

**STATE OF CALIFORNIA**

**OFFICE OF ADMINISTRATIVE LAW**

In re: )  
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)  
CALIFORNIA HORSE RACING BOARD ) DECISION OF DISAPPROVAL  
) OF REGULATORY ACTION  
)  
REGULATORY ACTION: )  
) (Gov. Code, sec. 11349.3)  
Title 4, California Code of Regulations )  
) OAL File No. 07-1019-01 SR  
Adopt section: 1843.3 )  
Amend section: 1843.2 )  
)  
)  
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**DECISION SUMMARY**

On October 19, 2007, the California Horse Racing Board ("Board") submitted to the Office of Administrative Law (OAL) proposed changes to Title 4 of the California Code of Regulations (CCR). The proposed rulemaking seeks to establish the classification of drug substances administered to horses and penalty guidelines for violation(s) of Business and Professions Code section 19581, which provides that no substance of any kind may be administered to a horse after the horse has been entered into a race, unless the Board has specifically made provision for it. The OAL notified the Board on December 04, 2007, that the proposed rulemaking was disapproved. OAL disapproved the proposed regulations for the following reasons:

- (1) Failure to comply with the Consistency standard of Government Code section 11349.1;
- (2) Failure to comply with the Clarity standard of Government Code section 11349.1;
- (3) Failure to follow the correct APA procedures; and,
- (4) Failure to summarize and/or adequately respond to each comment made regarding the proposed action.

This disapproval decision contains examples of the identified issues, but is not exhaustive. All of the issues have been identified to and discussed with Board staff. All issues must be resolved before the regulations can be approved by OAL. Because the regulations require significant redrafting, OAL reserves the right to conduct a complete Administrative Procedure Act ("APA") review for compliance with the procedural requirements of the APA and for compliance with the substantive standards set forth in Government Code section 11349.1 when the regulations are resubmitted.

## **DECISION**

Regulations adopted by the Board must be adopted pursuant to the APA. Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the Board 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.) Before it may become effective, the rule or regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the substantive standards set forth in Government Code section 11349.1. No exemption or exclusion applies to this proposed regulatory action.

Generally, to satisfy the standards, a rule or regulation must be legally valid, supported by an adequate record, and easy to understand. OAL's review is limited to the rulemaking record. This review is an independent check on the exercise of rulemaking powers by executive branch agencies 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.

### **A. CONSISTENCY**

OAL must review regulations for compliance with the "Consistency" standard of the APA, in accordance with Government Code section 11349.1. Government Code section 11349, subdivision (d), defines "Consistency" as meaning ". . . being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." There are a number of provisions in the proposed rulemaking that are in conflict with existing law. Examples are as follows:

#### **1. Business and Professions Code section 19517.5.**

Currently, Business and Professions Code section 19517.5 provides that all enforcement proceedings as to Class I, II or III violations are referred to the Office of Administrative Hearings unless both the licensee and the Board waive the referral.

As of January 1, 2008, Business and Professions Code section 19517.5 (Statutes 2007, chapter 417, section 1) is amended as follows:

- Prior to January 1, 2008, the Board can only amend an Administrative Law Judge decision by decreasing a sanction or penalty. That provision is being repealed as of January 1, 2008.
- Prior to January 1, 2008, all enforcement proceedings that allege a Class I, II or III violation are referred to the Office of Administrative Hearings for adjudication, unless both parties agree to do otherwise. As of January 1, 2008, a respondent (licensee) in an enforcement proceeding that alleges a violation of a Class I, II or III prohibited substance, may *elect* to have his/her matter referred either to: (1) a Board of Stewards or, (2) a hearing officer appointed by the Board from a pool jointly developed by a list of interested parties.

**Existing section 1843.2 (Classification of Drug Substances)** is proposed to be amended. Pursuant to Business and Professions Code section 19517.5, both stewards and hearing officers will be adjudicating matters. Existing language in regulation 1843.2 refers only to the “stewards” considering the classes of drug substances in their adjudication. As amended, it states:

The stewards, when adjudicating a hearing for the finding of a drug substance(s) in a test sample taken from a horse participating in a race, shall consider the classification level of the substance as established . . . below: . . .

