

**State of California
Office of Administrative Law**

**In re:
Veterinary Medical Board**

**Regulatory Action: Title 16
California Code of Regulations**

**Adopt sections: 2030.05, 2030.3, 2032.05,
2032.15, 2032.25, 2032.35**

**Amend sections: 2030, 2030.1, 2030.2,
2032.1, 2032.2, 2032.3,
2032.4, 2037**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2012-1026-01 S

SUMMARY OF REGULATORY ACTION

The Veterinary Medical Board (Board) proposed this regulatory action to adopt six regulations and to amend eight regulations pertaining to the practice of veterinary treatment of animals under title 16 of the California Code of Regulations. The proposed action was intended to update the minimum standards of practice to accommodate changes in technology and veterinary practice, as well as provide additional protection to consumers in areas not covered in the existing regulations.

Among other things, the proposed action would provide general cleanup of existing regulations to enhance clarity, enhance communications between veterinarians and clients, including the communication of the availability of emergency veterinarian services, and improve sanitary conditions of various premises where veterinarians treat or perform surgery on animals. The proposed action would also establish provisions for the responsibility of a registered licensee-manager over veterinary premises activities and conditions, provisions for small animal vaccination clinics, a provision for humane treatment of animals under anesthesia, and provisions that would allow an animal owner to obtain continued animal treatment or fill prescriptions for animals, as specified, in the absence of the originally treating veterinarian. Finally, the proposed action would provide that the use of a dental scaler on an animal's teeth constitutes a "dental operation" as used in Business and Professions Code section 4826(d).

DECISION

On December 12, 2012, the Office of Administrative Law (OAL) disapproved the proposed regulatory action because the regulations failed to meet certain substantive or procedural requirements of the Administrative Procedure Act (APA). Specifically, the action did not meet the necessity and clarity standards of Government Code section 11349.1, and the final statement of

reasons did not contain an adequate summary and response to each of the comments submitted to the Board during the regulatory action, as required by Government Code section 11346.9(a)(3).

This decision discusses many of the APA issues resulting in OAL's disapproval of the proposed action, but is not exhaustive of all APA issues that need to be resolved. OAL identified and discussed all the APA issues with the Board's staff. Because the regulation text and rulemaking documents will require substantial revision or supplementation, OAL reserves the right to conduct a complete APA review when the regulatory action is resubmitted.

DISCUSSION

The adoption of regulations by the Board 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 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.) No exemption or exclusion applies to the Board's proposed regulatory action.

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 sections 11349 and 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 a meaningful opportunity to comment on rules and regulations before they become effective. (Gov. Code, secs. 11340.1 and 11349.1.)

A. NECESSITY

Government Code section 11349.1(a)(1) requires OAL to review all regulations for compliance with the "necessity" standard. Government Code section 11349(a) provides the following definition of the necessity standard:

(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 purpose of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

Title 1, California Code of Regulations, section 10(b) elaborates on the Government Code section 11349(a) "substantial evidence" requirement for satisfying the necessity standard:

(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(b).) The initial statement of reasons is the primary document in the rulemaking record that demonstrates that the adoption, amendment, or repeal satisfies the necessity standard. 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 “why” the particular provisions contained in this regulation were chosen to fill that need. (Gov. Code, sec. 11346.2(b)(1).) The initial statement of reasons must also identify any technical, theoretical, or empirical study, report, or similar document upon which the agency relies. (Gov. Code, sec. 11346.2(b)(2).)

The initial statement of reasons must be submitted to OAL with the notice of the proposed action and be made available to the public 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 why the regulation is needed and why the particular provisions contained in the regulation were chosen to fill that need. This information is essential in order for the public to comment knowledgeably. The initial statement of reasons and all data and other factual information, studies or reports upon which the agency relies in the regulatory action must also be included in the rulemaking file. (Gov. Code, secs. 11347.3(b)(2) and (7).)

The initial statement of reasons provided with this proposed action¹ was inadequate to demonstrate the need for many of the proposed adopted and amended regulatory provisions. As a result, the Board will need to add a document to the rulemaking file that supplements the initial statement of reasons in a 15-day notice and public comment period pursuant to Government Code section 11347.1. The following examples show places where statements in the initial statement of reasons need to be supplemented to satisfy the necessity standard.

¹ The Board apparently realized after publication of its 45-day notice of proposed action that the original initial statement of reasons submitted to OAL at the commencement of the proposed action would have failed the necessity standard. On January 5, 2012, the Board added an amended initial statement of reasons to the rulemaking file in a 15-day notice and comment period, pursuant to Government Code section 11347.1, in an attempt to resolve any necessity issues. Reference in this decision to the Board’s initial statement of reasons refers to this amended initial statement of reasons.

Example 1. Adoption of Section 2032.15.

The proposed adoption of section 2032.15, particularly subdivision (a) of the section, adds a number of regulatory provisions for the continuance of a veterinary-client-patient relationship with a veterinarian other than the original treating veterinarian in the absence of communication from the client. The proposed adoption of section 2032.15 would provide:

- (a) A VCPR [veterinary-client-patient relationship] may continue to exist, in the absence of client communication, when:
 - (1) A VCPR was established with an original veterinarian, and another designated veterinarian serves in the absence of the original veterinarian, and;
 - (2) The designated veterinarian has assumed responsibility for making medical judgments regarding the health of the animal, and;
 - (3) The designated veterinarian has sufficient knowledge of the animal(s) to initiate at least a general or preliminary diagnosis of the medical condition of the animal(s). This means that the veterinarian is personally acquainted with the care of the animal(s) by virtue of an examination of the animal(s) or by medically appropriate and timely visits to the premises where the animals are kept, or has consulted with the veterinarian who established the VCPR, and;
 - (4) The designated veterinarian has continued the medical, treatment, diagnostic and/or therapeutic plan as was set forth and documented in the medical record by the original veterinarian.
- (b) If the medical, treatment, diagnostic and/or therapeutic plan differs from that which was communicated to the client by the original veterinarian, then the designated veterinarian must attempt to communicate the necessary changes with the client in a timely manner.

