

**State of California  
Office of Administrative Law**

**In re:  
Department of Real Estate**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Regulatory Action: Title 10  
California Code of Regulations**

**Government Code Section 11349.3**

**Adopt sections:  
Amend sections: 3006, 3007, 3007.05,  
                  3007.2, 3007.3,  
                  3007.6, 3008, 3010,  
                  3011.1, 3011.2,  
                  3011.4, 3012.2**

**OAL File No. 2010-0226-03 S**

**Repeal sections: 3005**

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**SUMMARY OF REGULATORY ACTION**

On February 26, 2010, the Department of Real Estate (Department) submitted to the Office of Administrative Law (OAL) its proposed regulatory action to amend the California Code of Regulations, title 10, sections 3006, 3007, 3007.05, 3007.2, 3007.3, 3007.6, 3008, 3010, 3011.1, 3011.2, 3011.4, and 3012.2, and to repeal section 3005. The regulatory provisions dealt with continuing education requirements including, but not limited to, criteria used by the Department when reviewing an application for a continuing education course for approval, what supporting documentation must be submitted with the application for continuing education course approval, the procedures that must be followed during the administration of a final examination, and what documentation needs to be submitted when petitioning for equivalency for course instruction, authorship of articles or books, or credit for attendance at unapproved programs. On April 12, 2010, OAL notified the Department that OAL disapproved the proposed regulations because the regulations failed to comply with the necessity, clarity, and consistency standards, and procedural requirements of the California Administrative Procedure Act (APA). 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:

- A. The proposed regulations failed to comply with the necessity standard of Government Code section 11349.1, subdivision (a)(1), and title 1 of the California Code of Regulations, section 10, subdivision (b);
- B. The proposed regulations failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3);
- C. The proposed regulations failed to comply with the consistency standard of Government Code section 11349.1, subdivision (a)(4); and
- D. The Department failed to follow the required procedure when submitting the Economic and Fiscal Impact Statement (Std. Form 399) as part of its rulemaking record. (Gov. Code, sec.11346.5, subd. (a)(6); State Administrative Manual, section 6615.)

All APA issues must be resolved prior to OAL's approval of any resubmission.

### **DISCUSSION**

The adoption of regulations by the Department 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 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.

#### **A. NECESSITY**

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all regulations for compliance with the necessity standard. Government Code section 11349, subdivision (a), defines "necessity" to mean "... 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 purpose 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 (CCR) provides:

(b) 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 regulations 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 perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons. (Gov. Code, sec. 11346.2, subd. (b).) The initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2, subd. (b)(1).) The initial statement of reasons must be submitted to OAL with the initial notice of the proposed action and made available to the public during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, sec. 11346.2, subd. (b) and sec. 11346.5, subs. (a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The initial statement of reasons in the rulemaking record provided background information and general purpose for the amendments proposed by the Department, such as,

- “Due to the current market economy, real estate licensees are also looking toward technology as a means of completing their continuing education program ....”
- “Rules must be established to keep pace with technology and to insure the consistency of the continuing education program regardless of the method of presentation.”
- “The purpose of the proposed changes [is] to establish and clarify the criteria that the Commissioner will apply when reviewing an application for a continuing education course for approval, that the criteria are consistent throughout the

program regardless of the method of presentation, and to insure the integrity of all continuing education offerings.”

- “This amendment is necessary to make specific the requirements a continuing education provider must adhere to when submitting a continuing education course for approval to insure that all course offerings are consistent throughout the continuing education program.”

The proposed amendments to the regulations, in particular sections 3006, 3007, and 3007.3, contain several detailed prescriptive standards. For example, section 3006 requires that “participants shall be physically present for at least 90% of the offering time exclusive of the time allocated to the administering of a final examination,” and that a correspondence course “shall consist of adequate study materials, consisting of a minimum of 3,750 words per credit hour of content excluding the table of contents, indexes and bibliographies....” (Underlined language proposed for adoption.) Section 3007 specifies several documents that must be submitted with the application for approval of an education offering. Section 3007.3 specifies “The minimum number of questions required on a final examination consisting only of multiple choice, true/false, and/or fill-in the blank questions shall be: (1) 1 credit hour – 5 questions ... (14) 32-34 credit hours – 100 questions, (15) 35 credit hours and over – 3 questions per hour.” (Underlined language proposed for adoption.) Section 3007.3 contains several other specific rules governing the administration of a final examination.

