

**State of California
Office of Administrative Law**

In re:
Bureau of Automotive Repair

Regulatory Action:

Title 16, California Code of Regulations

**Adopt sections: 3351.7.1, 3351.7.2,
3351.7.3**

Amend sections: 3371.1

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2017-0417-04

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

On April 17, 2017, the Bureau of Automotive Repair (Bureau) submitted to the Office of Administrative Law (OAL) this proposed regulatory action to adopt and amend various sections in Title 16 of the California Code of Regulations (CCR). These regulatory changes are proposed to establish registration, advertising, and other standards for automotive repair dealers who engage in the business of mobile automotive repair and who do not operate a currently registered place of business where the diagnosis or repair of motor vehicles is performed.

DECISION

On May 30, 2017, OAL notified the Bureau that OAL disapproved the proposed regulations because the Bureau failed to follow procedural requirements of the California Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DISCUSSION

The adoption, amendment, or repeal of regulations by the Bureau must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 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.

The APA requires agencies to follow specific procedures. In this rulemaking action, the Bureau failed to follow certain required procedures by omitting to: (1) obtain Department of Finance (Finance) signature on the Form STD 399, (2) properly display text, (3) name the Department of Consumer Affairs in section B.6 of the Form 400, (4) have an authorized person sign the Form 400, (5) include authority and reference citations in the regulation, and (6) include in the Table of Contents the required affidavit or declaration under penalty of perjury.

1. FAILURE TO OBTAIN DEPARTMENT OF FINANCE SIGNATURE ON FORM STD 399

Government Code section 11347.3, subdivision (b)(5) requires a rulemaking file to include 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 the notice of proposed action to include, in part, the estimate of the cost or savings to any state agency as a result of the proposed action. This subdivision 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 Finance adopt instructions for inclusion in the State Administrative Manual (SAM) prescribing the methods that an agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate, and other information, Finance has developed, and requires regulatory agencies to use, the STD. 399 “Economic and Fiscal Impact Statement.” (SAM Chapter 6600, commencing with section 6601.) Specifically, at SAM section 6615, Finance has established when financial estimates contained in a STD. 399 require the concurrence of Finance. Section 6615 states:

A state agency is not required in all instances to obtain the concurrence of [Finance] 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 |

Currently in the rulemaking record, the Fiscal Impact Statement part of the STD. 399 depicts “other” in sections A.6 and B.4. Thus, the STD. 399 requires Finance signature. The rulemaking file does not include a STD. 399 that includes a Finance signature, and therefore, the Bureau has failed to follow required APA procedures. A review and signature from Finance must be obtained on the STD. 399 before this rulemaking action can be approved by OAL.

2. IMPROPER ILLUSTRATION OF TEXT

When noticing any modified text to the public for comments, the Bureau must ensure that the changes to the underlying text of the regulations are accurately illustrated. (Gov. Code, sec. 11346.2, subd. (a)(3); 1 Cal. Code Regs., secs. 44, and 46.) The proposed regulations were noticed to the public; however, the text was not accurately illustrated so that the public would know what the exact changes were and be able to comment on those changes.

For example, during the second 15-day public comment period, the Bureau modified proposed section 3351.7.3, subdivision (b). The phrase “must separately register” was changed to “shall hold a unique registration number.” However, the change was not shown with strike-out or underline.

The Bureau may remove the modified language and use the language that was properly noticed to the public; that is, the Bureau may return to the use of the phrase “must separately register.” If the Bureau opts to use the phrase “shall hold a unique registration number,” the Bureau must make the modified text available for a 15-day public comment period and the changes to the text must be properly illustrated. The Bureau must make all changes available to the public for comment, with changes accurately illustrated, prior to resubmitting the rulemaking to OAL for review. The Bureau must also document the change made in the Updated Informative Digest and provide the necessity for the change in the Final Statement of Reasons.

3. FAILURE TO NAME THE DEPARTMENT OF CONSUMER AFFAIRS IN SECTION B.6 OF THE FORM 400

California Code of Regulations, Title 1, section 6, subdivision (b)(6), requires the Bureau to indicate the Department of Consumer Affairs in section B.6. of the Form 400. It states:

(b) The completed Form 400 attached to the regulation(s) submitted to OAL shall contain:

(1)

(6) if a statute requires that, prior to submitting the regulatory action to OAL, the rulemaking agency provide notice to another agency or entity of the regulatory action, or otherwise to submit the regulations to another agency or entity for review, consultation, approval or concurrence, at any time prior to the submission of the regulations to OAL, the name of any and all such agencies or entities....