The statement provided to support necessity for the adoption of these provisions is on page six of the initial statement of reasons and states the following:

The proposed regulation establishes standards for issuing written prescription [sic] in the absence of originally [sic] prescribing veterinarian and creates authorization for animal owners to obtain refills of an on-going [sic] prescription in order to allow an animal owner to continue treatment when their originally prescribing veterinarian is temporarily unavailable. Subsection (b) defines the parameters of what takes place with the condition of the animal or the therapeutic plan deviates from the basis upon which the original prescription was issued.

This statement is very general and fails to provide substantial evidence to support the need for many of the specific regulatory provisions in proposed section 2032.15, as required by Government Code section 11349(a)(1). For example, nothing is stated to explain why a designated veterinarian is needed, why the designated veterinarian must have sufficient knowledge of the animal, or why the designated veterinarian must continue the medical,

treatment, diagnostic and/or therapeutic plan as set forth and documented in the medical record by the original veterinarian.

Example 2. Adoption of Section 2030.05(d).

The proposed adoption of section 2030.05(d) would provide:

(d) The Licensee Manager shall maintain what ever [sic] physical presence is reasonable within the facility to ensure that the requirements in (a) - (c) are met.

The statement provided to support necessity for the adoption of this provision is on page four of the initial statement of reasons and states the following:

The proposed regulation establishes that the licensee manager must be on-site [sic] at the premises for which he or she is manager for the amount of time that is necessary to ensure that requirements in subsections (a-c) [sic] are met.

This statement is an example of an initial statement of reasons statement that merely restates what the regulatory provision says, without explaining the rationale of “why” the regulation is needed. It does not provide the substantial evidence of the need for the adopted provision to effectuate the purpose of the Business and Professions Code section that the provision implements, interprets, or makes specific, as required by Government Code section 11349(a).

Example 3. Adoption of Section 2032.05.

The proposed adoption of section 2032.05 appears to establish a standard for the humane treatment of animals and involves the moving of a regulatory provision from section 2032.4, a section that pertains to the use of anesthesia on animals. The proposed adoption of section 2032.05 would provide:

When treating a patient, a veterinarian shall use appropriate and humane methods of anesthesia, analgesia and sedation to minimize pain and distress.

The statement provided to support necessity for the adoption of this provision is on page six of the initial statement of reasons and states the following:

The proposed regulation was moved from section 2032.4 so that it separately and specifically defines the overall need for humane treatment of animals.

This statement is very general and does not provide sufficient information to explain the need for the new provision to satisfy the necessity standard of Government Code section 11349(a)(1).

Example 4. Amendment of Section 2037.

The proposed amendment to section 2037 would establish that the use of a dental scaler on an animal’s teeth constitutes “dental operation” as used in Business and Professions Code section 4826(d), making any such use fall within the practice of veterinary medicine and requiring the

performance of scaling an animal's teeth be done by a licensed veterinarian.² The Board provided the following statement to support the necessity for this amendment on page eight of the initial statement of reasons: "The proposed regulation clarifies existing law regarding the use of a scaler" The statement that the proposed amendment to section 2037 "clarifies existing law" does not provide the substantial evidence of the need for the amendment to effectuate the purpose of the Business and Professions Code section 4826(d) that the amendment implements, interprets, or makes specific, as required by Government Code section 11349(a).

Generally stating that a regulation is needed to clarify existing law is an insufficient necessity rationale, as it fails to describe any rationale or policy reason for the regulation. As required by title 1, California Code of Regulations, section 10(b)(2), the statement of reasons must include information explaining why the amendment is required to carry out the described purpose of the amendment, and if based on policy, must include supporting facts, studies, expert opinion, or other information. For example, the Board should provide statements or other information that address why the regulation is not clear in the first place, the problems the Board has experienced with the current regulation in implementing Business and Professions Code section 4826(d), how the amendment of section 2037 would further the purpose of Business and Professions Code section 4826(d), and any other facts, expert opinion, information, or documents supportive to the amendment.

Example 5. Materials Relied Upon.

There are no materials in the rulemaking file that the Board relies upon that provide any additional necessity to support the proposed regulations. However, the Board has informed OAL of its intent to add additional materials to the rulemaking file to supplement necessity. Such materials may include technical, theoretical, and empirical studies, reports, or similar documents, as allowed by Government Code section 11346.2(b)(3), data and other factual information, technical, theoretical, and empirical studies or reports, as contemplated by Government Code section 11347.3(b)(7), or other information, including facts, studies, or expert opinion, as contemplated by title 1, California Code of Regulations, section 10(b)(2). The addition of any such materials to the rulemaking file is required to be added in a 15-day notice and public comment period pursuant to Government Code section 11347.1

B. 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." The clarity standard is defined further in title 1, California Code of Regulations, section 16, which provides:

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

² We note that Business and Professions Code section 4827 exempts "a bona fide owner of one's own animals" from the Veterinary Medicine Practices Act, as further specified therein.

- (a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:
- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - ...
- (b) Persons shall be presumed to be “directly affected” if they:
- (1) are legally required to comply with the regulation;
 - (2) are legally required to enforce the regulation; or
 - (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
 - (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

There are two regulatory provisions in the Board’s proposed action that do not meet the clarity standard.

1. Section 2030.05(b) is Unclear.

The proposed adoption of section 2030.05(b) would provide:

(b) The Licensee Manager is responsible for ensuring that the premise [sic] for which he/she is manager complies with the requirements in Sections 4853, 4854, 4855 and 4856 of the Business and Professions Code, Division 2, Chapter 11, Article 3. The Licensee Manager is responsible for ensuring that the physical and operational components of a premise [sic] meet the minimum standards of practice as set forth in sections 2030 and 2032.5 of the California Code of Regulations, Title 16, Division 20, Article 4.
[Emphasis added.]

The problem with this regulatory provision is that it should probably state “sections 2030 through 2032.5,” not sections 2030 “and” 2032.5, or subdivision (b) of section 2030.05 should refer to all of the title 16 regulations that implement Business and Professions Code sections 4853, 4854, 4855 and 4856 and that pertain to “physical and operational components of a premise[s].” Otherwise, it appears that sections 2030 and 2032.5 are underinclusive of regulations that implement Business and Professions Code sections 4853, 4854, 4855 and 4856, which a licensee manager is required to comply with as provided earlier in subdivision (b). As a result, there is an internal inconsistency in section 2030.05(b), making it reasonably and logically subject to interpretation that would have more than one meaning, which does not satisfy the clarity standard based on title 1, California Code of Regulations, section 16(a)(1). Section 2030.05(b) would be unclear to anyone directly affected by it as to which title 16 regulations they would need to comply with.

