

**State of California
Office of Administrative Law**

In re:
**Department of Alcoholic Beverage
Control**

Regulatory Action:

Title 04, California Code of Regulations

Adopt section: 61

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2017-0213-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This rulemaking action by the Department of Alcoholic Beverage Control (Department) proposes to add section 61 to title 4 of the California Code of Regulations (CCR). The purpose of this action is to establish a process for protesting the issuance of an alcoholic beverage license. In addition to section 61, the Department proposes to adopt two forms: ABC-510-A, "Protest Against Alcoholic Beverage License Application" (rev. Jan. 2016), and ABC-510, "Information Regarding Alcoholic Beverage License Applications and Protests" (rev. Jan. 2016).

DECISION

On February 13, 2017, the Department submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On March 28, 2017, OAL notified the Department of the disapproval of this regulatory action. The reasons for the disapproval were failure to comply with the "necessity" and "clarity" standards of Government Code section 11349.1 and failure to follow all required procedures under the California Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DISCUSSION

Regulations adopted by the Department must generally be adopted pursuant to the rulemaking provisions of the APA, chapter 3.5 of part 1 of division 3 of title 2 of the Government Code (secs. 11340-11361). 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.

I. 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.

Additionally, subdivision (b) of section 20 of title 1 of the CCR requires that all material proposed to be incorporated by reference shall be reviewed in accordance with procedures and standards for a regulation.

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 documents relied upon in proposing the regulation, if any, in the Initial Statement of Reasons (ISR), pursuant to Government Code section 11346.2, subdivision (b). In the instant case, the Department’s rulemaking record includes only an ISR, with no other documents relied upon in support of the proposed regulation text.

As discussed below, the rulemaking record fails to comply with the necessity standard of the APA for a number of proposed regulatory provisions in forms ABC-510 and ABC-510-A, incorporated by reference in section 61.

Issue 1. Form ABC 510-A includes a section called “Verification,” in which the protestant must declare, under penalty of perjury:

- (1) That I am the Protestant herein;
- (2) That I have read the above protest and know the contents thereof; and
- (3) That the same is true of my own knowledge except as to those matters which are therein stated on information and belief, and as to those matters I believe to be true.

Business and Professions Code section 24014, subdivision (a), states:

- (a) A protest made by any person other than an employee of the department or a public officer shall be verified. Verification may be on information and belief.

The underlying statute includes a verification requirement, but it does not expressly require the verification to be under penalty of perjury. In the absence of an express statutory mandate, the Department’s discretionary choice to implement the penalty of perjury requirement is one that must be supported by substantial evidence in the rulemaking record. The ISR describes how delays in processing protests will be mitigated by requiring the exclusive use of form ABC 510-A and its verification conditions. Yet, the ISR does not provide any evidence to explain why the Department chose to meet the statutory verification mandate by including the specific penalty of perjury condition in the form. This lack of substantial evidence constitutes a failure to satisfy the necessity standard of the APA.

Issue 2. Page 1 of form ABC-510 includes the following provision under the heading, “Filing Your Protest:”

If you feel that there was insufficient notice posted, you must notify the Department within 10 days of becoming aware of the posting. An extension to file a protest may be granted by the Department, but the burden to show why the extension should be granted is on the person requesting the extension. An affidavit or other document submitted under penalty of perjury related to the facts should be submitted.

The ISR does not explain why the Department fixed the deadline to request an extension at 10 days, as opposed to a longer or shorter period of time. The ISR also does not explain why the burden of proof for an extension is on the protestant. Further, the ISR does not explain why an affidavit or other document should be submitted, nor why the submission must be under penalty of perjury. The failure to explain the need for these proposed regulatory provisions constitutes a violation of the necessity standard of the APA.

Issue 3. Form ABC-510 includes a number of other regulatory provisions that are not adequately explained in the rulemaking record. All such necessity issues must be resolved by the Department prior to approval by OAL. The following examples taken from form ABC-510 are representative, and do not comprise an exclusive list of unsupported provisions:

- Letters returned by the Post Office without a forwarding address will be considered as an abandonment of the protest.
- Failure to respond to communications from the Department to the protestant's address shall be considered abandonment of the protest.
- Incomplete and/or illegible information will cause the protest to be rejected.

Ultimately, in order to meet the necessity standard of the APA, the rulemaking record must include substantial evidence demonstrating why the Department needed to adopt the text in the ways described above and the evidence then needs to be made available to the public pursuant to Government Code section 11347.1.

