

State of California Office of Administrative Law

In re:
State Controller's Office

Regulatory Action:

**Title 02, California Code of
Regulations**

**Adopt sections: 1180.60, 1180.61,
1180.62, 1180.63,
1180.64, 1180.65**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2024-0621-04

**OAL Matter Type: Regular
Resubmittal (SR)**

SUMMARY OF REGULATORY ACTION

In this regulatory action, the State Controller's Office (hereinafter "SCO") proposes to adopt a process by which owners may submit unclaimed property claims to SCO. The process requires the submission of forms and required documentation.

On June 21, 2024, SCO submitted the above-referenced regulatory action to the Office of Administrative Law (hereinafter "OAL") for review. On August 5, 2024, OAL notified SCO of OAL's decision to disapprove the proposed regulations.

DECISION

OAL disapproved the above-referenced regulatory action because the proposed regulatory changes failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3), the necessity standard of Government Code section 11349.1, subdivision (a)(1), and required Administrative Procedure Act (hereinafter "APA") procedures.

DISCUSSION

SCO'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amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 this regulatory action.

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.

1. 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 California Code of Regulations (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; or
 - (2) [...]
 - (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) [...]

(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.

The following provisions in SCO's proposed regulations do not satisfy the clarity standard.

1.1. Inconsistencies Between Regulation Text and Forms Incorporated by Reference

Proposed sections 1180.60, 1180.61, 1180.62, and 1180.63, each incorporate a form by reference: the Unclaimed Property Claim Affirmation Form, the Claim Filing Instructions and Requested Documentation form, the Deceased Owner Heir Claim Filing Instructions and Requested Documentation form, and the Business Claim Filing Instructions and Requested Documentation form, respectively.

In each proposed regulation, the claimant is required to submit sufficient documentation to prove a claim. However, SCO's proposed regulation text differs from the language in the forms incorporated by reference making it unclear what documentation is sufficient to support a claim.

For example, proposed section 1180.61 provides that "sufficient documentation includes, but is not limited to, the listed **recommended evidence** in the Claim Filing Instructions and Requested Documentation (4/6/2022), which is hereby incorporated by reference." [Emphasis added.] However, the form itself appears to **require** certain documentation. To illustrate, the form states:

To claim property reported in your name, **please provide** the following:

1. Completed Claim Affirmation Form signed by the property owner. In general, a Power of Attorney instead of the reported owner's signature will not be accepted.
 - A. You must notarize the Claim Affirmation Form if: [...]
 - B. If the property lists multiple owners, **please provide** the following:
 - 1) Each owner must sign a Claim Affirmation Form. Multiple owners may submit their Claim Affirmation Forms together if they are sharing the same documentation to support the claims.
 - a) If the owners submit separate Claim Affirmation Forms, **each claim should contain all requested documentation.**
 - 2) If the property is a safe deposit box, and all owners are living, **a Safe Deposit Box Property Release Form may be requested** to be signed by all owners authorizing the release of the contents to one owner. You can find the release form on our Web site at: http://www.sco.ca.gov/upd_form_claim.html.
 - 3) [...]
 2. Copy of your current Driver License or State-Issued Photo Identification Card.
 - A. If you do not have a valid Driver License or State-Issued Photo Identification Card, you may provide: [...]
 3. Proof of your Social Security Number (SSN). **Suggested documents:** [...]
 4. If you are a foreign citizen and do not have a SSN or ITIN, **please provide all** of the following: [...]
 5. If you are claiming property on behalf of a minor, provide:
 - B. Proof of minor's SSN. **Suggested documents:** [...]
- [Bold and italics added.]

Although proposed section 1180.61 states that the form lists "recommended evidence," the form indicates that some items are required while others are merely suggested. Thus, the regulation is unclear because it can be reasonably and logically interpreted to have more than one meaning and it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(5).)

This issue is compounded by the fact that section 1.B.1)a) of the form states, "[i]f claimants submit separate Claim Affirmation Forms, each claim **should contain all requested documentation.**" [Emphasis added.] It is unclear to the regulated public what documents are, and are not, required. Thus, the form is unclear

because it can be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1).)

1.2. Safe Deposit Box Property Release Form

Section 1.B.2) of the Claim Filing Instructions and Requested Documentation form states, “[i]f the property is a safe deposit box... a Safe Deposit Box Property Release Form may be requested to be signed by all owners authorizing the release of the contents to one owner.” The use of the word “may” makes it unclear when a Safe Deposit Box Property Release Form will be required. Thus, the form is unclear because it can be reasonably and logically interpreted to have more than one meaning and it presents information in a format that is not readily understandable by persons “directly affected.” (Cal. Code Regs., tit. 1, sec. 16, subds. (a)(1) and (a)(5).)

1.3. Durable Power of Attorney

In both the Claim Filing Instructions and Requested Documentation form and the Deceased Owner Heir Claim Filing Instructions and Requested Documentation form, the forms state: “***In general***, a Power of Attorney instead of the reported owner’s signature will not be accepted.” [Emphasis added.]

