

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

SECRETARY OF STATE

REGULATORY ACTION:
Title 2, California Code of
Regulations

ADOPT SECTIONS 22620.1,
22620.2, 22620.3, 22620.4, 22620.5,
22620.6, 22620.7, AND 22620.8

DECISION OF DISAPPROVAL
OF REGULATORY ACTION
(Gov. Code, sec. 11349.3)

OAL File No. 2011-1207-02S

SUMMARY OF REGULATORY ACTION

The Secretary of State proposed to adopt sections 22620.1 through 22620.8 of title 2 of the California Code of Regulations to establish uniform state standards for use in recording, storing, and reproducing permanent and nonpermanent documents or records in electronic media pursuant to section 12168.7 of the Government Code. On December 7, 2011, the Secretary of State submitted the proposed adoption to the Office of Administrative Law (OAL) for review in accordance with the California Administrative Procedure Act (APA). On January 23, 2012, OAL disapproved the proposed adoption. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

The Office of Administrative Law disapproved the above referenced regulatory action for the following reasons: failure to comply with the consistency and clarity standards of Government Code section 11349; the regulatory file did not contain all required documents; and required documents included in the file are defective.

DISCUSSION

The adoption of regulations by the Secretary of State must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any rule or 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 rule or regulation subject to the APA may become effective, the rule or 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 rule or 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 rules and regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on rules and regulations before they become effective.

1. CONSISTENCY/CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “consistency” standard. (Gov. Code, sec. 11349.1(a)(4).) “Consistency” as defined by Government Code section 11349(d) means “...being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

Section 12168.7 of the Government Code recognizes the need to adopt uniform statewide standards for the purpose of storing and recording permanent and nonpermanent documents in electronic media. In subdivision (b) of the statute, the Secretary of State is directed to adopt these uniform statewide standards. In this regulatory action, the Secretary of State initially proposed the adoption of uniform statewide standards for use in recording, storing, and reproducing permanent and nonpermanent documents or records in electronic media as directed by the Legislature in subdivision (b) of section 12168.7 of the Government Code. However, during a 15 day availability period conducted during this rulemaking, the Secretary of State added the following language to introductory regulation section 22620.1 of the newly adopted regulations:

“These regulations are recommendations and best practice guidelines, which state and local agencies are strongly encouraged to follow.”

This additional language violates the consistency standard.

Section 12168.7 of the Government Code provides:

(a) The California Legislature hereby recognizes the **need to adopt uniform statewide standards for the purpose of storing and recording permanent and nonpermanent documents in electronic media.**

(b) **In order to ensure that uniform statewide standards remain current and relevant, the Secretary of State, in consultation with the Department of General Services, shall approve and adopt appropriate standards established by the American National Standards**

Institute or the Association for Information and Image Management.

(c) The standards specified in subdivision (b) shall include a requirement that a trusted system be utilized. For this purpose and for purposes of Sections 25105, 26205, 26205.1, 26205.5, 26907, 27001, 27322.2, 34090.5, and 60203, Section 102235 of the Health and Safety Code, and Section 10851 of the Welfare and Institutions Code, "trusted system" means a combination of techniques, policies, and procedures for which there is no plausible scenario in which a document retrieved from or reproduced by the system could differ substantially from the document that is originally stored.

(d) In order to develop statewide standards as expeditiously as possible, and until the time that statewide standards are adopted pursuant to subdivision (b), state officials shall ensure that microfilming, electronic data imaging, and photographic reproduction are done in compliance with the minimum standards or guidelines, or both, as recommended by the American National Standards Institute or the Association for Information and Image Management for recording of permanent records or nonpermanent records.
(Emphasis added.)

The Secretary of State is mandated by Government Code section 12168.7 to adopt uniform state standards and there is no indication in Government Code section 12168.7 that such uniform state standards were only to be recommendations.