In that stewards *or hearing officers* will be adjudicating matters, section 1843.2 upon resubmittal must reflect the fact that both stewards and hearing officers "shall consider the classification levels" listed in the Penalty Categories Listing By Classification (1/07).

The proposed new section 1843.3 (Penalties for Medication Violations) adopted by the Board, provides that “the Board, the board of stewards, or the hearing officer” shall consider the proposed penalties for each classification in their adjudication. The regulations should be consistent in their reference to adjudicators.

It is also unclear as to whether the "board of stewards" is a different entity than the term "stewards" which is used throughout the chapter.

The regulations as submitted, are inconsistent and unclear as to the adjudicators of the matters and the process for adjudication. If the current rulemaking file is resubmitted, the changes in the law must be reflected in the regulations and the new version of the regulations must be consistent with the law.

## **2. Business and Professions Code section 19582.**

According to Business and Professions Code section 19582, the permanent revocation of a license is reserved for a third violation of a Class I or II penalty:

(a) . . .

(2) The board may classify violations of Section 19581 based upon each class of prohibited drug substances, prior violations within the previous three years, and prior violations within the violator's lifetime.

**(3) (A) The board may provide for the suspension of a license for not more than three years, except as provided in subdivision (b), or a monetary penalty of not more than fifty thousand dollars (\$50,000), or both, and disqualification from purses, for a violation of Section 19581.**

(B) The actual amount of the monetary penalty imposed pursuant to this paragraph shall be determined only after due consideration has been given to all the facts, circumstances, acts, and intent of the licensee, and shall not be solely based on the trainer-insurer rule, as established in Sections 1843 and 1887 of Title 4 of the California Code of Regulations.

(4) The punishment for second and subsequent violations of Section 19581 shall be greater than the punishment for a first violation of

Section 19581 with respect to each class of prohibited drug substances, unless the administrative law judge, in findings of fact and conclusions of law filed with the board, concludes that a deviation from this general rule is justified.

**(b) (1) A third violation of Section 19581 during the lifetime of the licensee, determined by the board to be at a class I or class II level, may result in the permanent revocation of the person's license.**

(2) The administrative law judge shall, after consideration of the circumstances surrounding a violation specified in paragraph (1), file a decision with the board that includes findings of fact and conclusions of law.

(c) Any person whose license is suspended or revoked pursuant to this section shall not be entitled to receive any material benefit or remuneration in any capacity or from any business activity permitted or allowed by the license during any period of its suspension or revocation.

(d) The penalties provided by this section are in addition to any other civil, criminal, and administrative penalties or sanctions provided by law, and do not supplant, but are cumulative to, other penalties or sanctions. [Emphasis added.]

Proposed section 1843.3 provides that the penalty against a trainer for a **second** lifetime offense of a Class "A" penalty is a "Minimum three-year suspension absent mitigating circumstances. The presence of aggravating factors could be used to impose a *maximum of license revocation with no reapplication for a three-year period* [emphasis added.]" Section 1843.3 appears to be inconsistent with the three year maximum suspension provided by Business and Professions Code section 19582(a)(3)(A). In addition, the terms "suspension" and "revocation" of a license are used almost interchangeably in the regulatory provisions, which causes confusion as to what is meant by each term.

### **3. Business and Professions Code section 19582.5.**

Business and Professions Code section 19582.5 states:

The board may adopt regulations that prohibit the entry in a race of a horse that tests positive for a drug substance in violation of Section 19581. Upon a finding of a prohibited drug substance in an official test sample, a horse may be summarily disqualified from the race in connection with which the drug sample was taken.

**Upon the disqualification of a horse pursuant to these regulations, any purse, prize, award, or record for that race shall be forfeited.** However, the board, including its hearing officers and stewards, shall have the authority to order, in the interests of justice, that a jockey be permitted to keep his or her share of the purse, prize, or award for that race upon a finding that a person, other than the jockey, willfully, and with flagrant

disregard for recommended veterinary practice and the regulations of the board, administered the prohibited substance. Such an order may provide that the jockey's share of the purse, prize, or award shall be paid by the person or persons determined to be responsible for willfully administering the prohibited substance. [Emphasis added.]

