

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
)	
VETERINARY MEDICAL BOARD)	DECISION OF DISAPPROVAL
)	OF REGULATORY ACTION
)	
REGULATORY ACTION:)	Government Code section 11349.3
)	
Title 16, California Code of Regulations)	OAL File No. 01-0730-05 S
)	
Adopt sections 2085, 2085.1, 2085.2,)	
2085.3, 2085.4, 2085.5,)	
2085.6, 2085.7, 2085.8,)	
2085.9, 2085.10.)	
)	
Amend sections 2070)	
_____)	

SUMMARY OF REGULATORY ACTION

This regulatory action implements section 4846.5 of the Business and Professions Code which imposes continuing education requirements for those persons licensed by the Veterinary Medical Board. On September 11, 2001, the Office of Administrative Law (“OAL”) disapproved this regulatory action for failure to comply with clarity, consistency, and necessity standards of the Administrative Procedure Act and for failure to comply with the requirements for incorporation by reference. In addition, the Fiscal Impact Statement (STD. 399) may need approval by the Department of Finance.

DISCUSSION

Regulations adopted by the Veterinary Medical Board (“Board”) concerning continuing education must be adopted pursuant to the Administrative Procedure Act (“APA”). Any regulatory act adopted by a state agency through the exercise of quasi-legislative power delegated to the agency by statute is subject to the APA unless the act is expressly exempted or excluded by statute from APA coverage. (Gov. Code section 11346.) No

exemption or exclusion applies to the regulatory action here under review. Thus, before the instant regulatory action may become effective, it is subject to a review by the OAL for compliance with procedural requirements of the APA and for compliance with certain substantive standards. (Gov. Code section 11349.1(a).)

1. CLARITY

OAL is mandated to review each regulation adopted by a state agency pursuant to the APA to determine whether the regulation complies with the “clarity” standard, among other standards. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning or regulations will be easily understood by those persons directly affected by them.”

a. Subdivision (b) of section 4846.5 of the Business and Professions Code provides that:

“(1) Notwithstanding any other provision of law, continuing education hours shall be earned by attending courses relevant to veterinary medicine and sponsored or cosponsored by any of the following

(3) The board may approve other continuing veterinary medical education providers not specified in paragraph (1).”

Subdivision (j) of section 4864.5 of the Business and Professions Code provides in pertinent part:

“For those continuing education providers not listed in paragraph (1) of subdivision (b), the board or its recognized national approval agency shall establish criteria by which a provider of continuing education shall be approved. The board shall initially review and approve these criteria and may review the criteria as needed”

Section 2085.9 of the regulations adopted by the Board would establish a process (and an application form) for a continuing education provider who is not recognized by statute to apply to the Board or the Board recognized national continuing education approval body for approval as a provider. Section 2085.9 provides the time frames for review of the application for completeness and for making a decision on the application itself. However, neither section 2085.9, nor any other regulation adopted by the Board in this rulemaking, establishes any criteria by which a provider of continuing education shall be approved. A continuing education provider not enumerated in subdivision (b)(1) of Section 4846.5 of the Business and Professions Code, who is applying for approval under subdivision (b)(3), would not understand from section 2085.9 or anywhere else in the regulations what the criteria for approval is.

In this regard, please also note that subdivision (a) of Government Code section 11340.5 provides:

“No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.”

- b. Section 2085.5 of the regulations adopted by the Board provides that qualifying continuing education courses must be relevant to veterinary medicine and provides standards for determining relevancy. If there are any other standards or criteria under which continuing education courses are evaluated by the Board, these also must be specified in the regulation. A person directly affected by this regulation would not know what these standards are.

Similarly, if there are any requirements for instructors of qualifying continuing education courses, or an approval process, this also must be specified in the regulation.

- c. Section 2085.8 of the regulations adopted by the Board provides in subsection (a)(6) that the Board recognized national continuing education approval body shall:

“Establish a procedure for reconsideration of its decision that a provider or a provider’s course does not meet the **criteria set forth in this article.**”
(Emphasis added.)