With respect to state officials, subdivision (d) of Government Code section 12168.7 goes so far as to require:

...until the time that statewide standards are adopted pursuant to subdivision (b), state officials shall ensure that that microfilming, electronic data imaging, and photographic reproduction are done in compliance with the minimum standards or guidelines, or both, as recommended by [ANSI or AIIM] for recording of permanent records or nonpermanent records....”

It is not reasonable to assume that the Legislature would have intended that state officials be required to comply with the minimum standards of ANSI or AIIM for the preservation of documents until the uniform statewide standards are adopted by the Secretary of State, but that once those uniform statewide standards are adopted by the Secretary of State, compliance with those uniform statewide standards was only to be voluntary.

With respect to local agencies, a number of statutes require records and documents to meet the requirements of Government Code section 12168.7 under certain specified circumstances. For example, section 26205 of the Government Code provides in part:

At the request of the county officer concerned, the board of

supervisors of any county may authorize the destruction of any record, paper, or document that is not expressly required by law to be filed and preserved **if all of the following conditions are complied with:**

- a) The record, paper, or document is photographed, microphotographed, reproduced by electronically recorded video images on magnetic surfaces, recorded in the electronic data processing system, recorded on optical disk, or reproduced on film **or any other medium that is a trusted system and that does not permit additions, deletions, or changes to the original document and is produced in compliance with Section 12168.7 for recording of permanent records or nonpermanent records....**
(Emphasis added.)

The language added to regulation section 22620.1 that these standards "...are recommendation and best practice guidelines, which state and local agencies are strongly encouraged to follow..." is inconsistent with the requirement that the specified medium be in compliance with Government Code section 12168.7 in the limited instance described in section 26205 of the Government Code. The same is true for language requiring compliance with Government Code section 12168.7 in specified circumstances described in sections 25105, 26205.1, 26205.5, 26907, 27001, 27322.2, 34090.5 and 60203 of the Government Code, section 102235 of the Health and Safety Code, and section 10851 of the Welfare and Institutions Code.

OAL is also 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 person directly affected by them."

If the language added to regulation section 22620.1 was not intended to make these standards voluntary in those circumstances where Government Code section 12168.7 and other statutes provide that they are to be mandatory, this needs to be clarified in the text of the regulation itself. A person directly affected by new regulation section 22620.1 would not easily understand that the "recommendations and best practice guidelines, which state and local agencies are strongly encouraged to follow" are in some circumstances mandatory.

2. THE RULEMAKING FILE DOES NOT INCLUDE A COPY OF ALL OF THE REQUIRED DOCUMENTS AND REQUIRED DOCUMENTS INCLUDED IN THE RULEMAKING FILE ARE DEFECTIVE.

- a. Subdivision (b)(6) of Government Code section 11347.3 requires that the rulemaking file include:

All data and other factual information, any studies or reports, and **written comments** submitted to the agency in connection with the adoption, amendment, or repeal of the regulation. (Emphasis added.)

The written comment designated as H-12 in the Final Statement of Reasons and Tab H in the rulemaking file was missing from the rulemaking file.

- b. Subdivision (b)(2) of Government Code section 11346.9 requires that the Final Statement of Reasons include a "...summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change...." The Final Statement of Reasons submitted with this regulatory action did not contain a summary and response to the comment made on page two of the written comment designated as H-2 nor the suggested language near the top of page 2 of the written comment designated as H-25. The Final Statement of Reasons should also include a determination that it would be cumbersome, unduly expensive, or otherwise impractical to print the documents incorporated by reference in the new regulations in the California Code of Regulations (CCR) in accordance with section 20, title 1, of the CCR.
- c. The statement of compliance with the requirements for the 15 day availability period was inaccurate and did not meet the requirements of section 44 of title 1 of the California Code of Regulations.

CONCLUSION

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

We also note that boxes B.4 (Beginning and Ending Dates of Availability of Modified Regulations) and B.5 (Effective Date of the Changes) of the STD 400 were left blank.

If you have any questions, please contact me at (916) 323-6808.

Date: January 25, 2012

RAIG TARPENNING

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