

**State of California
Office of Administrative Law**

**In re:
Department of Justice**

Regulatory Action:

Title 11, California Code of Regulations

Adopt sections:

Amend sections: 999.5(i)

Repeal sections:

**DECISION OF PARTIAL
DISAPPROVAL OF REGULATORY
ACTION**

Government Code Section 11349.3

OAL Matter Number: 2015-0420-03

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

On April 20, 2015, the Department of Justice (Department) submitted a rulemaking action for review by the Office of Administrative Law (OAL). The rulemaking action proposed amendments to section 999.5 of title 11 of the California Code of Regulations (CCR). Section 999.5 establishes procedures, criteria, and requirements for proposed agreements or transactions that include asset transfers or transfers of control of assets pertaining to health facilities owned by nonprofit public benefit corporations, as more fully specified in Corporations Code sections 5914(a)(1) and 5920(a)(1). Pursuant to Corporations Code section 5914 et seq. and section 5920 et seq., the Attorney General has authority to review proposed agreements or transactions of specified health facilities and consent to, give conditional consent to, or not consent to a proposed agreement or transaction. Existing law requires health facilities anticipating entering into an agreement or transaction to provide notice and sufficient information to the Attorney General to allow the Attorney General to evaluate and decide whether to consent to the proposed agreement or transaction.

The proposed amendments to section 999.5 primarily address the specific information to be provided to the Attorney General and increase public access to information related to the proposed agreement or transaction. Of particular importance to this decision, the Department proposed a new subdivision (i) to section 999.5, which, in the second sentence, would have reserved a right with the Attorney General to require a transferee to a health facility transaction, which the Attorney General consented to or conditionally consented to, to fulfill all representations made during the application process, including those regarding types or levels of medical services.

DECISION

On June 2, 2015, OAL approved all amendments to section 999.5 but disapproved the addition of subdivision (i) because it failed to meet the clarity standard pursuant to Government Code section 11349.1.

DISCUSSION

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 Administrative Procedure Act (APA) unless a statute expressly exempts or excludes the act from compliance with the APA. (Gov. Code, sec. 11346.) No exemption or exclusion applies to the rulemaking action under review. Accordingly, regulations adopted by the Department must be adopted pursuant to the APA. Thus, before the proposed regulatory action may become effective, it is subject to a review by OAL for compliance with procedural requirements and substantive standards of the APA. (Gov. Code, sec. 11349.1(a).) 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.

Clarity

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to the persons who must comply with the regulations. (Gov. Code, sec. 11340(b).) For this reason, Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349(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.” Title 1, CCR, section 16, further provides:

- (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
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In this rulemaking action, the Department proposed adding subdivision (i) to section 999.5, which provided:

(i) Enforcement of Conditions

The Attorney General reserves the right to enforce all conditions imposed on the Attorney General's approval of an agreement or transaction. **The Attorney General further reserves the right to require the transferee to fulfill all representations made during the application process, including those regarding types or levels of medical services.** Nothing in this subdivision precludes the Attorney General from pursuing any other available legal remedies.
[Underlining in original. Bold emphasis added.]

The second sentence of subdivision (i) conflicts with the Department's description of the effect of this language in its initial statement of reasons and final statement of reasons, which is presumed not to comply with the clarity standard pursuant to title 1, CCR, section 16(a)(2). On page 14 of the Department's initial statement of reasons, the following language describes the effect of this regulatory provision:

In deciding whether to consent to the transfer of a nonprofit health care facility, the Attorney General necessarily relies on the information, representations and documents provided by the applicant. Typically, the Attorney General will place specific conditions on the consent to transfer a facility. The amendment codifies the Attorney General's existing authority to enforce all such conditions. Further, the Attorney General may require the parties to fulfill the representations they made to the Attorney General to obtain consent to the transaction. This regulation codifies the Attorney General's authority to enforce the terms of these agreements. This is not a change in policy or procedure.
[Emphasis added.]

OAL identified four discrepancies in the emphasized language quoted from the initial statement of reasons that directly conflict with the language in the second sentence of subdivision (i).

