

**State of California
Office of Administrative Law**

In re:
Cemetery and Funeral Bureau

Regulatory Action:

Title 16, California Code of Regulations

Adopt sections: 2326.2, 2326.3

Amend sections: 2326, 2326.1, 2326.5

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2015-1013-07

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

The Cemetery and Funeral Bureau (Bureau) proposed to adopt sections 2326.2 and 2326.3 and amend sections 2326, 2326.1, and 2326.5 of title 16 of the California Code of Regulations concerning cemeteries owned by limited liability companies.

DECISION

The Office of Administrative Law disapproved the above referenced regulatory action for the following reasons: failure to comply with the “clarity” standard of Government Code section 11349.1 and failure to comply with the requirements for incorporation by reference.

DISCUSSION

The adoption of regulations by the Bureau must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any 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 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 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 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

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. Subdivision (a) of section 2326 of title 16 of the California Code of Regulations as amended by this rulemaking action provides in pertinent part:

...Applications for a certificate of authority to operate a cemetery shall be filed on Form 23-COA (rev. 1/15) which is hereby incorporated by reference.... In addition to the payment of fees required by section 2311 of these rules, **each application shall be accompanied by the following:**

...

- (4) A good and substantial map of the proposed cemetery site (scale not less than one inch (1”) to five hundred feet (500’) and surrounding area showing highways, access roads, etc., and area to be initially developed delineated thereon. [Emphasis added.]

Subdivision (a)(4) of section 2326, cited immediately above, is an existing provision in title 16 of the California Code of Regulations. However, the new version of the “Application for a Certificate of Authority, Form 23-COA (rev. 1/15),” incorporated by reference in subdivision (a) of section 2326, has with it an “Application Check List.” The “Application Check

List” which accompanies the newly revised and incorporated Form 23-COA appears to the reader to include a list of all the documents to be submitted with the newly revised application. The “Application Check List” does not include the map required by subdivision (a)(4) of section 2326 of title 16 of the California Code of Regulations. A person directly affected by section 2326 of title 16 of the California Code of Regulations would not easily understand from the language in subdivision (a)(4) that the map described in subdivision (a)(4) is no longer required to accompany the application form.

- b. Subdivision (b) of section 2326 of title 16 of the California Code of Regulations as amended by this rulemaking action provides in pertinent part:

In addition to complying with the provisions listed above (all apply, except (2)(C)(1)), a limited liability company applying for a certificate of authority must also include the following:

...

- (2) Comply with one, or a combination, of the following:

(A) Maintain a policy or policies of insurance of not less than one million dollars (\$1,000,000) for up to five licensed employees plus an additional one hundred thousand dollars (\$100,000) for each licensed employee over five, not to exceed five million dollars (\$5,000,000) accompanied by Form 23-INS (1/15) which is hereby incorporated by reference.

(B) Maintain in trust or bank escrow, cash, bank certificates of deposit, United States Treasury obligations, bank letters of credit or bonds of insurance or surety companies as security of not less than one million dollars (\$1,000,000) for up to five licensed employees plus an additional one hundred thousand dollars (\$100,000) for each licensed employee over five, not to exceed five million dollars (\$5,000,000) accompanied by Form 23-INS (1/15) which is hereby incorporated by reference.

(C) Confirm a net worth equal to or exceeding ten million dollars (\$10,000,000) as if the most recently completed fiscal year accompanied by Form 23-NW (1/15) which is hereby incorporated by reference.

However, Business and Professions Code section 9653.5 provides in pertinent part:

....

(b) At the time of certification, and at all times during which a limited liability company transacts intrastate business as a cemetery authority, the company shall be required to provide security for claims against it based upon acts, errors, or omissions of its licensed employees as described in subdivision (a) by complying with one, or a combination, of the following:

- (1) (A) Maintaining a policy or policies of insurance against liability imposed on or against it by law for damages arising out of claims. However, the total aggregate limit of liability under the policy or policies of insurance for a limited liability company that employs five or fewer licensed persons shall not be less than one million dollars (\$1,000,000), and for a limited liability company that employs more than five licensees, an additional one hundred thousand dollars (\$100,000) of insurance shall be obtained for each additional licensee except that the maximum amount of insurance is not required to exceed five million dollars (\$5,000,000) in any one designated period, less amounts paid in defending, settling, or discharging claims as set forth in this paragraph....
- (2) Maintaining in trust or bank escrow, cash, bank certificates of deposit, United States Treasury obligations, bank letters of credit, or bonds of insurance or surety companies as security for payment of liabilities imposed by law for damages arising out of all claims. However, the maximum amount of security for a limited liability company that employs five or fewer licensed persons shall not be less than one million dollars (\$1,000,000), and for a limited liability company that employs more than five licensees rendering professional services on behalf of the company, an additional one hundred thousand dollars (\$100,000) of security shall be obtained for each additional licensee except that the maximum amount of security is not required to exceed five million dollars (\$5,000,000)....

