

**State of California  
Office of Administrative Law**

**In re:**

**Bureau of Barbering and  
Cosmetology of the Department of  
Consumer Affairs; and Board of  
Barbering and Cosmetology**

**Regulatory Action: Title 16  
California Code of Regulations**

**Amend section:           950.3**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2008-0902-01 S**

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**SUMMARY OF REGULATORY ACTION**

In this regulatory action, the Bureau of Barbering and Cosmetology of the Department of Consumer Affairs and the Board of Barbering and Cosmetology proposed to amend section 950.3 in title 16 of the California Code of Regulations entitled "Curriculum for Skin Care Course." This regulation sets forth the required "Esthetician Curriculum" for an approved skin care course offered at an approved school. Substantial revisions and restructuring of the existing curriculum requirements were proposed.

**DECISION**

On October 15, 2008, the Office of Administrative Law (OAL) notified the Bureau of Barbering and Cosmetology of the Department of Consumer Affairs and the Board of Barbering and Cosmetology of the disapproval of this regulatory action. The reasons for the disapproval were the following: (1) failure of the regulation to comply with the "Consistency" standard of Government Code section 11349.1, (2) failure of the regulation to comply with the "Clarity" standard of Government Code section 11349.1, (3) failure of the regulation to comply with the "Necessity" standard of Government Code section 11349.1, (4) failure to adequately summarize and respond to each public comment made regarding the proposed action, (5) failure to comply with all required Administrative Procedure Act procedures, and (6) a number of the required documents were missing or defective.

## **PRELIMINARY DISCUSSION REGARDING THE BUREAU AND THE BOARD**

Business and Professions Code section 7303 establishes the Board of Barbering and Cosmetology (Board) within the Department of Consumer Affairs and vests administration of the Barbering and Cosmetology Act (Business and Professions Code section 7301 et seq.) with that Board. Section 7303, as it read on June 30, 2008, by its terms became inoperative on July 1, 2008. Business and Professions Code section 101.1, subdivision (b), generally provides that when a board within the Department of Consumer Affairs becomes inoperative or is repealed, the Department of Consumer Affairs shall succeed to and is vested with all the duties, powers, purposes, responsibilities and jurisdiction not otherwise repealed or made inoperative of that board and its executive officer. Consequently, effective July 1, 2008, the Bureau of Barbering and Cosmetology (Bureau) within the Department of Consumer Affairs generally assumed responsibility for the duties, powers, purposes, responsibilities and jurisdiction of the Board.

Two bills pertinent to the status of the Board and Bureau recently passed the Legislature, were signed by the Governor, and were filed with the Secretary of State on June 23, 2008 and chaptered into law. First, SB 797, Chapter 33, Statutes of 2008 added a new Business and Professions Code section 101.2 which until January 1, 2009 (i.e., on an interim basis) essentially provides that the Board's executive officer shall continue to have the same administrative duties in the Bureau under the direction of the Department of Consumer Affairs, grants the Governor the authority formerly held by the Board to appoint an executive officer, and authorizes the Department of Consumer Affairs to create an advisory committee for the Bureau and the Bureau's executive officer consisting of the prior members of the Board. Second, AB 1545, Chapter 35, Statutes of 2008 will amend Business and Professions Code section 7303 to essentially establish a new Board of Barbering and Cosmetology effective January 1, 2009 which will then be vested with the former Board's duties, powers, purposes, responsibilities and jurisdiction.

In light of the above, this Decision of Disapproval of Regulatory Action is issued to both the Bureau and the Board. Since most of the activities of this disapproved rulemaking took place during the administration of the Barbering and Cosmetology Act by the Board and since the statutes within the Barbering and Cosmetology Act continue to refer to the "Board" rather than the "Bureau," the remainder of this decision will for convenience refer solely to the "Board." However, the discussion which follows applies to both the Bureau and the Board in relation to the proposed amendment of section 950.3 of title 16 of the California Code of Regulations (CCR).

## **DISCUSSION**

Regulations adopted by the Board must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), Government Code sections 11340 through 11364. 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 regulation from compliance with the APA

(Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Furthermore, Business and Professions Code section 7312, subdivision (a), specifically provides that the Board shall “[m]ake rules and regulations in aid or furtherance of [the Barbering and Cosmetology Act] in accordance with the Administrative Procedure Act.” (Emphasis added.) Consequently, before the proposed amendment to section 950.3 of title 16 of the CCR may become effective, the regulation and rulemaking record must be reviewed by OAL for compliance with the procedural requirements and substantive standards of the APA, in accordance with Government Code section 11349.1.