The first discrepancy in the initial statement of reasons is in the reference to "the parties." There is no language in subdivision (i) that references anything like "the parties." There is a reference to "the transferee," but the transferee is only one party to the agreement or transaction for which consent is sought from the Attorney General. This conflict between the language in subdivision (i) and the initial statement of reasons results in the language in subdivision (i) being presumed not to comply with the clarity standard pursuant to title 1, CCR, section 16(a)(2). Additionally, it is not clear in the language of subdivision (i) whether "all representations made" include representations made just by the transferee to the transaction, by the parties to the transaction, or by anyone, making the language unclear pursuant to Government Code section 11349(c) and title 1, CCR, section 16(a)(1).

The second discrepancy in the initial statement of reasons is in the reference to "they." Like the reference to "the parties" discussed above, the language in subdivision (i) makes no reference to "they." Presumably, the word "they" would relate to "the parties," but there is no reference to "the parties" in subdivision (i). This conflict between the language in subdivision (i) and the

initial statement of reasons results in the language in subdivision (i) being presumed not to comply with the clarity standard pursuant to title 1, CCR, section 16(a)(2).

The third discrepancy in the initial statement of reasons is in the reference to “representations made to the Attorney General.” There is no language in subdivision (i) that limits any representation made during the application process to only those made to the Attorney General. This conflict between the language in subdivision (i) and the initial statement of reasons results in the language in subdivision (i) being presumed not to comply with the clarity standard pursuant to title 1, CCR, section 16(a)(2). Instead of specifying to whom representations are made, the language in subdivision (i) is left open-ended, referring to “all representations made during the application process.” This could mean any representation made to anyone by anyone, not necessarily by the transferee, and thus the language is vague and unclear to persons directly affected pursuant to Government Code section 11349(c) and title 1, CCR, section 16(a)(1).

The fourth discrepancy in the initial statement of reasons is in the reference to “to obtain consent to the transaction.” There is nothing in the language in subdivision (i) that requires that representations subject to enforcement in subdivision (i) be made to obtain consent to the agreement or transaction by the Attorney General. The reason this matters is the Department states in the first sentence of the quoted language of its initial statement of reasons that the Attorney General “necessarily relies” on representations provided by the applicant for Attorney General consent, but the language in subdivision (i) does not contain any limiting language that indicates any representations made during the application process that might be subject to enforcement under subdivision (i) are only those made “to obtain consent to the transaction” or upon which the Attorney General relies in consenting to an agreement or transaction. This conflict between the language in subdivision (i) and the initial statement of reasons results in the language in subdivision (i) being presumed not to comply with the clarity standard pursuant to title 1, CCR, section 16(a)(2).

We note that the reference to “applicant” in the first sentence of the quoted language in the Department’s initial statement of reasons also conflicts with the language in subdivision (i), which only refers to a transferee.¹ Similar to the discussion above pertaining to “the parties,” there is no reference to the “applicant” in the language of subdivision (i), which conflicts both with the language in the Department’s initial statement of reasons and the second sentence in subdivision (i), and which results in the language in subdivision (i) being presumed not to comply with the clarity standard pursuant to title 1, CCR, section 16(a)(2).

Other Clarity Considerations

Another clarity consideration of the language in subdivision (i) is the reference to “during the application process.” It is unclear whether this language is intended to refer to the formal

¹ The “applicant” is the transferor, not the transferee, to an agreement or transaction subject to Corporations Code section 5914 et seq. or section 5920 et seq.; the party required to “give notice to, and obtain the written consent of, the Attorney General prior to entering into any agreement or transaction,” as more fully specified in Corporations Code sections 5914(a)(1) and 5920(a)(1). (See also title 11, CCR, section 999.5(b)(1), which similarly defines “applicant” as meaning “any corporation or entity that is required by section 999.5(a)(1) of these regulations to submit written notice to the Attorney General.” Section 999.5(a)(1) essentially restates the provisions in Corporations Code sections 5914(a)(1) and 5920(a)(1).)

application process between the applicant and the Attorney General or to the time period in which the application process occurs. It is therefore unclear whether “during the application process” is intended to include only formal representations made to the Attorney General during the process for seeking approval of an agreement or transaction, or if it is intended to include any representation made to anyone, whether in the formal record or not, during this process. There is nothing in the rulemaking file that clarifies these issues. Therefore, this phrase is unclear pursuant to Government Code section 11349(c) and title 1, CCR, section 16(a)(1).

