

**State of California  
Office of Administrative Law**

**In re:**  
**California Gambling Control  
Commission**

**Regulatory Action:**

**Title 04, California Code of Regulations**

**Adopt sections:** 12250, 12260, 12261,  
12262, 12263, 12264,  
12285, 12287, 12290

**Amend sections:** 12003, 12200, 12200.7,  
12200.9, 12200.10A,  
12200.11, 12200.18,  
12220, 12220.18, 12560,  
12562

**Repeal sections:** 12200.13, 12200.16,  
12200.21, 12220.13,  
12220.16, 12220.21

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL Matter Number: 2017-0427-01**

**OAL Matter Type: Regular (S)**

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**SUMMARY OF REGULATORY ACTION**

On April 27, 2017, the California Gambling Control Commission (Commission) submitted to the Office of Administrative Law (OAL) this proposed regulatory action to change various sections in Title 4 of the California Code of Regulations (CCR). The proposed modifications allow playing books to be maintained electronically for all sessions of play by Third-Party Providers of Proposition Player Services (TPPPS) and gambling businesses. The regulations also propose to separate playing book approvals from contract approvals and registration processes. The regulations further create an approval process that would be uniformly applied to both TPPPS and gambling businesses and would require only initial and amended playing book form approvals.

**DECISION**

On June 9, 2017, OAL notified the Commission that OAL disapproved the proposed regulations because the regulations failed to comply with the necessity and clarity standards of Government Code section 11349.1 and the Commission failed to follow procedural requirements of the California Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

## DISCUSSION

The adoption, amendment, or repeal of regulations by the Commission must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 regulation subject to the APA may become effective, the 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 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 regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

It is important to note that material proposed to be incorporated by reference into a regulation shall be reviewed in accordance with the same procedures and standards for a regulation published in the CCR. (1 Cal. Code Regs., sec. 20, subd. (b).) Therefore, the form BGC-APP 036 (Rev. 02/16) – *Application for Playing Book Approval*, which is incorporated by reference in the regulations, must comply with all APA standards.

### **1. NECESSITY STANDARD**

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all regulations for compliance with the necessity standard. Government Code section 11349, subdivision (a), defines “necessity” to mean:

(a) ...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 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, Title 1 of the CCR, section 10, subdivision (b) provides:

(b) 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. [Emphasis added.]

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 (ISOR). (Gov. Code, sec. 11346.2, subd. (b).) The ISOR 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, subd. (b)(1).) The ISOR 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, sec. 11346.2, subd. (b) and sec. 11346.5, subds. (a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The ISOR in this rulemaking action lacks necessity for many of the proposed regulations. It merely paraphrases the new or revised regulatory provisions rather than explains the reasons for the proposed regulatory language.

For example, proposed section 12264, subdivision (a)(1), requires an application processing fee of \$1,200 per electronic playing book system. The ISOR simply states that “[t]his paragraph would adopt an application processing fee of \$1,200 for the initial review and processing of the electronic playing book approval application.” It does not explain the problem that prompted the need for this fee and the purpose and rationale for imposing the fee, including an explanation or rationale of how the Commission came up with the amount of \$1,200.

To further illustrate, proposed section 12250, subdivision (b)(6), defines an “independent gaming test laboratory” as a “gaming test laboratory that is... [l]icensed or registered to test, approve, and certify gambling equipment, systems, and software in any United States jurisdiction, and accredited by a signatory to the International Laboratory Accreditation Cooperation (ILAC)[,] Mutual Recognition Arrangement (MRA)[,] or other equivalent laboratory accreditation agreement....” Here too, the ISOR simply paraphrases the regulation. It does not explain the problem, purpose, and rationale for requiring an independent gaming test laboratory to be accredited by a signatory to the ILAC, MRA, or other equivalent laboratory accreditation agreement.

The APA requires the ISOR to include an explanation of the need and the rationale for *each* proposed new provision or change to the existing regulatory language, including language found in documents incorporated by reference, and such explanation must be made available to the

public. Any supplement to the ISOR that provides the missing necessity must be made available to the public for comment for at least 15 days prior to adoption of the regulations by the Commission pursuant to Government Code section 11347.1.

## 2. CLARITY STANDARD

In adopting the APA, the Legislature found the language of many regulations to be unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines “clarity” to mean “written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them.”

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

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;...
- (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation;....

In this regulatory action, the Commission failed to comply with the clarity standard of the APA.