### **A. CONSISTENCY**

OAL must review regulations for compliance with the “Consistency” standard of the APA, as required by 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.”

Business and Professions Code section 7362, which governs the various schools and approved courses of instruction under the Board’s jurisdiction (including the skin care course), specifically provides in subdivision (b) the following: “The board shall determine by regulation the required subjects of instruction to be completed in all approved courses, including the minimum hours of technical instruction and minimum number of practical operations for each subject...”

(Emphasis added.) As discussed below, the Board’s proposed amendment of the skin care course curriculum requirements in regulation section 950.3 as presently worded is not consistent with these specific requirements of subdivision (b) of Business and Professions Code section 7362 because “minimum hours of technical instruction” and “minimum number of practical operations” are not included. Therefore, the “Consistency” standard has not been satisfied.

The Board’s existing regulation section 950.3 (before the proposed amendments) establishes a number of specified subject areas for the skin care course curriculum and then for each subject area clearly specifies “minimum hours of technical instruction” and “minimum practical operations,” as applicable. In fact, the existing regulation in section 950.3(b) is structured with three distinct columns entitled “Subject,” “Minimum Hours of Technical Instruction,” and “Minimum Practical Operations.” For example, the existing regulation in connection with the subject “disinfection and sanitation” clearly sets forth a requirement of 10 “minimum hours of technical instruction” and 10 “minimum practical operations.” This clear presentation of “subject,” “minimum hours of technical instruction,” and “minimum practical operations” is consistent with the specific requirements of subdivision (b) of Business and Professions Code section 7362.

In this rulemaking, the Board proposes to amend regulation section 950.3, substantially revising the structure of the regulation. According to the Initial Statement of Reasons as contained in the rulemaking file, the “specific purpose” of the revisions is “to ensure that esthetician students are adequately trained and equipped while in school.” The Initial Statement of Reasons goes on to explain that the beauty industry is constantly evolving with new trends surfacing regularly and that “it is imperative that the Board ensures esthetician students are being educated to safely and competently operate as licensees.” The explanation continues: “As the beauty industry

continues to change, the esthetician curriculum taught in schools should reflect those changes. With this in mind, school instructors should be given some flexibility in determining the number of hours certain subjects are taught in schools.” The Initial Statement of Reasons further indicates that “[t]he current esthetician curriculum is inflexible, restricting students from being current on beauty trends and safety issues” and that “[l]icensees lacking the necessary training on popular trends and practices put those consumers receiving beauty services at risk of getting injured.” The “factual basis/rationale” section of the Initial Statement of Reasons reaches the following conclusion: “Therefore, the Board is proposing to amend the esthetician curriculum. The proposed language modifies the curriculum structure, still requiring specific subjects to be taught while allowing instructors to focus their lecture/curriculum accordingly....”

While the Board is certainly authorized to amend the curriculum requirements for the reasons it has set forth in the Initial Statement of Reasons (including providing greater flexibility for schools and instructors), the amended regulation section 950.3 must be written in a manner which is fully consistent with all governing statutes, including subdivision (b) of Business and Professions Code section 7362. The proposed amendment of section 950.3 still lists a number of subject areas, but it no longer clearly sets forth the “minimum hours of technical instruction” and the “minimum number of practical operations” for each subject as required by statute. The amended regulation appears to essentially group technical instruction and practical operations together for each of five specified subject areas and refers to requiring a specified number of “hours and/or operations” for each subject. The amended regulation as proposed does not set forth the “minimum hours of technical instruction” or the “minimum number of practical operations” for each of these five subject areas. Because the proposed regulation does not set forth the “minimum hours of technical instruction” and “minimum number of practical operations” for each subject as specifically required by subdivision (b) of Business and Professions Code section 7362, the regulation as currently proposed is not consistent with this statute, and the “Consistency” standard of Government Code section 11349.1 has not been met.

In making this determination under the “Consistency” standard, OAL does not question the Board’s apparent judgment that more flexibility is needed in the esthetician curriculum. In accordance with subdivision (a) of Government Code section 11340.1 and subdivision (c) of Government Code section 11349.1, OAL does not in its review of regulations substitute its judgment for that of a rulemaking agency as to the substantive content of regulations. However, if a proposed regulation is not consistent with statutory requirements, OAL is required by Government Code section 11349.1 to disapprove that regulation.

