

**State of California
Office of Administrative Law**

In re:
California Horse Racing Board

Regulatory Action:

Title 04, California Code of Regulations

Adopt sections:

Amend sections: 1632

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-1201-03

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This action by the California Horse Racing Board (Board) proposed to amend minimum jockey riding fees for losing mounts and to provide direction for calculating jockey riding fees for second and third place mounts. On December 1, 2016, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On January 17, 2017, OAL notified the Board of the disapproval of this regulatory action.

DECISION

The reasons for the disapproval were failure to comply with the “clarity” and “necessity” standards of Government Code section 11349.1. The Board also failed to follow all required procedures under the California Administrative Procedure Act, Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (sections 11340-11361) (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL’s action.

DISCUSSION

Regulations adopted by the Board must generally be adopted pursuant to the rulemaking provisions of the APA. Pursuant to section 11346 of the Government Code, 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. No exemption or exclusion applies to the present regulatory action under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

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 California Code of Regulations (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 proposed regulation violates the clarity standard. All clarity concerns must be addressed by the Board prior to resubmission of this rulemaking to OAL.

Existing section 1632, subdivision (b), of title 4 of the CCR provides a table and provisions specifying the minimum jockey riding fees for losing mounts as well as the method for calculating the jockey riding fees for second and third place mounts. The Board proposes the following amendments to subdivision (b):¹

(b) ~~Non-winning jockey~~ Jockey riding fees for losing mounts are:

GROSS PURSE	2nd Mount	3rd Mount	Losing Mount
\$100,000 and up:...	<u>5% of Place Purse, plus \$10.00</u>	<u>5% of Show Purse, plus \$10.00</u>	\$168.74 177.18
50,000-99,999.....	<u>5% of Place Purse, plus \$10.00</u>	<u>5% of Show Purse, plus \$10.00</u>	137.49 144.37
25,000 – 49,999.....	<u>5% of Place Purse, plus \$10.00</u>	<u>5% of Show Purse, plus \$10.00</u>	118.74 124.68
15,000 – 24,999.....	<u>5% of Place Purse, plus \$10.00</u>	<u>5% of Show Purse, plus \$10.00</u>	106.24 111.55
10,000 – 14,999.....	<u>5% of Place Purse, plus \$10.00</u>	<u>5% of Show Purse, plus \$10.00</u>	99.99 104.99
5,000 – 9,999.....	\$112.49	\$96.25	93.75 98.44
3,500 – 4,999.....	99.99	87.49	81.25
2,000 – 3,499.....	87.49	81.25	78.75
1,500 – 1,999.....	74.99	72.49	72.49

- (1) The purpose of subsection (b) is to set a minimum, but not a maximum riding fee. No non-winning jockey shall be paid less than the riding fee set forth in subsection (b).
- (2) All fees pursuant to subsection (b) are payable in the lower purse range until the next higher purse range is reached unless there is a written agreement to the contrary. However, no such written agreement shall reduce the minimum required by subsection (b).
- (3) To determine the horse owner's place purse or show purse when calculating non-winning jockey riding fees, the Paymaster of Purses shall use the purse agreement provided in the Horsemen's Agreement for the race meeting at which the jockeys earned such fees. The losing mount fee shall be paid as provided under subsection (b) of this rule.
- (4) For horse races with gross purses between \$10,000 and \$100,000, a minimum of five percent of the horse owner's place purse or show purse plus \$10.00 shall be used when calculating the second place and third place non-winning jockey riding fees.

¹ Proposed deletions to existing text are shown in ~~strikethrough~~ and proposed additions are shown in underline.

(5) If the losing mount fee is equal to or greater than the third place mount fee, the Paymaster of Purses shall adjust the mount fees so that the third place mount shall earn \$2 more than the losing mount, and the second place mount shall earn \$2 more than the third place mount.

...

