

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:)	
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AGENCY: CALIFORNIA HORSE RACING BOARD)	DECISION REGARDING DISAPPROVAL OF A RULEMAKING ACTION
)	
RULEMAKING ACTION: Amend Section 1691 of Title 4 of the California Code of Regulations)	(Gov. Code Sec. 11349.3) OAL File No. 01-0807-07 S

SUMMARY OF RULEMAKING ACTION

This rulemaking action authorizes advertising including logos, labels, or product endorsements on jockey clothing, owner silks, and track saddle cloths during the running of horse races. The action also restricts the location and maximum size of allowed advertisements, and regulates the content of the advertising by banning advertising that promotes tobacco, weapons, pornography, and “[p]roducts that are detrimental to the best interests of horse racing, as determined by the Board.” The action provides that a copy of the advertisement signage must be submitted to the track stewards before a horse is entered to race.

SUMMARY OF DECISION

On September 19, 2001, the Office of Administrative Law (OAL) disapproved the above-referenced rulemaking action for the following reasons. The term "weapons" is not defined for purposes of the regulation. The record lacks necessary information showing that the ban on the advertising of weapons at horse races furthers a substantial governmental interest; that the ban will in fact advance that interest to a material degree; and that the ban is not more extensive than is necessary. The ban on advertising that promotes tobacco products is preempted by, and is thus inconsistent with the Federal Cigarette Labeling and Advertising Act. The term “pornography” is not defined for purposes of this regulation. The ban on “products that are detrimental to the best interests of horse racing, as determined by the Board” requires jockeys, horse owners, track owners, and stewards to apply "board determination[s]" that are not contained in this regulation. A detailed explanation of the reasons for this decision by OAL follows below.

DISCUSSION

The adoption of regulations by the California Horse Racing Board must satisfy requirements established by the part of the California Administrative Procedure Act which governs rulemaking by a state agency (APA). Any rule or regulation adopted or amended 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.

Before any rule or regulation, or the amendment or repeal of any rule or regulation subject to the APA may become effective, the rulemaking action is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code Section 11349.1. Generally, to satisfy the standards a rule or 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 executive branch check on the exercise of rulemaking powers by executive branch agencies and is intended to improve the quality of rules and regulations that implement, interpret and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

In this rulemaking action the Board adopted the following changes to rule 1691 of Title 4 of the California Code of Regulations. (Additions are shown in *italic*, deletions in ~~strikeout~~.)

- (a) A jockey shall be properly attired for riding in a race, wearing the colors of the owner of the horse he or she is riding, and exhibiting a number on the ~~saddle cloth corresponding~~ *saddlcloth that corresponds* to the number of the horse on the official program.
- (b) ~~No form of advertising~~ *Advertising*, including logos, labels, or product endorsements shall be permitted on a jockey's attire, *owner silks, and track saddlcloths* ~~during the running of the race.~~ *from the point of weighing out for a race to weighing in after its conclusion provided it does not promote:*
 - (1) *Tobacco*
 - (2) *Weapons*
 - (3) *Pornography*
 - (4) *Products that are detrimental to the best interests of horse racing, as determined by the Board.*
- (c) *A copy of the advertisement signage must be submitted for review, for compliance with the provisions of this rule, to the stewards at the track where the advertisement will be worn before the horse is entered to race.*
- (d) *Advertisement on jockey clothing is limited to:*
 - (1) *A maximum of 32 square inches on each thigh of the pants on the outer sides between the hip and knee and 10 square inches on the rear at the base of the spine.*
 - (2) *A maximum of 24 square inches on boots and leggings on the outside of each nearest the top of the boot.*
 - (3) *A maximum of 6 square inches on the front center in the neck area.*
- (e) *Advertisement on owner silks is limited to:*
 - (1) *A maximum of 32 square inches on the chest area.*
 - (2) *A maximum of 1.5 inches by 4 inches on each collar.*
- (f) *Advertisement on track saddlcloths is not limited to size or placement.*

The Board cites Business and Professions Code sections 19420 and 19562 as the statutes that authorize the adoption of these amendments, and as the statutes that these amendments

implement, interpret, or make specific. Neither of these statutes specifically addresses advertising.

We consider the standards of review. Each regulation must satisfy the Necessity, Consistency and Clarity standards. (Government Code section 11349.1, subdivisions (a)(1), (a)(4) and (a)(3).)

"'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.

"'Consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Government Code Section 11349(d).)

"'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them. (Government Code Section 11349(c).)"