Note that Business and Professional Code section 4853(b) defines “premises” very broadly, as follows:

(b) "Premises" for the purpose of this chapter shall include a building, kennel, mobile unit, or vehicle. ...

Because of this broad definition of "premises," the Board regulations that implement Business and Professional Code sections 4853 and 4854, which refer to regulations adopted by the Board relating to veterinary "premises," clearly include most of the regulations in this action, as well as other title 16 regulations that have to do with veterinary premises beyond just sections 2030 and 2032.5. For example, title 16, California Code of Regulations, sections 2030.1 (minimum standards for small animal fixed premises), 2030.2 (small animal mobile clinic), and 2030.3 (small animal vaccination clinic) all implement Business and Professions Code sections 4853 and 4854 and include provisions related to the "physical and operational components of a premise[s]." Additionally, Business and Professions Code sections 4855 and 4856 pertain to record keeping requirements of animals receiving veterinary services, which would at a minimum include title 16, California Code of Regulations, section 2032.3, a section that is being amended in this action, as its provisions are related to "operational components of a premise[s]."

Modifying the text in section 2030.05(b) to change the "and" to "through" so that it reads "sections 2030 through 2032.5," or to identify all of the regulations that implement "physical and operational components of a premise[s]" in Business and Professions Code sections 4853, 4854, 4855 and 4856, would be a substantial change. The Board will need to modify section 2030.05(b) to resolve the inherent inconsistency of the proposed text. This will require the Board to provide the modified text to the public in a 15-day notice and public comment period pursuant to Government Code section 11346.8(c) and title 1, California Code of Regulations, section 44.

2. Section 2032.05 is Unclear.

The proposed adoption of section 2032.05 would provide:

When treating a patient, a veterinarian shall use appropriate and humane methods of anesthesia, analgesia and sedation to minimize pain and distress.
[Emphasis added.]

The plain language of this provision appears to state that a veterinarian shall use an anesthesia, analgesia, or sedative whenever treating an animal, at least when an animal exhibits signs of pain or distress. The rulemaking file is not clear that this is the intended result of the proposed adoption of section 2032.05. The necessity statement in the initial statement of reasons for this section provides the following:

The proposed regulation was moved from section 2032.4 so that it separately and specifically defines the overall need for humane treatment of animals.

There is no clear description in this statement of an intent that some form of anesthesia will be required on an animal any time an animal exhibits signs of pain or distress. Additionally, the statement fails to elicit any intent for section 2032.05 other than some vague "need for humane treatment of animals," which may or may not require the use of anesthesia. Based on other things stated in the record (e.g., comments from veterinarians), it would appear that veterinarians have discretion in the use of anesthesia, but it is unclear whether the Board intended in this section for

the use of anesthesia, analgesia and sedation to be discretionary or required. As such, section 2032.05 is at odds with the clarity standard based on title 1, California Code of Regulations, section 16(a)(2), because the language of the regulation inherently conflicts with the Board's statement of the effect of the regulation.

OAL discussed this provision with the Board's staff to determine what the effect of section 2032.05 was intended to be. The Board has taken this issue under advisement and will clarify in its supplement to the initial statement of reasons what the effect of section 2032.05 is supposed to be, and, if needed, will modify this section in a 15-day notice and public comment period. Alternatively, the Board may remove section 2032.05 from this action and retain the language in section 2032.4.

C. INSUFFICIENT SUMMARY AND RESPONSE TO COMMENTS IN THE FINAL STATEMENT OF REASONS

Since its inception in 1947, the APA has afforded interested persons the opportunity to participate in quasi-legislative proceedings conducted by state agencies. The APA currently requires that rulemaking agencies provide notice and at least a 45-day comment period prior to adoption of a proposed regulatory action (Gov. Code, secs. 11346.4 and 11346.5), and at least a 15-day comment period whenever an agency makes substantial and sufficiently related changes to the 45-day text (Gov. Code, sec 11346.8(c)). By requiring the state agency to summarize and respond in the record to any comments received during a comment period, the Legislature has clearly indicated its intent that an agency account for all relevant comments received, and provide written evidence of its meaningful consideration of all timely, relevant input.

Government Code section 11346.9(a) provides that an agency proposing regulations shall prepare and submit to OAL a "final statement of reasons." One of the required contents of the final statement of reasons is a summary and response to public comments. Specifically, Government Code section 11346.9(a)(3) requires that the final statement of reasons include:

(3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action....

Furthermore, where an agency makes substantial, but sufficiently related changes to its original regulatory proposal and provides notice of the changes pursuant to Government Code section 11346.8(c), that statutory provision specifically includes the following requirement:

(c) ... Any written comments received regarding the change must be responded to in the final statement of reasons required by [Government Code] Section 11346.9.

In this rulemaking action, the Board provided a public comment period for its originally proposed 45-day text, a comment period for the addition of its amended initial statement of reasons to the rulemaking file, and two public comment periods in subsequent modifications of

the original 45-day text in two 15-day notices of modified text. In response, the Board received over 22,000 written and oral public comments. The Board adequately summarized and responded to most of these comments. However, a number of public comments were not adequately summarized or received no summary, were not adequately responded to or received no response, or both. Examples of these are provided below.

1. Form Letters Opposing the Proposed Amendment to Section 2037.

In its final statement of reasons, the Board indicated that of the approximate 22,000 written comments, almost all were in response to the 45-day text and almost all were directed at the amendment to section 2037 regarding the use of a scaler. However, most of the 22,000 written comments were one of 52 form letters, i.e., letters that were ostensibly identical in content but submitted by different people. All of the form letters were directed at the amendment to section 2037. Under the APA, the Board is allowed to aggregate and summarize and respond to these repetitive form letters once. Government Code section 11346.9(a)(3) provides as follows:

(3) ... The agency may aggregate and summarize repetitive or irrelevant comments as a group, and may respond to repetitive comments or summarily dismiss irrelevant comments as a group. ...