As discussed in item 1.a. above, these regulations contain no criteria for approval of providers. A person directly affected by the regulation would not understand what criteria is being referred to. Similarly, if there are any criteria for qualifying continuing education courses not specified in section 2085.5, a person directly affected by the regulation would not know what these criteria are (see item 1.b. above).

- d. Section 2085.10 of the regulations adopted by the Board provides in subsection (a) that the Board may withdraw “its approval of a statutorily recognized or board approved provider” However, subdivision (b)(1) of section 4846.5 of the Business and Professions Code provides that “[n]otwithstanding any other provision of law, continuing education hours shall be earned by attending courses relevant to veterinary medicine and sponsored or cosponsored by [enumerated entities].” Consistent with this, section 2085.9 of the regulations in subdivision (a) only provides that a “continuing education provider who is **not** a statutorily recognized provider

may apply . . . for approval as a provider.” (Emphasis added.) A continuing education provider enumerated in subdivision (b)(1) of Business and Professions Code section 4846.5 would not understand from the regulations that any approval by the Board or the Board recognized national continuing education approval body is required, nor what the process or criteria for approval might be. Of course, OAL must reserve judgment at this time as to whether any as yet unspecified approval requirements imposed upon statutorily enumerated providers would be consistent with subdivision (b)(1) of section 4846.5 of the Business and Professions Code.

- e. Section 2085.3 of the regulations adopted by the Board provides in subsection (a) that “[c]ourses or presentations that are between 25 and 49 minutes in excess of one hour **may** be granted credit in half-hour increments.” (Emphasis added.) A person directly affected by the regulation would not understand under what conditions such courses would or would not be granted credit in half-hour increments.
- f. Section 2085.8 of the regulations adopted by the Board provides in subsection (a) that the Board recognized national continuing education approval body “agrees to” perform certain specified tasks. If the intent here is to impose requirements on the Board recognized national continuing education approval body, mandatory language such as “shall” should be used.
- g. Section 2085.8 of the regulations adopted by the Board provides in subsection (a)(7) that the Board recognized national continuing education approval body shall submit the fees it charges to the Board for approval and that the fees “. . . shall not exceed the **agency’s** costs for complying with the provisions of this article.” (Emphasis added.) Actually, this regulation apparently intends to refer to the costs of the Board recognized national continuing education approval body in administering this article rather than the Board’s costs.
- h. Section 2085.10 of the regulations adopted by the Board provides in subsection (a)(2) that good cause for withdrawing approval of a provider includes any “. . . material misrepresentation of fact by the respondent in any information required to be submitted to the **board.**” (Emphasis added.) If the Board’s intent is to also include a material misrepresentation of fact by a respondent in any information required to be submitted to the Board recognized national continuing education approval body as well, language clarifying this should be included.
- i. Section 2085.10 of the regulations adopted by the Board provides the procedure by which the Board can withdraw approval of a provider. If the provider notifies the Board of its request for a hearing within 30 days of receipt of the written changes, subsection(b) provides the “. . . board or its designee shall hold a hearing as soon as reasonably possible.” A definite time frame is needed here as a provider would not understand from the regulation when it could expect a hearing on the charges.

j. Section 2085.6 of the regulations adopted by the Board provides that on completion of a qualifying continuing education course, the provider shall issue a record of course completion to the licensee containing specified information. Subsection (f) requires that the record of course completion include the “[m]aximum number of hours, which can be granted to an individual licensee.” If the Board intends to have the record of course completion include that actual number of hours credit granted to the licensee, this must be clarified.

k. The Permit Reform Act provides in section 15376 of the Government Code:

“All state agencies which issue permits shall adopt regulations regarding their procedures for considering and issuing permits, specifying the following criteria:

- (a) A period dating from the receipt of a permit application within which the agency must either inform the applicant, in writing, that the application is complete and accepted for filing, or that the application is deficient and what specific information is required.
- (b) A period dating from the filing of a completed application within which the agency must reach a permit decision.
- (c) The agency’s median, minimum, and maximum time for processing a permit, from the receipt of the initial application to the final permit decision, based on the agency’s actual performance during the two years immediately preceding the proposal of the regulation”

