

OFFICE OF ADMINISTRATIVE LAW

300 Capitol Mall, Suite 1250
 Sacramento, CA 95814
 (916) 323-6225 FAX (916) 323-6826

SUSAN LAPSLEY
 Director



Date: August 1, 2008

To: Karen Grube

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 16(S)**
(CTU2008-0626-01)
 (Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;
 Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation Form VS-117 (06/08) "License and Certificate of Marriage," issued by the Department of Public Health, Office of Vital Records

On June 26, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether state form VS-117 (06/08) "License and Certificate of Marriage," issued by the Department of Public Health, Office of Vital Records, constitutes an underground regulation. Form VS-117 is a document used throughout California to apply for a marriage license. A June 2008 revision to the form substituted the words "Party A" and "Party B" in locations where the form previously used the words "Groom" and "Bride," respectively.¹

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,² which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).³ Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

Generally, a rule which meets the definition of a "regulation" in Government Code section 11342.600 is required to be adopted pursuant to the APA. In some cases, however, the Legislature has chosen to establish exemptions from the requirements of the APA. Government

¹ VS-117 appears to be the most widely used of five different marriage license or marriage record forms. All five forms were revised in June 2008 to substitute "Party A" and "Party B" for "Groom" and "Bride."

² "Regulation" means 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.

³ Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

Code section 11340.9 subdivision (c) provides that the requirements of the APA do not apply to a "form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued."

This law creates an exemption from APA requirements for a form which consists only of existing statutory and regulatory requirements. If a form exceeds the scope of existing statutory and regulatory requirements and further interprets, implements or makes specific the law enforced or administered by the agency, the contents that exceed the scope of existing law would constitute a regulation as defined in section 11342.600. *Stoneham v. Rushen*⁴ describes the forms exemption as applicable to "operational" forms. A typical operational form would contain blank fields for information that is required by law to be provided; for example the name and address of the owner on a vehicle registration form (Vehicle Code section 4453). If a form requires data not covered by applicable existing statutory or regulatory requirements, that portion of the form would not be exempt under the forms exemption and a rule requiring the data would need to be adopted pursuant to the APA.

An additional exemption from the APA exists for rules which embody the only legally tenable interpretation of the law. (Government Code section 11340.9, subd. (f).) In its discussion of the "only legally tenable" exemption in *Morning Star*,⁵ the California Supreme Court stated:

...the exception for the lone "legally tenable" reading of the law applies only in situations where the law "can reasonably be read only one way" (1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3122, 3124), such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language. (See Cal. Law Revision Com. com., 32D West's Ann. Gov. Code (2005 ed.) foll. § 11340.9, p. 94; 1989 Off. Admin. Law Determination No. 15, Cal. Reg. Notice Register 89, No. 44-Z, pp. 3124-3131 [reviewing an agency interpretation of the law for compliance with the APA and concluding that although the agency had a "well-supported" rationale for its view, it was not the only legally tenable interpretation of the pertinent statute].)

State law requires parties to obtain a marriage license from a county clerk before entering a marriage. (Family Code section 350.) The marriage license form is prescribed by the state registrar pursuant to Family Code section 355 and Health and Safety Code section 103125.⁶ Health and Safety Code section 103175(a)(1) specifies that the form shall include the "personal data of each party married, including the date of birth, full given name at birth" and other data such as address, previous marriage, etc. Family Code section 355 requires the marriage license form to include an affidavit that the parties to the marriage must sign. Additional requirements for the marriage license form can be found in Family Code sections 350 (county clerk), 356 (expiration date), 357 (obligation to return the marriage license to the county clerk), and 359

⁴ *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, [188 Cal.Rptr. 130].

⁵ *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324 [132 P.3d 249].

⁶ The Director of the Department of Public Health serves as the state registrar pursuant to Health and Safety Code section 102175 and section 131050 et seq.

(data concerning the person solemnizing the marriage and witnesses). Form VS-117 contains blank fields for data or signatures to be provided by the parties to the marriage, the person solemnizing the marriage, the witnesses to the marriage, or the county clerk.

We find that the fields on form VS-117 which contain blanks for data or signatures are all requirements imposed by existing law. As such, these requirements are exempt from the APA pursuant to the forms exemption.

The June 2008 revision to form VS-117 substituted the words "Party A" and "Party B" in place of the words "Groom" and "Bride" in various locations where the form requires signatures or data pertaining to the parties to the marriage. The terms "Groom" and "Bride" are commonly understood to refer specifically to a male and female, respectively: Webster's Unabridged Dictionary (2nd Edition) defines "Groom"⁷ as a man just married or about to be married, and defines "Bride" as a woman just married or about to be married.

On May 15, 2008, the California Supreme Court issued the ruling of *In re Marriage Cases* (43 Cal.4th 757 [76 Cal.Rptr.3d 683]) (hereafter *In re Marriage*). *In re Marriage* invalidated provisions in the Family Code that limit marriage to unions between a man and a woman, finding that the privacy and due process provisions of the state Constitution guarantee the civil right of marriage to individuals without regard to their sexual orientation.⁸ The Court ordered the language "between a man and a woman" to be stricken from Family Code section 300, and ruled that remaining statutory language "must be understood as making the designation of marriage available both to opposite-sex and same-sex couples." (*Ibid.*)

The Court further ordered that the "Plaintiffs are entitled to the issuance of a writ of mandate directing the appropriate state officials to take all actions necessary to effectuate our ruling in this case so as to ensure that county clerks and other local officials throughout the state, in performing their duty to enforce the marriage statutes in their jurisdictions, apply those provisions in a manner consistent with the decision of this court." (*Ibid.*) The Court's decision became effective on June 16, 2008 and represents current California law regarding the official family relationship of marriage.

Because "Groom" and "Bride" are commonly understood to refer specifically to a male and female, respectively, we find that the removal of the terms from form VS-117 and their replacement with "Party A" and "Party B" represents the only legally tenable interpretation of existing California law as set forth by the California Supreme Court in *In re Marriage*.

For the reasons discussed above, state form VS-117 and its June 2008 revisions do not constitute an underground regulation.⁹

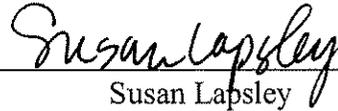
⁷ According to Webster's Dictionary, "groom" is a synonym for "bridegroom."

⁸ It is well settled that the California Supreme Court is the final authority on interpretation of the state Constitution. (*Nogues v. Douglass* (1858) 7 Cal. 65, *Raven v. Deukmejian* (1990) 52 Cal.3d 336 [276 Cal.Rptr. 326], *Sands v. Morongo Unified School District* (1991) 53 Cal.3d 863 [281 Cal.Rptr. 34].)

⁹ The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.



Susan Lapsley
Director



Linda C. Brown
Deputy Director

Copy: Mark Horton

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
... **(E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.** (Emphasis added.)