Thus, if all 52 form letters were identical in content, they would be considered repetitive comments and the Board would only be required to summarize and respond to the comments contained in the form letters once. (Similarly, to the extent that the form letters contained irrelevant comments, the Board would be allowed to dismiss any such comment once. We will discuss the issue of irrelevant comments below.)³

With regard to 49 of the 52 form letters, the Board made the following statement on page nine of the final statement of reasons in a subheading titled “*4) Opposed Comments without Recommendation to Change the Proposed Language:*”⁴

Form letters 1-30, 32-41, and 43-52 [excluding Form letter 49]⁵ and other opposed comments included at least one of the following statements: the Board is unnecessarily changing California laws to eliminate competition; the Board is attempting to regulate the right of pet owners to choose anesthesia free teeth cleaning; the Board is increasing costs to pet owners and eliminating jobs; the Board is establishing a teeth cleaning monopoly; the Board is serving in the interest of its members and not pet owners; the Board is taking away consumer choice; the Board will cause the commenter to lose their job/income cleaning teeth; there is no legislative intent to cover cosmetic teeth cleaning.

³ For purposes of this discussion, relevant comments are “objections or recommendations specifically directed at the agency’s proposed action or to the procedures followed by the agency in proposing or adopting the action.” An irrelevant comment is one that “is not specifically directed at the agency’s proposed action or to the procedures followed by the agency in proposing or adopting the action.” (See Gov. Code, sec. 11346.9(a)(3).)

⁴ Italicized language quoted from the final statement of reasons is italicized in the original final statement of reasons.

⁵ Hereafter referred to as Form letters 1-30, 32-41, 43-48, and 51-52.

If the Board captured all relevant comments in Form letters 1-30, 32-41, 43-48, and 51-52, it would have satisfied the summarizing of these comments as required by the APA. However, our review of these form letters revealed that a number of issues raised in them were not summarized. All of the issues raised in the form letters pertain to the amendment to section 2037. Among the issues the Board did not summarize are the following:⁶

- a. It will make it too costly to afford pet teeth cleaning.
- b. It will decrease tax revenue for California.
- c. It will take away the rights of California citizens to care for pets.
- d. Non-veterinarians who clean animals' teeth are well trained and refer people to veterinarians for more serious dental issues.
- e. It is arrogant to believe that only veterinarians can clean animals' teeth.
- f. The amendment to section 2037 is not necessary because there are no problems with the teeth cleaning services provided by non- veterinarians.
- g. Why don't you adopt the higher superior court decision in Alexander v. State of California (San Joaquin Superior Court Case #205626), which held that scaling an animal's teeth above the gum line was not a dental operation within the meaning of Business and Professions Code section 4826?
- h. There never was any legal backing by the Board that anesthesia-free teeth cleaning is illegal. Practitioners of this service have never claimed that they replace veterinary care and only claim that the service is cosmetic.
- i. The Board cannot rely on a 2005 administrative decision that they designated a precedent decision since the Board lost that case. Additionally, statutory procedures required to be followed in that decision were not followed, making it invalid.
- j. A study from the American Animal Hospital Association, the most respected veterinary association in the United States, shows that 1 in 233 cats or dogs die from anesthesia.
- k. We [individual pet owners] could all be accused of practicing veterinary medicine.
- l. The Federal Trade Commission considers this type of action a restriction on trade, stating in a similar issue in Texas that it would "significantly restrict competition without providing any countervailing benefit, thereby harming consumers."
- m. APA procedures were not followed. The Board hid the amendment to section 2037 in an action titled "Minimum Standards Regulations."
- n. Form 41 indicates five issues that the Board relies on for amending section 2037 that are false: (1) Proper teeth cleaning cannot be accomplished without anesthesia; (2) anesthesia-free teeth cleaning may cause damage to the teeth; (3) The consumer may be misled into the belief that all of their pet's dental needs are met with this service; (4) Teeth cleaning is complicated and requires special training (if this is true, why is it not part of the curriculum in universities that teach veterinary medicine?); (5) Pets are harmed by the service.
- o. The term "dental operation" cannot plausibly be interpreted to include the use of a manual scraper for cosmetic cleaning of an animal's teeth.

⁶ This is not an exhaustive list. The Board should review the form letters to ensure it has summarized all relevant comments for the aggregation of this group of form letters.

The Board will need to revise the statement in the final statement of reasons summarizing the comments in this group of form letters to capture all relevant comments.

In response to these comments, the Board made the following statement on page nine of the final statement of reasons:

Board Response: Reject the comments. The comments are not specifically directed at the proposed action and made no recommendations to amend the proposed language.

While it is true that none of the comments identified in these form letters by the Board, or additional comments or issues identified by OAL, made any recommendations to amend the proposed language, they are still relevant comments that require a response. They are specifically directed at the Board's action or the procedures followed by the Board. Additionally, some of the comments are germane to the proposed amendment to section 2037 in that they challenge the necessity for the amendment or the Board's authority in making the amendment, including whether there is sufficient legislative intent underlying Business and Professions Code section 4826(d) to support the interpretation that using a scaler on an animal's teeth is a dental operation. While the general comments made in these form letters may be classified as general objections, the Board still needs to provide a response to them. As to the latter comments that address Board procedures, authority, legislative intent, and necessity, the Board needs to respond to these comments and either give the reasons for making no changes or describe the changes made to accommodate the comment. If the Board intends to rely on the 2005 precedent decision, it should address the opposition to its validity or the Board's reliance on the decision made by many of the commenters.

On page nine of the final statement of reasons, the Board made the following statement regarding form letters designated as Form letters 31, 42, and 49 in a subheading titled "*5) Opposed Comments Specific to the Rulemaking Action without Recommendation to Change the Proposed Language.*"

Form letters 31, 42, and 49 included one of the following statements: the Board has not established necessity in proposing changes to California Code of Regulations section 2037; the Board does not have the authority to adopt the proposed regulations; the Board is in violation of the Administrative Procedures Act.

Our review of Form letters 31, 42, and 49 revealed several additional comments that were not identified by this statement. For example, Form letter 31 states that the amendment will cost 1000s of jobs, and both Form letters 31 and 49 state that the amendment will adversely affect small businesses that provide anesthesia-free teeth cleaning services. These comments are not summarized for this group of comments. Additionally, the summaries are far too general to be considered a summary of each objection raised in the comments. For example, all three form letters cite specific legal opinions or statements or state facts to support the conclusion that cosmetic teeth cleaning and scaling of an animal's teeth do not constitute a dental operation within the meaning of Business and Professions Code section 4826 and that, therefore, the Board does not have authority to make the proposed amendment to section 2037. The Board needs to summarize each specific assertion that it lacks authority to amend section 2037. Accordingly, the Board did not satisfy the

APA requirement for summarizing this group of comments. The Board will need to revise this statement to identify specifically each comment raised in this group of comments.

