

**STATE OF CALIFORNIA**  
**OFFICE OF ADMINISTRATIVE LAW**

**2000 OAL Determination No. 17**

**November 6, 2000**

**Requested by:** CALIFORNIA COALITION OF TRAVEL ORGANIZATIONS

**Concerning:** CALIFORNIA TRADE AND COMMERCE AGENCY criteria that a provider of on-line lodging reservation services or telemarketing reservation services must meet in order to receive a direct electronic or telephonic link with the Division of Tourism

**Determination issued pursuant to Government Code Section 11340.5; California Code of Regulations, Title 1, Section 121 et seq.**

**ISSUE**

Do criteria issued by the California Trade and Commerce Agency establishing requirements that a provider of on-line lodging reservation services or telemarketing reservation services must meet in order to receive a direct electronic or telephonic link with the Division of Tourism constitute “regulations” as defined in Government Code section 11342, subdivision (g), which are required to be adopted pursuant to the Administrative Procedure Act (Gov. Code, div. 3, tit. 2, ch. 3.5, sec. 11340 et seq.; hereafter, “APA”)?<sup>1</sup>

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1. This request for determination was filed by the California Coalition of Travel Organizations, Diane Embree, President, 925 L Street, Suite 220, Sacramento, CA, 95814, (916) 441-4166. The California Trade and Commerce Agency’s response was filed by Lon S. Hatamiya, Agency Secretary, 801 K Street, Suite 1918, Sacramento, CA, 95814-3520, (916) 322-1394. This request was given a file number of 99-019. This determination may be cited as “**2000 OAL Determination No. 17.**”

## CONCLUSION

The California Trade and Commerce Agency's criteria that providers of on-line lodging reservation services or telemarketing reservation services must meet in order to receive a direct electronic or telephonic link with the Division of Tourism constitute "regulations" as defined by the APA and are required to be adopted and codified pursuant to the rulemaking procedures of the APA.

## ANALYSIS

### Background

The Trade and Commerce Agency ("Agency") is responsible for promoting tourism within the State of California. (Gov. Code, sec. 15364.51, subd. (b).) Within the Agency is an office known as the Division of Tourism. (Gov. Code, sec. 15372.65, subd. (g); 15325, subd. (d).) One of the functions delegated by the Legislature to both the Agency and the Division of Tourism is to "facilitate travel and visitorship to, and within, California." (Gov. Code, sec. 15364.53, subd. (c).)

In 1995, the California Tourism Marketing Act (Gov. Code, sec. 15372.60 et seq.) expanded these responsibilities to include the development of a "cooperative partnership funded in part by the state" in order to promote tourism in California. (See Gov. Code, sec. 15372.61, subd. (d)(1).)

The Agency, through the Division of Tourism, has sought to implement these statutory policies by establishing, among other things a centralized, on-line lodging reservation system which provides direct links with private reservation services or agencies and a toll-free 800 number currently operated by Bay Area Seating Service ("BASS"), which also provides for direct reservations. The Division of Tourism operates both systems by utilizing private business organizations that provide the lodging and reservation services. To do this, the Agency established criteria to be used to select these private entities. In the case of the toll-free telephone number, the Agency also established contractual standards any selected entity must meet. These criteria and standards are the subject of this regulatory determination.

## Applicability of the APA to the Agency's Policy

A determination of whether the Agency's criteria are "regulations" subject to the APA depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Agency, (2) whether the challenged criteria contains "regulations" within the meaning of Government Code section 11342, and (3) whether the challenged criteria falls within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly or specifically exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Gov. Code, sec. 11342, subd. (a), and sec. 11346.) In this connection, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Gov. Code, sec. 11000.) The Agency is in neither the judicial nor legislative branch of state government, and, therefore, unless expressly exempted from the APA, its rulemaking requirements generally apply to the Agency. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA).)

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

Government Code section 11342, subdivision (g), defines "regulation" as follows:

". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make

specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]”

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274 -275, agencies need not adopt as regulations those rules contained in a “statutory scheme which the Legislature has [already] established . . . .” But “to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . .” (*Ibid.*)

Similarly, agency rules properly adopted *as regulations* (i.e., California Code of Regulations (“CCR”) provisions) may not be “embellished upon.” For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of “intermediate physician service” in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went “far beyond” the text of the duly adopted regulation. Just as statutes may legally be amended only through the legislative process, duly adopted regulations—generally speaking—may legally be amended only through the APA rulemaking process.