## **B. CLARITY**

OAL must review regulations for compliance with the “Clarity” standard of the APA, as required by Government Code section 11349.1. 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.”

The “Clarity” standard is further defined in section 16 of title 1 of the CCR, OAL’s regulation on “Clarity,” which provides the following:

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; or
- (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
- (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or
- (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be “directly affected” if they:

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

As discussed below, the meaning of proposed regulation section 950.3 is not “easily understood” in several respects and therefore the regulation fails to meet the “Clarity” standard.

1. Use of the phrase “technical and practical operations” in subsection (a): Subsection (a) of proposed section 950.3 reads: “The curriculum for students enrolled in a skin care course shall consist of six hundred hours (600) hours of technical and practical operations covering all practices of an esthetician pursuant to Section 7316 of the Barbering and Cosmetology Act.” (Emphasis added.) Business and Professions Code section 7364 provides: “A skin care course established by a school shall consist of not less than 600 hours of practical training and technical instruction in accordance with a curriculum established by board regulation.” (Emphasis added.) Further, as discussed above under “Consistency,” Business and Professions Code section 7362 specifically refers to the Board’s approved course requirements including the “minimum hours of technical instruction” and “minimum number of practical operations” for each subject. When the Board in regulation section 950.3(a) proposes to refer to “technical and practical operations,” it is difficult to understand the meaning of this phrase in relation to the separate concepts of “technical instruction” and “practical operations” (or “practical training”) as contained in the governing statutes. Perhaps this is just a wording error where the word “instruction” has been inadvertently omitted after the word “technical,” but as currently proposed the language of subsection (a) is not clear.

2. Use of the phrase “technical and practical instruction” in subsection (b): The introductory language of subsection (b) of proposed regulation section 950.3 reads: “For purposes of this section, technical instruction shall mean instruction by demonstration, lecture, classroom participation, or examination; practical operations shall mean the actual performance by the student of a complete service on another person or on a mannequin. Technical and practical instruction shall include the following hours and/or operations.” (Emphasis added.) After separately defining the statutory terms “technical instruction” and “practical operations,” the regulation then (in setting up the requirements for the specific subject areas which follow) uses the ambiguous phrase “[t]echnical and practical instruction.” As was the case with the use of the phrase “technical and practical operations” in subsection (a), the phrase “technical and practical instruction” is difficult to understand in relation to the statutory terminology that refers separately to requirements for “technical instruction” and “practical operations.” This apparent mixing of the concepts of “technical instruction” and “practical operations” into the phrase “technical and practical instruction” contributes to the ambiguity of the regulation. If the intention here is to provide for “technical instruction” and “practical operations” (in accordance with subdivision (b) of Business and Professions Code section 7362 and in accordance with the terminology defined in the immediately preceding sentence of the regulation), then the regulation should use the phrase “technical instruction and practical operations.”

3. The specific curriculum requirements of subsection (b): The meaning of the specific curriculum requirements of subsection (b) of proposed regulation section 950.3, including subsections (b)(1), (b)(2), (b)(3), (b)(4), and (b)(5), is not easily understood. As indicated above, the introductory paragraph of subsection (b) ends with the phrase: “Technical and practical instruction shall include the following hours and/or operations.” (Emphasis added.) This introductory language is followed by the five subject area requirements:

For subsection (b)(1) -- “200 Hours/Operations in Safety and Sanitation consisting of but not limited to:” (then listing specific safety and sanitation topics).

For subsection (b)(2) -- “150 Hours/Operations in Facial Treatment Procedures consisting of but not limited to:” (then listing specific facial treatment procedure topics).

For subsection (b)(3) – “100 Hours/Operations in Evaluation and Preparation consisting of but not limited to:” (then listing specific evaluation and preparation topics).

For subsection (b)(4) – “100 Hours/Operations in Hair Removal Procedures consisting of but not limited to:” (then listing specific hair removal procedure topics).

For subsection (b)(5) – “50 Hours/Operations in Make-up Procedures consisting of but not limited to:” (then listing specific make-up procedure topics).

