Office of Administrative Law

In re: **Dental Hygiene Committee of California**	**DECISION OF DISAPPROVAL OF REGULATORY ACTION**
Regulatory Action: **Title 16 California Code of Regulations**	**Government Code Section 11349.3**
Adopt sections: 1149, 1150, 1151, 1152, 1153.	**OAL File No. 2012-1221-02 S**

SUMMARY OF REGULATORY ACTION

In this regulatory action, the Dental Hygiene Committee of California (Committee) proposed to adopt regulations pertaining to "Sponsored Free Health Care Events." These regulations would implement Business and Professions Code section 901 which was enacted in Statutes 2010, Chapter 270 (A.B. 2699). Under this legislation, California's healing arts boards, committees, and commissions are generally authorized to adopt regulations under which a health care practitioner licensed or certified and in good standing in another state, district or territory of the United States (an out-of-state practitioner) under specified conditions may offer or provide the health care services in California without obtaining California licensure. In order to qualify, the out-of-state health care practitioner must, among other things, provide the services on a voluntary basis and without charge to uninsured or underinsured persons, at a sponsored health care event, and for a period of 10 calendar days or less per event.

Pursuant to statutory requirements in Business and Professions Code section 901, the Committee's proposed regulations set forth the process for the "sponsoring entity" of a sponsored event to register with the Committee in advance of the event. The Committee's proposed regulations further set forth a process for an out-of-state practitioner licensed or certified to practice dental hygiene in another state, district or territory of the United States to obtain authorization from the Committee to participate in a sponsored event in California and establish a processing fee of $86.00. In furtherance of these procedures, the Committee proposed incorporating by reference two forms, including "Registration of Sponsoring Entity Under Business and Professions Code Section 901, Form 901-A (DCA/2011)" adopted by the Department of Consumer Affairs and "Request for Authorization to Practice Without a License at a Registered Free Health Care Event, Form DHCC-901-B (07/2012)." Additional provisions of the proposed regulations include definitions of terms, reporting and recordkeeping

requirements, and provisions pertaining to the termination of out-of-state practitioner authorization and appeals.

DECISION

On February 6, 2013, the Office of Administrative Law (OAL) notified the Committee 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) failure to comply with the "Necessity" standard of Government Code section 11349.1; and (3) failure to comply with all required Administrative Procedure Act procedures (failure to identify documents relied upon).

DISCUSSION

Regulations adopted by the Committee 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, §§ 11340 through 11361). 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, § 11346). No exemption or exclusion applies to the regulatory action here under review. Moreover, Business and Professions Code section 1906, which sets forth the Committee's general authority to adopt regulations, specifically states: "(a) The committee shall adopt, amend, and revoke regulations to implement the requirements of this article. (b) All regulations adopted by the committee shall comply with the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code." (Bus. & Prof. Code, § 1906, subds. (a) & (b) [emphasis added].) Consequently, before regulations proposed by the Committee may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements 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 California Code of Regulations (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 "Sponsored Free Health Care Events" rulemaking, OAL's principal clarity concern relates to proposed regulation section 1151 as discussed below.

Proposed Regulation Section 1151 – Out-of-State Practitioner Authorization to Participate in Sponsored Event:

Proposed section 1151 prescribes the criteria and process for an out-of-state dental hygiene practitioner to register for and participate in a sponsored health care event in California. Subdivision (a) sets forth the required form for a request to participate and establishes an $86.00 registration fee. Subdivision (b) specifies that the Committee must approve or deny a completed application within 20 calendar days. Subdivision (c) identifies various grounds for mandatory and permissive denial of a request to participate, and subdivision (d) provides a means for a practitioner to appeal the denial of a request to participate.

Among other things, proposed subdivision (c)(1)(A) provides the following as grounds for mandatory denial of an application by an out-of-state practitioner:

> The submitted "Request for Authorization to Practice Without a License at a Registered Free Health Care Event" form DHCC 901-B (07/2012) is incomplete and the applicant has not responded timely to the Committee's request for additional information. [Emphasis added.]

The regulation text does not specify what "timely" is or explain how the Committee will determine whether a response to a request for additional information is timely. On its face, this provision can be reasonably and logically interpreted to have more than one meaning and uses terms which do not have meanings generally familiar to those "directly affected" by the regulation. (Cal. Code Regs., tit. 1, §16, subd. (a)(1) & (3).) Proposed subdivision (c)(1)(A) of section 1151 is therefore unclear.

Compounding this lack of clarity, the language of the regulation conflicts with the Committee's description of the effect of the regulation set forth in the Initial Statement of Reasons (ISOR). (Cal. Code Regs., tit. 1, §16, subd. (a)(2).) For example, the Committee's explanation and necessity for this provision, as set forth in the ISOR at page 10, provides:

> The committee has determined that the failure of an applicant to respond within seven days to a request for additional information will result in an automatic denial of a request. Because the committee only has 20 days in which to grant or deny a request, timing is critical and the committee's opinion is that failure of an applicant to respond within seven calendar days will sufficiently jeopardize the committee's ability to effectively review a complete application within the allotted time. [Emphasis added.]

Based on this explanation, the Committee would consider a request for additional information as untimely, thereby warranting mandatory denial of the application, if a response to the request is not received within seven calendar days. Thus, the ambiguous term "timely" conflicts with the Committee's description of a specific seven day requirement as set forth in the ISOR.

