

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:	)	
	)	
BOARD OF OPTOMETRY	)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
	)	
REGULATORY ACTION:	)	
	)	(Gov. Code, sec. 11349.3)
Title 16, California Code of Regulations	)	
	)	OAL File No. 06-0323-02 S
Amend Section: 1579	)	
	)	
_____	)	

**SUMMARY OF REGULATORY ACTION**

This regulatory action deals with citations and fines. On May 5, 2006, the Office of Administrative Law (“OAL”) notified the Board of Optometry (“Board”) that OAL disapproved the proposed regulation because it failed to comply with the Necessity standard contained in Government Code section 11349.1 and for incorrect procedure.

**DISCUSSION**

Regulations adopted by the Board 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 there were numerous provisions of the proposed regulation that failed to meet the Necessity standard and to comply with procedural requirements. Examples of some of the issues are contained in this disapproval. These examples and all of the Necessity and procedural problems with the regulation must be resolved before the regulation can be approved by OAL. All of the issues have been discussed with Board staff. Because the regulation may require redrafting OAL reserves the right to conduct a complete APA review when the regulation is resubmitted.

## **A. NECESSITY**

Government Code section 11349.1, subdivision (a)(1) requires that OAL review all regulations for compliance with the “Necessity” standard. Government Code section 11349, subdivision (a) defines “Necessity” to mean that

“ . . . 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.”

Section 10, subdivision (b) of Title 1 of the CCR provides that in order to meet the “Necessity standard” the rulemaking record must include:

“(1) A statement of the specific purpose of each adoption, amendment, or repeal; 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, 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.”

The only Necessity in the file is for eliminating the current regulatory structure for citations and fines based on specific Business and Professions Code section violations and for the following language in subdivision (c)(5):

“Notwithstanding the administrative fine amounts specified in subsection (b), a citation may include a fine of between two thousand five hundred and one dollars (\$2501) and five thousand dollars (\$5000) if one or more of the following circumstances apply: . . . (5) The citation involves fraudulent billing submitted to an insurance company, or Medi-cal or Medi-Care programs.”

Upon resubmittal Necessity is required for all of the other regulatory provisions contained in the final text adopted by the Board.

## **B. INCORRECT PROCEDURE**

OAL must review rulemaking records to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1.)

1. Government Code section 11343 requires that

“Every state agency shall (a) transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one that is a building standard . . .

(c) Deliver to the office, at the time of transmittal for filing a regulation or order of repeal, six duplicate copies of the regulation or order of repeal, together with a citation of the authority pursuant to which it or any part thereof was adopted.”

Changes to the regulation text were made available for a 45-day public comment period from December 24, 2004 until February 7, 2005. A 15-day public availability period for additional modifications was held from August 3, 2005, until August 17, 2005. On August 18, 2005, the Board voted to adopt the text that was modified as a result of the 15-day public availability period. On December 6, 2005, the Board submitted the text to the Department of Consumer Affairs (“Department”) for their approval as required by Business and Professions Code section 313.1. The record is silent as to why a subsequent 15-day public availability of modified text occurred from January 19 to February 2, 2006, and there is also no indication in the record if the Board ever adopted those subsequent modifications. The text submitted to OAL for review as the Board’s final text is the second 15-day text. It is also not clear from the record if the Department’s review and approval is for the first or second 15-day text. The file contains a letter dated December 6, 2005, from the Department that the file was submitted to their Director on December 6, 2005, which would have only included the first 15-day text. The Form 400, which is the form used to submit final regulations to OAL for review, has the signature and title of the Director of the Department but because it is not dated it is not clear if the second 15-day text was ever reviewed and approved in accordance with Business and Professions Code 313.1.

2. Government Code section 11346.8, subdivision (c) states in relevant part that:

“(c) No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15-days before the agency adopts, amends or repeals the resulting regulation.” (Emphasis added.)

Section 46, subdivision (a) of Title 1 of the California Code of Regulations (“CCR”) mandates that:

“(a) Changes to regulations in accordance with Government Code Section 11346.8(c) shall be made using a uniform method and shall illustrate accurately all changes to the original text.” (Emphasis added.)

The following examples illustrate errors in clearly showing changes to the text which is necessary for meaningful public participation and to permit effective judicial review of the rulemaking record.

(a) The 45-day text showed the strike out of existing subdivisions (a), (b) and (c) of section 1579 which contain minimum and maximum ranges of fines for violations of specified Business and Professions Code sections. The Informative Digest and the Initial Statement of Reasons explains that currently section 1579

“ . . . must be amended each time there is an applicable law or regulation change. In cases where there is a violation of a law or regulation that is not listed in CCR 1579, the Board does not have authority issue a citation and/or fine. This amendment will eliminate the specificity of the existing language and create categories of violations thus eliminating the need for ongoing amendments in response to future changes in optometry law.”

