

**State of California
Office of Administrative Law**

In re:
Dental Board of California

Regulatory Action:

Title 16, California Code of Regulations

Adopt sections:

Amend sections: 1021, 1022

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2017-0413-02

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

In this rulemaking action the Dental Board of California (Board) is proposing to amend sections 1021 and 1022 of title 16 of the California Code of Regulations (CCR). These amendments increase the fees for dentists and dental assistants. This rulemaking action also proposes to remove some fees and adopt other new fees.

DECISION

On April 13, 2017, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On May 25, 2017, OAL notified the Board of the disapproval of this regulatory action. The reason for the disapproval was failure to comply with the “necessity” standard of Government Code section 11349.1. This Decision of Disapproval of Regulatory Action explains the reasons for OAL’s action.

DISCUSSION

Regulations adopted by the Board must generally be adopted pursuant to the rulemaking provisions of the APA, chapter 3.5 of part 1 of division 3 of title 2 of the Government Code (secs. 11340-11361). Pursuant to section 11346 of the Government Code, 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. No exemption or exclusion applies to the present regulatory action under review. Consequently, before these regulations 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.

NECESSITY

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 “...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, subdivision (b) of section 10 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, Government Code section 11346.2, subdivision (b), requires a rulemaking agency to describe the need for the regulation and identify documents relied upon in proposing the regulation, if any, in the Initial Statement of Reasons (ISR). Additionally, a rulemaking agency must prepare and submit a Final Statement of Reasons (FSR) pursuant to Government Code section 11346.9(a) and that FSR must update the information contained in the ISR.

As discussed below, the rulemaking record fails to comply with the necessity standard of the APA for the proposed changes to title 16 section 1021(r) and (ab).

Issue 1. When initially proposing to amend section 1021(r), the Board proposed changing the fee for an “oral conscious sedation certificate renewal” from the existing \$75 fee to a \$500 fee. Necessity was provided in the ISR for this proposed change, but the Board elected to amend this fee again during a Board hearing after the initial public comment period. The text was changed from requiring a \$500 fee to requiring a \$136 fee. The revised text was sent out for a 15-day public comment period. The Board, therefore, is required to provide the necessity for this change in the FSR.

The FSR does not provide any evidence to explain why the Board elected to change the fee from the originally proposed \$500 fee to a \$136 fee. In fact, the rulemaking record contains minutes of the Board's August 19, 2016 board hearing where the Board discussed and voted to change the fee from \$500 to \$168, not \$136. This lack of substantial evidence for the \$136 fee constitutes a failure to satisfy the necessity standard of the APA. Additionally, because the \$168 fee approved by the Board during the adoption hearing on August 19, 2016 was not the fee amount noticed or submitted as part of the final text, the Board must determine and approve the correct fee amount needed. If the fee amount differs from the \$136 fee that was noticed to the public, the Board must make this change available for a minimum 15-day public comment period. The Board must then document in the FSR the necessity for the chosen fee.

Issue 2. Section 1021(ab) in title 16 of the CCR was initially noticed as new text adding a "license certification" fee for \$50. Necessity was provided in the ISR for this addition to the CCR. During the subsequent 15-day public comment period this language disappeared from the Board's proposed rulemaking text. The Board is required to provide necessity for this text change in the FSR as an update to the ISR.

The FSR is completely silent regarding this removal of proposed section 1021(ab). There is no mention of the removal of this language from the text or a reason why the language was removed. The Board's minutes from the August 19, 2016 board hearing are also silent as to why this language was removed. The failure to explain the need for the removal of this proposed fee constitutes a violation of the necessity standard of the APA.

Ultimately, in order to meet the necessity standard of the APA, the rulemaking record must include substantial evidence demonstrating why the Board needed to make the changes to the text in the ways described above.


Any changes made to the regulation text to address the necessity 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. Additionally, any document the Board may create or otherwise propose to add to the record in order to address the necessity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11347.1. The Board must adopt the final text after consideration of all relevant material, including comments submitted (Gov. Code, sec. 11346.8(a).)

CONCLUSION

For the reasons set forth above, OAL disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Board may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this disapproval decision will be e-mailed to the Board contact person on the date this decision is signed as specified below.

If you have any questions, please contact me at (916) 323-6225.

Date: June 1, 2017



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