- (3) Unless the limited liability company has satisfied paragraph (4), each member of a limited liability company certificated as a cemetery authority that provides professional services rendered by employees who are licensed professionals described in subdivision (a), by virtue of that person's status as a member, thereby automatically guarantees payment of the difference between the maximum amount of security required for the limited liability company by this subdivision and the security otherwise provided in accordance with paragraphs (1) and (2), provided that the aggregate amount paid by all members under these guarantees shall not exceed the difference....**
- (4) Confirming, pursuant to the procedure in subdivision (c) of Section 16956 of the Corporations Code, that, as of the most recently completed fiscal year of the limited liability company, it had a net worth equal to or exceeding ten million dollars (\$10,000,000). The limited liability company shall transmit evidence of this paragraph to the Cemetery and Funeral Board in a form similar to the form submitted by a limited liability partnership providing alternative security provisions pursuant to subdivision (c) of Section 16956 of the Corporations Code. [Emphasis added.]

Proposed subdivision (b)(2) of section 2326 of title 16 of the California Code of Regulations does not include the provision located in subdivision (b)(3) of Business and Professions Code section 9653.5. The requirement from subdivision (b)(3) of Business and Professions Code section 9653.5 is instead contained in Form 23-INS which is incorporated by reference in subdivisions (b)(2)(A) and (b)(2)(B) of regulation section 2326. For this reason, a person directly affected by proposed section 2326 of title 16 of the California Code of Regulations would not easily understand from reading subdivision (b)(2) of the regulation that there is such a requirement.

We also note that the citation to subdivision "(2)(C)(1)" in the first sentence of subdivision (b) of regulation section 2326 is incomplete. The subdivision being referred to should be described as '(a)(2)(C)(1).'

2. INCORPORATION BY REFERENCE

(a) Section 20 of title 1 of the California Code of Regulations provides in pertinent part:

(a) “Incorporation by reference” means the method whereby a regulation printed in the California Code of Regulations makes provisions of another document part of that regulation by reference to the other document.

(b) Material proposed for “incorporation by reference” shall be reviewed in accordance with procedures and standards for a regulation published in the California Code of Regulations....

(c) An agency may “incorporate by reference” only if the following conditions are met:

...

(5) The regulation text states that the document is incorporated by reference and **identifies the document by title** and date of publication or issuance. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.

...

(d) If the document is a formal publication reasonably available from a commonly known or identified source, the agency need not provide six duplicate copies of the document under Government Code section 11343....

[Emphasis added.]

Section 2326 of title 16 of the California Code of Regulations, as amended by this rulemaking action, does not identify incorporated Form 23-COA (rev. 1/15), Form 23-LE (1/15), Form 23-INS (1/15), nor Form 23-NWS (1/15) by their titles as required by subdivision (b)(5) of section 20 of title 1 of the California Code of Regulations. Similarly, new section 2326.3 of title 16 of the California Code of Regulations, as adopted by this rulemaking action, does not identify Form 23-NC (1/15) nor Form 23-LE (1/15) by their titles as required by subdivision (b)(5) of section 20 of title 1 of the California Code of Regulations.

(b) Government Code section 11343 provides in pertinent part:

Every state agency shall:

(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one that is a building standard.

...

(d) Deliver to the office at the time of transmittal for filing a regulation or order of repeal, six duplicate copies of the regulation or order of repeal....

The forms incorporated by reference in sections 2326, 2326.2 and 2326.3 of title 16 of the California Code of Regulations as adopted and amended by this rulemaking were not attached to the original Form STD 400, nor to the six duplicate copies, as required by subdivision (d) of Government Code section 11343.

Changes made to the text of the regulations or to the documents incorporated by reference to address the concerns discussed above must be made available to the public for comment for at least 15 days pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations prior to adoption by the Bureau.

CONCLUSION

For the reasons stated above, OAL has disapproved this regulatory action.

Date: December 1, 2015

/s/ Craig Tarpenning

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