

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

In re:

DEPARTMENT OF HOUSING AND
COMMUNITY DEVELOPMENT

DECISION OF DISAPPROVAL
OF REGULATORY ACTION
(Gov. Code, sec. 11349.3)

REGULATORY ACTION:

Title 25, California Code of
Regulations

ADOPT SECTION 7097

AMEND SECTIONS 7054, 7056, 7058,
7060, 7062, 7062.1, 7076, 7078, 7104

REPEAL SECTIONS 7064, 7066, 7074,
7078.1, 7078.2, 7078.3, 7078.4, 7078.5,
7078.6 AND 7078.7

OAL File No. 2012-0215-07S

SUMMARY OF REGULATORY ACTION

The Department of Housing and Community Development (Department) proposed to adopt section 7097, amend sections 7054, 7056, 7058, 7060, 7062, 7062.1, 7076, 7078, and 7104, and repeal sections 7064, 7066, 7074, 7078.1, 7078.2, 7078.3, 7078.4, 7078.5, 7078.6, and 7078.7 in title 25 of the California Code of Regulations to make changes to the operation of the State Community Development Block Grant Program. On February 15, 2012, the Board submitted the proposed regulatory action to the Office of Administrative Law (OAL) for review in accordance with the Administrative Procedure Act (APA). On March 29, 2012, OAL disapproved the proposed regulatory action. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action for failure to follow the required procedure, required documents included in the file were defective, and for failure to comply with the clarity, necessity, authority, and reference standards of Government Code section 11349.1.

DISCUSSION

The adoption of regulations by the Department must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any rule or regulation adopted by a state

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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 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.

1. THE REGULATION TEXT MADE AVAILABLE TO THE PUBLIC AND SUBMITTED TO OAL FOR REVIEW AND FILING WITH THE SECRETARY OF STATE CONTAINS CHANGES TO THE REGULATIONS THAT WERE NOT PROPERLY MADE AVAILABLE TO THE PUBLIC FOR COMMENT

Subdivision (a) of Government Code section 11346.2 requires that an agency proposing to make changes to the California Code of Regulations make the proposed changes available to the public for comment:

Every agency subject to this chapter shall prepare, submit to the office with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:

- (a) A copy of the express terms of the proposed regulation.
- ...
- (3) The agency shall use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations.

The text of section 7058 made available to the public for comment during the 45 day availability period contained changes from section 7058 as it currently exists in title 25 of the California Code of Regulations. Existing section 7058 of title 25 provides:

Activities eligible for funding are those described in 42 USC 5305.

The text of section 7058 made available to the public for comment during the 45 day availability period provided:

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- (a) Eligible Activities: Activities eligible for funding are those described in 42 USC 5305 and pursuant to 24 C.F.R. 570.201-203, 24 C.F.R. 205, and 24 C.F.R. 207-209, including:

The new language “and pursuant to 24 C.F.R. 570.201-203, 24 C.F.R. 205, and 24 C.F.R. 207-209, including:” was not shown in underline or italics as required by subdivision (a)(3) of Government Code section 11346.2. As a result, a member of the affected public would not reasonably have known that this language was being proposed for adoption and for this reason never had an opportunity to comment on these proposed changes. These changes to section 7058 will need to be accurately illustrated in underline or italics in the text of the regulation and then made available to the public before being adopted by the Department.

Subdivision (c) of Government Code section 11346.8 requires that substantial changes to the original text be made available to the public for comment for at least 15 days before the changes are adopted by the agency:

No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. **If a sufficiently related change is made, the full text of resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends or repeals the resulting regulation.** Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9. (Emphasis added.)

Section 44 of title 1 of the California Code of Regulations specifies how such sufficiently related changes are to be made available:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and
- (4) all persons who requested notification from the agency of the availability of such changes.

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(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

Prior to resubmission to OAL, the changes to section 7058 previously not shown in underline or italics will need to be shown in underline or italics and made available to the public for at least 15 days prior to adoption by the Department pursuant to Government Code section 11346.8(c) and section 44, title 1, California Code of Regulations.

Similarly, please note that the text of the regulations attached to the STD 400 submitted to OAL for review and filing with the Secretary of State did not accurately illustrate in underline or italics the changes to section 7058 as it appears in the California Code of Regulations.

2. CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

- a. New subdivision (b) of section 7056 as proposed by the Department would provide:

The NOFA shall specify...the matching contribution requirements **pursuant to section 7058(5)(ii)**....(Emphasis added.)

There is no such subdivision in the regulations. HCD staff has indicated that subdivision (a) of Health and Safety Code section 50833 was intended. A person directly affected by this regulation would not easily understand this from the language used in the regulation.

- b. New subdivision (b)(1)(A) of section 7058 as proposed by the Department would provide:

For purposes of this section, “slums” and “blight” means a blighted area or structure characterized by one or more of the following conditions:
...and (2) **properties which suffer from economic dislocation...because of factors listed in Health and Safety Code, Section 33032.** (Emphasis added.)

Health and Safety Code section 33032 was repealed by the Legislature in 1993.

- c. New subdivision (b)(1) of section 7062.1 as proposed by the Department would provide:

Two activities are eligible under the Enterprise Fund. The first is Business Assistance activities under HUD’s Special Economic Development Activities under section **(105(a)(17)**, (105(a)(14) and , **(105(a)(17)** of the Housing and Community Development Act of **1947**....(Emphasis added.)

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Subdivision “105(a)(17)” is listed twice and the Act being referred was adopted in 1974. HCD staff has indicated section 105(a)(15) was intended to be included. A person directly affected by this regulation would not easily understand this from the language used in the regulation.

- d. New subdivision (b) of section 7078 as proposed by the Department would provide:
...Applications will be ranked, if needed, **per Section 7078(C)(3)**.
(Emphasis added.)

Section 7078 has no such subdivision.

- e. New subdivision (d) of section 7076 as proposed by the Department would provide:
Pursuant to **Section 916 of the Housing and Community Development Act of 1990**, up to 10% of the total amount of CDBG funds available shall be made available for Colonia activities. (Emphasis added.)

Section 916 is contained in the National Affordable Housing Act of 1990.

- f. New subdivision (a)(6) of section 7062.1 as proposed by the Department would provide:
Pursuant to **Health and Safety Code 50831(c)** all funds awarded to the Department from HUD, must be awarded within the Funding Cycle....”
(Emphasis added.)

Health and Safety Code section 50831 has no such subdivision and is inapplicable. Health and Safety Code section 50834 is the correct statute.

- g. The new definition of “Targeted Income Group” in section 7054 as proposed by the Department would provide:
“Targeted Income Group” or “TIG” means persons or households with low to moderate income (Low/Mod) **as defined in 42 USC 5032(a)(20)**....(Emphasis added.)

Section 5032 of title 42 of the United States Code was repealed in 1973. Section 5302 of title 42 of the United States Code is the correct statute.

- h. In a number of instances in this regulatory action, existing regulation provisions are deleted with the Initial Statement of Reasons (ISOR) giving as the reason for their removal that all pertinent application and funding information will be announced in the Notice of Funding Availability (NOFA) pursuant to section 7056 or in the grant agreement. For example, see the explanation in the ISOR for the repeal of subdivisions (b)(1)-(3), (5)(C)-(G), (b)(7), (c)(2), (3), (5), (d), (d)(3)(A)-(C) of existing section 7062.1, and section 7072.

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New subdivision (b) of section 7056 as proposed by the Department would provide:

The NOFA shall specify, among other things, the maximum amounts of funds available, the activities eligible, the time frame for submittal of applications, application requirements pursuant to Section 7070, the allocation of rating points pursuant to Section 7078, the matching contribution requirements pursuant to Section 7058(5)(ii), any prohibitions of uses of funds, the availability of administrative funds, and the general terms and conditions of funding allocations.

If regulatory material is removed from the regulation text, the clarity standard of the APA would be violated to the extent a person directly affected by the regulation would not easily understand regulatory requirements from the language used in the regulation text itself. In this regard, see also the prohibition in subdivision (a) of Government Code section 11340, which provides:

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 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. (Emphasis added.)

Government Code section 11342.600 defines “regulation” to mean:

"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.