### 2.1. Proposed Section 12250(b)(6)

Proposed section 12250, subdivision (b)(6), defines an “independent gaming test laboratory” as follows:

(b)(6) ...a gaming test laboratory that is...

(A) Licensed or registered to test, approve, and certify gambling equipment, systems, and software in any United States jurisdiction, and accredited by a signatory to the International Laboratory Accreditation Cooperation (ILAC)[,] Mutual Recognition Arrangement (MRA)[,] or *other equivalent laboratory accreditation agreement*....

(B) ....

[Emphasis added.]

The phrase “other equivalent laboratory accreditation agreement” is unclear. The regulation does not provide the criteria that will be used to determine whether the agreement is “equivalent” to the

ILAC or the MRA. Thus, this provision is unclear because it can reasonably and logically be interpreted to have multiple meanings.

## **2.2. Proposed Section 12261(d)**

Proposed section 12261, subdivision (d), requires the Bureau<sup>1</sup> to be notified of any changes to a playing book form. It states:

(d) If a change is non-substantive, for example, the addition of a Bureau-approved controlled game, or a change in formatting, font, spacing, or other cosmetic change, the primary owner must submit a notice and copy of the revised form to the Bureau to update the Bureau's records. This *notice will be deemed accepted unless otherwise advised by the Bureau* within 30 calendar days of receiving the notice. [Emphasis added.]

The regulation does not establish how the applicant will be advised in the event the change is not accepted. Thus, the regulation is unclear because the term "otherwise advised by the Bureau" may be interpreted to have more than one meaning and it is not easily understood by those affected by the regulation.

## **2.3. Proposed Section 12263(c)(1)**

Proposed section 12263, subdivision (c), lists the information storage and retrieval requirements that the primary database of an electronic playing book database has to meet. Subdivision (c)(1) states:

(c)(1) Data stored in the system cannot be edited, deleted, or replaced. If any necessary changes to the data are made, all original data must be preserved, with notation or documentation of any edits, deletions, or replacements, and the reasons therefore.

This provision contains an internal inconsistency. The first sentence states that data stored in the system cannot be edited, deleted, or replaced. However, the sentence immediately following that addresses the scenario in which the data stored is edited, deleted, or replaced. Thus, this regulation is unclear because it is not easily understood by those directly affected.

For the reasons discussed above, the regulations fail to comply with the clarity standard of the APA. Thus, the Commission must make proposed modifications available to the public for comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the CCR before adopting the final regulations and resubmitting this regulatory action to OAL for review. Additionally, any comments made in relation to these proposed modifications must be summarized and responded to in the final statement of reasons, pursuant to Government Code section 11347.1, subdivision (d). The Commission must adopt the

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<sup>1</sup> California Code of Regulations, Title 4, section 12002, subdivision (e), defines "Bureau" as "the Bureau of Gambling Control in the California Department of Justice, acting as 'the department' as provided in section 19810 of the Business and Professions Code."

final text after consideration of all relevant material, including the comments (Gov. Code, sec. 11346.8, subd. (a).)

### 3. FAILURE TO FOLLOW REQUIRED APA PROCEDURES

The APA requires agencies to follow specific procedures. In this rulemaking action, the Commission failed to follow the required procedures by omitting to: (1) properly display text, (2) summarize and respond to public comments, (3) include all the required information in the final statement of reasons, (4) properly incorporate a form by reference pursuant to the APA, and (5) include all the required information on the Form 400.

#### 3.1. Improperly Displaying Text

Prior to noticing any modified text to the public for comments, the Commission must ensure that the underlying text of the proposed regulations is properly displayed. (Gov. Code, sec. 11346.8, subd. (c); 1 Cal. Code Regs., sec. 46.) The CCR further clarifies in section 46, subdivision (a), that:

(a) Changes to regulations in accordance with Government Code Section 11346.8(c) shall be made using a uniform method and shall illustrate accurately all changes to the original text.

Below are examples of some of the improperly displayed text:

- Proposed text of section 12261, subdivision (b), stated: “To request the review of a new or amended playing book....” However, the final text submitted to OAL states: “To request the review of a new or amended *hardcopy* playing book...” (emphasis added) without illustrating the change. The word “hardcopy” should have been underlined.
- Section 12220, subdivision (b)(16) does not match what is currently printed in the CCR. The existing CCR defines the term “other employee” as an “individual employed by a primary owner who is not authorized to *serve as a player.*” (Emphasis added.) However, the final regulation text submitted to OAL uses the phrase “provide proposition player services” instead of the phrase “serve as a player” without illustrating the change. The phrase “provide proposition player services” should have been stricken out and the phrase “serve as a player” should have been added with an underline.