During OAL’s review of this rulemaking action, the Department needed to supplement its summary and response to several comments in order to satisfy the APA requirement that agencies consider public comments, pursuant to Government Code section 11346.9(a)(3). The Department’s supplemental response to several comments regarding the second sentence in subdivision (i) states,

. . . Given the public nature of the [application] process, the Attorney General considers representations made by parties to the public in order to obtain the Attorney General’s approval to be representations made to the Attorney General.

...

We note again the Department’s reference to “parties,” which, as discussed above, conflicts with the language in subdivision (i) and results in the language in subdivision (i) being presumed not to comply with the clarity standard pursuant to title 1, CCR, section 16(a)(2). However, the quoted text states that representations made by parties “to the public” in order to obtain Attorney General approval are to be considered representations made to the Attorney General due to the public nature of the application process. There is no language in subdivision (i) that expressly indicates representations “to the public” would be included as representations that might be subject to enforcement under subdivision (i), let alone that representations made to the public would be deemed to be representations made to the Attorney General. The language in subdivision (i) is left open-ended and could mean representations made to anyone. This reference to “to the public” in the quoted supplemental response to comments also results in a conflict between the language in subdivision (i) and the stated effect of the language, both in the initial statement of reasons (“representations . . . made to the Attorney General”) and in the supplemental response to comments in the final statement of reasons, which results in the language in subdivision (i) being presumed not to comply with the clarity standard pursuant to title 1, CCR, section 16(a)(2).

The Department’s supplemental response to comments regarding the second sentence in subdivision (i) further states,

. . . Any enforcement action by the Attorney General’s Office will be done in a manner consistent with due process of law and requires the Attorney General to establish to the satisfaction of a court that parties to a transaction made representations in connection with an application that resulted in the approval of the transaction and then failed to comply with those representations. . . .

This statement clearly indicates that enforcement of any representations that might fall under subdivision (i) and that a party to the agreement or transaction (or a transferee, depending on what is intended) might be required to fulfill requires court action by the Department. The language is not self-executing. There is no language in subdivision (i) that clarifies this making it unclear to persons directly affected pursuant to Government Code section 11349(c).

Resolution of Clarity Issues

The Department will need to resolve the clarity issues discussed above in order for the second sentence in subdivision (i) to meet the clarity standard. To resolve these issues, the Department will need to provide for public comment a 15-day notice and availability that modifies the language of subdivision (i) and modifies the statements in the initial statement of reasons and responses to comments in the final statement of reasons. This can be done by modifying the language in subdivision (i), pursuant to Government Code section 11346.8(c) and title 1, CCR, section 44, and by adding a document to the rulemaking file that modifies the statements quoted above in the initial statement of reasons and the final statement of reasons, pursuant to Government Code section 11347.1. The language in the second sentence of subdivision (i) should harmonize with the statements in the rulemaking file, and the other clarity issues discussed above should be resolved in the modified text. The modified text needs to be included in the mailing of the 15-day notice pursuant to title 1, CCR, section 44. The document added to the rulemaking file needs to be identified in the 15-day notice and made available during the 15-day comment period pursuant to Government Code section 11347.1. We recommend the document added to the rulemaking file to modify statements in the initial statement of reasons and the final statement of reasons be titled "Statement of Reasons Supplement" or words to that effect.

CONCLUSION

For the reasons set forth above, OAL disapproved subdivision (i) of section 999.5. Pursuant to Government Code section 11349.4, the Department has 120 days from the date of this decision to resubmit the rulemaking action with all clarity issues resolved as discussed above. If you have any questions, please contact me at (916) 323-6809.

Date: June 8, 2015



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