II. 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 CCR, 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 above, page 1 of Form ABC-510 includes this regulatory provision:

If you feel that there was insufficient notice posted, you must notify the Department within 10 days of becoming aware of the posting. An extension to file a protest may be granted by the Department, but the burden to show why the extension should be granted is on the person requesting the extension. An affidavit or other document submitted under penalty of perjury related to the facts should be submitted. [Emphasis added.]

This provision presents two clarity issues that must be resolved before the Department resubmits this action to OAL.

Issue 1. Subdivision (a) of section 24013 of the Business and Professions Code provides:

- (a) Protests may be filed at any office of the department within 30 days from the first date of posting the notice of intention to engage in the sale of alcoholic beverages at the premises, within 30 days of the mailing of the notification pursuant to Section 23985.5, or within 30 days of the mailing of the notices of the department to public officials as required by Section 23987, whichever is later.

The statute clearly provides 30 days to file a protest, yet how to determine the start of the 10-day window to request an extension of the protest period is unclear. Can a protestant request an extension after the expiration of the 30-day protest period, if he or she does not become aware of the application for an alcoholic beverage license until that time? If so, then it is not clear for how long after the close of the protest period the protestant may make a request. If not, then based on the proposed text alone, it is not clear that the protestant must request an extension within 10 days of becoming aware of the posting and before the 30th day of the protest period. Because the text is not patently clear and unambiguous to a directly affected reader, it violates the clarity

standard of the APA in Government Code section 11349, subdivision (c), and section 16(a)(1) of title 1 of the CCR.

Furthermore, the rulemaking record for this action does not discuss how the Department is able to offer an extension of the 30-day protest period in a way that is consistent with the Business and Professions Code. OAL notes that in addition to the clarity issue discussed above, the proposed text of form ABC-510 may also violate the consistency standard of the APA. See Government Code section 11349, subdivision (d). The Department must address this apparent inconsistency prior to resubmitting the action to OAL.

Issue 2. The condition stated in the last sentence of the provision is ambiguous because of the word “should.” Will a protestant’s request be rejected if it is submitted without supplemental documentation, or without being signed under penalty of perjury? Will such a request be given substantially different consideration than a request that includes a signed affidavit? In other words, would the proposed text only be clear and accurate if it stated that an affidavit or other document “shall” be submitted along with a request for extension in order to be considered by the Department? This ambiguity is a violation of section 11349.1 of the Government Code and section 16(a)(1) of title 1 of the CCR.

III. FAILURE TO COMPLY WITH APA PROCEDURES

A. Incorporation by Reference

Section 20 of title 1 of the CCR establishes the process of incorporation by reference, and sets forth a number of requirements that apply when a rulemaking agency proposes to incorporate documents by reference in its regulations. Subdivision (c) of section 20 provides:

- (c) An agency may “incorporate by reference” only if the following conditions are met:
- (1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.
 - (2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.
 - (3) The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation

of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.

(4) 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.

(5) The regulation text specifies which portions of the document are being incorporated by reference. [Emphasis added.]

In this rulemaking action, the Department failed to comply with section 20 in the following ways:

Issue 1. The Final Statement of Reasons (FSR) does not include the demonstrative statements required by section 20, subdivisions (c)(1) and (c)(2). The Department must revise the FSR to include this information before resubmitting to OAL.

Issue 2. Proposed section 61, subdivisions (a) and (b), state:

(a) Unless a public official protesting in an official capacity, protests against the issuance of alcoholic beverage licenses shall be submitted on form ABC-510-A (Rev. January 2016), "Protest Against Alcoholic Beverage License Application," attached.

(b) In addition to form ABC-510-A, rules for submission of a protest are located on form ABC-510 (Rev. January 2016), "Information Regarding Alcoholic Beverage License Applications and Protests," attached. [Emphasis added.]

The proposed text of section 61 does not state that the two forms are incorporated by reference, though the title and date of publication of each form are provided. The Department must modify section 61 to include text that satisfies section 20, subdivision (c)(4), before resubmitting to OAL.