Section 2085.9 of the regulations adopted by the Board provides in subsection (e):

“(1) The minimum, median and maximum review times for review of a continuing education provider application, from the time of receipt of an application until the approval entity informs the applicant, in writing, that the application is complete and accepted for filing or that the application is deficient and what specific information is required thereon is set forth below:

Minimum – 10 days

Median – 15 days

Maximum – 25 days

- (2) The minimum, median and maximum processing times for the provider approval organization to make a decision on the continuing education provider application from the time of receipt of a complete application is set forth below:

Minimum – 15 days

Median – 25 days

Maximum – 35 days”

A person submitting a continuing education provider application might read subsection (e) of section 2085.9 as simply describing past action by the Board rather than as specifying maximum time periods which the Board and the Board recognized national continuing education approval body must inform the applicant whether the application is complete and also take final action on the application as required by subdivisions (a) and (b) of Government Code section 15376.

1. Section 2085.2 of the regulation adopted by the Board provides in subsections (c)(1) and (c)(2) the two instances in which a waiver may be granted. It would be clearer if the word “or” followed the semicolon at the end of subsection (c)(1). If the examples described in subsections (c)(2)(A) and (c)(2)(B) were not intended as an exclusive listing of the acceptable waivers described in subsection (c)(2), this too should be clarified.

2. CONSISTENCY

OAL is also required to review every regulation adopted by a state agency pursuant to the APA to determine whether the regulation complies with the “consistency” standard. “Consistency” means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code sec. 11349(d).)

- a. Section 4846.5 of the Business and Professions Code provides in pertinent part in subdivision (h):

“The board, in its discretion, may exempt from the continuing education requirement, any veterinarian who for reasons of health, military service, or **undue hardship**, cannot meet those requirements” (Emphasis added.)

Section 2085.2 of the regulations adopted by the Board provides in subsection (c):

“The board shall grant the waiver if the licensee can provide documents, satisfactory to the board, that:

- (1) For at least one year during the licensee’s current license period the licensee was or will be absent from California due to military service;

- (2) For at least one year during the licensee’s current license period the licensee has been or will be prevented from practicing veterinary medicine or from completing continuing education courses for reasons of health or **other good cause** which includes:
 - (A) A significant physical and/or mental disability of the veterinarian;
or
 - (B) A significant physical and/or mental disability of an individual where the veterinarian has total responsibility for the care of that individual.” (Emphasis added.)

Business and Professions Code 4846.5 provides that the Board may exempt a veterinarian from the continuing education requirement for reasons of health, military service, or “undue hardship” while section 2085.2 allows a waiver for military service, reasons of health, or “other good cause.” Unless subsections (c)(2)(A) and (c)(2)(B) of section 2085.2 are provided as the only examples of “good cause” acceptable to the Board, the regulations use of “good cause” goes beyond the statutory limitation to “undue hardship.” And if subsections (c)(2)(A) and (c)(2)(B) are exclusive, these then would be the only examples of undue hardship the Board would accept for a waiver.

- b. Section 4846.5 of the Business and Professions Code provides in pertinent part in subsection (e) that applicants keep records of course completion for 4 years:

“. . . Applicants shall maintain records of completion of required continuing education course work for a period of four years and shall make these records available to the board for auditing purposes upon request”

Section 2085.7 of the regulations adopted by the Board provides in subsection (a):

“A licensee shall maintain records of course completion for a qualifying continuing education course for a period of four (4) years **from the date of license renewal** for which the course was completed and shall provide these records to the Board upon audit or request.” (Emphasis added.)

As written, section 2085.7 would require the licensee to maintain records of course completion well beyond the four year period required by section 4846.5 of the Business and Professions Code. It should also be noted that the Initial Statement of Reasons for section 2085.7 provides in pertinent part:

“. . . Two of the four years are preceding license renewal and are used to earn the continuing education”

This is not consistent with the text of section 2085.7 as adopted by the Board and is also inconsistent with section 4846.5 of the Business and Professions Code. (Initial Statement of Reasons, p.8.)

