

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

BOARD OF CHIROPRACTIC
EXAMINERS

REGULATORY ACTION:
Title 13, California Code of
Regulations
ADOPT SECTIONS 360, 363.1, 370
AMEND SECTIONS 355, 355.1, 356,
356.5, 357, 358, 359 AND 360
REPEAL SECTION 355.2

DECISION OF DISAPPROVAL
OF REGULATORY ACTION
(Gov. Code, sec. 11349.3)

OAL File No. 2010-1101-07S

SUMMARY OF REGULATORY ACTION

The Board of Chiropractic Examiners (BCE) proposed to adopt sections 360, 363.1 and 370, amend and renumber sections 355, 355.1, 356, 356.5, 357, 358, 359 and 360, and repeal section 355.2 of title 16 of the California Code of Regulations pertaining to continuing education and license renewal. On November 1, 2010, the BCE submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On December 16, 2010, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above referenced regulatory action for the following reasons: failure to comply with the clarity and necessity standards of Government Code section 11349; a defective initial statement of reasons; failure to make a change available to the public; failure to comply with the requirements for incorporation by reference; a defective statement of mailing for the notice; and the text of the regulations submitted for review and filing with the Secretary of State did not show changes to the existing California Code of Regulations in underline and strikeout and did not contain authority and reference citations.

DISCUSSION

The adoption of regulations by the BCE must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted 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. (Gov. Code, sec. 11346.)

Before any rule or regulation subject to the APA 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 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 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.

1. NECESSITY/DEFECTIVE INITIAL STATEMENT OF REASONS

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(a) defines “necessity” to mean “. . . 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 purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of the title 1 of the California Code of Regulations provides:

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 regulations 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.

In order to provide the public with an opportunity to review and comment upon an agency’s perceived need for a regulation, the APA requires that the agency describe the need for the

regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2(b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The initial statement of reasons submitted with this proposed regulatory action contained for the most part only a very general explanation of the need for the changes proposed by this rulemaking. Although a demonstration of necessity is not required for those regulatory provisions carried over from the existing regulation sections, the initial statement of reasons is required to include an explanation of the need for each new provision or change to the existing provisions proposed in the initial text made available to the public with the 45 day notice. A revised statement of reasons providing the necessity missing from the initial statement of reasons should be made available to the public for at least 15 days prior to resubmission to OAL pursuant to Government Code section 11347.1.

2. CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the 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 following provisions fail to comply with the clarity standard:

- a. Subsection (g) of renumbered section 361 as proposed by this rulemaking provides that “Courses approved by the board shall be limited to the following subject areas” and proceeds to describe sixteen subject areas (although (g)(15) is actually a Board meeting). Subsection (a) of new section 363 requires a provider of these courses to submit “...one application for each continuing education course being offered.” After specifying the documentation required with the application in subsections (a)(1) to (a)(4), an undesignated provision states that “A ‘course’ is defined as an approved program of coordinated instruction, in any one of the subject areas as defined in Section 361(g) and given by the Provider...” In responding to a comment in the final statement of reasons concerning multi-topic research conferences, the BCE appears to intend that a separate application would be required for each subject area covered by a course. A person proposing to provide a continuing education course that included instruction in subjects described in more than one subsection in section 361(g) would not easily understand from section 363 that a separate application was required to be submitted for each subject area in subsection 361(g) touched upon by the proposed course.

b. Renumbered section 365 as proposed by this rulemaking provides:

Any person making application for reinstatement or restoration of a license which has been revoked shall be required to fulfill the continuing education requirements for each year the license was revoked and may be required to complete an approved course of continuing education, or to complete such study or training as the board *deems appropriate*. (Emphasis added.)

If there are any standards the BCE applies in determining when and what such additional study or training will be required, these standards need to be specified in the regulation. If there are no such standards and this additional study or training is imposed by BCE on a case-by-case basis, this should be explained in the final statement of reasons.

c. Renumbered section 371 as proposed by this rulemaking provides that disciplinary license restoration conditions "...are defined in Article 10 of the Initiative Act." In that this provision is codified as section 1000-10 of the Business and Professions Code, the regulation should also include a citation to this location.

Any changes made to the regulations to address the clarity concerns in paragraphs (a) or (b) above must be made available to the public pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations.

3. THE REGULATIONS SUBMITTED TO OAL FOR FILING WITH THE SECRETARY OF STATE CONTAIN A CHANGE THAT WAS NOT MADE AVAILABLE TO THE PUBLIC

Subdivision (a)(3) of Government Code section 11346.2 requires that changes to the existing California Code of Regulations be highlighted when made available to the public:

The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

The text of the regulations in tab 2 as the regulation text submitted to OAL with the notice of proposed rulemaking and purportedly made available to the public during the 45 day comment period did not show the following new paragraph in subsection (b) of renumbered section 362 as new language and subject to comment by way of underline or italics as required by Government Code section 11346.2(a)(3):

As used in this section, a provider is an individual, partnership, corporation, professional association, college or any other entity approved by the board to offer board approved continuing education courses to licensees to meet the annual continuing education requirements set forth in section 361 of these regulation.

This language should now be made available for comment pursuant to section 44 of title 1 of the California Code of Regulations.

4. RENUMBERED SECTION 371 DOES NOT COMPLY WITH THE REQUIREMENTS FOR INCORPORATION BY REFERENCE

Section 20 of title 1 of the California Code of Regulations provides the requirements for incorporating an external document by reference into a regulation. Subsection (c)(4) requires that:

The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance....

Subsections (c) and (d) of renumbered section 371 as proposed by this rulemaking incorporate by reference “‘Renewal’ form (R1HDC)” and subsection (e) of section 371 incorporates by reference “‘Forfeiture Notice’ form (D1HDC)”. A date of publication or issuance should be added to the forms and the regulation text or a space provided with instruction if OAL is directed to enter a date when the regulation is approved.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Please also note that: the text submitted to OAL for review and filing with the Secretary of State needs to show changes to the existing California Code of Regulations in underline and strikeout and must include authority and reference citations; the Final Statement of Reasons must include a statement that publication of the incorporated forms would be cumbersome, unduly expensive, or otherwise impractical to publish in the California Code of Regulations pursuant to title 1, section 20(c)(1), of the California Code of Regulations; the statement as to the mailing of the notice contains a substantive typographical error; there are some discrepancies in the proposed regulation text from the existing California Code of Regulations; the statement of sections amended that is attached to the STD 400 has some typographical errors; and the statement of completion and closure was not signed. If you have any questions, please contact me at (916) 323-6808.

Date: December 20, 2010

CRAIG TARPENNING

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