In describing these changes, the Board's Initial Statement of Reasons (ISR) states, in pertinent part:

The proposed amendment to Rule 1632 addresses the mount fee disparities by changing the non-winning jockey riding fee chart under subsection 1632(b) to reflect only the dollar amounts to be paid jockeys riding losing mounts, **and by adding new subsections 1632(b)(3) through 1632(b)(5) to provide direction for calculating jockey riding fees for second and third place mounts. Subsections 1632(b)(3) through 1632(b)(5) do not change current practice; instead, they place current practice in narrative form.** A new subsection 1632(b)(3) states that the Paymaster of Purses shall use the Horsemen's Agreement to determine the horse owner's place purse when calculating non-winning jockey riding fees. The Horsemen's Agreements provide the percentage of the gross purse the horse owner will receive, based on the order of the finish. The owner's percentage of the gross purse is the dollar amount from which the Paymaster of Purses will calculate the jockey mount fee. The subsection also provides that the losing mount jockey riding fee shall be paid as provided under subsection 1632(b). This is due to the fact that the losing fees are specific dollar amounts based on the requirements of Business and Professions Code section 19501. The minimum jockey riding fees for losing mounts are increased whenever California's minimum wage is increased and are not based on the owner's share of the gross purse. Therefore, the losing mount fees must be stated in the regulation. **A new subsection 1632(b)(4) provides the formula for calculating the second and third place mount fees. It is the same formula that is provided under the current 1632(b) non-winning jockey riding fee chart: 5 percent plus \$10.** A new subsection 1632(b)(5) provides instructions for the Paymaster of Purses should the losing mount fee be equal to or greater than the third place mount fee. The third place mount shall earn \$2 more than the losing mount and the second place mount shall earn \$2 more than the third place mount. This will allow the Paymaster of Purses to ensure that losing mount fees are never equal to or greater than second and third place mount fees. [ISR at p. 2 (Bolding added).]

Issue 1: The proposed amendments to subdivision (b) include removal of the method for calculating second and third place mount jockey riding fees for races with gross purses of "\$100,000 and up" from the existing table. Although proposed subdivision (b)(4) provides the methodology for calculating minimum second and third place mount jockey riding fees for races with gross purses "between \$10,000 and \$100,000," there is no proposed regulatory provision

governing the calculation of the minimum jockey riding fees for second and third place mounts when the gross purse is over \$100,000. Thus, it is unclear whether second and third place mounts are intended to be exempt from the minimum jockey riding fee requirements or if the formula in subdivision (b)(4) is intended to apply to these mounts. This ambiguity creates clarity issues in violation of subdivisions (a)(1) and (a)(5) of section 16 of title 1 of the CCR.

In addition, although the provision governing the calculation for second and third place mount minimum jockey fees when the gross purse is over \$100,000 has been completely removed from the proposed regulation, the ISR explanation states that new subdivision (b)(4) does “not change current practice; instead, they place current practice in narrative form.” The ISR goes on to state that it “is the same formula that is provided under the current 1632(b) non-winning jockey riding fee chart: 5 percent plus \$10.” Thus, the proposed language of the regulation conflicts the description of the effect of the regulation in violation of subdivision (a)(2) of section 16 of title 1 of the CCR.

Issue 2: Proposed section 1632, subdivision (b), removes the minimum jockey riding fees for second and third place mounts when the gross purse for a race is between \$5,000 and \$9,999 while increasing the minimum jockey riding fee for losing mounts for these same races from \$93.75 to \$98.44. Although the minimum jockey riding fee has been increased for races with gross purses between \$5,000 and \$9,999, the proposed regulation does not specify either the amount or methodology for calculating the jockey riding fees for second and third place mounts at this gross purse level. Thus, it is unclear whether second and third place mounts are intended to be exempt from the minimum jockey riding fee requirements or if the formulas in subdivisions (b)(4) or (b)(5) are intended to apply to these mounts. This ambiguity creates clarity issues in violation of subdivisions (a)(1) and (a)(5) of section 16 of title 1 of the CCR.