The Commission must make all changes available to the public for comment, with changes accurately illustrated and get final Commission approval, prior to resubmitting the rulemaking to OAL for review.

### 3.2. Failure to Summarize and Respond to Public Comments

Government Code section 11346.9, subdivision (a), provides that an agency proposing regulations shall prepare and submit to OAL a final statement of reasons (FSR). The Commission's summary of, and response to, public comments is required to be part of the FSR. Specifically, Government Code section 11346.9, subdivision (a)(3), requires that the FSR include:

(a)(3) A summary of *each* objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate *each* objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.... [Emphasis added.]

The FSR included in the rulemaking file omitted to summarize and respond to several public comments:

- During the 45-day comment period, a commenter commented that “[a]lthough [proposed section 12003, subdivision (c)] does state ‘systems that support’ it is not clear in the definition of ‘system’ in section 12250, subdivision (b)(14), that programs, software, and applications are included in it.”
- During the 45-day comment period, a commenter pointed out that the term “significant loss” found in proposed section 12285, subdivision (a), is vague and its meaning may vary from club to club.
- During the 15-day comment period, a commenter made some objections and recommendations related to the definition of “other employees.”

These comments were not summarized or responded to in the FSR. The Commission is required to summarize and respond to these comments before resubmitting the rulemaking action to OAL for review.

### 3.3. Failure to Include All Required Information in the Final Statement of Reasons

Additional requirements of the FSR are found in Government Code section 11346.9, subdivisions (a)(2) and (a)(4). Specifically, these provisions require that the FSR include:

(a)(2) A determination as to whether adoption, amendment, or repeal of the regulation imposes a mandate on local agencies or school districts. If the determination is that adoption, amendment, or repeal of the regulation would impose a local mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4 [of the Government Code]. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding.

(a)(3) ....

(a)(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law....

The FSR contained in the rulemaking record submitted to OAL does not include the above local mandates or alternative determinations. Upon resubmittal, the Commission must discuss the required determinations in the FSR.

### **3.4. Failure to Properly Incorporate a Form by Reference Pursuant to the APA**

Title 1 of the CCR, section 20, subdivision (c), establishes the conditions an agency must meet in order to incorporate a document by reference. It states:

(c) An agency may “incorporate by reference” only if the following conditions are met:

(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the [CCR].

(2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained....

In this rulemaking record, the Commission proposes to incorporate by reference the *Application for Playing Book Approval*, Form BCG-APP 036 (Rev. 02/16). However, the FSR did not include the required statements, pursuant to section 20 of the CCR. Upon resubmittal, the FSR must include all of the required statements, pursuant to section 20 of the CCR, in order to properly incorporate Form BCG-APP 036 (Rev. 02/16) by reference.

### **3.5. Failure to Include All Required Information on the Form 400**

Title 1 of the CCR, section 6, subdivision (b), provides a list of all the information that the Form 400 is required to contain. The Form 400 submitted to OAL in this rulemaking action did not comply with these requirements:

- It did not include the beginning and ending dates of availability of the modified regulations. (Form 400, B.4.)
- It did not indicate that the regulations required concurrence from the Department of Finance (Finance), even though the Form STD 399 contained in the record was signed off by Finance. (Form 400, B.6.)



Upon resubmittal, the Form 400 must be correctly filled out in compliance with Title 1 of the CCR, section 6, subdivision (b).

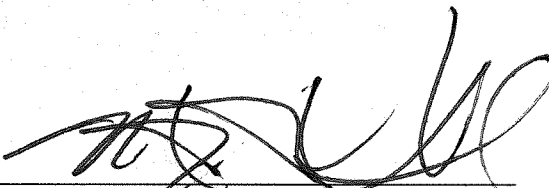
**CONCLUSION**

For these reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Commission may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this Disapproval Decision will be emailed to the Commission on the date indicated below.

Any changes made to the regulation text to address the issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR prior to adoption. Additionally, any document relied upon and any supplement to the ISR or other document the Commission may create or otherwise propose to add to the record in order to address the necessity issue discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11347.1 prior to adoption. The Commission must document in the rulemaking file its approval of the final text after consideration of all public comments and relevant information, as well as resolve all other issues raised in this Decision of Disapproval, before resubmitting to OAL.

If you have any questions, please do not hesitate to contact me at (916) 323-6824.

Date: June 16, 2017



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