

**State of California  
Office of Administrative Law**

**In re:  
California Horse Racing Board**

**Regulatory Action:**

**Title 04, California Code of Regulations**

**Adopt sections:**

**Amend sections: 1865**

**Repeal sections:**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL Matter Number: 2018-1010-08**

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

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**SUMMARY OF REGULATORY ACTION**

This regulatory action by the California Horse Racing Board (Board) proposed to repeal the minimum fine for trainers that do not correctly identify the true sex of a horse in the official race program and to extend liability to other “responsible parties.” This action also proposed to revise the requirement to declare a horse from a race if the trainer failed to report the horse's true sex to the racing office prior to the opening of wagering for a race.

On October 10, 2018, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On November 26, 2018, OAL notified the Board that OAL disapproved the proposed regulation pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reason for OAL’s action.

**DECISION**

OAL disapproved the above-referenced regulatory action because the proposed regulation failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3).

**DISCUSSION**

The Board’s regulatory action 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 Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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.) No exemption applies to the present regulatory action under review.

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 the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the APA 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.

### **I. Clarity Standard**

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.”

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 the above-referenced regulatory action, the Board proposed to amend subdivision (e)(1) of section 1865 as follows:

~~If the true sex of a horse is not correctly identified in the official program for the race in which the horse is entered, the responsible party may be sanctioned by the steward ~~strainer of the horse shall be subject to a minimum fine of \$1,000.~~~~

As discussed below, the proposed amendment to section 1865 fails to comply with the clarity standard of the APA. These clarity issues must be resolved before the Board resubmits this action to OAL.

**Issue 1.** Subdivision (e)(1) is not written or displayed so that the meaning of the regulation will be easily understood by those persons directly affected by them. (Gov. Code, sec.11349, subd. (c).) As written, the regulated public is left without any meaningful guidance regarding who the stewards may sanction, when sanctions will be imposed, what those sanctions may include, or how the sanctions will be determined.

**A. Reference to “Responsible Party.”** How will the stewards determine the “responsible party” to be sanctioned or whether multiple parties may be sanctioned? What criteria will be used to evaluate responsibility? These standards are not found in regulation.

- B. Use of “May.”** The permissible use of “may” makes it unclear when sanctions will be imposed. The criteria to be evaluated by the stewards in order to render this determination are not found in regulation, either.
- C. Imposition of “Sanctions” or “Penalties.”** If the stewards determine that sanctions are warranted, how will the stewards determine the appropriate monetary penalty and/or length of suspension? Business and Professions Code section 19661 authorizes the Board to impose a “monetary penalty” of not more than one hundred thousand dollars. Existing section 1405 of the Board’s regulations further specifies that violation of any of the Board’s regulations is “punishable in the discretion of the Board by revocation or suspension of any license, by fine, or by exclusion from all racing inclosures under the jurisdiction of the Board, or by any combination of these penalties.” This list of “penalties” is similar, but not identical to, the “sanctions” described in the Board’s notice of proposed action and the initial statement of reasons. Assuming the term “sanctions” used in the proposed regulation is intended to be used interchangeably with the term “penalties,” the proposed language of subdivision (e)(1) authorizes the stewards to impose a penalty of one hundred thousand dollars against one individual, but impose a two-day suspension of a license against a different individual for the same violation. How will the stewards evaluate each violation in order to determine which sanction(s) is appropriate? What criteria and procedures will be used? The regulation is silent on these points. The Board must also clarify what it means by “sanctions” or use the term “penalties,” if that is the appropriate term, as “penalties” is the term primarily used in statute and the Board’s regulations. The introduction of a new term causes the meaning of the regulation to not be easily understood.

Subdivision (e)(1) does not inform the regulated public what criteria and procedures will be utilized in order to render these determinations. Without this information, the stewards cannot impose sanctions fairly and equitably.

**Issue 2.** Subdivision (e)(1) is also unclear because the language of the regulation conflicts with the Board’s description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) As written, proposed subdivision (e)(1) provides the stewards with unlimited discretion to sanction a “responsible party.” However, the notice of proposed action states: “The removal of the \$1,000 fine is the result of the Board’s determination that declaration of the horse alone is a penalty which renders the fine an unnecessary deterrent.” This explanation is reiterated in the initial statement of reasons. If it is the Board’s intention to not impose fines if the sex of a horse is not correctly identified, the regulation must reflect that intent. Contrary to the explanation provided, proposed subdivision (e)(1) does not preclude the stewards from sanctioning an individual by imposing a fine for failing to correctly identify the true sex of a horse in the official race program. As stated above, assuming the term “sanctions” is synonymous with the term

“penalties,” the proposed language of subdivision (e)(1) in fact authorizes the stewards to impose a fine of up to one hundred thousand dollars for failing to correctly identify the true sex of a horse in the official race program. If the Board intends for the stewards to impose specific sanctions (or “penalties”) for failing to correctly identify the true sex of a horse in the official race program, those sanctions must be promulgated in regulation and adequately explained in the rulemaking record.

### 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 regulatory action within 120 days of its receipt of this Decision of Disapproval. A copy of this Decision will be emailed to the Board on the date indicated below.

The Board 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 days pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the CCR before adopting the regulation and resubmitting this regulatory action to OAL for review. Additionally, any comments made on these proposed modifications must be presented to the Board for consideration prior to the Board’s final vote on the proposal, and be summarized and responded to in the final statement of reasons. (Gov. Code, sec. 11346.8, subd. (c); Gov. Code, sec. 11346.9, subd. (a)(3).)

If you have any questions, please contact me at (916) 323-6820.

Date: December 3, 2018

  
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