In a footnote, the forms state:

We ***may accept*** a Durable Power of Attorney (DPOA) in cases where a medical condition prevents the property owner from signing the claim form. In such a case, our Legal Office will determine whether or not to accept a DPOA. To submit a claim signed by a DPOA, include all pages of the DPOA agreement and a medical verification signed by a licensed physician that states the property owner who is the subject of the DPOA is unable to sign the claim form because they are disabled, incapacitated or incompetent and are unable to handle their affairs. Any claim signed by a DPOA that does not contain medical verification by a licensed physician will be denied without consideration.
[Emphasis added.]

The words “in general” suggest that sometimes the DPOA will be accepted and sometimes it will not. The footnote indicates that a DPOA that does not contain medical verification by a licensed physician will be denied but it is unclear if a DPOA that does contain medical verification will ensure acceptance. In other

words, the form does not specify how SCO will determine whether to accept or deny a DPOA. Thus, the form is unclear because it is not easily understood by those directly affected by it. (Gov. Code, sec. 11349, subd. (c) and Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).)

1.4. Inconsistent Language in the Regulation Text

The proposed regulations and the Unclaimed Property Claim Affirmation Form, the Claim Filing Instructions and Requested Documentation form, the Deceased Owner Heir Claim Filing Instructions and Requested Documentation form, and the Business Claim Filing Instructions and Requested Documentation form, do not use language consistently.

For example, proposed sections 1180.60, 1180.61, 1180.62, and 1180.63, each incorporate a form by reference: the Unclaimed Property Claim Affirmation Form, the Claim Filing Instructions and Requested Documentation, the Deceased Owner Heir Claim Filing Instructions and Requested Documentation, and the Business Claim Filing Instructions and Requested Documentation, respectively.

However, the content of each form refers to other forms using different titles, such as "Claim Affirmation Form," "Deceased Owner Heir Claim filing instructions," "Documentation Requested for Property Owners Claims," "Documentation Requested for Business Claims," and "Documentation Requested for Deceased Owner Claims." The use of varying titles could be interpreted to mean that SCO refers to forms other than those incorporated by reference in proposed sections 1180.60, 1180.61, 1180.62, and 1180.63.

These internal inconsistencies cause the regulations to be unclear because the regulations present information in a format that is not readily understandable by persons "directly affected." (Gov. Code, sec. 11349, subd. (c), and Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).)

1.5. Additional Clarity Issues

OAL also notes that the text contains grammatical and syntax issues in some regulatory provisions that must be addressed prior to resubmittal. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(4)).

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2. 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:

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 the modified regulation text made available pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the CCR, SCO made numerous substantive changes to the originally proposed regulations. However, SCO did not provide the necessity for a number of these changes and, therefore, does not comply with Government Code section 11346.9, subdivision (a), and section 10 of title 1 of the CCR. For example, the record does not discuss the rationale for various requirements in the forms incorporated by reference. Prior to resubmitting this regulatory action, SCO must provide the necessity for all substantive changes made to the originally proposed regulations.

3. REQUIRED APA PROCEDURES

The APA and OAL's regulations in title 1 of the CCR require agencies to follow specific procedures when conducting a regulatory action. In this action, SCO did not comply with the following procedures.

3.1. Summarize and Respond to Public Comments

Government Code section 11346.9, subdivision (a)(3), requires that the Final Statement of Reasons (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 does not contain a summary of and response to all relevant objections and recommendations received during the comment periods. (Gov. Code, sec. 11346.9, subd. (a)(3).) For example, a commenter suggested that the online form include space for investigators to enter their information. In response, the FSR simply stated that the comment was irrelevant and that SCO is not required to respond. SCO must summarize and respond to all comments, in compliance with Government Code section 11346.9, subdivision (a)(3), before resubmitting the rulemaking action to OAL for review.

3.2. Incorporation by Reference

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 section 1.B.2) of the Claim Filing Instructions and Requested Documentation (4/6/2022) form states, "a Safe Deposit Box Property Release Form may be requested to be signed by all owners authorizing the release of the contents to one owner." The Safe Deposit Box Property Release Form was not included in the rulemaking record and was not listed as a document incorporated by reference in any of the public notices. To the extent requiring use of this form is regulatory or this form contains regulatory elements, then it must be incorporated by reference pursuant to section 20 of title 1 of the CCR.

3.3. Updated Informative Digest

Subdivision (b) of Government Code section 11346.9 requires that the Updated Informative Digest (UID) contain "a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation." The UID in the rulemaking record does not include the required summary. Prior to resubmitting this action, SCO must complete a UID in accordance with subdivision (b) of Government Code section 11346.9 and include it in their rulemaking record.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), SCO may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval of Regulatory Action. A copy of this Decision will be emailed to SCO on the date indicated below.

Any substantive regulatory text changes necessary to address the deficiencies discussed above, must be sufficiently related to the originally noticed text, and be made available for public comment for at least 15 days pursuant to subdivision (c) of Government Code section 11346.8 and section 44 of title 1 of the CCR. Any objections or recommendations raised by the public during the 15-day public comment period must be summarized and responded to in the FSR. SCO must resolve all issues raised in this Decision of Disapproval of Regulatory Action prior to the resubmittal of this regulatory action. OAL reserves the right to review SCO's resubmitted regulations and rulemaking record for compliance with all substantive and procedural requirements of the APA.

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

Date: August 12, 2024

Thanh Huynh

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Director

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