Additionally, the responses given by the Board to these comments are generally insufficient. Starting on page nine of the final statement of reasons, the Board makes the following statements in response to these comments:

Board Response: Reject the comments.

The Board has not established necessity in proposing changes to California Code of Regulations section 2037.

Government Code section 11349(a) defines “necessity” as:

(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.

The Board, through numerous investigations, has established consumers are confused as to what is and is not permissible in the practice of veterinary dentistry. In order to better protect consumers, the Board has determined it is necessary to further define in regulation what constitutes the practice of veterinary dentistry.

In this response, the Board attempts to provide a necessity rationale for the amendment to section 2037, apparently in response to the single comment made in Form letter 31 that “[y]our proposed changes to Reg. 2037 are unnecessary....” However, the response does not clearly state how the Board established “what is and is not permissible in the practice of veterinary dentistry” in its investigations, nor how these findings relate to the use of a scaler on an animal’s teeth. Additionally, the statement does not provide how amending section 2037 to prohibit use of a scaler by unlicensed individuals will better protect consumers. While the response starts out to define necessity as provided in the APA, the remainder of the response fails to provide any necessity or address the comment in Form letter 31.

The Board continues in its responses to this group of comments on page 10 of the final statement of reasons, as follows:

"The Board does not have the authority to adopt the proposed regulations." In accordance with Business and Professions Code sections 4808 and 4826, the Board has authority to adopt regulations related to the practice of veterinary medicine and veterinary dentistry.

This response is not responsive to the many specific assertions made in Form letters 31, 42, and 49 as to why the Board lacks authority to make the proposed amendment to section 2037. For example, Form letter 31 lists seven cases, legal opinions, statements, or facts that support the

conclusion that cosmetic teeth cleaning and scaling of an animal's teeth do not constitute a dental operation within the meaning of Business and Professions Code section 4826(d). Form letters 42 and 49 cite other cases or statements and assert, in essence, that the proposed amendment to section 2037 enlarges the scope of Business and Professions Code section 4826(d) and is therefore in conflict with it. The cited cases stand for the proposition that a valid regulation cannot exceed the scope of authority of the enabling statute. The Board's response that it has authority "to adopt regulations related to the practice of veterinary medicine and veterinary dentistry" based on Business and Professions Code sections 4808 and 4826 is far too general to address each of the specific comments raised in this group of comments.

Finally, the Board concludes its response to this group of comments on page 10 of the final statement of reasons, as follows:

"The Board is in violation of the Administrative Procedures Act." The comments did not specify with what section and manner of the Administrative Procedures Act the Board is alleged to have been in violation. The Board has authority, and has established necessity to enact the proposed language.⁷

It is accurate that none of Form letters 31, 42, or 49 "specify with what section and manner of the Administrative Procedures Act the Board is alleged to have been in violation." However, it is implicit in the assertions made in all three form letters that the Board lacks authority to make the proposed amendment to section 2037, so it is likely that all three form letters intended their assertions of violations of the APA to be based on lack of authority, which, if true, would be a violation of one of the APA substantive standards provided in Government Code section 11349.1(a). The Board should address this as the possible violation of the APA asserted by these three form letters and respond to it accordingly.

2. Individual Letters Opposing the Proposed Amendment to Section 2037.

The Board indicated on page nine of the final statement of reasons that it received approximately 1,000 individual letters opposing the amendment to section 2037. However, instead of addressing each of these comments, the Board appears to have combined them with the summary and responses to the comments made in Form letters 1-30, 32-41, 43-48, and 51-52. If, in fact, the 1,000 individual comments repeated the same comments as the form letters, then, to the extent the Board adequately summarized and responded to the form letter comments, it would also have adequately summarized and responded to the 1,000 individual letters. However, as discussed, the Board needs to supplement its summary and responses to Form letters 1-30, 32-41, 43-48, and 51-52. Additionally, our review of the 1,000 comments revealed additional comments that were not summarized in the Board summary to Form letters 1-30, 32-41, 43-48, and 51-52. The following list includes examples of these additional comments:⁸

- a. One in nine pets have complications from teeth cleaning under anesthesia.

⁷ As discussed above, the Board has yet to establish necessity for the proposed amendment to section 2037.

⁸ This is not an exhaustive list. The Board should review the individual letters and comment submissions to ensure it has summarized and responded to all relevant comments.

- b. The amendment to section 2037 makes teeth cleaning required to be performed by veterinarians.
- c. Pets respond favorably to anesthesia-free teeth cleaning as opposed to going to a veterinarian.
- d. Many animals have health conditions that will not allow anesthesia. The amendment to section 2037 will require anesthesia in order to have an animal's teeth cleaned.
- e. Anesthesia-free teeth cleaning is complementary to veterinarian care. Why aren't we looking at ways to have anesthesia-free teeth cleaning performed routinely, at a reasonable cost, in veterinary offices?
- f. If it were true that teeth cleaning and scaling requires the expertise of a veterinarian, then dentists would be cleaning our teeth and dental hygienists would not exist.
- g. How can it be required that only veterinarians can perform teeth scaling when it is not taught at veterinary universities?
- h. Many veterinarians support our practice of anesthesia-free teeth cleaning and readily refer their clients to us without reservation.
- i. Adoption of pets from shelters will diminish as the cost of pet care goes up.
- j. Pets do not need anesthesia for teeth cleaning any more than humans do.

The Board also received numerous comments from Ms. Collins, which included Board records of disciplinary cases against licensed veterinarians that allegedly show that pets have been harmed on numerous occasions by licensed veterinarians while putting animals under anesthesia, some of these during the course of teeth cleaning. To this, Ms. Collins adds that there is about 500 individuals in California that perform anesthesia-free teeth cleaning and that there is no record of harm done to an animal using anesthesia-free teeth cleaning. In another comment, Ms. Collins cites to the Board's 1988 initial statement of reasons for the adoption of section 2037, and indicates that there are no cases to substantiate claims that use of anesthesia-free teeth cleaning results in injury, etching and pitting of tooth enamel, the dislodging, devitalizing, or debilitating of animal's teeth, pain or discomfort to an animal, or that it gives the owner a false sense of cleaning below the gum line or results in inadequate scaling. Based on her comments, Ms. Collins asserts that the Board has failed to show that having a veterinarian present during anesthesia-free teeth cleaning would protect the public in any way.

