State of California
Office of Administrative Law

In re: **Board of Chiropractic Examiners**	**DECISION OF DISAPPROVAL OF REGULATORY ACTION**
Regulatory Action: Title 16 **California Code of Regulations**	**Government Code Section 11349.3**
Adopt sections: 309, 309.1, 309.2, 309.3, 309.4 **Amend sections:** **Repeal sections:**	**OAL File No. 2015-0121-01S**

SUMMARY OF REGULATORY ACTION

This rulemaking action by the Board of Chiropractic Examiners (the "Board") proposes to adopt sections 309, 309.1, 309.2, 309.3, and 309.4 in title 16 of the California Code of Regulations ("CCR"). Specifically, proposed regulations would implement, interpret, and make specific the provisions of Business and Professions Code section 901 as it pertains to licensed doctors of chiropractic. This includes the application and registration requirements, disciplinary actions, recordkeeping requirements, and provisions for terminating the exemption of an out-of-state licensed doctor of chiropractic who wishes to participate in a sponsored free health care event. Lastly, the Board proposes to incorporate two forms by reference through this rulemaking action.

On January 21, 2015, the Board submitted the above-referenced rulemaking action to the Office of Administrative Law ("OAL") for review. On March 5, 2015, OAL notified the Board of OAL's decision to disapprove the proposed rulemaking. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced rulemaking action for the following reasons: the proposed regulations failed to comply with the clarity standard of Government Code section 11349.1; the proposed regulations failed to comply with the necessity standard of Government Code section 11349.1; and the agency failed to follow required Administrative Procedure Act ("APA") procedures.

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

DISCUSSION

The Board's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. (See Gov. Code, sec. 11340 et seq.) Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations set forth in Government Code section 11349.1. (See Gov. Code, sec. 11340.1, subd. (a).) Generally, to satisfy the APA 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. (*Ibid.*) This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Clarity

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3) requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c) defines "clarity" to mean that regulations are "written or displayed so that the meaning of the 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:
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> (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
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> (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
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> (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
>
> . . .
>
> (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or

. . . .

Each instance of non-compliance with the clarity standard of the APA is set forth below:

1.1. Section 309.2, Subdivision (c)(2)(D): Denial of Request for Authorization to Participate

Pursuant to the proposed Section 309.2, subdivision (c)(2)(D), "The board ***may*** deny a request for authorization to participate if . . . [t]he applicant has participated in 3 sponsored events during the 12 month period immediately preceding the current application." (Emphasis added.) The initial statement of reasons (the "ISR") provides the following rationale for the adoption of this subdivision:

> . . . It would be against the public interest to permit an applicant to practice, even temporarily for a limited purpose, in this State without a license for more than 3 sponsored events per year (maximum of 30 calendar days per year). As a result, the proposed regulation would specify that grounds for denial of authorization to practice for an out-of-state practitioner would include that the applicant had participated in three sponsored events during the 12-month period immediately preceding the current application.

(ISR, p. 12.)

The primary clarity issue with subdivision (c)(2)(D) is that the rationale for the adoption of this subdivision leaves some ambiguity as to whether the threshold is three sponsored events or participation for 30 calendar days per year, and whether reaching this threshold leads to the automatic denial of a request for authorization to participate. The Board states, "It would be against the public interest to permit an applicant to practice, even temporarily for a limited purpose, in this State without a license for more than 3 sponsored events per year (maximum of 30 calendar days per year)." (ISR, p. 12.) What if an applicant participated in three sponsored events during the preceding 12-month period, but only participated for one day at each event for a total of three days? Would permitting the applicant to practice at a fourth sponsored event be "against the public interest"? Based on the Board's explanation in the ISR, it appears as though their primary concern is that participation in three sponsored events allows an out-of-state practitioner to practice in California without a license for up to 30 calendar days. However, the regulation text does not mention the number of days as a factor leading to the possible denial of a request for authorization to participate. As it currently exists, "the language of the regulation conflicts with the agency's description of the effect of the regulation." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) If the Board is only concerned about the number of sponsored events an out-of-state applicant has participated in during the preceding 12-month period, then the Board must clarify this point in another addendum to the ISR. If the Board is primarily concerned about the number of days an out-of-state applicant has participated in sponsored events during the preceding 12-month period, then the Board must revise the regulation text accordingly. It is equally unclear whether having practiced at three sponsored events during the preceding 12-month period leads to automatic denial of a request for authorization to participate, or whether denial on these grounds is permissive. Section 309.2, subdivision (c)(2)(D) is listed as a situation where the Board "***may*** deny a request for authorization to participate[.]" (Emphasis

added.) However, the ISR explains that it would be against the public interest to permit an applicant to practice in California without a license for more than three sponsored events. (ISR, p. 12.) This explanation leads to the reasonable and logical inference that any request for authorization to participate at a fourth sponsored event within a 12-month period leads to the automatic denial of a request to participate. (See Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1), (2).) The Board needs to clarify whether participating in three sponsored events during the preceding 12-month period leads to the automatic denial of a request to participate in a fourth event, or if there are some situations where applicants may be permitted to participate in a fourth event. If the Board chooses the latter option, then they must also set forth the circumstances under which they will allow an applicant to participate in a fourth sponsored event or more in a 12-month period.

