

**State of California
Office of Administrative Law**

In re:
Department of Justice

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

Adopt sections:
Amend sections: 300, 301, 303, 305, 306,
307, 308, 310, 311, 999.1
Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2013-0426-01S

SUMMARY OF REGULATORY ACTION

On April 26, 2013, the Department of Justice (Department) submitted to the Office of Administrative Law (OAL) its proposed regulatory action to amend the California Code of Regulations, title 11, sections 300, 301, 303, 305, 306, 307, 308, 310, 311, and 999.1. These regulatory provisions pertain to the "Supervision of Trustees and Fundraisers for Charitable Purposes Act." The Department's most notable proposed amendment would require charitable organizations that fall below a federal tax filing threshold to file a treasurer's report annually with the Registry of Charitable Trusts (RCT). Some proposed modifications are a revision of regulatory terms and forms incorporated by reference in the regulations.

On June 10, 2013, OAL notified the Department that OAL disapproved the proposed regulations because the regulations failed to comply with the Clarity and Necessity standards of Government Code section 11349.1, failed to follow procedural requirements of the California Administrative Procedure Act (APA), and failed to summarize and respond to each comment. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action for the following reasons:

- A. The proposed regulations failed to comply with the necessity standard of Government Code section 11349.1, subdivision (a)(1), and title 1 of the California Code of Regulations, section 10, subdivision (b);
- B. The proposed regulations failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3);

- C. The Department failed to comply with APA procedural requirements, such as (1) failed to include the economic impact assessment in the rulemaking file as required by Government Code section 11346.3; (2) failed to clearly indicate additions and deletions to the regulations; (3) failed to include written comments in the rulemaking record; and (4) failed to provide six copies of the documents incorporated by reference; and
- D. The Department failed to adequately respond to all of the public comments made regarding the proposed action pursuant to Government Code section 11346.9, subdivision (a)(3).

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

DISCUSSION

The adoption, amendment, or repeal of regulations by the Department must satisfy requirements established by the part of the California Administrative Procedure Act that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

A. NECESSITY STANDARD

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

- (a) ... 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, title 1 of the California Code of Regulations, section 10, subdivision (b) provides:

(b) In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

(1) A statement of the specific purpose of *each* adoption, amendment, or repeal; and

(2) information explaining why *each provision* of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question. (Emphasis added.)

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

The initial statement of reasons in the rulemaking record only identifies two revisions as being substantial changes, therefore, only two statements of specific purpose and rationale were provided. For the remaining modifications, the initial statement of reasons states in general that “the proposed amendments clarify existing reporting requirements and make technical corrections to existing regulations and related forms.”

Nevertheless, a thorough review of the proposed regulations, forms and form instructions reveals that the two revisions identified as substantial changes are not the only changes with regulatory effect. The Department failed to meet the necessity standard for the following changes:

- In section 308, subdivision (a)(4) of the California Code of Regulations (CCR), the Department proposes to insert the following phrase: “and report all revenue raised nationwide; reporting is not restricted to revenue raised in California”;

- The proposed subdivision (e) to section 308 adds the requirement that each form listed in section 308 to be filed with the Attorney General and signed under penalty of perjury;
- The Department proposes to amend the Initial Registration Form, which is also referred to as Form CT-1. One of the proposed amendments, located on page 2 of the form, removes the requirement of organizations to disclose “whether [they] are monitored in [their] home state, and if so, by whom”;
- Page 3 of the proposed new Form CT-1 contains an additional requirement: organizations will be asked to provide the registration number assigned by the Registry of Charitable Trusts;
- The Department proposes to repeal the following forms as well as their related instructions and adopt new versions of them: the Annual Registration Form (Form CT-1CF), the Annual Financial Report/Commercial Fundraiser (Form CT-2CF), the Annual Financial Report/Thrift Store Operations (Form CT-2TCF), the Annual Financial Report/Vehicle Donation Program (Form CT-2VCF), the Fundraising Counsel Annual Registration Form (Form CT-3CF), the Surety Bond Form (Form CT-4CF) [form only], the Commercial Coventurer Annual Registration Form (Form CT-5CF), the Commercial Coventurer Annual Financial Report (Form CT-6CF), the Deposit by Assignment in Lieu of Commercial Fundraiser for Charitable Purposes Surety Bond Form (Form CT-8CF), the Receipt for Notice of Assignment in Lieu of Commercial Fundraiser for Charitable Purposes Surety Bond Form (Form CT-9CF), the Notice of Intent to Solicit for Charitable Purposes – Commercial Fundraiser for Charitable Purposes Form (Form CT-10CF), the Notice of Intent to Solicit for Charitable Purposes – Fundraising Counsel for Charitable Purposes Form (Form CT-11CF), and the Annual Registration Renewal Fee Report (Form RRF-1);
- A comparison of the proposed repealed forms with the proposed adopted forms shows numerous differences between both versions. The proposed new instructions to Form CT-2CF explains that Line 1G requires the commercial fundraiser for charitable purposes to report the “TOTAL (gross) revenue generated from the campaign (nationwide, not just California).” The wordings in parentheses are not in the current Form CT-2CF’s instructions, thus, indicating that the Department will be requesting new information that has not been requested in the past;
- The proposed new Forms CT-2CF, CT-2VCF, and CT-6CF no longer have the requirement to disclose whether the figures in the report are from “National Campaign” or “California Campaign,” which appears on the current forms;
- On page 2 of Form CT-2VCF the Department currently asks for the “[total] amount charity realized from operation of vehicle donation program.” However, the proposed new form asks for the “[net] proceedings to charity from vehicle donation program”;
- The instructions to Form CT-2VCF currently requires commercial fundraisers for charitable purposes to enter “the total money actually collected as a result of the