The amendments to rule 1691 provide that advertising may not "promote" tobacco, weapons, pornography, or products that are detrimental to the best interests of horse racing, as determined by the Board. In this regard, advertising, or commercial speech, is entitled to a measure of protection under the state and federal constitutions. The United States Supreme Court, in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 100 S.Ct. 2343, 2349-2351, held that commercial speech that is otherwise not illegal and is not misleading may be regulated if (1) the asserted governmental interest is substantial, (2) the rule directly advances the governmental interest asserted, and (3) the restriction is not more extensive than is necessary to serve that interest (see also *Nordyke v. Santa Clara County* (9th Cir., 1997) 110 F.3d 707). Thus, the regulation of commercial speech must directly advance a substantial governmental interest. An agency proposing a regulation limiting commercial speech must identify a substantial governmental interest affected by its regulatory program for protection and prepare a rulemaking record containing substantial evidence that demonstrates that the regulation directly advances that interest without going further than necessary. This the Board has not done. The Statement of Reasons explains that the Board has proposed restrictions on advertising to protect the morality of the general population and promote a family atmosphere at the track. This information alone, does not satisfy the above-mentioned test, nor the Administrative Procedure Act's Necessity standard.

We consider each of the content restrictions established by the amendments to rule 1691.

Weapons.

The Board may ban advertising of illegal weapons. The proposed regulation, however, is broader in scope and prohibits advertising of all weapons. Under California and federal law, some "weapons" are legal to possess and use, while others are illegal. The record does not include information that tends to show that there is a substantial governmental interest that needs protection, nor does it show that banning advertising of legal weapons will directly advance such an interest. Finally, the Board has not demonstrated that the ban it proposes is limited to that which is necessary to accomplish its purposes.

The proposed advertising ban in Section 1691 applies to "weapons." The term "weapons" is not defined for purposes of the regulation. Many common items may be used as a weapon. Also, the term "weapons" could apply to both legal and illegal weapons. Consequently, the regulation fails to satisfy the Clarity standard.

Since the ban on advertising of weapons is unclear and potentially inconsistent with constitutional protections of commercial speech, OAL disapproved it for failing to satisfy the Clarity and Consistency and Necessity standards of Government Code Section 11349.1(a).

Tobacco

While the Horse Racing Board specifically identifies the interests being protected by all of the content restrictions included in the regulation as (1) the morality of the general population and (2) a family atmosphere (at the track), in reality these interests are probably based upon smoking and health. Smoking of tobacco products continues to be a lawful activity for adults. In this regard, the issue of prohibitions on the advertisement of tobacco products is one regulated by federal law (see Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1334) and *Lindsey v. Tacoma-Pierce County Health Dept.* (1999) 195 F.3d 1065. In *Lindsey*, convenience store owners brought suit, challenging a county board of health resolution banning outdoor tobacco advertising. The Court of Appeals, held that a local ban on outdoor tobacco advertising was preempted by Federal Cigarette Labeling and Advertising Act. Thus, we think the Board's ban on advertising that promotes tobacco products, to the extent it regulates advertising of cigarettes based on smoking and health, is preempted by, and is thus inconsistent with the Federal Cigarette Labeling and Advertising Act, *supra*. Consequently, the ban on advertising of tobacco products fails to satisfy the Consistency standard of Government Code Section 11349.1(a).

Pornography. The term "pornography" is undefined for purposes of this regulation, and the precise meaning cannot be easily understood by those who are directly affected by it. Consequently, the term fails to satisfy the Clarity standard of Government Code Section 11349.1(a). Should the Board wish to consider modifying the regulation to refer to "'obscene matter' as defined by Penal Code Section 311," the regulation would be aligned with the definition of illegal obscene matter in the Penal Code and would, thus, avoid an inconsistency with constitutional protections of speech by prohibiting advertising which promotes an illegal activity.

Products that are detrimental to the best interests of horse racing, as determined by the Board. This category of products fails to satisfy the Clarity standard because those who are directly affected by the regulation cannot easily understand the specific products to which it applies. Those who are directly affected are jockeys, horse owners, track owners, and stewards. This regulation requires the application of a "board determination" that is not contained in this regulation. Consequently, the ban fails to satisfy the Clarity standard of Government Code Section 11349.1(a).

The only legal method for the Board to determine that the advertisement of a particular product is detrimental to the best interest of horse racing (other than identifying the product in a duly adopted regulation) is to make use of a precedential decision with regard to a product that satisfies the requirements of Government Code Section 11425.60. Any such decision, would, of course, have to satisfy the constitutional standards relating to speech pointed out above.

Conclusion

OAL disapproved the above-referenced rulemaking action for failing to satisfy the Necessity, Consistency and Clarity standards of Government Code Section 11349.1(a).

[**A technical note.** The heading for the section, "Colors and Number," needs to be modified to reflect the section's revised content. It could read, for example, "Colors and Number, and Advertising on Jockey Attire, Owner Silks, and Track Saddlecloths."]

Date: September 27, 2001

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