Another clarity issue with the proposed Section 309.2, subdivision (c)(2)(D) is that it is not clear whether the 12-month period set forth in the regulation is calculated from (a) the date the application is received, (b) the date the application is reviewed (or, if the review occurs over a span of several days, which day within that period), or (c) the date the Board renders a decision on the application. Depending on which date is used for the purposes of this calculation, an application may or may not be subject to denial upon these grounds. As such, "the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning" (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1)).

1.2. "Request for Authorization to Practice Without a License at a Registered Free Health Care Event", Form 901-B (BCE/2013)

"Incorporation by Reference" means "the method whereby a regulation printed in the [CCR] makes provisions of another document part of that regulation by reference to the other document." (Cal. Code Regs., tit. 1, sec. 20, subd. (a).) "Material proposed for 'incorporation by reference' shall be reviewed in accordance with procedures and standards for a regulation published in the [CCR]." (*Id.* at subd. (b).) The Board proposes to incorporate two documents by reference through this rulemaking action: "Registration of Sponsoring Entity Under Business & Professions Code Section 901", Form 901-A (DCA/2014 – revised) (the "Registration Form"), and "Request for Authorization to Practice Without a License at a Registered Free Health Care Event", Form 901-B (BCE/2013) (the "Request for Authorization Form"). Pursuant to subdivision (b) of section 20 of title 1 of the CCR, both forms "shall be reviewed in accordance with the procedures and standards for a regulation published in the [CCR]." (*Ibid.*)

There are several clarity issues regarding the Request for Authorization Form. The first issue is whether the $59.00 application processing fee set out in Part 1 of the application is non-refundable. The proposed Section 309.2, subdivision (a)(1) states that this fee is non-refundable. However, the Request for Authorization Form, which also lists the fee, does not state that it is non-refundable. This is an issue since the same application form clarifies that a separate fee of $49.00 for processing ink cards is non-refundable, so there should be consistency in how the application addresses and clarifies whether fees are non-refundable. If the $59.00 fee is non-refundable, then the Board must add a statement to Part 1 of the Request for Authorization Form clarifying this aspect of the fee.

The second clarity issue with the Request for Authorization Form lies in Part 3 of the application. Question 4 asks, "Have you ever had any disciplinary action taken against a doctor of chiropractic license or other healing arts license?" It is not clear whether the scope of this question is limited to actions taken against licenses held by the applicant, or if it also includes actions taken by the applicant against licenses held by other licensees. As such, "the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning[.]" (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1).) Question 3 provides an example where the scope of the question is clear: "Have you ever had charges filed against a doctor of chiropractic license that you currently hold or held in the past, including charges that are still pending?" The phrase "that you currently hold or held in the past" clarifies that the scope of this question is limited to charges filed against licenses held by the applicant. If the scope of Question 4 is also limited to licenses held by the applicant, then OAL suggests adding a phrase similar to the one identified in Question 3.

OAL also notes two final clarity issues with the Request for Authorization Form. The ISR states that Part 2 of the Request for Authorization Form requires applicants to provide the name and location of the chiropractic college from which the applicant graduated. (ISR, p. 9.) However, there is no request for this information in this section of the application. Rather, the applicant is required to provide this information in Part 3 of the Request for Authorization Form. (See Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) The Board must clarify this statement in the final statement of reasons (the "FSR"). Lastly, Question 1 in Part 3 of the Request for Authorization Form asks, "Do you hold a current, active, and valid issued by a state, district, or territory of the United States authorizing the unrestricted practice of chiropractic in your jurisdiction(s)?" The word "license" must be added between the words "valid" and "issued" to clarify the scope of this question. (See Cal. Code Regs., tit. 1, sec. 16, subd. (a)(4).)