Although the 45-day text showed the strikeout of existing subdivisions (a), (b) and (c), the first 15-day text shows only the strikeout of existing subdivision (a) and subdivision (b) and (c) are not in the text at all. The second 15-day text contains the same error.

Because the Board adopted only the repeal of existing subdivision (a) and not the repeal of existing subdivisions (b) and (c), the resultant regulation contains two different systems of citations and fines that are internally inconsistent and do not achieve the stated intent of eliminating the existing system and replacing it with a system of three classes of violations.

(b) The 45-day text correctly showed the following language underlined to indicate it was proposed language subject to public comment. “A class ‘C’ violation is subject to an administrative fine in an amount not less than two-hundred and fifty dollars (\$250) and not exceeding twenty-five hundred dollars (\$2,500) for each and every violation.”

The first 15-day text changed the minimum amount of an administrative fine for a class “C” violation to “. . . an amount no less than fifty dollars (\$50) . . .”

The first 15-day text described the method used to distinguish the originally proposed 45-day text from modified language but that method was not used for this regulatory provision. Instead the \$250 amount disappeared and was replaced by the \$50 amount thereby making it appear that the \$50 amount had been part of the 45-day text and no longer subject to public comment when in fact it was subject to public comment.

The record shows the Board adopted this language but the subsequent second 15-day shows the minimum amount as \$250 and again does not follow the described method of illustrating changes. The \$50 was not shown as deleted and the \$250 amount just appears with no indication that it was subject to public comment. The \$250 minimum amount for class C violations is in the final text attached to the Form 400 even though the record does not show the Board had adopted it and it is not clear if the Department had approved the \$50 or \$250 minimum amount.

(c) The 45-day and first 15-day versions of the text did not make any changes to the following part of the first paragraph of current section 1579: “The executive officer shall not impose any duplicate fines for the same violation.” After the Board adopted the text with no change to this regulatory provision the text was transmitted to the Department. The second 15-day text correctly showed the strikeout of this language but the record does not show that the Board approved the deletion and it is not clear if the Department reviewed and approved it.

3. Government Code section 11347.3, subdivision (b) requires that “The rulemaking file shall include: . . . (2) All published notices of proposed adoption . . .” The rulemaking file contains a copy of the notice submitted to OAL on December 14, 2004, for publication but that notice had a subsequent correction of the public comment period deadline and it is therefore not an accurate copy of the notice that was published on December 24, 2004, in the California Regulatory Notice Register.

4. Government Code section 11346.5, subdivision (a)(3)(A) requires the Informative Digest to include “A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.” Government Code section 11347.3, subdivision (b) requires that “The rulemaking file shall include: . . . (2) . . . an updated informative digest. . . .” The Updated Informative Digest states in relevant part that “At the August 18, 2005 public Board meeting it was decided to change text in order to provide clarifying language and correct non-substantive form and typographic errors . . . .”

The Board’s minutes for the August 18, 2005 public meeting contains only the following statement on page 3 about the proposed amendment of section 1579:

“Section 1579, Citations and Fines. Modified language was presented to public for 15-days with no comments received. Move to adopt modified language. M – Goldstein, S – Galvan, MSP – Unanimous.”

MSP stands for moved, seconded and passed. Clarification is needed from the Board to resolve the inconsistency between the Updated Informative Digest and the Board’s minutes.

5. Government Code section 11346.9 (a) (1) requires in relevant part that the Final Statement of Reasons shall include “An update of the information contained in the initial statement of reasons.”

The Final Statement of Reasons contains the following information:

“Updated Information

The Initial Statement of Reasons is included in the file. Text was modified August 18, 2005 and February 3, 2006 to provide clarifying language and correct non-substantive, format and typographic errors. The Board received no comments concerning the text modifications.” Because there were substantive changes in both the first and second 15-day modified texts, this statement is not accurate.

6. The rulemaking record does not contain a transcript, recording or minutes of the February 7, 2005, public hearing which is required by Government Code section 11347.3, subdivision (b)(8).

**CONCLUSION**

For the reasons described above, OAL disapproved this regulatory action because it did not comply with the Necessity standard contained in Government Code section 11349.1 and for incorrect procedure.

May 10, 2006

---

BARBARA ECKARD  
Senior Staff Counsel

For:

WILLIAM L. GAUSEWITZ  
Director

Original: Taryn Smith, Executive Officer