

**State of California  
Office of Administrative Law**

**In re:**

**Department of Justice, Bureau of  
Gambling Control**

**Regulatory Action: Title 11  
California Code of Regulations**

**Adopt sections: 2080, 2082, 2084, 2086,  
2088, 2090, 2092, 2094,  
2096, 2098, 2100, 2102,  
2104, 2106, 2108, 2110,  
2112, 2114, 2116**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2008-1120-01 S**

---

**SUMMARY OF REGULATORY ACTION**

The Bureau of Gambling Control of the Department of Justice (“Bureau”) proposed regulations for the registration of fundraising events involving the use of controlled games conducted by nonprofit organizations. The regulations would implement the mandate of Business and Professions Code section 19986 which requires such registration. On November 20, 2008, the proposed regulations were submitted to the Office of Administrative Law (“OAL”) for review in accordance with the Administrative Procedure Act (“APA”) and on January 7, 2008, OAL disapproved the regulations. This Decision of Disapproval explains the reasons for OAL’s action.

**DECISION**

OAL disapproved the proposed regulations because the rulemaking record does not meet the necessity standard; some of the regulations are not clear; the informative digest included in the Bureau’s notice of rulemaking lacks the required summary of existing law; the Bureau’s new form BGC-SP 003 is incomplete; and for miscellaneous omissions and errors in the accompanying text and documentation.

## DISCUSSION

### A) NECESSITY HAS NOT BEEN DEMONSTRATED

OAL reviews proposed regulations for compliance with the necessity standard pursuant to Government Code section 11349.1. The standard is defined in Government Code section 11349, subdivision (a):

“Necessity” means 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.

In the course of rulemaking under the APA, this evidence is first presented in the initial statement of reasons (“ISR”). The notice alerting the public of the proposed action includes information about the availability of the ISR for inspection so that interested persons may review and offer comments on the basis for the proposed action. OAL has a regulation that is intended to clarify the application of the necessity standard. California Code of Regulations, title 1, section 10, subdivision (b) 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. (Emphasis added.)

The Bureau’s ISR prepared for this rulemaking includes the required statements describing the specific purpose of each regulation, but as for why each provision is required, the ISR says only that the regulations are necessary to effectuate the registration and regulation of nonprofit organizations that wish to conduct fundraisers using controlled games. There is no evidence of the *need* for any of the specific provisions included in these regulations. To remedy this oversight, the Bureau may prepare a supplement to the statement of reasons that includes a discussion of all the substantive provisions of these regulations and a description of the need for

including them in the proposed regulations. As provided in Government Code section 11346.8, subdivision (d), this supplement must be made available for at least 15 days of public comment pursuant to Government Code section 11347.1.

## B) CLARITY

OAL reviews proposed regulations for compliance with the clarity standard pursuant to Government Code section 11349.1. Clarity is defined in section 11349, subdivision (c), as follows: “[c]larity means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” The following provisions included in the proposed regulations are not clear and must be improved.

(1) Proposed section 2084, subdivision (a) provides:

On and after January 1, 2007, no person, entity or nonprofit organization *for the purpose of this section* shall conduct a nonprofit organization fundraiser without a current and valid registration issued by the Bureau. (Emphasis added.)

This provision is, by and large, a reiteration of the basic requirement for preapproval and registration set forth in Business and Professions Code section 19986, which became operative January 1, 2007. While it seems appropriate to include this information in the regulation, the Bureau has added the phrase “for the purpose of this section.” Plainly, the regulation will not be effective until after it has been approved and filed with the Secretary of State. To the extent the phrase suggests that the provisions of section 2084, or of any of these regulations have an effect that relates back to a time before their approval, it is misleading and unclear.

(2) Several sections provide for the exercise of discretion by the Bureau in reviewing applications for registration and taking action concerning registrants. Several of the proposed regulations are unnecessarily vague.

- Proposed section 2092, subdivision (a) sets forth grounds for cancellation of a registration. The last item in the list of specific misconduct is “*any other reason deemed appropriate by the Bureau.*”
- Proposed section 2098, subdivision (d) requires “full and true disclosure as required for the application *and as requested by the Bureau* to carry out the policies of this state relating to nonprofit organization fundraisers.”
- Section 2104, subdivision (a) requires “assurances required by this chapter *or requested by the Bureau Chief.*”

Each of these provisions is broad in scope, authorizing requests for information beyond that specified in the regulations and action founded upon reasons not set forth in the regulations. There is no explanation included in the ISR offered to support the need for these rules. Perhaps once the Bureau has explained why it needs these provisions, it may be possible to clarify the rules and achieve what is needed without the overbreadth. Note that Business and Professions Code section 11986, subdivision (e), limits the information to be collected in connection with annual registration. It provides, in part:

The department shall, by regulation, collect only the information necessary pursuant to this section on the form.