The use of the phrase “hours and/or operations” in the introductory language followed by the “Hours/Operations” format in the subject area provisions that follow makes the meaning of the subsection (b) curriculum requirements ambiguous and potentially open to different interpretations. The exact meaning of these provisions is not “easily understood.” One reading

of subsection (b) is that for a given subject area, the skin care course must include a number of hours of technical instruction and a number of practical operations that totals the number specified for that subject area. For example, in the case of subsection (b)(1), the “200 Hours/Operations in Safety and Sanitation” requirement might be construed as meaning that for a skin care course any combination of hours of technical instruction and number of practical operations covering the specified “Safety and Sanitation” topics which adds up to 200 meets the requirement. In other words, the course could include options for the “Safety and Sanitation” subject area such as 200 hours of technical instruction with no practical operations, or 150 hours of technical instruction and 50 practical operations, or no technical instruction and 200 practical operations.

However, given the vague wording of subsection (b), it is also possible that some users of the regulation might alternatively read subsection (b) as setting a total number of hours for all technical instruction and practical operations within a subject area (i.e., an overall “hours” requirement for all forms of education within a subject area). For example, in the case of subsection (b)(1), the “200 Hours/Operations in Safety and Sanitation” requirement might be construed as meaning that for a skin care course 200 total hours of technical instruction and practical operations are required for the “Safety and Sanitation” subject area. In other words, the course could include options such as 200 hours of technical instruction with no hours of practical operations, or 150 hours of technical instruction and 50 hours of practical operations, or no hours of technical instruction and 200 hours of practical operations. (As discussed later in this decision, the Board’s own Notice of Proposed Changes for this rulemaking includes in the “Informative Digest/Policy Statement Overview” an inaccurate summary of Business and Professions Code section 7362 which refers to the statute requiring a “minimum number of hours of practical and technical instruction,” thereby suggesting that the requirement is for a total number of hours applicable to all technical instruction and practical operations education within a subject area.)

It is critical that the regulation be clear regarding the requirements for “minimum hours of technical instruction” and “minimum number of practical operations” for the various subject areas, both to make certain that the meaning of the regulation is easily understood by the “directly affected” public and to satisfy the statutory mandate of subdivision (b) of Business and Professions Code section 7362. For the reasons discussed above, OAL finds that the meaning of the specific curriculum provisions of proposed regulation section 950.3(b) as currently written is not “easily understood” and the “Clarity” standard has not been met. Subsection (b) of the regulation needs to be clarified so that the meaning is unambiguous for the “directly affected” public and so that it is evident that the statutory requirements have been satisfied.

4. Undefined acronym in subsection (b)(3) – In proposed regulation section 950.3(b)(3), one of the required topics under the subject “Evaluation and Preparation” is “CPR/AED.” While “CPR” is a term with a widely-understood meaning (i.e., cardiopulmonary resuscitation), “AED” may be a term (an acronym) with a meaning that is not generally familiar to those persons “directly affected” by the regulation, and it does not appear that this term has been defined in governing statutes or regulations. Undefined terms (including acronyms) may constitute a “Clarity” problem. See CCR, title 1, section 16(a)(3). Either the regulation text needs to include the meaning of “AED,” the term needs to be defined, or the rulemaking record needs to

demonstrate that the meaning of “AED” is generally familiar to persons directly affected by the regulation.

### C. NECESSITY

OAL must review regulations for compliance with the “Necessity” standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (a), defines “Necessity” as meaning: “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.” (Emphasis added.)

The “Necessity” standard is further defined in OAL’s regulation on “Necessity” in section 10 of title 1 of the CCR, which provides the following in subsection (b):

(b) In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall 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.

Related to meeting the “Necessity” standard, the Initial Statement of Reasons written in support of a rulemaking is required by Government Code section 11346.2, subdivision (b)(1), to include the following: “A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed.”