The Board also received as an individual comment from two commenters (one of them Ms. Collins) the submission of an extensive research study conducted by a professional legislative research firm, Legislative Research and Intent, LLC (LRI). The study traces the history of Business and Professions Code section 4826 from its 1893 origins to its current version to show a lack of legislative intent to support the use of a scaler as within the meaning of "dental operation" in Business and Professions Code section 4826(d), thus arguing the proposed amendment to section 2037 lacks authority. LRI makes numerous findings and conclusions in its analysis of the history of Business and Professions Code section 4826, and ultimately concludes the following:

The legislative history surrounding Business and Professions Code § 4286 ... does not provide any evidence of an intent to cover non medically related animal care services provided for non medically related purposes. There is especially no evidence of any intent to cover the mere, non medically related cleaning of the

exposed surfaces of an animal's teeth, including but not limited to, tartar removal with the terms "dental operation" in subdivision (d).

Rather, the history strongly supports the understanding that the veterinary medicine practice act was only intended to cover medically related procedures or services, including but not limited to dental operations, that are provided for medically related purposes, requiring the special education and skill of a licensed veterinarian.

There is even strong support for the understanding that any operation, surgical or dental, may only be provided for the medically related purposes specified under subdivision (b) of §4286 which currently reads as follows: "...for the prevention, cure or relief of a wound, fracture, bodily injury, or disease of animals."

The Board also received 35 written comments at its October 17, 2011 public hearing. On page 10 of the final statement of reasons, under a subheading titled "Written Comments Received at the Regulatory Hearing (October 17, 2011)," the Board summarized and responded to these comments, as follows:

The Board received 35 written comments at the October 17, 2011 Regulatory Hearing. The Board reviewed the comments, and determined all 35 comments include at least one of the following statements: the Board is establishing a teeth cleaning monopoly; the Board is increasing costs to pet owners and eliminating jobs; the Board is unnecessarily changing California laws to eliminate competition; the Board is increasing costs to pet owners and eliminating jobs; the Board is taking away consumer choice; the Board will cause the commenter to lose their job/income cleaning teeth.

In our review of the written comments submitted at the October 17, 2011 public hearing, we identified several additional comments that were made. These include the following:⁹

- a. The amendment to section 2037 lacks necessity.
- b. The Board is relying on dictum from a 2005 precedent decision.
- c. The proposed amendment to section 2037 places pets at risk with unnecessary use of anesthesia.
- d. There is no legislative intent to include cleaning and tartar removal as a "dental operation" in Business and Professions Code section 4826(d).
- e. Anesthesia-free teeth cleaning should be seen as complementary to veterinary dental operations.¹⁰

⁹ This is not an exhaustive list. The Board should review the individual letters and comment submissions it received at the October 17, 2011 public hearing to ensure it has summarized and responded to all relevant comments.

¹⁰ We recognize that many of these comments are repetitious of comments made elsewhere. If written or oral comments received at the public hearing are repetitious of comments received during a public comment period, then, as a suggestion, the Board can simply point to where in the final statement of reasons the comment is dealt with, e.g., "see response to comment under heading _____."

Thus, the Board did not adequately summarize all the written comments submitted to it at the public hearing. The Board will need to supplement its summary statement to include these additional and possibly other comments in these written comments.

The Board responds to its summary of these written comments with the following statement:

Board Response: Reject the comments. The comments are not specifically directed at the proposed action and made no recommendations to amend the proposed language.

This response is inadequate as it indicates that the “comments are not specifically directed at the proposed action.” To the contrary, all of the comments appear to be directed specifically at opposing the amendment of section 2037. As such, they should, at a minimum, be considered as general objections to the amendment of section 2037. Additionally, several of the comments are germane to whether the proposed amendment to section 2037 meets the APA necessity and authority standards. These comments should be addressed specifically in the Board’s summary and response to comments.

The Board adds the following to the summary and response to written comments submitted at the October 17, 2011 public hearing:

Linda Cordy commented that by removing “or other similar items” in the proposed language will exclude items that are similar and currently legal.

Board Response: Reject the comment. The Board believes items currently cited in California Code of Regulations section 2037 are sufficient for a layperson to use and clean their own animal's teeth.

This summary and response appears sufficient on its face. However, the written comment submitted by Ms. Cordy raised two other issues, including the amendment to section 2037 enlarges the scope of what constitutes the practice of veterinary medicine beyond what is provided in Business and Professions Code section 4826(d), and that the Board misplaces its reliance on the 2005 precedent decision because it relies on dictum from the decision. The Board needs to summarize and respond to these two additional comments.

Additionally, Ms. Collins submitted comments to the Board at the October 17, 2011 public hearing, which reflect many of the comments discussed by her above. The summary and response to comments completely overlooks these comments. The summary and response to comments will need to be supplemented to summarize and respond to these comments submitted by Ms. Collins.

The Board will need to revise the statement in the final statement of reasons summarizing the comments in this group of individual comment letters to capture all relevant comments, including the conclusions provided in the LRI study.

3. Oral Comments Opposing the Proposed Amendment to Section 2037.

On page 10 of the final statement of reasons, under a subheading titled “Oral Comments Received During the Regulatory Hearing (October 17, 2011),” the Board summarizes oral comments it received at the October 17, 2011 public hearing. For the most part, the summary and response to the oral comments are sufficient. However, in response to “comment #4,” the Board provides the following statement:

Board Response: Reject the comment. The comments are not specifically directed at the proposed action, and made no recommendations to amend the proposed language.

This is an appropriate response to comment #4. However, the Board inappropriately cross-references this response in at least four other places as its response to subsequent oral comments. For example, comment #6 is summarized as follows:

6) *Cindy Collins, Canine Care:* Ms. Collins stated she has done legislative intent research, and has a written opinion that in the history of the Board there is no legislative intent for “dental operation” to include cleaning of pets’ teeth, and that the Board would need to statutorily change the law. She added the Office of Administrative Law, a Legislative counsel opinion, and Superior Court decisions disagree with the Board’s position on “dental operation.” Ms. Collins stated there is no necessity in the Board’s rulemaking action, and by going through enforcement records no harm has been done by cleaning pets’ teeth and that it is a valuable service.