Under Government Code section 11342, subdivision (g), a rule is a “regulation” for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency’s procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251; *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

In this analysis, we are guided by the California Court of Appeal in *Grier v. Kizer*, *supra*:

“[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead*, . . . 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA’s requirements should be*

*resolved in favor of the APA.* [Emphasis added.]” (219 Cal.app.3d at 438, 268 Cal.Rptr. at 253.<sup>2</sup>)

For an agency policy to be a “standard of general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).)

### The On-Line Reservation System

In 1997, the Agency’s role in the promotion of tourism expanded dramatically with the establishment of a centralized reservation system in which browsers have the option of reserving and paying for rooms at over 300 privately owned places of lodging. This Internet feature was bolstered by a toll-free (1-800-462-2543) state telephone reservation system in mid-January, 1998.<sup>3</sup>

Because of concerns raised by the travel industry and various legislators, the Division of Tourism suspended implementation of the central reservation system.<sup>4</sup> Following several months of meetings with interested business groups, the Division of Tourism reactivated the central reservation system in 1998.<sup>5</sup>

According to the California Coalition of Travel Organizations (“CCTO”), with the establishment of the central reservation system in question, its members who provide lodging reservation services are required to compete with two business entities which are directly linked to the Division of Tourism through its website and through the 800 telephone number. CCTO further asserts that these direct linkages give the companies involved “an advantage over other sectors of the

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2. OAL notes that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still good law for these purposes.
  3. “*Has the State’s entry into the lodging reservation business provided unfair competition to California travel agents?*” Report Prepared for Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development, Joint Legislative Staff Task Force on Government Oversight, February 3, 1998, p. 2.
  4. *California Central Reservation System Issues Analysis & Implementation Plan*, July 2, 1998, p. 1, attached to request for determination.
  5. WorldRes Press Release, July 16, 1998. See also California Coalition of Travel Organization (“CCTO”) press release, July 20, 1998.

travel industry who do not have these arrangements.”<sup>6</sup>

In implementing its central reservation system, the Division of Tourism included on its website at <http://gocalif.ca.gov>, under the title “CalTour Linking Criteria for Lodging Contact Information/Reservation Services and Travel Agent Access,” certain criteria that apply to any business entity that wishes to obtain a direct linkage with the Agency’s centralized reservation system.<sup>7</sup>

The title suggests that the Agency has established certain performance criteria and a standard of judgment that will be used to compare and evaluate the qualification of lodging reservation services that wish to have direct electronic linkage to the website. The criteria included in its website are organized under “Technical Requirements” and “Lodging Inventory Requirements.” “Lodging Inventory Requirements” include the ability of the service to obtain in the aggregate at least 100,000 individual guest rooms within the first 6 months of being on-line. “Technical Requirements” include features the lodging reservation must build into its system, such as instant on-line confirmations and the ability of travel agents to directly access a large inventory of lodging properties.<sup>8</sup>

Among other things, these requirements establish the rights, responsibilities, and obligations of entities who wish to be directly linked to the Agency’s website. These criteria have the effect of implementing and making specific the provisions of the Tourism Marketing Act and related enabling legislation of the Agency.

To appreciate the regulatory impact of the Agency’s criteria, the case of *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 74 Cal.Rptr.2d 407 is instructive. An unsuccessful bidder for a contract to provide data processing services to the Department of Motor Vehicles challenged the validity of the procurement and protest procedures established by the Departments of Information Technology and General Services, which established the ground rules for the bidding process. Those procedures obviated the need to follow formal notice and bid protest procedures. The procedures had been included as guidelines in the State Administrative Manual, but not adopted as regulations pursuant to the APA.

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6. Request for determination, p. 1.

7. Joint Legislative Staff Task Force on Government Oversight, *supra*, p. 2.

8. <http://gocalif.ca.gov>, pp. 1 – 3.

The Court of Appeal noted that the procedures established by the Department of General Services and set forth in the State Administrative Manual were to implement the intent of the Public Contract Code and, thus, regulations subject to the APA and unenforceable because they were not adopted in compliance with the APA. (63 Cal.App.4th at 1009, 74 Cal.Rptr.2d at 411.)

Thus, to summarize, the Agency has broad authority to establish and promote tourism within the State of California. One of the ways it has done this is through the on-line central reservation system.<sup>9</sup> In order to operate such a system, the Agency utilizes the services of private entities who maintain reservation services. To qualify for direct linkage with the Agency's on-line reservation system, the entity must meet certain criteria. Those criteria are set forth on the Agency's website. Therefore we think that these criteria are "regulations" that implement or make specific the law enforced or administered by the Agency.