Proposed section 1843.3 Penalties for Medication Violations provides that the penalty for a Class "B" violation for an owner is "Disqualification of horse and loss of purse absent mitigating circumstances." Business & Professions Code section 19582.5 authorizes the consideration of "mitigating circumstances" in relation to disqualification of the horse. However, it does not provide for "mitigating circumstances" with respect to the loss of purse. Pursuant to Business and Professions Code section 19582.5, once a horse is disqualified, the purse, prize, award, or record for the race must be forfeited. Proposed section 1843.3 is therefore inconsistent with Business and Professions Code section 19582.5.

## **B. CLARITY**

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the proposed regulation complies with the "clarity" standard. (Gov. Code, sec. 11349.1(a)(3).) "Clarity" as defined by Government Code section 11349(c) means "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 California Code of Regulations which requires that:

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) 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.

The regulations propose to establish a complex penalty system which needs to be understood by those affected by them. The proposed regulations contain the following clarity issues, among others:

**Example 1.** Proposed section 1843.3(i)(1) states:

Any licensed veterinarian, owner or other licensee found to be responsible for the administration of any drug resulting in a positive test may be subject to the same penalties set forth for the licensed trainer and his presence may be required at any and all hearings relative to the case. For purposes of this regulation owner means the individual owner(s) or entity that owns the horse from which the official pre-or post race test sample was taken. Any penalty for a violation will be imposed upon the entity owning the horse.

(1) Any veterinarian found to be involved in the administration of any drug in Penalty Category "A" shall be referred to the California Veterinary Medical Board (CVMB) for consideration of further disciplinary action and not be allowed to practice at any California racetrack, indefinitely.

(2) Any veterinarian found to be involved in the administration of any drug in Penalty Category "B" or "C" may be referred to the CVMB for consideration of further disciplinary action upon the recommendation of the Equine Medical Director or hearing officers.

Section 1843.3(i)(1) is unclear in the following ways:

- It is unclear as to whether the regulation seeks to hold the veterinarian for disciplinary action for “the administration of any drug” or “the *unauthorized* administration of any drug.”
- If the regulation means that a single authorized administration of a drug would amount to the veterinarian’s license being permanently revoked, then it would be inconsistent with Business and Professions Code section 19582, which allows for permanent revocation for a third violation.
- The regulation refers to the recommendation of the Equine Medical Director and hearing officers, but does not refer to “stewards” who may also be adjudicating such matters.

**Example 2.** Proposed section 1843.3(j) provides that: "Any licensee *found* to be in violation of state *criminal statutes* may be referred to the appropriate law enforcement agency." In that the Board does not have jurisdiction to make findings concerning criminal statutes, the regulation should be redrafted.

**Example 3:** Penalties for violation of section 1844 as to the licensed trainer's third violation states that: "The official veterinarian may withdraw permission for the trainer to use any NSAID for a period of up to 60 days." The same violation for an owner's third violation states: "The official veterinarian may withdraw permission for the trainer to use any NSAID for a period of up to 120 days." If the provision is dealing with the same violation concerning the same horse, there is a clarity issue as to the maximum period of permission withdrawal allowed for the violation.

**Example 4:** Proposed section 1843.3(d).

Proposed section 1843.3(d) states: "If a penalty is administered, it shall be greater than the last penalty administered to the licensee for a violation concerning the same class of drug substance pursuant to B&P Code Section 19582(a)(4)." Business and Professions Code section 19582(a)(4) indicates that if "the ALJ concludes that a deviation from the general rule is warranted," then a different result is justified. The regulation, in just stating half the law, implies that the adjudicator is without discretion, when that is not the case.

**Example 5:** Business and Professions Code section 19582.5 states that: "Upon the disqualification of a horse pursuant to these regulations, any purse, prize, award, or record for that race shall be forfeited." Therefore, all provisions in the regulations that state "Disqualification of horse and loss of purse in the absence of mitigating circumstances" are unclear absent the provision that "prizes," "awards" and "records" for that race are also forfeited when a horse is disqualified.

