

**State of California  
Office of Administrative Law**

**In re:  
Board of Accountancy**

**Regulatory Action: Title 16  
California Code of Regulations**

**Adopt sections: 15, 15.1, 15.2, 15.3, 15.4  
Amend sections: 70, 71, 87.1  
Repeal sections:**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2012-1210-03 S**

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**SUMMARY OF REGULATORY ACTION**

In this regulatory action, the California Board of Accountancy (Board) proposed to adopt five sections and amend three sections in Title 16 of the California Code of Regulations. The Board's proposed regulations set out to establish, pursuant to Statutes of 2011, Chapter 395 (A.B. 431), a system for placing a license in a retired status for certified public accountants and public accountants who are not actively engaged in the practice of public accountancy or any activity which requires them to be licensed by the Board. The Board's proposed regulations further set forth the requirements for obtaining and maintaining such a license in retired status. Additional provisions of the proposed regulations establish how a license may be restored from retired status to active status.

**DECISION**

On January 23, 2013, the Office of Administrative Law (OAL) notified the Board of the disapproval of this regulatory action. The above referenced regulatory action was disapproved for the failure to comply with the necessity standard of Government Code section 11349.1.

**DISCUSSION**

The adoption of regulations by the Board must satisfy requirements established by the part of the Administrative Procedure Act (APA) 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.) No exemption or exclusion applies to the regulatory action here under review.

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.

### 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 California Code of Regulations 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 that a rulemaking agency describe the need for the regulation and identify documents relied upon in proposing the regulation in the Initial Statement of Reasons, pursuant to Government Code section 11346.2, subdivision (b).

The fees in proposed regulation sections 70(i)(1) and 70(i)(2)(A) – (E) -- While the Board’s rulemaking file in most respects satisfies the “Necessity” standard, the showing of “Necessity” is insufficient in relation to fees established in section 70. Section 70(i)(1) establishes a \$100 fee

required of licensees submitting an application for retired status. The fees in 70(i)(2)(A) – (E) range from \$200 to \$1000 to restore a license from retired status to active status. The range is based on how long a licensee’s license has been in retired status. The fees increase the longer a license has been in retired status. The showing of “Necessity” is insufficient in relation to the fees established in section 70, as discussed below.

Business and Professions Code section 5134, subdivision (g), sets forth the requirement for an application fee. Pursuant to section 5134(g) the fee “...shall be fixed by the board at an amount not to exceed two hundred fifty dollars (\$250).” Business and Professions Code section 5134, subdivision (h), sets forth the requirement for a fee to restore a retired status license to an active status license. It states that the fee “...shall be fixed by the board at an amount not to exceed one thousand dollars (\$1,000).”

In its Initial Statement of Reasons for this rulemaking, the Board references (on page 5) the requirement of an application fee and a fee to restore a retired status license to an active status license and then provides only the following very general explanation of the proposed fee amounts:

The amount of \$100 was selected as the application fee as it is half of the Board’s normal renewal fee. It is intended to be the last payment made by a licensee. If however, a licensee desires to return to active status, they are to pay a restoration fee that is based on the amount of time they were retired, up to the statutory cap of \$1000. This amount is set in such a way as to discourage the use of retired status as a temporary status. In addition, the Board did not want the retired status used as a means of temporarily escaping renewal fees that are typically paid by active and inactive licensees.

In summary, the rulemaking file does not include data or other information showing how the Board actually determined (calculated) the fee amounts based upon the estimated costs of reviewing, processing, monitoring, and administering the applications to convert a license to retired status and the applications to restore a retired license to active status. In other words, there is no evidence in the rulemaking record that demonstrates a reasonable relationship between the fees assessed and the costs of the regulatory activity.

In order to meet the “Necessity” standard, the rulemaking file needs to include additional information showing how the Board calculated the fee amounts based upon estimated regulatory program costs. In raising this concern, we are mindful of the substantial body of judicial decisions in California relating to fees. See, for example, the recent California Supreme Court decision in California Farm Bureau Federation v. State Water Resources Control Board 51 Cal.4<sup>th</sup> 421, 436, 437 121 Cal.Rptr.3d 37 (2011) where the court determined:

Thus, once plaintiffs have made their prima facie case, the state bears the burden of production and must show “(1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity.” (*Sinclair Paint, supra*, 15 Cal.4th at p. 878, 64 Cal.Rptr.2d 447, 937 P.2d 1350;

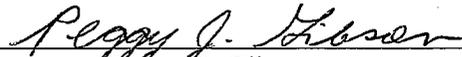
see California Assn. of Prof. Scientists v. Department of Fish & Game (2000) 79 Cal.App.4th 935, 945, 94 Cal.Rptr.2d 535 (Prof. Scientists ).

The Board needs to add to the rulemaking file information explaining how the fee amounts were determined (calculated), and the information then needs to be made available to the public pursuant to Government Code section 11347.1.

**CONCLUSION**

For the reason set forth above, OAL has disapproved this regulatory action. If you have any questions, please contact me at (916) 323-6805.

Date: January 28, 2013

  
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Peggy J. Gibson  
Senior Counsel

FOR: DEBRA M. CORNEZ  
Director

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