

State of California Office of Administrative Law

In re:
Bureau of Real Estate Appraisers

Regulatory Action:

Title 10, California Code of Regulations

Adopt sections:

Amend sections: 3526, 3561, 3563, 3567,
3568, 3569, 3570, 3575,
3602, 3603, 3641, 3662

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2018-0918-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

In this regular rulemaking action, the Bureau of Real Estate Appraisers (Bureau) proposed to repeal one form and amend eight forms that are incorporated by reference in twelve regulations. The repealed form relates to the summary of appraisal experience. The amended forms concern logging appraisal experience, petitioning for course equivalency credit, consenting to service of process, applying for issuance of a license, course provider accreditation, course accreditation, and appraisal management company registration. The Bureau proposed amending the forms to include required statutory language, update fee requirements, improve the clarity of questions and directions, and make other stylistic changes.

On September 18, 2018, the Bureau submitted the above-referenced rulemaking action to the Office of Administrative Law (OAL) for review. On October 30, 2018, OAL notified the Bureau that OAL disapproved the proposed regulations pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's disapproval.

DECISION

OAL disapproved the above-referenced regulatory action because the Bureau failed to comply with the necessity and clarity standards of the APA. Additionally, the Bureau failed follow required APA procedures by not stating in the Initial Statement of Reasons (ISOR) any benefits of the proposed regulatory action and not providing any facts in support of the determination that the proposed regulatory action will not have a significant adverse economic impact on business. The Bureau must resolve all APA issues detailed herein before OAL can approve any resubmission.

DISCUSSION

The Bureau's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. (See Gov. Code, sec. 11340 et seq.) Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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.) No exemption applies to the present regulatory action under review.

Generally, before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with both the procedural requirements of the APA and the standards for administrative regulations in Government Code section 11349.1. (See Gov. Code, sec. 11340.1, subd. (a).) Materials proposed for "incorporation by reference" are reviewed in accordance with the same procedures and standards for a regulation published in the California Code of Regulations (CCR). (Cal. Code Regs., tit. 1, sec. 20, subd. (b).)

To satisfy the APA standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In its 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. (Gov. Code, sec. 11340.1, subd. (a).) 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.

1. Necessity

The APA requires that proposed regulations have adequate necessity. "Necessity" is defined in Government Code section 11349, subdivision (a), as follows:

"Necessity" means 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.

The ISOR supporting a regulatory action must include a statement of (1) the specific purpose of each adoption, amendment, or repeal; (2) the problem the agency intends to address; and (3) the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it proposed. (Gov. Code, secs. 11346.2, subd. (b)(1), 11349, subd. (a), 11349.1, subd. (a)(1).) The necessity for many proposed amendments to the forms incorporated by reference is absent from the ISOR, including support for the following:

- 1.1. Form REA 3004 is amended to remove the requirement that the form be notarized.

- 1.2. Form REA 3005 is amended to delete the statement on page 2 that, "Community college and university courses approved by an approved regional accrediting agency do not need to be petitioned."
- 1.3. Form REA 3006 is amended to delete section 1 which stated,
 1. Complete "a" or "b":
 - a. If engaging in activities requiring a California Real Estate Appraiser License, the complete address of the applicant's or licensee's place of business is:
_____.
 - b. If not engaging in activities requiring a California Real Estate Appraiser License, the complete address of the applicant's or licensee's residence is:
_____.
- 1.4. Form REA 3008 is amended to delete section 5 of the form that required the applicant include their home address.
- 1.5. Form REA 3013 is amended to delete the requirement to "Attach copies of all accreditations: Council of Private Post Secondary and Vocational Education or Equivalent Approvals."
- 1.6. Form REA 5001, Section A is amended to no longer exclude P.O. Boxes as a mailing address.
- 1.7. Form REA 5001, Section B is amended to no longer require a mailing address and physical home address of the Designated Officer.
- 1.8. Form REA 5001, Section D is deleted eliminating the Agent for Service of Process certification.
- 1.9. Form REA 5001, Part III is amended to shorten the Application Declaration on pages 3 and 4, eliminating the Business and Professions Code 11345.3 certification and Agent for Service of Process certification.

As the above changes are not discussed in the ISOR, these portions of the rulemaking fail to meet the necessity standard. The Bureau must resolve these necessity issues through an addendum to the ISOR and make the addendum available to the public for comment for at least 15 calendar days pursuant to Government Code section 11347.1.

2. Clarity

In adopting the APA, the Legislature found that the language of many regulations was 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" as meaning "...written or displayed so that the meaning of

regulations will be easily understood by those persons directly affected by them.” Proposed amendments to forms REA 3004 and REA 3014 fail to comply with the clarity standard of the APA.

Form REA 3004 is used by license applicants to provide a log of their appraisal experience. Applicants must list information related to appraisals they have performed, including but not limited to, the property address, type of property, a description of the work performed, and date of the report. The directions for form REA 3004 state,

WORK SAMPLES (Please read carefully)

BREA licensing staff will contact the applicant regarding the submission of work samples selected from the Log of Appraisal Experience. *Typically* five work samples will be requested.

...

[Emphasis added.]

An applicant has no way of knowing how many work samples they need to submit. The regulation does not articulate a standard that the Bureau will use to determine how many work samples to request from each applicant. What criteria will the Bureau use in deciding how many work samples to request? Without additional criteria the regulations are not “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” (Gov. Code, sec. 1 1349, subd. (c).)

In addition to the clarity issue in form REA 3004, form REA 3014, which is required to be used when applying for course accreditation, uses the terms “correspondence” and “online” inconsistently when referring to the types of courses that may be submitted for accreditation. Thus, the regulation is not easily understood by those directly affected by the regulation.

The Bureau must make all substantial regulatory text changes, which are sufficiently related to the original text, available to the public for comment for at least 15 calendar days pursuant to Government Code section 11346.8, subdivision (c), and section 44 in title 1 of the CCR.

3. Failure to Follow Procedure

OAL also notes the following APA procedural issues that must be addressed prior to any resubmission of this rulemaking action.

3.1. Benefits Anticipated from the Regulatory Action

Government Code section 11346.2, subdivision (b)(1) requires the Bureau, in the ISOR, to “... enumerate the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute. These benefits may include, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of fairness or social equity, and the increase in openness and transparency in business and government,

among other things.” The Bureau does not enumerate any benefits anticipated by this regulatory action.

3.2. Facts Supporting No Significant Statewide Adverse Economic Impact

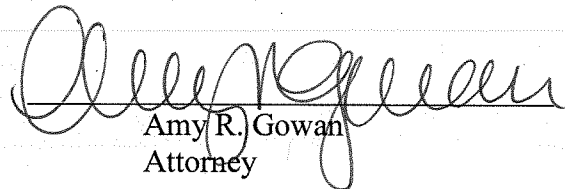
The Bureau states in its Notice of Proposed Action that “[t]he Bureau has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.” Government Code section 11346.2, subdivision (b)(5)(A) requires the Bureau to include in its ISOR “facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business.” No facts or evidence were included in the ISOR to support this determination.

The Bureau must resolve these procedural issues through an addendum to the ISOR and make the addendum available to the public for comment for at least 15 calendar days pursuant to Government Code section 11347.1.

CONCLUSION

For these reasons, OAL disapproved the Bureau’s rulemaking action. Pursuant to Government Code section 11349.4(a), the Bureau may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this Decision was emailed to the Bureau on the date indicated below. If you have any questions, please do not hesitate to contact me at (916) 323-7465.

Date: November 6, 2018



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