3. NECESSITY

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation. 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 California Code of Regulations (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 description of the public problem, administrative requirement, or other condition or circumstance which each provision of the regulation is intended to address; 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, fact, 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 perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code sec. 11346.2(b).) The initial statement of reasons must include the agency’s description of the public problem or administrative requirement, a statement of the purpose for each regulation, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed (Gov. Code sec. 11346.2(b)(1) and (2)) or, simply restated, “why” a regulation is needed and “how” this proposed regulation fills that need. The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov.

Code secs. 11346.2(b) and 11346.5(a)(16) and (b).) It is only in this way that the public can be fully informed about the regulatory action and may comment knowledgeably. The initial statement of reasons and all data and other factual information, studies or reports upon which the agency is relying in the regulatory action must also be included in the rulemaking file. (Gov. Code sec. 11347.3(b)(2) and (7).)

The discussion in the Initial Statement of Reasons submitted with this rulemaking failed to provide information explaining why the following particular provisions were necessary to carry out the purpose of the statute: the 30 working days chosen as the period within which to notify one requesting a waiver in section 2085.2; the February 1, 2000 cut-off date for courses from unapproved providers in section 2085.4; 2085.5(b); 2085.7(c); 2085.8(b); the maximum time periods chosen within which Board must act in meeting 2085.9 (e)(1) and (e)(2); time periods and procedures specified in section 2085.10(b); 2085.10(c); information required in the incorporated forms (Request for Waiver from Continuing Education, Form #VMB/CE/1; Continuing Education Provider Approval Application, Form #VMB/CE/2) which was not required by the incorporating regulation.

4. INCORPORATION BY REFERENCE

Section 2085.2 of the regulations adopted by the Board provides in pertinent part in subsection (a):

“A request for a waiver from the continuing education requirements shall be submitted to the board on an application provided by the board (see VMB/CE/1) . . .”

Section 2085.9 of the regulations adopted by the Board provides in subsection (b)(1):

“Where a provider has applied to the board for approval, the provider shall submit its application on an application provided by the board (see form #VMB/CE/2) and accompany it by the fee specified in section 2070 of these regulations.”

OAL has adopted section 20 of Title 1 of the California Code of Regulations to assure that material incorporated by reference in regulations conforms to the requirements of the APA. Subsection (c) of section 20 provides the requirements for a state agency that wishes to incorporate another document as part of a regulation by reference to that document. With respect to the text of the regulation itself, it must refer to the incorporated document by “. . . title and date of publication or issuance.” (Cal.Code Regs., tit.1, sec. 20(c)(4).) Subsections 2085.2 (a) and 2085.9 (b)(1) of the regulations adopted by the Board provide neither. See subsection (c) of section 20 for other procedural requirements.

We also note that the Economic and Fiscal Impact Statement (STD. 399, Rev. 2-98) submitted with this rulemaking indicates that a legislative budget change proposal for fiscal year 2001/02 in the amount of \$37,000 was submitted for a half time position to handle the increased workload. Section 6660 of the State Administrative Manual provides in pertinent part:

“A state agency is not required in all instances to obtain the concurrence of DOF in its estimate of the fiscal effect of its proposed regulation on governmental entities. However, such concurrence is required for those estimates which contain any of the following elements, as depicted on STD. 399:

- | | |
|------------------------------------|---------------------|
| A.1 – Reimbursable Local Costs | B.1 – State Costs |
| A.2 – Non-reimbursable Local Costs | B.2 – State Savings |
| A.3 – Local Savings | |

In addition, DOF’s **approval** is required for the inclusion in any such estimate of any statement to the effect that reimbursement of local costs will be requested in a subsequent Governor’s Budget, A.1 (b) on STD. 399.”

Thus, the Department of Finance should be consulted as to whether its approval is required, and, if so, approval should be obtained prior to resubmittal.

Lastly we note a few typographical errors: strike “s” from “. . . sections 4846.5 of the Code” in the second line of section 2085.2(b); pluralize the work “address” in “. . . names and address of licensees . . .” in subsection 2085.7 (b)(4); and the new subsection “(j)” added to existing section 2070 would follow existing subsection “(g).”

DATE: September 18, 2001

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