In connection with the Board’s proposed amendment of regulation section 950.3, the Board has included in the rulemaking record broad, general statements regarding the need to amend the existing regulation. As discussed above in the “Consistency” section of this decision, the Initial Statement of Reasons indicates that the curriculum is being revised for reasons such as ensuring that esthetician students are adequately trained and equipped while in school, providing greater curriculum flexibility for school instructors, and allowing for the teaching of new trends in a constantly-evolving beauty industry. However, the rulemaking record includes very little to explain the Board’s rationale for the specific provisions which are proposed for inclusion in the amended regulation. For example, there is no specific explanation for the division of the curriculum into the five subject areas “Safety and Sanitation,” “Facial Treatment Procedures,” “Evaluation and Preparation,” “Hair Removal Procedures,” and “Make-up Procedures.” Why



were these particular subject areas chosen? What is the rationale for the specific content within each subject area? Similarly, there is no specific rationale presented for the “200 Hours/Operations,” “150 Hours/Operations,” “100 Hours/Operations,” “100 Hours/Operations,” and “50 Hours/Operations” allocated to the five subject areas. The Board needs to explain each provision of the proposed revised regulation, setting forth a provision-by-provision necessity analysis for the proposed new language.

Because the rulemaking record submitted to OAL does not present the Board’s rationale for each of the specific provisions proposed to be included in the amended regulation, the proposed regulation does not meet “Necessity” standard of Government Code section 11349.1.

#### **D. SUMMARY AND RESPONSE TO PUBLIC COMMENTS**

Government Code section 11346.9, subdivision (a)(3), requires that the Final Statement of Reasons submitted with an adopted regulation 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 reasons for making no change...” In the case of this rulemaking, one response to a public comment is inadequate and therefore the Final Statement of Reasons does not fully satisfy the requirements of Government Code section 11346.9, subdivision (a)(3), as discussed below.

Regulation section 950.3 was initially proposed during the 45-day public comment period to include a subsection (d) which read: “Students may receive up to 30 hours in excused absences per the schools’ attendance policy, provided they have completed all state and school requirements upon graduation.” During the 45-day public comment period, commenter Karyn S. Laitis, Executive Director of Education for the Marinello Schools of Beauty, submitted the following comment: “I would suggest removing (d) regarding students receiving up to 30 hours of excused absences. I believe that to be an infringement upon [a] school’s right to establish attendance policies within the guidelines of the State Board curriculum and DOE. If students read this, they will demand 30 hours of excused absences. I would prefer to substitute this with a statement that schools be able to give credit up to 30 hours for industry related activities as designated by the school. e.g. professional conferences, field trips, participation in volunteer events or competitions.”

The Board summarized this public comment and then presented the following response in the Final Statement of Reasons: “The Board disagrees with this comment because students should be allowed excused hours while in school. However, the reference to state requirements has been removed from the statement regarding excused absences in the esthetician curriculum proposed language. Pending Board approval, the statement regarding excused absences will provide that students may receive up to 30 hours in excused absences per the school’s attendance policy, provided they have completed all school requirements. The Board highly recommends allowing students to have excused absences while attending a Board-approved barbering, cosmetology or electrology school.”

This response is both inaccurate and incomplete. First, the Board did not, as indicated in the response, ultimately retain the “excused absences” provision of regulation section 950.3(d) with only the deletion of the reference to “state” requirements. While the Board did in its first 15-day notice of modified regulation text propose retaining the excused absences provision with only the deletion of the reference to “state” requirements, this proposal was not adopted in the final regulation. In fact, by the end of the rulemaking, the Board decided to delete the “excused absences” provision of regulation section 950.3(d) entirely and provided public notice of the deletion of this subsection in its second 15-day notice of modified regulation text. Consequently, the response to the comment does not accurately reflect the final outcome with respect to proposed section 950.3(d). Second, the commenter made an additional recommendation that, in lieu of the “excused absences” provision, the Board substitute a statement that schools be able to give credit up to 30 hours for industry-related activities as designated by the school. The Board did not respond to this particular recommendation.

#### **E. INCORRECT PROCEDURES (INCLUDING MISSING AND DEFECTIVE DOCUMENTS)**

In addition to the substantive issues discussed above, there were also a number of problems relating to APA procedural requirements, including missing and defective documents. Each of these problem areas is discussed below.

1. Initial Statement of Reasons – The Initial Statement of Reasons as included in the rulemaking file submitted to OAL does not appear to be the exact document that would have been available to the public during the 45-day public comment period. In the “Underlying Data” section of the Initial Statement of Reasons in the rulemaking file, two of the documents identified are the “January 13, 2008 Board meeting minutes” and the “April 20, 2008 Board meeting minutes.” The public comment period for this rulemaking was from November 23, 2007 (the date of publication of the 45-day Notice of Proposed Changes) until January 7, 2008 (the date of the close of the written public comment period and of the public hearing on this matter). The Initial Statement of Reasons made available to the public during this public comment period would presumably not have referenced as “underlying data” Board meeting minutes with subsequent January 13, 2008 and April 20, 2008 meeting dates, as those meetings would not yet have occurred and therefore such meeting minutes would not yet be in existence.