The potential consequences resulting from this unclear provision are easy to predict. Applicants who receive requests for additional information, and who look to the ISOR for guidance, would logically, albeit potentially mistakenly, understand that a response must be provided to the Committee within the strict seven day timeframe. Other applicants may be unaware of the ISOR explanation and would be left to speculate about the deadline to respond. In addition to confusion on the part of the regulated public, the ambiguous language creates a risk that members or employees of the Committee may interpret, and therefore apply, this provision differently when determining whether an application must be approved or denied. In order to avoid confusion and possible underground regulation issues (see generally Gov. Code, § 11340.5, subd. (a)), if the Committee intends to impose a specific seven day criteria for receiving a response, this requirement should be specifically set forth in the regulation text. Alternatively, if the Committee's intention is to make a timeliness determination on a case-by-case basis within the time frames imposed by Business and Professions Code section 901, then this requirement should be clearly set forth in the regulation text and be supported by the ISOR.

In light of the foregoing, the Committee must revise the text and rulemaking file to address these clarity issues. Any changes or additional information must be made available for review and comment pursuant to sections 11346.8, subdivisions (c) and (d), and 11347.1 of the Government Code, and title 1, sections 44 and 46 of the CCR.

B. NECESSITY AND INCORRECT PROCEDURE

OAL must review regulations for compliance with the "Necessity" standard of Government Code section 11349.1. Government Code section 11349, subdivision (a), defines "Necessity" as meaning: "[T]he 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 purposes 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, section 10, subdivision (b) of title 1 of the CCR 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 regulation 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 need for a regulation, the APA requires that a rulemaking agency describe the need for the regulation and identify documents relied upon in proposing the regulation in the ISOR, pursuant to Government Code section 11346.2, subdivision (b).

Proposed Section 1151(a) - $86.00 Processing Fee For Out-of-State Practitioner Authorization to Participate in Sponsored Event:

While the Committee's rulemaking file in most respects satisfies the "Necessity" standard, the showing of "Necessity" is insufficient in relation to the $86.00 processing fee required of applicant out-of-state practitioners, as discussed below.

As a condition of participation in a sponsored health care event, Business and Professions Code section 901, subdivision (b)(1)(C), requires that each out-of-state practitioner "pays a fee, in an amount determined by the board by regulation, which shall be available, upon appropriation, to cover the cost of developing the authorization process and processing the request." In proposed regulation section 1151, the Committee has included the following provision in subdivision (a): "An applicant shall request authorization by submitting to the Committee a completed 'Request

for Authorization to Practice Without a License at a Registered Free Health Care Event' Form DHCC 901-B (07/2012), which is hereby incorporated by reference, accompanied by a nonrefundable, nontransferable processing fee of $86.00." [Emphasis added.]

In the originally proposed text, the processing fee required by this regulation was $55.00. While the ISOR for this rulemaking makes reference to the $55.00 processing fee (see ISOR pages 7, 8 and 15), the Committee provides only the following very general explanation to support the proposed $55.00 processing fee: "Code Section 901(b) requires an out-of-state practitioner to request authorization from the committee in order to participate in a sponsored event. The statute specifically requires the committee to prescribe a form and set a processing fee for this purpose." (ISOR at page 7.) The ISOR does not include any cost data or other information to support the $55.00 processing fee, or any other amount of fee. Nor does the Committee identify any documents relied upon to support the fee.

In the second notice of modified text, beginning on July 13, 2012, the Committee revised the fee in subdivision (a) from $55.00 to $86.00. While the proposed text and Form DHCC-901-B (07/2012) reflect the change in the fee amount, the notice of modified text does not include any justification for the $86.00 fee or identify any documents relied upon to support the fee amount.

The only explanation for the $86.00 processing fee in the rulemaking file at the time of the second notice of modified text appears to be in connection with the Economic and Fiscal Impact Statement, Form STD. 399. Attached to the Economic and Fiscal Impact Statement, the Committee has included a document labeled "Table A: Data Supporting Application Fee for Out-of-State Practitioner Authorization to Participate in Sponsored Event" (Table A). In Table A, the Committee provides a breakdown of the specific costs expected to be incurred in connection with processing requests for authorization. Although the July 9, 2012, Committee meeting minutes contained in the rulemaking file reference the $86.00 fee amount, Table A was not identified as a document relied upon until the Final Statement of Reasons was prepared. The problem created by this sequence of events is that the only support in the rulemaking record sufficient to substantiate the $86.00 processing fee is Table A. Although the July 13, 2012, Notice of Modified Text reflects the change in the fee, the notice does not identify Table A as a document relied upon or even allude to its existence. Members of the regulated public therefore did not have proper notice of this document or the information contained therein. Because Table A was not identified as a document relied upon, the Committee cannot rely upon it to support the necessity for the $86.00 processing fee.

In order to meet the "Necessity" standard, the documents and information supporting the $86.00 processing fee must be identified and made available for public comment pursuant to Government Code sections 11346.8 and 11347.1. In raising this concern, we are mindful of the substantial body of judicial decisions in California relating to fees and particularly "regulatory fees." See, for example, the recent California Supreme Court decision in *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421 [121 Cal.Rptr.3d 37].

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-8916.

Date: February 7, 2013

Kevin D. Hull
Staff Counsel

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Director

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