As stated above, the initial statement of reasons must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. In addition to the background information or general purpose provided by the Department, the initial statement of reasons also contains a description of what the regulation does. The initial statement of reasons does not, however, contain the rationale for the amendments proposed by the Department, or why each of the specific standards or amendments is needed to carry out the purpose for which they are proposed. (Cal. Code Regs., tit. 1, sec. 10, subd. (b).) This rationale must be provided and made available to the public for comment before being resubmitted to OAL for review.

## **B. CLARITY**

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines “clarity” to mean “... written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them.” Title 1, CCR, section 16 states in part that:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exist:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; ...

Section 3007 establishes what supporting documents are required to be submitted along with the application for approval of an education offering. Section 3007, subdivision (a), provides:

(a) Upon initial application and as changes occur, a Sponsor is required to submit the following:

- (1) If sponsoring entity is a corporation, the following is to be included:
  - (A) From a Domestic Corporation – a current Certificate of Status (Domestic corporation) executed by the California Secretary of State not earlier than 30 days prior to submittal and the filed Articles of Incorporation.
  - (B) From a Foreign Corporation – a current Certificate of Qualification or a Certificate of Good Standing (Foreign Corporation executed by the California Secretary of State not earlier than 30 days prior to submittal.
- (2) If the Sponsor is operating under a DBA – a Fictitious Business Name Statement that has been filed with the county recorder in the county where Sponsor maintains their principal place of business or in Sacramento County if Sponsor does not maintain a place of business in California. [Emphasis added.]

Subdivision (a) of section 3007 is not easily understood because it is unclear what changes subdivision (a) is referring to (i.e., changes to the application or changes to the corporation’s status) or what process the Sponsor must follow in submitting the changes. For instance, is there a time frame requirement for submitting any changes such as the 30-day time frame for submitting the initial application?

Subdivision (c) of section 3007 requires the applicant to submit “A C.E. Instructor Certification ... for each live course offering.” It is unclear what type of certification this requirement refers to because the regulations are silent on this. There are qualifications that a person must meet in order to present a continuing education course, but the Department’s regulations do not require an instructor to be certified by the Department.

Because subdivisions (a) and (c) of section 3007 are not easily understood by those persons directly affected by them, these subdivisions do not meet the clarity standard.

### C. CONSISTENCY

Government Code section 11349.1, subdivision (a)(4), requires OAL to review all regulations for compliance with the consistency standard. Government Code section 11349, subdivision (d), defines “consistency” to mean “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” In this rulemaking, the proposed amendments to section 3007 conflict with Government Code section 11340.5, subdivision (a).

Government Code section 11340.5, subdivision (a), provides:

No state agency shall issue, 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 [Government Code] Section 11342.600, 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 this chapter.

The Department proposed to amend section 3007 as follows (with added language illustrated with underlining and deleted language illustrated with strikeout):

Section 3007. Application for Offering Approval.

An application for approval of a ~~continuing~~ an education offering shall be made on a form prescribed by the Department not less than 90 days before the proposed commencement date of the offering. The completed application shall be accompanied by the fee and include at least the following supporting documents when applicable:

- ~~(a) The name, address and telephone number of the applicant.~~
- ~~(b) Summary of the offering including:~~
  - ~~(1) Title.~~
  - ~~(2) Textbook(s) and student materials prescribed.~~
  - ~~(3) Outline or syllabus.~~
  - ~~(4) A statement whether the offering is intended to comply with Business and Professions Code section 10170.5(a)(1), (2), (3), (4), (5) or (6).~~
  - ~~(5) Disclosure of the method of offering presentation.~~

[New proposed subdivisions (a) – (k) set forth the documents that would be required to be submitted to support the application for approval of an education offering.]

The Department proposes to delete from section 3007 the information that is required on the form prescribed by the Department. If the required information is removed from the CCR, then this information required to be submitted on the form has been repealed and is no longer duly adopted pursuant to the Administrative Procedure Act. If this information is not required to be submitted by an applicant by existing law anyplace

else, and only the form requires the information, then this proposed amendment is inconsistent with Government Code section 11340.5, subdivision (a).