When the Notice of Proposed Changes for this rulemaking was submitted to OAL for publication in the Notice Register in November 2007, according to our records that notice filing was accompanied by a different version of the Initial Statement of Reasons with a different list of “underlying data.” It is the Initial Statement of Reasons as it was actually made available to the public during the 45-day public comment period that should be in the rulemaking file. See Government Code sections 11346.2, subdivision (b), and 11347.3, subdivision (b)(2). The Initial Statement of Reasons should generally not change once the 45-day public comment period commences. If information contained in the Initial Statement of Reasons changes or is later determined to be incorrect, that information is updated in the Final Statement of Reasons as provided in Government Code section 11346.9, subdivision (a). Upon resubmission of this regulatory action to OAL, the rulemaking file needs to include the Initial Statement of Reasons as it was made available to the public during the 45-day public comment period.

2. Missing Document Relied Upon -- Related to the Initial Statement of Reasons issue discussed immediately above, the Initial Statement of Reasons contained in the November 2007 notice publication filing referenced as “Underlying Data” a document identified as “August 5, 2007 Board meeting minutes.” This August 5, 2007 document has not been included in the final rulemaking file as submitted to OAL. It would appear that the “August 5, 2007 Board meeting minutes” constitutes a document or data relied upon as described in Government Code section 11347.3, subdivision (b)(7), especially given the Board’s characterization as “Underlying Data.” Therefore, the August 5, 2007 Board meeting minutes need to be included in the rulemaking file (assuming that the Initial Statement of Reasons that accompanied the November 2007 notice publication filing is the Initial Statement of Reasons actually made available to the public during the 45-day public comment period).

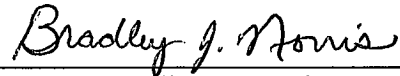
3. Informative Digest Error in the Notice of Proposed Changes -- In the “Informative Digest/Policy Statement Overview” section of the Notice of Proposed Changes published and mailed in November 2007, the Board summarized the various Business and Professions Code sections cited as “Authority” and “Reference” for this rulemaking. While generally the statute summaries in the Informative Digest were accurate, the summarization of Business and Professions Code section 7362, the key statute discussed above under “Consistency,” was in error. The Notice of Proposed Changes summarized this statute as follows: “Business and Professions Code, Section 7362 authorizes the Board to determine the required subjects of instruction to be completed by students including the minimum number of hours of practical and technical instruction.” (Emphasis added.) As discussed above, the pertinent phrase from Business and Professions Code section 7362 actually reads “including the minimum hours of technical instruction and minimum number of practical operations for each subject.” The difference between the meaning of this statute as summarized in the Informative Digest and the actual statutory language is significant in terms of describing the required content of the regulation. The Notice of Proposed Changes cannot be altered at this point. However, upon the resubmittal of this rulemaking to OAL, the Updated Informative Digest (which updates the information contained in the original Informative Digest, including the “clear and concise summary of the immediately preceding laws and regulations”) should be updated to correct the record regarding the requirements of Business and Professions Code section 7362.

4. Showing Deletion of Existing Regulation Text – In the final regulation text submitted to OAL for review, generally the Board has accurately shown the new text being added and the existing text being deleted in underline/strikeout format, in accordance with CCR, title 1, section 8. However, on page 1 of the regulation text where the existing language of regulation section 950.3(b) is being deleted, the caption over the third column is in error. The caption over the third column is shown as “Minimum Hours of Practical Operations.” (Emphasis added.) Instead, the correct existing CCR language over the third column is “Minimum Practical Operations.” The final regulation text needs to be corrected to accurately show this deletion of language in the final regulation text. In addition, the Board should show the accurate deletion in connection with any 15-day notices of regulation text changes under Government Code section 11346.8, subdivision (c), and CCR, title 1, section 44.

**CONCLUSION**

For the reasons set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-4237.

Date: October 22, 2008



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Bradley J. Norris  
Senior Staff Counsel

FOR: SUSAN LAPSLEY  
Director

Original: Kristy Underwood  
Copy: Stacy Meza