solicitation. This is the gross amount, without deducting any expenses.” The proposed instructions to the new form would require the organization to enter “the total (gross) revenue generated from the campaign nationwide, not just California”;

- At the bottom of page 1 of Form CT-5CF, the third row of the table currently states “Title/Relationship to Commercial Co-Venturer.” The wording in the proposed new form replaces that with “Title/Relationship to Commercial Fundraiser for Charitable Purposes”;
- The proposed new Form CT-8CF requires the name of the officer of the business. This information is not currently being requested in the existing form;
- The proposed instructions to Form RRF-1 require entities that must register with the Attorney General to annually file Form RRF-1 “even if the corporation files Form 990s annually or is on extended reporting”;
- The current instructions to Form RRF-1 requires “[c]harities with total gross revenue or assets of \$25,000 or more [to] file a copy of the IRS Form 990, 990-EZ, or 990-PF and attachments with the Attorney General’s Registry of Charitable Trusts.” The proposed instructions to the form ask for a copy of the above-mentioned IRS forms and related attachments, *together with Form RRF-1*. The proposed instructions further requires “[o]rganizations whose revenue falls below the threshold for filing IRS form 990-EZ to file *Form RRF-1, together with a treasurer’s report*” (Emphasis added);
- The proposed instructions to Form RRF-1 then directs organizations to another form entitled “Annual Treasurer’s Report” (Form CT-TR1), which is proposed to be adopted but is not incorporated by reference in any of the regulations in the CCR;
- The current instructions to Form RRF-1 state that a “REGISTRATION FEE IS NOT DUE WITH AN AMENDED REPORT FOR ANY REPORT PERIOD IN WHICH A FEE HAS ALREADY BEEN PAID. The proposed version of this document contains the above language, but also says “UNLESS AN AMENDED REPORT CHANGES THE AMOUNT OF THE FEE DUE” (Capitalization and underlining in original);
- In the proposed instructions to Form RRF-1, under Question 6, organizations are required to disclose the name of each funding source;
- In the proposed instructions to Form RRF-1, under Question 8, organizations are required to disclose of the name, mailing address and telephone number of each commercial fundraiser, if they are mentioned in Question 5;
- The Department proposes to repeal a document entitled “Bond Letter” which is essentially a letter from the Attorney General’s Office that explains the statutory requirement for a bond.

As stated above, the initial statement of reasons must include a statement of the specific purpose for *each* adoption, amendment, or repeal, and the rationale for the determination by the agency that *each* regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. Although a couple of substantial changes have a statement of necessity and the Department made one general statement of purpose, the initial statement of reasons has neither a statement of purpose nor an explanation of the rationale for the adoptions, amendments, and repeals discussed above. (Cal. Code Regs., tit. 1, sec. 10, subd. (b).) Thus, before this regulatory action is resubmitted to OAL, the Department must draft a supplemental statement of reasons to correct the lack of necessity in the initial statement of reasons.

Government Code section 11347.1 requires this supplemental statement of reasons, which provides the necessity missing from the initial statement of reasons, to be made available to the public for at least 15 days prior to the Department’s adoption, amendment or repeal of the regulations. Moreover, any comments made in relation to the supplemental statement of reasons must be summarized and responded to in the final statement of reasons. (Gov. Code, sec. 11347.1, subd. (d).)

B. CLARITY STANDARD

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

The “clarity” standard is further defined in section 16, title 1, of the CCR, OAL's regulation on “clarity,” 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:

- (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....

1. Proposed Amendment to the Initial Registration Form

The Initial Registration Form CT-1 is not incorporated by reference in any of the regulations. Rather, the specific regulatory content of the Initial Registration Form is listed in section 300, title 11, of the CCR. Any modifications with a regulatory effect made to Form CT-1 must be reflected in section 300 to ensure that both the regulatory content of the form and the terms of the regulation are the same and are easily understood by those affected by them. It also prevents

confusion and ensures the regulation is not reasonably and logically interpreted to have more than one meaning.

The deletion of the following sentence on the second page of the form is not reflected in section 300: “Indicate whether you are monitored in your home state, and if so, by whom.” The Department further proposes to add language on the third page of the form, which would require organizations to provide a registration (FP) number assigned by the Registry of Charitable Trusts. Here too, the added wording is not repeated in section 300.