OAL notes the possibility that the Department may not have intended to incorporate the forms by reference, and instead intended to print the forms in their entirety in title 4 of the CCR. The reason OAL cannot be certain is because the Department's use of the word "attached" in section 61 is ambiguous. Strictly speaking, the APA does not allow for a separate document to be attached to the CCR. Documents may be incorporated by reference or printed in the CCR in full, either as part of the regulation section or as an appendix to the section. If incorporating the two forms by reference is not the objective, then the Department must modify the text of section 61 to resolve the ambiguity of the word "attached" and explain how the forms are to be printed in the CCR.

B. Summary and response to comments

Issue 1. The Department received written comments during the 45-day comment period, and oral comments at three of four public hearings. The FSR includes summaries of, and responses to, various written and oral comments, but does not specifically and accurately identify which comments are being summarized and responded to. For example, the FSR summarizes and responds to “Written Comment #1,” but does not identify that comment by author, date, or any other method; nor is the corresponding written comment in the rulemaking record labeled “Comment #1.” So, it is impossible for OAL to compare the FSR and the actual written comment in the record to determine whether “Written Comment #1” was adequately summarized and responded to. This is true for all comments in the FSR. The Department needs to organize the summary and response to the comments received during the 45-day comment period and at the hearings in a manner such that OAL can readily ascertain which comment relates to which summary and response.

C. Form STD. 399

Issue 1. Government Code section 11347.3, subdivision (b)(5), requires that the rulemaking record 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 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 Fiscal Impact Statement section of the STD. 399 in the rulemaking record, the Department checked box B.4-Other, and included the following statement in the space provided:

This regulation is consistent with the Department's current operations and practices currently absorbed through the Department's existing budget.

Pursuant to SAM section 6615, if a state agency indicates that its proposed regulatory action may have some fiscal effect on the agency, absorbable or not, 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 was no signature from DOF on the STD. 399 submitted to OAL for review. Thus, the Department failed to follow required APA procedures. A review and signature from DOF must be obtained and indicated on the STD. 399 before resubmitting this action to OAL.

D. Economic Impact Assessment

Issue 1. Government Code section 11346.2, excerpted below, requires the rulemaking agency to create an ISR that contains certain information, and make that ISR available to the public.

11346.2. Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

(a) [...]

(b) An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement of reasons shall include, but not be limited to, all of the following:

(1) [...]

(2)(A) For a regulation that is not a major regulation, the economic impact assessment required by subdivision (b) of Section 11346.3.

[Cont.]

Government Code section 11346.3, subdivision (b), provides:

(b)(1) A state agency proposing to adopt, amend, or repeal a regulation that is not a major regulation or that is a major regulation proposed prior to November 1, 2013, shall prepare an economic impact assessment that assesses whether and to what extent it will affect the following:

(A) The creation or elimination of jobs within the state.

(B) The creation of new businesses or the elimination of existing businesses within the state.

(C) The expansion of businesses currently doing business within the state.

(D) The benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

[Cont.]

The economic impact assessment (EIA) in the Department's ISR is procedurally deficient because it does not assess each of the required elements in Government Code section 11346.3, subdivisions (b)(1)(A)-(D).

In addition to the ISR, the Department's rulemaking record for this action includes a separate EIA that does appear to assess each of the required elements. However, the record includes no evidence that this second EIA was noticed and made available to the public for the duration of the 45-day notice period. Accordingly, even if it intended to remedy the deficient EIA described above, the Department still violated the APA by not including the revised EIA in the ISR and making it publically available pursuant to Government Code section 11346.2.

The Department must remedy this issue by providing notice of the correct EIA for 15 days pursuant to Government Code section 11347.1

E. Miscellaneous

Issue 1. The notice of proposed action is not included in the record, though it is identified in the Table of Contents for the record. The Department must provide the notice in the record.

Issue 2. The record includes a second notice entitled, “Notice of public hearing and extended comment period on proposed rulemaking,” which was published subsequent to the 45-day notice of proposed action. The Table of Contents for the record does not identify this document. The Department must revise the Table of Contents to include this information.

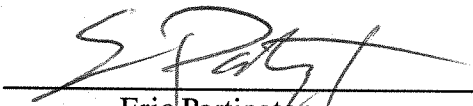
CONCLUSION

For the reasons set forth above, OAL disapproved this regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval. A copy of this disapproval decision will be e-mailed to the Department contact person on the date this decision is signed as specified below.

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. Additionally, any supplement to the ISR or other document the Department may create or otherwise propose to add to the record in order to address the necessity and procedural issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11347.1.

If you have any questions, please contact me at (916) 323-6225.

Date: April 4, 2017


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