

**State of California
Office of Administrative Law**

**In re:
Veterinary Medical Board**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

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

Government Code Section 11349.3

**Adopt sections:
Amend sections: 2070, 2071
Repeal sections:**

OAL File No. 2010-1202-02 S

DECISION SUMMARY

On December 2, 2010, the Veterinary Medical Board (Board) submitted to the Office of Administrative Law (OAL) proposed amendments to sections 2070 and 2071 of Title 16 of the California Code of Regulations (CCR). This regulatory action was intended to increase a variety of fees for application, registration, and renewal of veterinarian and registered veterinary technician (RVT) licenses.

On January 13, 2011, OAL notified the Board that OAL disapproved the regulatory action for failure to comply with specified procedures of the California Administrative Procedure Act (APA). The reasons for the disapproval are summarized below:

- A. the rulemaking file does not contain a Standard Form 399 (STD. 399) that has written concurrence from the California Department of Finance (DOF);
- B. the rulemaking file does not include accurate dates on which the agency made modifications of the proposed amendments available to the public;
- C. the agency failed to adequately summarize and respond to each public comment made regarding the proposed amendments; and
- D. the underlying text of the proposed amendments does not match what is currently printed in the CCR.

All APA issues must be resolved prior to OAL's approval of any resubmission.

DISCUSSION

The adoption of regulations by the Board must satisfy requirements established by the part of the California Administrative Procedure Act 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 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.

A. INCORRECT PROCEDURE

1. Failure to submit a completed Standard Form 399 that indicates review and concurrence by the California Department of Finance.

Government Code section 11347.3, subdivision (b)(5), requires that the rulemaking file contain the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). Section 11346.5, subdivision (a)(6) requires, in part, the estimate of the cost or savings to any state agency. This paragraph further defines "cost or savings" as "additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations." Government Code section 11357 requires that DOF adopt instructions for inclusion in the State Administrative Manual (SAM) prescribing the methods that any agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate and other information, DOF has developed, and requires regulatory agencies to use, the STD. 399 "Economic and Fiscal Impact Statement." (SAM Chapter 6600, commencing with section 6601.)

SAM section 6615 establishes when financial estimates contained in STD. 399 require the concurrence of DOF. Section 6615 provides in part:

6615 ESTIMATES WHICH REQUIRE DEPARTMENT OF FINANCE ACTION
(Revised and renumbered from 6660 on 03/09)

Subdivision (c) of Government Code Section 11357 specifically authorizes the DOF to "...review any estimate...for content including, but not limited to, the data and assumptions used in its preparation."

A state agency is not required in all instances to obtain the concurrence of the DOF in its estimate of the fiscal impact of its proposed regulation on governmental agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, *or in other nondiscretionary instances such as local/state revenue increases or decreases* (emphasis added) which must be depicted on the STD. 399 as follows:

- | | |
|----------------------------------|-------------------|
| A.1-Reimbursable Local Costs | B.1-State Costs |
| A.2-Non-Reimbursable Local Costs | B.2-State Savings |
| A.3-Local Savings | B.4-Other |
| A.6-Other | |

In addition, the DOF's approval is required for the inclusion in any such estimate of any statement to the effect that reimbursement of local costs will be requested in a subsequent Governor's Budget, Section A.1 (b) on the STD. 399....

In the rulemaking record, the Fiscal Impact Statement part of the STD. 399 indicates in section B.4, regarding the Board's proposed regulatory action's "Fiscal Effect on State Government":

Based on projections prepared by the Department of Consumer Affairs, Budget Office in October 2010, by 2010/11 the Board's expenditures will exceed its revenue. The Board anticipates that by raising its fees there will be an overall increase in revenue of \$223,000 in FY 2011/12; \$668,000 in FY 2012/13 and ongoing.

Pursuant to SAM section 6615, when a state agency indicates its proposed regulatory action will result in an increase in revenue, then the STD. 399 is required to be submitted to DOF for review and a signature obtained from DOF indicating concurrence by DOF before submitting the STD. 399 as part of the rulemaking record for OAL's review. This did not occur. There is no signature from DOF on the Board's STD. 399. Thus, the Board failed to follow required APA procedures. A review and signature from DOF must be obtained and indicated on the STD. 399 before resubmitting this amendment to OAL.

2. Failure to include accurate dates of public availability pursuant to Government Code section 11347.3(b)(9).

Pursuant to Government Code section 11347.3, subdivision (a), every agency is required to maintain an accurate and complete record of each regulatory rulemaking. The list of documents to be included in the record is set forth in Government Code section 11347.3, subdivision (b). Specifically regarding public availability of modifications to proposed regulatory text, Government Code section 11347.3, subdivision (b)(9) requires inclusion of:

The date on which the agency made the full text of the proposed regulation available to the public for 15 days prior to the adoption, amendment, or repeal of the regulation, if required to do so by subdivision (c) of Section 11346.8.