**Example 6:** The California Horse Racing Board (CHRB) Penalty Categories Listing By Classification refers to a "RCI" Class. This term is not spelled out or defined. The regulation text refers to the Association of Racing Commissioners International (ARCI), is this the same entity? If so, references to the association should be same throughout. The CHRB Penalty Categories Listing is referred to in proposed section 1843.2 as the CHRB Penalty "Category" Listing by Classification in regulation text and should be changed to be in conformity with the title of the document. There are other typographical or punctuation errors that are easily correctable.

**Example 7:** Class 5 in The CHRB Penalty Categories Listing By Classification states: "This class includes those therapeutic medications for which concentration limits have been established by the racing jurisdictions as well as certain miscellaneous agents such as DMSO and other medications as determined by the regulatory bodies." "Racing jurisdictions" and "regulatory bodies" are undefined and it is unclear if they are referring to the same entities.

**Example 8:** Proposed section 1843.3 refers to: “[t]he past record of the licensee in drug cases.” To what "drug cases" is the regulation referring? It is unclear as written. Business and Professions Code section 19582 indicates that the Board shall provide greater punishment for subsequent violations of Business and Professions Code section 19581 by the licensee.

## **C. INCORRECT APA PROCEDURES**

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. Citations.**

Subdivision (a)(2) of Government Code section 11346.2 provides:

The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations. Subdivision (b) of Government Code section 11349 provides:

"Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.

Subdivision (e) of Government Code section 11349 provides:

"Reference" means the statute, court decision, or, other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.

Proposed section 1843.3 incorrectly cites Business and Professions Code sections 19461, 19584 and 19582t. Business and Professions Code section 19440 should be listed. Some sections listed as reference citations are incorrect and other statutes that are being interpreted should be added. This minor defect can be easily remedied upon resubmission.

### **2. Government Code section 11346.9.**

Business and Professions Code section 19517.5 is amended, effective January 1, 2008. The amendment of Business and Professions Code section 19517.5 affects the current rulemaking and should have been mentioned in the Updated Informative Digest. Government Code section 11346.9(b) states:

11346.9. Every agency subject to this chapter shall do the following:



...  
(b) Prepare and submit to the office with the adopted regulation an updated informative digest containing 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 informative digest shall be drafted in a format similar to the Legislative Counsel's Digest on legislative bills.

The Final Statement of Reasons states: "There have been no changes in the laws relating to the proposed regulation. . . ." Clearly, this is in error. Although regulations are not disapproved for failure to mention that a change that has yet to take effect, it is still an incorrect APA procedure and is therefore mentioned for future reference.

**D. THE FINAL STATEMENT OF REASONS CONTAINS INADEQUATE RESPONSE TO COMMENT**

The APA requires that rulemaking agencies provide notice and a comment period prior to adoption of any substantive regulatory provision. (Gov. Code, secs. 11346.4 and 11346.5). Section 11346.9(a)(3) of the Government Code requires that the adopting agency prepare and submit to OAL a final statement of reasons which shall 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 reason for making no change."

Drew J. Couto, President of The Thoroughbred Owners of California made several suggestions in his April 9, 2007 letter to the Board.

**Example:**

It was suggested that Regulation 1843.3(k) be amended to state: ". . . This includes, but is not limited to, ensuring that horses are not transferred to licensed family members, spouses, domestic partners, significant others, employees and/or agents, such as an assistant trainer or anyone else under the employ of the trainer."  
[Underlining original.]

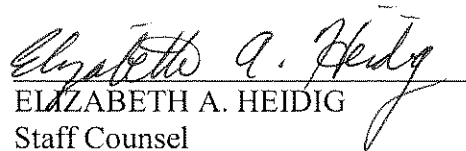
**Response:** The Board agrees. Section 1843.3(k)(1) has been added to define "licensed family members." In addition, section 1843.3(l) has been modified to conform to TOC's suggested changes.

However, not all of the suggested additions were made. The reason for rejecting the recommendations must be stated in the Final Statement of Reasons.

**CONCLUSION**

For the reasons described above, OAL disapproved this regulatory action because the Board did not comply with the Consistency and Clarity standards contained in Government Code section 11349.1 and failed to meet APA procedural requirements including the failure to fully respond to comments.

Date: December 11, 2007

  
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For:

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