

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:	)	
	)	
SECRETARY OF STATE	)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
	)	
REGULATORY ACTION:	)	
	)	(Gov. Code, sec. 11349.3)
Title 2, California Code of Regulations	)	
	)	OAL File No. 05-0207-01 S
ADOPT SECTIONS: 20800.1, 20800.2, 20800.3, 20800.4, 20800.5, 20800.6, 20800.7, 20800.8, 20800.9, 20801.1, 20801.2 and 20801.3	)	
AMEND SECTIONS: 20800, 20801 and 20802	)	
_____	)	

**SUMMARY OF REGULATORY ACTION**

This regulatory action deals with vendors who require approval by the Secretary of State before they can provide notary public education. The proposed regulations establish procedures for the following: application for and issuance of certificates of approval; issuance of proof of completion and warning letters; the list of approved vendors; notification of changes in vendor information and revised lesson plans; and termination or cancellation of certificates of approval. The Secretary of State submitted this regulatory action to the Office of Administrative Law (“OAL”) on February 7, 2005. On March 22, 2005, OAL notified the Secretary of State that OAL had disapproved the regulations because they failed to comply with the Clarity and Consistency standards contained in Government Code section 11349.1.

**DISCUSSION**

Regulations adopted by the Secretary of State must be adopted pursuant to the Administrative Procedure Act (“APA”). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA unless a statute expressly exempts or excludes the act from compliance with the APA. (Gov. Code, sec. 11346.) No exemption or exclusion applies to the regulatory action under review. Before this regulatory action may become effective, it is subject to a review by OAL for compliance with procedural requirements and substantive standards of the APA. (Gov. Code, sec. 11349.1(a).)

Please note that citations to sections are to the proposed regulations unless otherwise specified.

## CLARITY

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to the persons who must comply with the regulations. (Gov. Code, sec. 11340(b).) For this reason, subdivision (a)(3) of Government Code section 11349.1 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.” Section 16, subdivision (a), of title 1 of the California Code of Regulations (CCR) further provides in relevant part:

“(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; . . .

(b) Persons shall be presumed to be ‘directly affected’ if they:

- (1) are legally required to comply with the regulation;
- (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.”

Government Code Section 8201 requires on or after July 1, 2005, that any person seeking appointment by the Secretary of State as a notary public must have satisfactorily completed, prior to his or her appointment, a six hour course of study that must have been approved or provided by the Secretary of State concerning the functions and duties of a notary public. Persons who apply for reappointment as a notary public on or after July 1, 2005, are required to complete a three hour refresher course.

A person who provides this notary public education must have a valid “Certificate of Approval” (“certificate”) issued by the Secretary of State in order to be an approved vendor. (Gov. Code, secs. 8201 and 8201.2, and proposed regulation section 20800.) The certificate is the functional equivalent of a license or permit to provide courses.

- A. Section 20800.2 provides that if the Secretary of State determines the Application Form NP40 is incomplete or that a lesson plan does not satisfy specified requirements then a deficiency notice containing an itemized description of the deficiencies must be sent by first class mail to the applicant. The applicant has thirty business days from the date the deficiency notice was mailed to submit documentation to the Secretary of State curing the deficiency . Additional deficiency notices may be issued at any time during the review process. If no response is received in time or if the applicant does not cure the deficiencies the application and lesson plan shall be deemed disapproved and the Secretary of State will send a notice of disapproval.

Section 20800.2 is unclear because it is incomplete. The regulation does not specify if the applicant will be notified if the defect has been cured. It is also not clear if the applicant can appeal the disapproval, and if so, what is the procedure? If there are no appeal rights can the applicant augment their original application or must they resubmit the entire application and lesson plans? Are there time limitations or any additional limitations that would apply to a resubmitted application?

- B. Section 20801.1 provides in relevant part that:

“(a) The Secretary of State may issue a warning letter to an approved vendor upon any of the following grounds:

1. Violation of any of the provisions of this chapter or Sections 8201 or 8201.2 of the Government Code.
2. Misrepresentation of the laws of California concerning the duties and functions of a notary public.
3. Deviation from the lesson plan for a course of study approved by the Secretary of State.”

A warning letter shall be sent by certified mail to the approved vendor. Subdivision (c ) of section 20801.1 provides that “An approved vendor shall submit a written response to the Secretary of State in accordance with section 20800.8.”

Section 20800.8 provides in relevant part that

“(a) An approved vendor shall have thirty (30) business days from the date on which a written inquiry was sent by the Secretary of State to submit a written response to the Secretary of State....

(b) Failure to respond to a written inquiry of the Secretary of State in accordance with this section may result in the termination of a certificate of approval pursuant to Section 20801.2.” (Emphasis added.)”

Section 20801.2, subdivisions (a) and (b) state in relevant part that “(a)The Secretary of State may terminate a certificate of approval after issuing three (3) warning letters to an approved vendor or in accordance with Section 20800.8. (b)... A Notice of termination shall include the grounds for termination and the date on which the termination is effective.”

Section 20800.8 does not define what constitutes an “inquiry letter” and what are the grounds that would cause the inquiry letter to be sent. Would a letter asking for an information update qualify

as an inquiry letter? The penalty for failing to respond to one inquiry letter could be the termination of the certificate. How would an approved vendor know if their response to an inquiry letter resolved the issue or not? There is no mention in the regulations of any requirement that a decision be sent to the approved vendor.