1.3. Section 309.2, Subdivision (c)(1): Denial of Request for Authorization to Participate

OAL also notes a clarity issue with the proposed Section 309.2, subdivision (c)(1). This subdivision lists six circumstances under which the Board shall deny a request from a healthcare practitioner for authorization to participate in a sponsored event. Neither an "and" nor an "or" appears at the end of the fifth item on this list, which is located at Section 309.2, subdivision (c)(1)(E). The ISR indicates that it is not necessary for every condition listed in subdivision (c)(1)(A) through (F) to be met in order for the Board to deny a request for authorization to participate. (See ISR, p. 11 ["[F]ailure to meet any of the specified requirements determined by the Board and discussed under section 309.2(a) of these proposed regulations will constitute an automatic denial of the application."].) The ISR indicates that satisfying any of the conditions listed in subdivision (c)(1)(A) through (F) leads to the automatic denial of a request for authorization to participate. Based on the regulation text alone, it is unclear whether all conditions listed in subdivision (c)(1)(A) through (F) must be met, or if just one of these conditions must be met in order for the Board to deny a request for authorization to participate in a sponsored event. Therefore, subdivision (c)(1) violates the clarity standard since "the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1), (2).) The Board needs to resolve this clarity issue.

For the reasons discussed above, the Board failed to comply with the clarity standard of the APA. The Board must make all substantial regulatory text changes, which are sufficiently related to the original text, available to the public for comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the CCR before the Board adopts the regulations and resubmits this regulatory action to OAL for review. Additionally, any comments made in relation to these proposed modifications must be presented to the Board for consideration and be summarized and responded to in the FSR. (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

2. Necessity

In addition to clarity, OAL also reviews proposed regulations for necessity. (Gov. Code, sec. 11349.1, subd. (a)(1).) "Necessity" is defined in Government Code section 11349, subdivision (a), as follows:

> "Necessity" means 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.

This necessity must be provided in the ISR, which must include "[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 and address the problem for which it is proposed." (Gov. Code, sec. 11346.2, subd. (b)(1); see also Cal. Code Regs., tit. 1, sec. 10.) Each instance of non-compliance with the necessity standard of the APA is set forth below:

2.1. Section 309.1, Subdivision (c): Recordkeeping Requirements

The proposed Section 309.1, subdivision (c), sets forth the recordkeeping requirements for sponsored entities that provide, or arrange for the provision of, health care services at a sponsored health care event under Business and Professions Code section 901. The last regulatory provision in this subdivision requires that the sponsoring entity provide copies of any record required to be maintained to any representative of the Board within 15 calendar days of the request. The rulemaking file does not contain any evidence explaining why the period of 15 calendar days was chosen.

2.2. Section 309.3, Subdivision (e): Informal Conference Option

The proposed Section 309.3, subdivision (g) allows an out-of-state practitioner the option of requesting an informal conference with the Executive Officer regarding the reasons for the termination of an authorization to participate. This subdivision also states that the Executive Director has 10 days from the date of the informal conference to mail a copy of his or her findings to the out-of-state practitioner. The rulemaking file does not contain any evidence explaining why the period of 10 days was chosen.

2.3. Section 309.4, Subdivision (a): Notice Requirement

The proposed Section 309.4, subdivision (a) requires each out-of-state practitioner to post a notice visible to patients or prospective patients at every station where patients will be seen. This notice must "be in at least 48 point Arial font" and include information specified in the proposed regulation text regarding the practitioner's limited authorization to provide chiropractic services at the sponsored event. The rulemaking file does not contain any evidence explaining why the specific font and font size required by this subdivision was chosen.

2.4. Request for Authorization Form

There are several issues regarding the necessity for different regulatory provisions in the Request for Authorization Form. The first issue is found on page 2 of the application and relates to fingerprint processing. Regarding the "Ink on Card" method, the application states that other state's fingerprint cards will not be accepted. However, the rulemaking file does not include any explanation or evidence supporting the need for this regulatory provision.

The second issue regarding necessity lies with a regulatory provision found in Part 4 of the Request for Authorization Form. Part 4 contains the following requirement: "If a disciplinary action is filed against any license you currently hold pending the Board's decision on this application for authorization, you must notify the Board in writing within 48 hours." The rulemaking file does not contain any necessity explaining why the period of 48 hours was chosen.

Lastly, the "Notice of Collection of Personal Information" section of the Request for Authorization Form contains the following statement: "The information collected may be transferred to other governmental and enforcement agencies." It is not clear from the application or the ISR why the Board needs such broad consent to share an applicant's personal information with "other governmental and enforcement agencies[,]" and the rulemaking file does not contain any evidence supporting the need for this regulatory provision.

For the reasons discussed above, the Board failed to comply with the necessity standard of the APA. The Board must resolve these issues through another addendum to the ISR and make this document available to the public for comment for at least 15 calendar days pursuant to Government Code section 11347.1 before the Board adopts the regulations and resubmits this regulatory action to OAL for review. Additionally, any comments made in relation to this addendum must be presented to the Board for consideration and be summarized and responded to in the FSR. (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

3. Failure to Follow Procedure

OAL also notes the following procedural issues that must be addressed prior to any resubmission of this rulemaking action:

3.1. Board Approval of Regulation Text

Where a board is required to adopt regulations, the rulemaking record must provide evidence that the board with rulemaking authority adopted the proposed regulations after complying with all public availability requirements. (See Gov. Code, sec. 11346.8; see also Gov. Code, sec. 11347.4(b)(8); Cal. Code Regs., tit. 1, sec. 90, subd. (a).) Section 4, subdivision (b) of the Chiropractic Act[1] grants power to the Board to adopt, amend, and repeal regulations in accordance with the requirements of the APA.