Further, Business and Professions Code section 313.1, subdivision (c), states:

(a) Notwithstanding any other provision of law to the contrary, no rule or regulation, except those relating to examinations and qualifications for licensure, and no fee change proposed or promulgated by any of the boards, commissions, or committees within the department, shall take effect pending compliance with this section.

(b)

(c) The submission of all notices and final rulemaking records to the director and the completion of the director's review, as authorized by this section, shall be a precondition to the filing of any rule or regulation with the Office of Administrative Law. The Office of Administrative Law shall have no jurisdiction to review a rule or regulation subject to this section until after the completion of the director's review and only then if the director has not disapproved it....

Business and Professions Code section 22 defines the term "board" to include bureaus. It states:

"Board," as used in any provision of this [Business and Professions] code, refers to the board in which the administration of the provision is vested, and unless otherwise expressly provided, shall include "bureau," "commission," "committee," "department," "division," "examining committee," "program," and "agency."

Thus, the Bureau is subject to the requirements found in Business and Professions Code section 313.1.

In this rulemaking action, section B.6. of the Form 400 submitted to OAL was left blank. The Bureau is required to name the Department of Consumer Affairs (Department) in section B.6. of the Form 400 because approval from the Department is needed before the Bureau can submit its rulemaking action to OAL. Prior to resubmitting the rulemaking action to OAL for review, the Bureau must obtain approval from the Department, pursuant to Business and Professions Code section 313.1, subdivision (c). Due to this statutory requirement, section B.6. of the Form 400 must indicate that the regulations were submitted to the Department, pursuant to California Code of Regulations, section 6, subdivision (b)(6).

4. FAILURE TO PROVIDE A CERTIFICATION MADE BY THE HEAD OF THE AGENCY OR THEIR DESIGNEE

Government Code section 11343, subdivision (g) requires the head of the rulemaking agency to certify the rulemaking submission to OAL. Specifically, it requires that the certification of every regulation adopted, amended, or repealed by a state agency must "be made by the head of the state agency that is adopting, amending, or repealing the regulation, or by a designee of the agency head, and the certification and delegation shall be in writing."

Section B.8. of the Form 400 submitted to OAL shows that an unidentified person signed the form "for D.G. [Dean R. Grafilo, director of the Department]." The Form 400 was not signed by the Department's director and it was not signed by the one person who has been authorized

through a properly executed delegation to sign the form. Upon resubmittal, the Form 400 will have to be signed by the Department's director or his authorized designee.

5. FAILURE TO INCLUDE AUTHORITY AND REFERENCE CITATIONS

California Code of Regulations, Title 1, section 14, subdivision (d) requires each regulation to include authority and reference citations. Proposed sections 3351.7.1 and 3351.7.2 do not have authority and reference citations. Upon resubmittal, the Bureau must ensure each regulation includes authority and reference citations, pursuant to California Code of Regulations, Title 1, section 14, subdivision (d).

6. FAILURE TO INCLUDE IN THE TABLE OF CONTENTS THE REQUIRED AFFIDAVIT OR DECLARATION UNDER PENALTY OF PERJURY

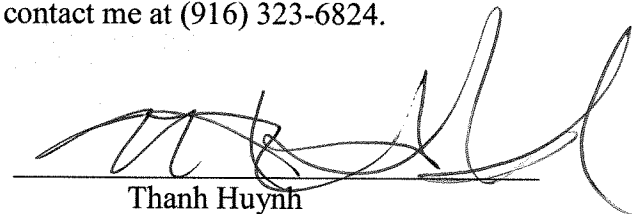
Government Code section 11347.3, subdivision (b)(12) requires the rulemaking file to have an index or a table of contents that includes an affidavit or declaration under penalty of perjury, specifying the date upon which the record was closed and that the file is complete. The Table of Contents contained in the Bureau's record contains a declaration under penalty of perjury that the rulemaking file is closed but it does not state under penalty of perjury that the file is complete. Upon resubmittal, the Table of Contents must contain an affidavit or a declaration under penalty of perjury that complies with Government Code section 11347.3, subdivision (b)(12).

CONCLUSION

For these reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4(a), the Bureau may resubmit this rulemaking action within 120 days of its receipt of this Decision of Disapproval.

A copy of this Disapproval Decision will be emailed to the Bureau on the date indicated below. If you have any questions, please do not hesitate to contact me at (916) 323-6824.

Date: June 6, 2017



Thanh Huynh
Senior Attorney

For: Debra M. Cornez
Director

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