In the record, the initial statement of reasons (p. 2) states that "This amendment is necessary to make specific the requirements a continuing education provider must adhere to when submitting a continuing education course for approval to insure that all course offerings are consistent throughout the continuing education program." The record does not indicate that the deleted information will no longer be required or that it is required by law someplace else. OAL did not find this information to be required by some other law.

Because the rulemaking record does not explain why the Department is deleting this required information, OAL is unsure if deleting the required information and adding the word "completed" in front of the word "application" was an attempt by the Department to incorporate by reference the form into section 3007. If so, the Department did not comply with the requirements of section 20 of title 1 of the CCR for incorporating the form by reference into section 3007.

The proposed amendment to delete required information and instead require that an applicant for approval of an education offering submit a "completed application" constitutes rulemaking outside of the APA rulemaking process where, in the alternative, the form was not properly incorporated by reference in compliance with section 20, title 1 of the CCR, or printed in full in the CCR. This proposed amendment to section 3007 is, therefore, inconsistent with Government Code section 11340.5(a).

#### **D. INCORRECT PROCEDURE**

Government Code section 11347.3, subdivision (b)(5), requires that the rulemaking file contain the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). Section 11346.5, subdivision (a)(6) requires, in part, the estimate of the cost to any state agency. This paragraph further defines "cost" as "additional [cost] ..., both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations." Government Code section 11357 requires that the Department of Finance (Finance) adopt instructions for inclusion in the State Administrative Manual (SAM) prescribing the methods that any agency shall use in making the estimate required by section 11346.5, subdivision (a)(6).

For purposes of reporting this estimate and other information, Finance has developed, and requires regulatory agencies to use, the Std. 399 "Economic and Fiscal Impact Statement." (SAM Chapter 6600, commencing with section 6601.)

SAM section 6615 establishes when financial estimates contained in Std. 399 require the concurrence of Finance. Section 6615 provides in part:

6615 ESTIMATES WHICH REQUIRE DEPARTMENT OF FINANCE ACTION  
(Revised and renumbered from 6660 on 03/09)

Subdivision (c) of Government Code Section 11357 specifically authorizes the DOF to "...review any estimate...for content including, but not limited to, the data and assumptions used in its preparation."

A state agency is not required in all instances to obtain the concurrence of the DOF in its estimate of the fiscal impact of its proposed regulation on governmental agencies. Such concurrence is required when the adoption, amendment, or repeal of a regulation results in local agency costs or savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399 as follows:

- |                                  |                   |
|----------------------------------|-------------------|
| A.1-Reimbursable Local Costs     | B.1-State Costs   |
| A.2-Non-Reimbursable Local Costs | B.2-State Savings |
| A.3-Local Savings                | B.4-Other         |
| A.6-Other                        |                   |

In addition, the DOF's approval is required for the inclusion in any such estimate of any statement to the effect that reimbursement of local costs will be requested in a subsequent Governor's Budget, Section A.1 (b) on the STD. 399....

In the rulemaking record, the Fiscal Impact Statement part of the Std. 399 indicates in section B., regarding the Department's proposed regulatory action's "Fiscal Effect on State Government":

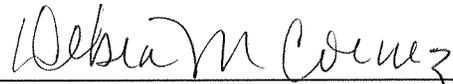
1. Additional expenditures of approximately \$5,000 (to review up to 500 course equivalency petitions at a cost of \$10 per review) in the current State Fiscal Year. It is anticipated that State agencies will:
  - a. Be able to absorb these additional costs within their existing budgets and resources.

Pursuant to SAM section 6615, when a state agency indicates its proposed regulatory action will have a cost impact on any state agency, then the Std. 399 is required to be submitted to Finance for review and a signature obtained from Finance indicating concurrence by Finance before submitting the Std. 399 as part of the rulemaking record for OAL's review. This did not occur. There is no signature from Finance on the Department's Std. 399. Additionally, the rulemaking record did not contain supporting data and calculations as required by Government Code section 11346.5, subdivision (a)(6); it only provided the estimate. Thus, the Department failed to follow required APA procedures. Supporting data and calculations for the \$5,000 cost estimate must be added to the rulemaking record and a review and signature from Finance must be obtained and indicated on the Std. 399 before resubmitting these regulations to OAL.

**CONCLUSION**

For the reasons stated above, OAL disapproved this regulatory action proposed by the Department. If you have any questions, please contact me at (916) 323-6831.

Date: April 19, 2010



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