#### Direct Telephonic Linkage

The same considerations apply to Agency criteria used for the toll-free 800 number. The Agency established a system in which bids are solicited from any potentially eligible travel organization.<sup>10</sup> The purpose of the bidding process was "the selection of a contractor to provide telemarketing and fulfillment services for the Agency's Office of Tourism."<sup>11</sup>

One organization, Bay Area Seating Services (BASS), was selected by the Agency in 1997 following a review of proposals submitted by several companies to handle this reservation system. Under this arrangement, BASS was to provide a central reservation system "which would allow prospective travelers to make lodging reservations either by calling the CalTour toll-free number (1-800-GO.CALIF) or by accessing the CalTour Internet website . . . ."<sup>12</sup>

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9. *California Central Reservation System Issues Analysis & Implementation Plan*, July 2, 1998, Executive Summary, attached to request for determination. See also letter of John Poiriroo, Deputy Secretary, Trade and Commerce Agency to Assembly Committee on Consumer Protection, p. 4 ("The need to employ [a] statewide online reservation service is a competitiveness issue for California accommodations. Without it, they will soon be at a competitive disadvantage.").

10. See Request for Proposal attached to request for determination, p. 2.

11. *Id.*

12. "California Central Reservation System," July 2, 1998, p. 1.

Attached to an Agency document entitled “REQUEST FOR PROPOSAL” is a section entitled “RULES AND CONDITIONS” used to determine bidder eligibility.<sup>13</sup> These rules and conditions apply to any entity entering the bidding that seeks to obtain a direct linkage with the Agency’s centralized reservation system. These criteria and conditions are therefore standards of general application.

The impact of the Agency’s bidding requirements and criteria on the public appear to be significant. The Request for Proposal contains numerous attachments, which set forth a variety of criteria for bidder eligibility, including rules and conditions, scope of work, selection process and evaluation criteria. Moreover, it establishes a grading system based on points allowed in several different categories. The process also contains its own rules on *how* the evaluation process will be conducted, defines “material deviation,” specifies grounds for rejection, and requires bidders to submit detailed information concerning its personnel, business structure, and operations.<sup>14</sup>

These requirements are regulatory in nature. Any entity must meet the above criteria in order to be considered for a direct link with the Division of Tourism’s 800 toll-free number. The Agency’s criteria, whether incorporated into the bidding process or the terms of its model contract, have thus established the rights and responsibilities of members of the regulated public. In addition, the criteria are used to judge the performance and qualifications of eligible applicants as well as establish standards of judgment used by the Agency in determining success or failure in the selection process.

The Trade and Commerce Agency notes that numerous meetings were held between a “working group and Division staff” to revise the criteria.<sup>15</sup> It also acknowledges that it is working to adopt permanent criteria which it plans to formally adopt as regulations in the very near future.<sup>16</sup> “In the meantime, interim criteria were established to allow the system to operate while the criteria were analyzed and developed.”<sup>17</sup>

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13. *Id.* at p. 6.

14. *Id.* at pp. 13 – 14.

15. Agency Response, June 5, 2000, p. 2.

16. *Id.*, p. 2.

17. *Id.*, p. 2.

The Agency's prior meetings with industry representatives and planned action in seeking the adoption of regulations are noteworthy. These actions do not, however, relieve it of its obligation to comply with the APA. A fundamental objective of the APA is to ensure that when a state agency implements a statute by specifying the process to be used in the selection of persons who will receive benefits from the government, the agency must first provide those same members of the public with notice and an opportunity to participate in the policy development process. This requirement is not satisfied when only a select minority of the interested public is afforded this opportunity. That is one reason why Government Code section 11346 provides in part as follows:

“It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations.” [Emphasis added.]

(3) With respect to whether the Commission's rules fall within any recognized exemption from APA requirements, generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346; *United Systems of Arkansas v. Stamison, supra*, 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411 (“*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.*” [Emphasis added.]

The Agency does not contend that any *express* statutory exemption applies. We note that the Legislature did expressly exempt several of the committees and commissions that were created as part of the Tourism Marketing Act. (See, e.g., Government Code sections 15372.66, subdivision (h) and 15372.72, subdivision (a).) However, the Legislature did not exempt the Trade and Commerce Agency, from APA compliance.

The Agency, however, argues that its direct telephonic linkage system is non-regulatory in nature because its criteria were established by means of the request for proposal process.<sup>18</sup>

The fact that a rule or criteria may have been issued or utilized as part of a bidding and proposal process does not insulate them from scrutiny under the APA. The key inquiry is whether the rule or criteria used in the bidding proposal process

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18. Agency's response, p. 1.

“implement[s], interpret[s], or make[s] specific the law enforced or administered by [the Agency].” (Government Code section 11342, subdivision (g).)