These provisions must be both supported by the record and clarified.

(3) The regulations require suppliers of gambling equipment or gambling services to register with the Bureau. Proposed section 2102 lists grounds for ineligibility for registration and subdivision (c) specifies “[a]ny misconduct under these regulations or any other California gambling law.” As noted by the commenter David Filgor, the regulation does not include any standard of materiality. In rejecting his comment asking for elimination of this provision the Bureau responded:

The Chief of the Bureau of Gambling Control reserves the right to deny or revoke an applicant from conducting a nonprofit fundraiser using controlled games at his or her discretion. The Bureau is charged statutorily with protecting the citizens of this State against unscrupulous and or criminal activity that results from the conduct of gambling. Limiting the Bureau to the provisions of these regulations and the California Penal Code is unreasonable.

The commenter has a valid point that the term “any misconduct” could include any failure to meet a requirement of the regulations. The Bureau’s response shows that its concern is with unscrupulous and criminal activity, and it does not follow that it would necessarily bar registration for every omission, mistake or violation under the regulations. Criminal activity is already a bar under subdivisions (d) and (e), and unscrupulous activity would be better covered by a clarification of the proposed regulation. The Bureau could then adhere to the provisions of its regulation without being limited to enumerated unscrupulous activities.

(4) Proposed section 2098 lists requirements for registration of a supplier of gambling equipment or services. Subdivision (f) provides “[t]he applicant shall maintain liability insurance.” Failure to have liability insurance is also listed as a cause for ineligibility for registration in section 2101, subdivision (b). This requirement is too general to be easily understood, and must be made more specific as to amount and risks covered so that applicants will know what insurance they must purchase in order to qualify. Also the requirement of section 2098, subdivision (g) that the liability insurance be made available for viewing upon request of the Bureau should be clarified to indicate whether this is a requirement for public display of evidence of insurance, or a contingent requirement to show a representative of the Bureau some evidence of insurance.

(5) Proposed section 2110, subdivision (i) provides:

A person under the age of 21 may not assist in operating or managing a nonprofit organization fundraiser event nor participate as a player in such fundraiser event.

It is an interpretation of Business and Professions Code section 19986, subdivision (n) which provides:

No person shall be permitted to participate in the fundraiser unless that person is at least 21 years of age.

A clarification of the statutory limitation on participation is likely to be useful, but assistance in operating is not a concept with clearly identifiable limits. Assistance might be rendered in a number of ways remote from the actual event. A clearer guideline would better inform registrants of the scope of the age limitation and help them avoid any conflict with the Bureau's purpose in having this rule.

### C) INFORMATIVE DIGEST WAS INADEQUATE

Rulemaking under the APA is initiated with a public notice. The notice must include an informative digest as prescribed in Government Code section 11346.5, subdivision (a)(3). The requirements for an informative digest are as follows:

- (A) A concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action.
- (B) . . .
- (C) A policy statement overview explaining the broad objectives of the regulation and, if appropriate, the specific objectives.

These requirements are intended to assure the provision of sufficient information to allow people who read the notice to determine whether they are interested in learning more about the proposed action and participating in the rulemaking process. The Bureau did include an informative digest in its notice for this rulemaking action, however it did not include a summary of existing laws and regulations. Fortunately there is sufficient information included to adequately identify the subject of the rulemaking action, and the Bureau may continue the process based upon the notice that was provided. In future rulemaking however, the Bureau must address the requirement of Government Code section 11346.5 for a summary of existing laws and regulations in the notice.

### CONCLUSION

For the foregoing reasons, the Bureau's proposed regulations were disapproved by OAL. Although not by themselves grounds for disapproval, the following errors were also noted during the review and must be corrected when the regulations are resubmitted.

- On the OAL Form 400, the Bureau must list each of the sections proposed for adoption, as required by 1 CCR 6, subdivision (b)(2), and the dates identifying the period during which changes to the originally proposed text were made available for public comment as required by subdivision (b)(4).
- There are some errors in citations included in the text of the regulations. Penal Code section 330(a) should be 330a, section 337(j)(e)(1) should be 337j(e)(1).
- Finally, the form *BGC-CP 003 New 09/08* which would be incorporated by reference in proposed section 2114, subdivision (e), lacks a box to report the information required by subdivision (d).

If you have any questions concerning this decision or would like to discuss any changes and procedures necessary to correct this rulemaking action, please contact David Potter at (916) 324 0358.

Date: January 14, 2009



---

David D. Potter  
Senior Staff Counsel

FOR: SUSAN LAPSLEY  
Director

Original: Jerry Brown  
Copy: Michelle Abe