

**State of California
Office of Administrative Law**

**In re:
Department of Public Health**

**Regulatory Action:
Title 22, California Code of
Regulations**

**Adopt sections: 72901, 72903, 72905,
72907, 72909, 72911,
72913**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2025-0306-02

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

SUMMARY OF REGULATORY ACTION

This action by the Department of Public Health (Department) proposes to adopt Chapter 3.6 (commencing with Section 72901) of Division 5 of Title 22 of the California Code of Regulations (CCR). This chapter establishes regulations for the temporary management of long-term health care facilities (LTHCFs), including: definitions; temporary manager qualifications and how they are selected; duties of licensees of LTHCFs where a temporary manager has been appointed; powers and limitations of appointed temporary managers; and documentation and final accounting requirements for temporary managers.

On March 6, 2025, the Department submitted the above-referenced action to the Office of Administrative Law (OAL) for review. On April 18, 2025, OAL notified the Department that OAL disapproved the proposed regulatory action pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the action for failure to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3), and for incorrect procedure.

DISCUSSION

The Department'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 Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 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 regarding 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 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" to mean "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 CCR, 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) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - (3) ...
 - (4) ...
 - (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 the Department's proposed regulatory action do not satisfy the clarity standard.

1.1. Proposed Subsections (a) and (b) of Section 72905

Proposed subsections (a) and (b) of section 72905 read:

(a) When the Department determines that appointment of a temporary manager to manage a facility may be required pursuant to Health and Safety Code section 1325.5(c), the Department may send a notice to applicants on the list of potential temporary managers based on a case by case determination of the needs of the facility, the capability of applicants, and the availability of a prospective temporary manager. Interested applicants must respond to the notice with an attestation that the applicant meets all of the qualifications for appointment as a temporary manager at

the identified facility, as required by this chapter and by the Health and Safety Code.

(b) The selected applicant must provide the following to the Department, upon request, prior to appointment...

Proposed subsections (a) and (b) are unclear because they present information in a format that is not readily understandable by persons “directly affected.” (Cal. Code Regs., tit. 1, sec. 16, sub. (a)(5).) As written, it is unclear from the proposed text how the Department chooses the “selected applicant” from “interested applicants” who have responded to the Department’s notice with the requisite attestation.

1.2. Proposed Subsection (c) of Section 72905

Proposed subsection (c) of section 72905 reads:

If the applicant selected by the Department to serve as a temporary manager is not acceptable to the licensee, **the Department may consult** with the licensee to appoint an alternative temporary manager from the Department’s list of potential temporary managers.
(Emphasis added.)

Health and Safety Code section 1325.5, subdivision (j)(5) states, “[t]he temporary manager appointed pursuant to this section shall...[b]e acceptable to the facility.”

The Department’s “Supplemental Statement of Reasons” provides the following description of the effect of this regulatory provision:

This subdivision is also revised to clarify that **the Department will consult** with the licensee to appoint a different temporary manager if the selected temporary manager is not acceptable to the licensee. This clarification aligns with [Health and Safety Code] section 1325.5(j)(5) but specifies that the licensee, which may or may not be the long term health care facility, can object to the appointment.
(Supplemental Statement of Reasons, p. 3, emphasis added.)

Proposed subsection (c) is unclear for two reasons.

First, proposed subsection (c) is unclear because it can reasonably and logically be 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, subs. (a)(1) and (a)(5).) The phrase “[t]he Department may consult with the licensee” is unclear as to the circumstances under which the Department will consult with a licensee to ensure the appointment of an alternative temporary manager acceptable to a facility. It is also unclear if the temporary manager must be acceptable to the “licensee” in addition to the “facility” as the statement in the Supplemental Statement of Reasons indicates.

Second, proposed subsection (c) is unclear because the proposed language conflicts with the Department’s description of the effect of proposed subsection (c). (Cal. Code Regs., tit. 1, sec. 16, sub. (a)(2).) While the proposed regulation text states “**the Department may consult** with the licensee to appoint an alternative temporary manager” when the temporary manager selected by the Department is not acceptable to the licensee, the Department’s Supplemental Statement of Reasons states “**the Department will consult.**” This discrepancy makes it unclear whether the Department is required to consult with the licensee prior to appointment of an alternative temporary manager or whether the Department may exercise discretion to determine whether to consult with the licensee or not.

1.3. Proposed Subsection (a)(6) of Section 72909

Proposed subsection (a)(6) of section 72909 reads:

(a)...The temporary manager will have the authority to take actions, including, but not limited to:

...

(6) Make repairs and improvements to the structure or furnishing of the facility if there is an immediate danger to the health and safety of the residents. Pursuant to Health and Safety Code section 1325.5(e)(2), repairs or improvements that are not intended to

address an immediate danger to the health or safety of residents
require the Department's prior written approval.

Proposed subsection (a)(6) is unclear because it presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, sub. (a)(5).) As written, the process for obtaining written approval from the Department is unclear because it is not contained in the proposed regulations, existing regulations, or statute.

For the reasons discussed above, the proposed regulatory changes failed to comply with the clarity standard of the APA.

2. INCORRECT PROCEDURE

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

2.1. Statement of Mailing for a Document Added to the Record

Government Code section 11347.1, subdivision (e), states:

The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date on which the notice was mailed.

After publication of the notice of proposed action, the Department added to the rulemaking file a document titled "Supplemental Statement of Reasons." The record does not include a statement confirming that the Department complied with the notice requirements of Government Code section 11347.1.

2.2. Updated Informative Digest (UID)

Subdivision (b) of Government Code section 11346.9 requires that the 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.

2.3. Final Statement of Reasons (FSOR)

2.3.1. Update of the Information Contained in the Initial Statement of Reasons

Government Code section 11346.9, subdivision (a)(1), requires that the FSOR include “[a]n update of the information contained in the initial statement of reasons.” The Department’s FSOR does not include an adequate update to the information contained in the Initial Statement of Reasons. Rather, the FSOR states, “The information contained in the [initial statement of reasons] at the time of the initial public notice remains unchanged.” The FSOR must reflect the effect of the revisions to the regulation text noticed during the 15-day public comment period.

2.3.2. Summary and Response to Comments

Government Code section 11346.9, subdivision (a)(3), requires the FSOR to include:

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...

Several deficiencies in the Department’s summaries and responses have been identified. These deficiencies will be discussed with the Department.

2.4. Final Regulation Text

The final regulation text, including authority and reference citations, requires nonsubstantive revisions pursuant to section 40 of title 1 of the CCR. These revisions will be discussed with the Department.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Department 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 the Department on the date indicated below.

The Department must make any substantive regulatory text changes, which are sufficiently related to the originally noticed text, 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 comments containing objections or recommendations must be summarized and responded to in the Final Statement of Reasons. The Department must resolve all other issues raised in this Decision of Disapproval of Regulatory Action prior to the resubmittal of this regulatory action.

Date: April 25, 2025

_____/s/____

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