Additionally, as the regulation is written, it is only the “Failure to respond” that may result in the termination of the certificate, not the adequacy of the response. This conflicts with the agency’s description of the effect of the regulations. The Initial State Statement of Reasons on page 6 describes the rationale for the duty to respond to an inquiry letter as “The Secretary of State must have a means to ensure compliance with all laws and regulations governing notary public mandatory education.” If a vendor merely responded to an inquiry letter in a perfunctory way, that would appear to satisfy the regulation’s requirement of a response but it would not provide a means to ensure compliance with applicable law.

The process for warning letters raises similar clarity issues. An approved vendor must respond “... in accordance with section 20800.8”. Again the regulations do not provide a mechanism for providing a decision of the issue to the approved vendor. The three letters could be on the same exact issue or on different issues. It appears that the act of issuing three warning letters, even though a response has been timely submitted, could trigger the termination of the certificate of approval. Informing the approved vendor of the grounds for termination and the effective date of the termination does not provide the approved vendor an opportunity to be heard. This lack of opportunity to be heard raises serious due process issues that are discussed in the Consistency part of this decision of disapproval.

Approved vendors who have a certificate terminated can no longer offer courses. Additionally, they have 30 days from the termination date to refund all fees to persons who paid for a course that was scheduled after the effective date of the termination. The regulations do not specify any appeal rights or whether the person is ineligible to reapply for approval.

## CONSISTENCY

OAL is 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).)

The regulations establish procedures for persons to become approved vendors of the required notary public courses. Because the regulations setting forth the procedures for application and termination of the certificate of approval are incomplete, the regulations are inconsistent with the basic due process requirements of notice and opportunity to be heard.

“Due process requires notice and hearing only in quasi-judicial actions in which the agency has discretion to determine the facts and law and apply them to a particular person. See Keeler v Superior Court. ( 1956) 46 C2d 596, 297, P2d 967; 7 Witkin, Summary of California Law, Constitutional Law §524 (9<sup>th</sup> ed 1988). Common examples of quasi-judicial

action include: Suspending or revoking an individual's license (Suckow v Alderson (1920) 182 C 247, 187 P 965 ...)” (Cal. Administrative Hearing Practice ( Cont. Ed. Car 2d ed. 1997) section 1.58, page 42.)”

The following analysis may assist the Secretary of State in resolving the interrelated Consistency and Clarity issues. In Oberholzer v. Commission on Judicial Performance, 84 Cal.Rptr.2d 466, 479; 20 Cal.4<sup>th</sup>, 371, 393 (1999) , the California Supreme Court declared that:

“Under the California Constitution, the extent to which procedural due process is available depends on a weighing of private and governmental interests involved. The required procedural safeguards are those that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decision making process. Specifically, determination of the dictates of due process generally requires consideration of four factors: the private interest that will be affected by the individual action; the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. [citations.] (Rodriguez v. Department of Real Estate (1996) 51 Cal.App.4<sup>th</sup> 1289, 1297, 59 Cal.Rptr.2d 652, fn, omitted; see also People v. Hansel (1992) 1 Cal.App.4<sup>th</sup> 1211, 1219, 4 Cal.Rptr.2d 888, 824, P2d 694 [due process is a flexible concept]; Saleey v. State Bar (1985) 39 Cal3d 547, 565, 216 Cal.Rptr. 367, 702 P2d 525 [not every situation requires a formal hearing with full rights of confrontation and cross-examination].)”

In footnote 16, the California Supreme Court then described the federal due process analysis which requires the aggrieved party to establish a protected property interest. (See Morrissey v. Brewer (1972) 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed. 484.) The court stated that:

“Although it is true the Fourteenth Amendment ‘protects the pursuit of one’s profession from abridgment by arbitrary state action’ (Endler v. Schutzbank (1968) 68 Cal.2d 162, 169, 65 Cal.Rptr. 297, 436, P2d 297) ‘due process of law’ is not a fixed theory, embodying a standardized set of procedures or a trial-like hearing in each instance. To the contrary, as noted by the United States Supreme Court in Hannah v. Larche (1960) 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307, due process is an elusive concept. Its exact boundaries are indefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a

generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding are all considerations which must be taken into account.’ (Citations omitted.) [‘The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . . [¶] . . . [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action.’)]”

The clarity issues that require a due process analysis in order to have the regulations provide notice and opportunity to be heard are the following: Applicants do not know if they can appeal the disapproval of their application or if there is an alternative procedure to follow in order to obtain approval. Approved vendors do not know if their response to an inquiry letter or warning letter has resolved the issue or if they are at risk of receiving a summary termination of the certificate. The certificate is the functional equivalent of a license or permit to provide courses. There is no opportunity to be heard prior to termination and the regulations do not address whether or not there is an appeal process. Because the submitted regulations are incomplete OAL reserves the right to conduct a full APA review when this regulatory action is resubmitted.

**CONCLUSION**

For the reasons described above, OAL disapproved this regulatory action because it did not comply with the clarity and consistency standards.

Please contact me at (916) 323-6809 if you have any questions.

March 29, 2004

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