The Board modified the text of the proposed amendment four separate times over the course of the rulemaking period, and each time the Board made the changes available to the public pursuant to Government Code section 11346.8, subdivision (c). However, the dates of public availability identified by various documents in the rulemaking record are in conflict. For example, the second 15-day notice provided by the Board lists an issuance date of November 23, 2009, while the statement of mailing required by Title 1, section 44 of the CCR shows a date of November 25, 2009. Not only are these dates in obvious conflict, but when the public comment end date of December 9, 2009, is taken into consideration it raises the potential issue of whether the proposed changes were made available to the public for the minimum 15-day comment period. Other inconsistencies among publication dates exist in documents related to the first and third 15-day notice periods.

By not resolving these inconsistencies, the Board failed to follow procedures set forth by Government Code section 11347.3, subdivision (b)(9). The Board must reconcile the beginning and ending dates of each 15-day notice period on all related documents in the rulemaking record before resubmitting this amendment to OAL.

3. Inadequate summary and response to comments pursuant to Government Code section 11346.9.

Government Code section 11346.9, subdivision (a), provides that an agency proposing regulations shall prepare and submit to OAL a "final statement of reasons." One of the required contents of the final statement of reasons is a summary and response to public comments. Specifically, Government Code section 11346.9, subdivision (a)(3), requires that the final statement of reasons 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. This requirement applies only to objections or recommendations specifically directed at the

agency's proposed action or to the procedures followed by the agency in proposing or adopting the action

Furthermore, where an agency makes substantial but sufficiently-related changes to its original regulatory proposal and provides notice of the changes pursuant to Government Code section 11346.8, subdivision (c), that statutory provision specifically includes the requirement: "Any written comments received regarding the change must be responded to in the final statement of reasons required by [Government Code] Section 11346.9."

Following publication of the initial 45-day public notice, the Board received six written public comments and held one public hearing on October 21, 2009, at which five oral comments were received. The Board summarized the comments in the aggregate, stating: "All comments similarly state the proposed fees are too high and will be a burden on the profession; however, the majority of the comments indicated some support for increased fees provided any fee increase limited the financial impact on the profession." The response to this summary, in the form of a rejection, was: "The proposed fees are needed to fund the operations of the licensing and regulatory programs of the Veterinary Medical Board. The Veterinary Medical Board has the statutory obligation to retain minimum and maximum contingency funds and due to a projected deficit in the fund various fee increases are necessary." However, according to the minutes from the meeting that followed the hearing on October 21, 2009:

The Board discussed the fact that the majority of comments received were related to the increase of the premise fees. Following discussion, the Board agreed to amend the proposed fee for premises from \$225 to \$200 each year.

It is clear that the Board reduced certain fees in response to one or more of the eleven comments received. Therefore, it is improper for the final statement of reasons to contain a summary rejection of the comments. Instead, the Board is statutorily required to explain how the proposed amendment was modified to accommodate at least those public comments related to premise fees. Regarding those public comments that did not prompt changes to the regulation, the Board is required to summarize and respond to each comment with the reason for making no change. The Board is permitted to aggregate summaries and responses to repetitive or irrelevant comments.

In addition, the Board received a total of 98 written public comments during the above-mentioned 15-day notice periods. Though the comments were by no means identical, the Board again chose to aggregate the comments into one brief summary and duplicated the single rejection that it prepared for the 45-day comments. Notwithstanding this rejection, the Board reduced various fees on at least three other occasions during the rulemaking period. If fee reductions occurred in response to any or all of the 98 comments received, the Board will have to properly summarize and respond to the comments as required by Government Code 11346.9, subdivision (a)(3) before resubmitting this amendment.

4. Failure to ensure consistency between existing regulatory text in the CCR and underlying text in the amendment.

OAL's regulation pertaining to "Final Text: Underline and Strikeout," as set forth in Title 1, section 8 of the CCR, describes the required format for the rulemaking agency-certified final regulation text submitted to OAL for filing with the Secretary of State. Section 8(b) provides: "The final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations. Underline or italic is not required for the adoption of a new regulation or set of regulations if the final text otherwise clearly indicates that all of the final text submitted to OAL for filing is added to the California Code of Regulations."

In connection with the final regulation text submitted to OAL for review and filing with the Secretary of State in this rulemaking, the Board generally did properly utilize a single underline and strikeout format to show additions to and deletions from the existing CCR text. However, a relatively small number of errors were made in showing the existing regulation text and in showing the underline and strikeout of the changes being made in the final regulation text. OAL will discuss these minor inaccuracies with the Board's staff.

CONCLUSION

For the foregoing reasons, OAL disapproves this regulatory action. If you have any questions, please contact me at (916) 322-3761.

Date: January 20, 2011



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