While the Board’s summary of this response is adequate, it responds by stating the following:

Board Response: Reject the comments. See Board response to oral comment #4.

The Board continues in its response to this comment to address the “necessity” issue raised by the commenter, but that is all. Referring back to oral comment #4, which states that the “comments are not specifically directed at the proposed action, and made no recommendations to amend the proposed language,” does not provide an adequate response to the remainder of Ms. Collins’ oral comments. It would be sufficient for the Board to cross-reference responses to other comments to address Ms. Collins’ oral comments. However, the cross-referenced responses would need to address each comment raised by Ms. Collins in her oral comments.

4. Written Comments Addressing the Regulations in General.

On page three of the final statement of reasons, the Board makes the following statement in a subheading titled “2) *Miscellaneous Comments without Recommendation to Change the Proposed Language:*”

The Board received 17 written miscellaneous comments that did not specifically cite the Board’s proposed rulemaking action. The comments largely offered testimonial evidence why animal teeth cleaning by unlicensed persons can be

damaging to animals. None of the 17 comments recommended any change to the proposed language.

While it is accurate that these comments generally provided testimonial evidence why animal teeth cleaning by unlicensed persons can be damaging to animals and did not recommend any specific change to the proposed language, some of them specifically cite the Board's proposed rulemaking action. Moreover, even if no specific change to the proposed language was recommended, implicit in these comments is support for the amendment of section 2037. However, it appears that at least one comment in this group of comments recommended a change to the proposed language (discussed below). Additionally, the subject matter of many of these comments supports the necessity for the amendment of section 2037.

One of these comments by a Mr. White appears to recommend a change to the proposed amendment of section 2037. In this comment, Mr. White states:

I will go so far as to suggest strengthening the law to prevent anyone, even veterinarians, from performing dental cleanings without anesthesia. Exempted would be those extremely rare cases where anesthesia would be truly life-threatening [sic].

The Board responds to these comments as follows:

Board Response: Reject the comments. The Board rejects the comments on the basis that the comments were not specifically directed at the Board's proposed action.

This responsive statement should be revised to indicate that many of the comments were specifically directed at the Board's proposed action, support the necessity for the amendment to section 2037, and support the amendment of section 2037. Accordingly, the Board should reconsider its rejection of these comments and should instead respond to them appropriately. Additionally, the Board should separately identify the comment by Mr. White and summarize and respond to it.

On page three of the final statement of reasons, the Board makes the following statement in a subheading titled "*Miscellaneous Comments Specific to the Rulemaking Action with Recommendation to Change the Proposed Language:*"

The Board received four (4) written miscellaneous comments specific to the proposed rulemaking action.

The Board then identifies each comment made by these commenters and summarizes and responds to them. Of these, several of the summaries or responses are insufficient. Examples of these are as follows:

Example 1. On page five of the final statement of reasons, the Board summarized and responded to one comment submitted by a Ms. Lutz regarding section 2032.05, as follows:

California Code of Regulations section 2032.05: Ms. Lutz commented the section could be stated more clearly.

Board Response: Accept the comment. The Board clarified the section with a more general statement for treating pain and administering medication.

These statements do not accurately summarize Ms. Lutz's comment or describe the Board's response to it. Ms. Lutz stated the following in this comment in regard to section 2032.05:

It is clear to me that the VMB [the Board] requires pain medication be given before and after all surgical procedures. If that is the case, clarify it in the regulation.

The Board's summary of this comment merely states "the section could be stated more clearly." This is far too general of a statement to represent what Ms. Lutz stated in her comment.

Apparently as a result of this comment, the Board deleted the words "during and after any procedures" from the original 45-day text for the adoption of section 2032.05, as shown with the stricken text below from the first 15-day modified text.

When treating a patient, a veterinarian shall use appropriate and humane methods of anesthesia, analgesia and sedation to minimize pain and distress ~~during and after any procedures.~~

While this modification to section 2032.05 appears related to Ms. Lutz's comment regarding pain medications being required "before and after all surgical procedures," it does not appear to clarify anything. Even as modified, section 2032.05 would still require pain medication be given during and after any treatment of an animal if the animal exhibits pain or distress. Additionally, Ms. Lutz's comment addresses use of medications related to "all surgical procedures," and neither the modification to section 2032.05 nor the Board's response to Ms. Lutz's comment clarifies whether section 2032.02 applies only to surgical procedures or any procedure performed on an animal.

In its response to this comment, the Board needs to clarify whether it has accepted Ms. Lutz's comment, accepted it in part and rejected it in part, or rejected it but made a modification to the text based on a decision made by the Board in relation to this comment.

Example 2. On page five of the final statement of reasons, the Board summarized and responded to another comment submitted by Ms. Lutz regarding section 2032.15(a)(4), as follows:

California Code of Regulations section 2032.15(a)(4): Ms. Lutz commented on amending the language for clarity.

Board Response: Accept the comment. The Board amended the language for clarity.

These statements do not accurately summarize Ms. Lutz's comment or describe the Board's response to it. Ms. Lutz stated the following in this comment:

Change "as" to "that" (therapeutic plan 'that' [instead of 'as'] was set forth...")

In its first modification to the text, the Board appears to have accommodated this comment. However, the Board's response merely states that it "amended the language for clarity" In each case where the Board modified the original text in response to a comment, it needs to describe specifically the modification that was made.

Example 3. On page seven of the final statement of reasons, the Board summarized and responded to a comment submitted by the California Veterinary Medical Association (CVMA) regarding section 2032.25(b)(2), as follows:

California Code of Regulations section 2032. 25(b)(2): The CVMA commented that the intent of the section is unclear and requires clarification.

Board Response: Accept the comment. The Board agreed to amend the proposed section based on detailed comments received from the CVMA.

These statements do not accurately summarize CVMA's comment or describe the Board's response to it. CVMA stated the following in this comment:

The CVMA would like to ask for clarification of Section [2]032.25, Written Prescriptions in Absence of Originally Prescribing Veterinarian, in the proposed regulations – specifically, subsection (b)(2). We believe the intent of the language is to allow a veterinarian to fill a prescription written by another veterinarian on an emergency basis for a client who is traveling and cannot return to their regular veterinarian for the refill. If this is the intent of this language, we request that the VMB [the Board] review and clarify the text to clearly state the intent.¹¹

The Board's summary of this comment is too general to specifically identify the comment and see its relationship to the actual comment submitted by CVMA.