The rulemaking record contains the public session minutes from Board meetings held on October 29, 2013, and April 24, 2014. At the meeting held on October 29, 2013, the Board unanimously passed a motion to commence "the rulemaking process for sponsored free health care event regulations and to delegate authority to the executive officer to make non-substantive changes to the language if necessary." (Board of Chiropractic Examiners Public Session Minutes, dated Oct. 29, 2013, pp. 4-5.) The 45-day comment period for this rulemaking action lasted from January 24, 2014, to March 10, 2014. At the meeting held on April 29, 2014, the Board unanimously passed a motion "to take all steps necessary to finalize the rulemaking process, authorize the executive officer to make the non-substantive changes [required by DCA] and adopt the regulations as discussed[.]" (Board of Chiropractic Examiners Public Session Minutes, dated Apr. 29, 2014, p. 7.) The Board then made the modified regulation text (including modifications to one of the forms incorporated by reference), fiscal impact estimates, and an addendum to the ISR available from June 27, 2014, to July 11, 2014.

Although both sets of meeting minutes reflect general Board approval of this regulatory action, neither set of public session minutes indicate that the Board ever reviewed and approved the proposed regulation text, including the two forms being incorporated by reference. Therefore, there is no evidence in the rulemaking file that the Board ever adopted the proposed regulations after complying with all public availability requirements, nor could the Board produce any such evidence upon request.[2] Upon resubmitting the rulemaking action, the Board needs to include evidence in the rulemaking file that they reviewed and adopted the final modified regulation text.

3.2. ISR – Adoption of a Prescriptive Standard in Section 309.4, Subdivision (a)

Pursuant to Government Code section 11342.590, "prescriptive standard" means "a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means." As stated in section 2.3, *supra*, the proposed Section 309.4, subdivision (a) requires that each out-of-state practitioner post a notice visible to patients or prospective patients at every station where patients will be seen. This notice must "be in at least 48 point Arial font" and include specific language set forth in the

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[1] The Chiropractic Act is an initiative measure appearing in West's Annotated Business and Professions Code following section 100 and in the appendix to Deering's Business and Professions Code.

[2] The Board did provide the public session minutes from their teleconference on June 26, 2014, but these minutes similarly fail to prove that the Board reviewed and adopted the final modified regulation text.

proposed regulation text regarding the practitioner's limited authorization to provide chiropractic services at the sponsored event. The regulation specifies the sole means of compliance with the notice requirement by setting forth specific font, font size, and the language that must be included in the notice. As such, the proposed Section 309.4, subdivision (a) falls within the meaning of a "prescriptive standard" pursuant to Government Code section 11342.590.

If the proposed regulatory action prescribes specific actions or procedures, the ISR shall include evidence that the agency considered the imposition of performance standards as an alternative and the reasons for rejecting the performance standards. (See Gov. Code, sec. 11346.2, subd. (b)(4)(A); see also Gov. Code, sec. 11340.1, subd. (a).) It has already been established that the proposed Section 309.4, subdivision (a) constitutes a prescriptive standard. However, the ISR does not contain any evidence that the Board considered the imposition of performance standards as an alternative or why the Board rejected performance standards. Prior to resubmitting the rulemaking action, the Board must provide evidence or documentation that performance standards were considered as an alternative to the adopted requirements of subdivision (a) and why the performance standards were rejected. The Board must also make this evidence or documentation available pursuant to Government Code section 11347.1.

For the reasons discussed above, the Board failed to comply with APA procedural requirements. The Board must resolve these issues through another addendum to the ISR and make this document available to the public for comment for at least 15 calendar days pursuant to Government Code section 11347.1 before the Board adopts the regulations and resubmits this regulatory action to OAL for review. The resubmitted regulatory action must also contain evidence or documentation that the Board reviewed and adopted the final modified regulation text after complying with all public availability requirements. Lastly, any comments made in relation to these documents must be presented to the Board for consideration and be summarized and responded to in the FSR. (Gov. Code, sec. 11346.8, subd. (c); see also Gov. Code, sec. 11346.9, subd. (a)(3).)

CONCLUSION

OAL disapproved the above-referenced rulemaking action for the foregoing reasons. Pursuant to Government Code section 11349.4, subdivision (a), the Board may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval. If you have any questions, please contact me at (916) 324-6948.

Date: March 12, 2015

Steven J. Escobar
Attorney

For: DEBRA M. CORNEZ
Director

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