NECESSITY

OAL must review regulations for compliance with the “necessity” standard of 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.”

To further explain the meaning of substantial evidence in the context of the “necessity” standard, subdivision (b) of section 10 of title 1 of the CCR 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 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.

In order to provide the public with an opportunity to review and comment upon an agency’s need for a regulation, the APA requires a rulemaking agency to describe the need for the regulation and identify any documents relied upon in proposing the regulation in the ISR, pursuant to Government Code section 11346.2, subdivision (b). In the instant case, the Board’s ISR fails to include the purpose and rationale for all of the proposed amendments to the existing regulation. The Board must resolve all necessity issues before resubmittal to OAL.

Issue 1. In this rulemaking, the Board proposes to remove the second mount, third mount and losing mount minimum jockey riding fees for races with gross purses of \$1,500-\$1,999, \$2,000-\$3,499 and \$3,500-\$4,999. There is no discussion in the rulemaking record about the removal of the minimum jockey riding fees for races with gross purses in these ranges. The ISR fails to provide the specific purpose or substantial evidence of the need for the removal of these jockey riding fees, and therefore, has not met the necessity standard of the APA. OAL notes that in providing the purpose and necessity for removing the minimum jockey riding fees for races with gross purses of \$1,500-\$1,999, \$2,000-\$3,499 and \$3,500-\$4,999, the Board must explain how such removal is consistent with the minimum jockey fee requirements for losing mounts mandated by Business and Professions Code section 19501, subdivision (b).

Issue 2. Proposed section 1632, subdivision (b)(5), provides:

If the losing mount fee is equal to or greater than the third place mount fee, the Paymaster of Purses shall adjust the mount fees so that the third place mount shall earn \$2 more than the losing mount, and the second place mount shall earn \$2 more than the third place mount.

While the ISR includes purpose and necessity generally to adjust the second and third place mount minimum jockey riding fees higher when the losing mount fee is equal to or greater than the third place mount fee, the ISR does not provide any specific explanation for why the Board chose to increase these fees by \$2. For example, how did the Board determine that increasing the third mount jockey riding fee by \$2 over the losing mount jockey riding fee was sufficient to “deter jockeys from intentionally losing a race rather than put forth his best effort in order to earn more money?” (ISR at p. 2.) The absence of this information in the ISR constitutes a violation of the necessity standard of the APA.

FAILURE TO FOLLOW APA PROCEDURES

Government Code section 11346.9, subdivision (a)(4), requires that every rulemaking agency subject to the APA:

(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

...

(5) A determination **with supporting information** that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. For a major regulation, as defined by Section 11342.548 proposed on or after November 1, 2013, the determination shall be based, in part, upon the standardized regulatory impact analysis of the proposed regulation and, in part, upon the statement of benefits identified in subparagraph (C) of paragraph (3) of subdivision (a) of Section 11346.5.
... [Emphasis added.]

In the instant matter, the Board's Final Statement of Reasons (FSR) includes the three determinations required by Government Code 11346.9, subdivision (a)(4). The FSR, however, does not include the required "supporting information" and is therefore in violation of Government Code section 11346.9, subdivision (a)(4). This supporting information must be included in the FSR upon resubmittal.

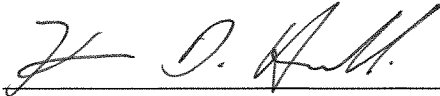
CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Board may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval.

Any changes made to the regulation text to address the clarity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR prior to adoption by the Board. Additionally, any supplement to the ISR or other document the Board may create or otherwise propose to add to the record in order to address the necessity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11347.1 prior to adoption by the Board. The Board must document in the rulemaking file its approval of the final text after consideration of all public comments and relevant information, as well as resolve all other issues raised in this Decision of Disapproval, before resubmitting to OAL.

If you have any questions, please contact me at (916) 323-8916.

Date: January 24, 2017



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