*United Systems of Arkansas v. Stamison, supra*, 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411, is also closely on point in this respect. The Court of Appeal held that:

“The procedures regarding [bidding] protests are designed to interpret and implement the provisions of Public Contract Code section 12102, subdivision (h). These implementing procedures are regulations. [Citations.] The protest procedures for ‘informal procurements’ set forth in the State Administrative Manual create a new rule, rather than simply applying an existing rule. This new rule is a regulation. [Citation.]”

Also instructive is *City of San Marcos v. California Com’n, Dept. of Transportation* (1976) 60 Cal.App.3d 383, 131 Cal.Rptr. 804. In that case, the Director of the Department of Transportation was authorized to make apportionments from a grade separation fund. Accordingly, a resolution was promulgated establishing a deadline for submission of applications for these funds. (60 Cal.App.3d at 404, 131 Cal.Rptr. at 817.) In the ensuing legal challenge initiated by the City of San Marcos, the trial court concluded that the absence of a regulation enacted pursuant to the APA meant that the deadline established by Department of Transportation was legally invalid. (*Id.* at 405, 131 Cal.Rptr. at 817.)

The Court of Appeal affirmed. It held that:

“It is obvious that the requirement in the 1973 resolution fixing a deadline for the receipt of ‘a valid and correct application,’ . . . and the accompanying list of minimum documents that must be included in a local agency’s application, are standards which the commission and the department purported to adopt to implement the provisions of section 2456 of the Streets and Highways Code . . . . They therefore would come within those provisions of the [APA] which govern when a regulation will become effective (§ 11422), the manner of giving notice of the proposed adoption of the regulation (§ 11423), the matter to be included in the notice (§ 11424), the opportunity for interested persons to be heard with respect to the proposed regulation (§ 11425), and filing and publication of the regulation

(§§ 11380-11385 and §§ 11409-11415).” (60 Cal.App.3d at 406, 131 Cal.Rptr. at 818.)

Thus, case law is clear that incorporation of “regulations” into bidding procedures does not immunize them from the APA. The same considerations also apply to contractual provisions. It is generally understood that parties to a contract are bound by more than just its terms. They are bound by all law in existence at the time of contracting as well. (*Alpha Beta Food Markets, Inc. v. Retail Clerks Union Local 770* (1955) 45 Cal.2d 764, 291 P.2d 433 (*cert. denied* 350 U.S. 996); *City of Redwood City v. Dalton Construction Co.* (1990) 217 Cal.App.3d 767, 266 Cal.Rptr. 198.) The California Supreme Court has stated:

“All applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.” (*Alpha Beta Food Markets v. Retail Clerks Union Local 770, supra*, 45 Cal.2d at 771.)

This principle has been further refined to include the proposition that “governmental regulations cannot be varied or evaded by a private contract.” (*Id.*) Therefore, a state agency entering into a contract is subject to requirements contained in statutes and regulations, including the APA. It would indeed be anomalous to hold that illegal “underground regulations” could be insulated from the APA simply by including them in a contract.<sup>19</sup>

Moreover, unlike the federal Administrative Procedure Act, the California APA has no comparable exemption for “matter[s] relating to . . . public property, loans, grants, benefits *or contracts*.” (5 U.S.C. sec. 553(a)(2); emphasis added.) The California Legislature rejected a similar exemption when it enacted the APA in 1947. Senate Bill 824 initially provided that public contracts were exempt from the APA. This provision was deleted from the bill and the bill died in committee. A competing bill, Assembly Bill NO. 35, *which did not exempt public contracts from the APA*, was approved by the Legislature and enacted. (Ch. 1425, Stats. 1947.)

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19. The most complete OAL analysis of the “contract defense” may be found in 1991 OAL Determination No. 6, pp. 168-169, 175-177. (CRNR 91, No. 43-Z, October 25, 1991, p. 1451.)

In addition, Government Code section 11346 requires that exemptions from the APA must be expressly stated in statute. Since no such exemption for contractual provisions exists in the APA, we think that the Agency's criteria, policies utilized in the request-for-proposals process, and any resulting contracts are subject to the APA.

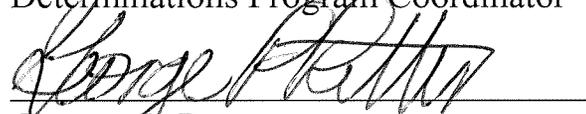
Based on the above, we therefore conclude that no express statutory exemption from the APA applies to the Agency.

Therefore, the California Trade and Commerce Agency's criteria that providers of on-line lodging reservation services or telemarketing reservation services must meet in order to receive a direct electronic or telephonic link with the Division of Tourism constitute "regulations" as defined by the APA and are required to be adopted and codified pursuant to the rulemaking procedures of the APA.

DATE: November 6, 2000

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