The above-discussion of “clarity” and subdivision (a) of Government Code section 11340 also applies to:

- (1) New subdivisions (d)(A)1-4, (d)(B)1-3, and (d)(C) of section 7078 as proposed by the Department, which provide for multiple evaluation factors, required objectives, and the tie-breaker process to be “...established in the Annual Plan...”.
- (2) New subdivision (c) of section 7097 as proposed by the Department which provides for certain provisions to be contained in the Grant Agreement itself.

For a similar discussion of this issue, see the previous “clarity” discussion in the OAL Decision of Disapproval of Regulatory Action, OAL File No. 96-1021-02S, issued by OAL to the Department on December 12, 1996.

Changes made to the regulation text to address the “clarity” problems discussed above must be made available to the public for comment for at least 15 days pursuant to Government Code section 11346.8 and section 44 of title 1 of the California Code of Regulations as described above in issue #1.

3. NECESSITY/DEFECTIVE INITIAL STATEMENT OF REASONS

Government Code section 11349.1(a)(1) requires that OAL review all regulations for compliance with the “necessity” standard. Government Code section 11349(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 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 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 (ISOR). (Gov. Code, sec. 11346.2(b).) The ISOR 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(b)(1).) The ISOR must be submitted to OAL with the initial notice of the proposed action and made available to the public

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during the public comment period, along with all the information upon which the proposal is based. (Gov. Code, secs. 11346.2(b) and 11346.5(a)(16) and (b).) In this way the public is informed of the basis of the regulatory action and may comment knowledgeably.

The discussion in the ISOR submitted with this regulatory action for the changes in section 7054 (definition of "Overpaying"), new subdivisions 7058(a)(1) and (a)(3), new subdivision 7078(b) and new section 7097 is inadequate. In some cases it describes the effect of the new or revised provisions in the regulations rather than explaining the reasons for the various provisions. This does not meet the necessity standard of Government Code section 11349 and section 10 of title 1 of the California Code of Regulations. In that the ISOR is required to include an explanation of the need and the rationale for each proposed new provision or change to the existing regulations and this document is required to be made available to the public with the 45 day notice, any addition to the statement of reasons now providing the necessity missing from the existing ISOR must be made available to the public for at least 15 days prior to adoption of the regulations by the Department pursuant to Government Code section 11347.1.

Government Code section 11347.1 provides in part:

- (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.
- (b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:
 - (1) Persons who testified at the public hearing.
 - (2) Persons who submitted written comments at the public hearing.
 - (3) Persons whose comments were received by the agency during the public comment period.
 - (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.
- (c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency.

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4. REQUIRED DOCUMENTS INCLUDED IN THE FILE WERE DEFECTIVE.

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “authority” and “reference” standards. (Gov. Code, sec. 11349.1(a)(2) and (a)(5).) “Authority” as defined by Government Code section 11349(b) means “...the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.” “Reference” as defined by Government Code section 11349(e) means “...the statute, court decision, of other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.”

Subdivision (a) of Government Code section 11346.2 requires that the adopting agency submit to OAL the express terms of the proposed regulation. Subdivision (a)(2) of Government Code section 11346.2 provides:

The agency shall include a notation following the express terms of each California Code of Regulations section, listing the specific statutes or other provisions of law authorizing the adoption of the regulation and listing the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations. (Emphasis added.)

The regulation text of the proposed regulations adopted by the Department and submitted to OAL for review and filing with the Secretary of State in this regulatory action did not contain any “authority” and “reference” citations as required by Government Code section 11346.2(a)(2). For this reason, OAL will reserve its authority to review for the “authority” and “reference” standards upon resubmission.

For defects in the ISOR, please see discussion in issue #3 above.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action. We also note that (1) the regulation text submitted to OAL for review and filing with the Secretary of State included extraneous regulation sections that were not being adopted, amended, or repealed by this regulatory action, (2) a very minor text discrepancy exists in subdivision 7062.1(c)(6)(D), (3) there is an incorrect use of parenthesis in subdivision 7062.1(b)(1), and (4) varying subdivision designation methods are used. OAL has also been informed that the Fiscal Impact Statement, Form STD 399, prepared by the Department for this regulatory action has been signed off by the Department of Finance (DOF). Please include a copy of the DOF signed STD 399 upon resubmission.

If you have any questions, please contact me at (916) 323-6808.

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April 3, 2012

Date: April 3, 2012

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