In the first modification to text, the Board made several modifications to section 2032.25(b)(2), as shown below with underlining and strikeout:

- (2) The veterinarian transmitted the order for the drugs to another veterinarian or registered veterinary technician, and if both of the following conditions exist:
- (A) The ~~practitioner~~ licensee had consulted with veterinarian or registered veterinary technician who had reviewed the patient's records.
 - (B) The ~~practitioner~~ licensee was designated as the ~~practitioner~~ veterinarian to serve in the absence of the animal patient's veterinarian, ~~as the case may be.~~

¹¹ Other commenters raised this same comment in addition to CVMA.

Although the Board indicated in its response to this comment that it “agreed to amend the proposed section based on detailed comments received from the CVMA,” it is unclear how these modifications to the text relate to CVMA’s comments. Accordingly, the Board should modify its response to this comment to indicate clearly whether it has accepted CVMA’s comment, accepted it in part and rejected it in part, or rejected it but made a modification to the text based on a decision made by the Board in relation to this comment. If the Board accepted this comment in whole or in part, it should describe in its response the specific modifications that were made to section 2032.25(b)(2) to accommodate the comment, and if additional modifications are made to the text, explain why.

Example 4. On page seven of the final statement of reasons, the Board summarized and responded to a comment submitted by a Mr. Gray regarding section 2037, as follows:

California Code of Regulations section 2037: [Mr.] Gray commented the section requires clarification, and suggested additional language that would provide for exemptions to existing language in the section.

Board Response: Reject the comment. Business and Professions Code section 4826 includes veterinary dentistry as the practice of veterinary medicine. California Code of Regulations section 2037 further defines “Dental Operation” and, therefore, the Board does not have authority under existing law to create an exemption for unlicensed practice.

In his comment, Mr. Gray’s recommended modification is extensive, and the Board’s summary of it is too general. Mr. Gray’s comment recommends leaving section 2037 as is but adding a subdivision (4) to the section, as follows:

- ...
- (4) (a) Nothing in this regulation shall prohibit any person from utilizing nonmotorized instruments, include a scaler, to remove calculus, soft deposits, plaque, or stains from an exposed area of an animal’s tooth above the gum line, provided the service is performed exclusively for cosmetic purposes.
- (b) Prior to performing any service described in subdivision (a) by a person not licensed under this chapter, the person performing the service shall obtain written permission from the person requesting the service in the following form:

I hereby give permission to _____ to clean my pet’s teeth. I understand that this is a cosmetic procedure involving only that portion of the teeth that is exposed above the gum line, and is not intended to treat disease of the teeth or gums or as a substitute for regular veterinary dental care.

Pet’s name: _____

Owner’s name: _____

Signature: _____

Date: _____

The Board rejected this comment by essentially stating that it “does not have authority under existing law to create an exemption for unlicensed practice.” However, subdivision (3) of section

2037 already provides specified exemptions for unlicensed practice, which it is presumably authorized to do under existing law, so the Board's response appears to be counterintuitive.¹² The Board has the right to reject this comment, but should revise its response to it by stating the policy reason for rejecting it.

5. Irrelevant Comments.

The APA requirement to summarize and respond to comments "applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action." (Gov. Code, sec. 11346.9(a)(3).) As discussed above, this is the definition for relevant comments.

Government Code section 11346.9(a)(3) further provides:

... For the purposes of this paragraph, a comment is "irrelevant" if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

Thus, comments that are irrelevant only need to be identified as such. It would be helpful for an agency to include a statement indicating that the comment is irrelevant or by providing a fuller explanation why the comment is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action. Additionally, in connection with specific comment periods, the Board only needs to treat as relevant comments those that are specifically directed at what is being proposed for that comment period. For example, for changes to the regulation text in a 15-day modification of text, the Board only needs to treat comments related to the changes being made in the modified text as relevant. All other comments would be irrelevant.

As discussed above, the Board inappropriately responded to numerous comments by deeming them irrelevant. Indeed, on page one of the final statement of reasons, the Board makes the following statement:

The majority of the written comments received during the 45-day comment period were determined not relevant to the proposed changes to California Code of Regulations section 2037.

Our review of the comments has revealed just the opposite, that most of the comments the Board received are relevant. However, the Board did receive a number of comments that are irrelevant. Among these are

- a. Comments asking the Board not to support proposed legislation in a 2011 bill, S.B. 697.
- b. Stories of harm done to pets unrelated to teeth cleaning.

¹² Section 2037(3) currently provides: "(3) Nothing in this regulation shall prohibit, however, any person from utilizing cotton swabs, gauze, dental floss, dentifrice, toothbrushes or similar items to clean an animal's teeth."

The Board will need to revise many of its responses to comments to address those that are relevant. However, with comments that are irrelevant, the Board may respond to them by indicating them as such. If any of the form letters, individual letters, or oral comments raises irrelevant comments, the APA allows the Board to “aggregate and summarize ... irrelevant comments as a group, and may ... summarily dismiss irrelevant comments as a group.” (Gov. Code, sec. 11346.9(a)(3).)

6. Miscellaneous.

There is a packet of legal documents of approximately 300 pages included with the comments in the rulemaking file. The documents are related to an administrative hearing by the Board pertaining to a licensed veterinarian and include approximately 46 exhibits. It is unclear in the record what comment this packet is related to or for what purpose they were submitted to the Board, if any. It is also unclear in the summary and response to comments whether the Board included this packet in considering the comments. OAL discussed this packet of documents with the Board staff. They will determine if the packet belongs with the comments and, if so, will make sure they are included in the summary and response to comments. If the packet of documents is unrelated to the comments and was erroneously placed with the comments, the Board will pull them from the rulemaking file.

CONCLUSION

For the reasons set forth above, OAL has disapproved the Board’s rulemaking action because it failed to meet the necessity and clarity standards of Government Code section 11349.1, and the final statement of reasons did not contain an adequate summary and response to each of the comments submitted to the Board during the regulatory action, as required by Government Code section 11346.9(a)(3).

Date: December 19, 2012



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