Thus, the proposed changes to Form CT-1 that are not reflected in section 300 do not meet the clarity standard. When reading the regulation, those who are directly affected by it may be confused or mislead and not know or understand which requirements to follow.

2. Proposed Adoption of Form CT-TR1

The Department proposes to adopt a new form entitled “Annual Treasurer’s Report” which is also referred as Form CT-TR-1. A close review of this regulatory action reveals that this newly adopted form is not incorporated by reference in any of the regulations and it is neither printed in the CCR nor is its regulatory content listed anywhere in the regulation text. It is simply mentioned in parentheses in the instructions of Form RRF-1.

Omitting to incorporate Form CT-TR1 by reference in the regulations or to include the form’s regulatory content in the regulations may result in those directly affected by the regulations not adequately complying with the Department’s requirements. What the Form CT-TR1 is, and what it requires would not be easily understood by those persons directly affected by it; thus, the mere mention of Form CT-TR1 in the instructions of Form RRF-1 does not meet the clarity standard.

3. Proposed Amendment to Section 308

As previously mentioned, the Department proposes to add subdivision (e) to section 308, which would require each of the forms listed in that section to be filed with the Attorney General and signed under penalty of perjury. However, two forms listed in section 308 do not contain a statement that prompts for a signature under penalty of perjury: Forms CT-8CF and CT-9CF. Requiring a signature under penalty of perjury on a form that does not currently prompts for one would cause confusion to those directly affected by the regulation.

Thus, prior to resubmitting the regulations to OAL for review, this provision or forms must be revised to meet the clarity standard.

4. Proposed Amendment to Section 999.1

The proposed amendment to section 999.1, subdivision (a), changes one of the regulatory citations within the regulation text from 999.2(e) to 999.2(f). However, subdivision (f) of section 999.2 does not exist in the CCR. Those directly affected by this regulation would not easily understand which requirements to comply with. This section must be revised to meet the clarity standard.

The Department must make proposed modifications available to the public for comment for at least 15 days pursuant to Government Code section 11346.8, subdivision (c), and section 44 of title 1 of the California Code of Regulations before resubmitting this regulatory action to OAL for review.

C. PROCEDURAL REQUIREMENTS

The Department failed to follow several required procedures. More specifically, the Department failed to include an economic impact assessment in the rulemaking file, failed to clearly indicate additions and deletions in the regulations with underline and strikeout, failed to include the written comments in the rulemaking record, and failed to provide six copies of the forms incorporated by reference in the regulations.

1. Economic Impact Assessment

On May 11, 2012, the Department published a public notice of proposed action, which commenced this regulatory action. At that time, Government Code section 11346.3, subdivision (b)(1) provided the following:

- (b)(1) All state agencies proposing to adopt, amend, or repeal a regulation ... shall prepare an economic impact analysis¹ that assesses whether and to what extent it will affect the following:
- (A) The creation or elimination of jobs within the State of California.
 - (B) The creation of new businesses or the elimination of existing businesses within the State of California.
 - (C) The expansion of businesses currently doing business within the State of California.
 - (D) The benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

The economic impact assessment (EIA) required by Government Code section 11346.3, subdivision (b)(1), mandates an assessment of any economic impacts described in subdivisions (b)(1)(A) through (C), and the benefits of the regulation described in subdivision (b)(1)(D). This assessment is required to be in the rulemaking file, either set forth within the initial statement of reasons, incorporated by reference in the initial statement of reasons, or identified as a document relied upon in the initial statement of reasons. If one of the latter two approaches is used, the EIA is to be included in the rulemaking file as a separate document.

The Department failed to include an EIA in the initial statement of reasons or in the rulemaking file of the proposed action. Pursuant to Government Code section 11347.1, the Department will

¹ In S.B. 1520 (Stats. 2012, c. 766; eff. Sept. 29, 2012), nonsubstantive amendments were made to Government Code section 11346.3(b)(1). Among these amendments, "economic impact assessment" was substituted for "economic impact analysis" in subdivision (b)(1). OAL uses the current term "economic impact assessment" in this decision.

need to prepare an EIA, make it available to the public for at least 15 days, and then add it to the rulemaking record before resubmitting these regulations to OAL.

2. Underline/Strikeouts

The Department is required to use underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations. (Gov. Code, sec. 11346.2, subd. (a)(3).) The California Code of Regulations further clarifies in section 8, subdivision (b), that:

(b) The final text of the regulation shall use underline or italics to accurately indicate additions to, and strikeout to accurately indicate deletions from, the California Code of Regulations. Underline or italics is not required for the adoption of a new regulation or set of regulations if the final text otherwise clearly indicates that all of the final text submitted to OAL for filing is added to the California Code of Regulations.

The proposed amendment to the Form CT-1 adds the following question on page 2: “Does the organization act as a fiscal sponsor/fiscal agent or otherwise holds funds in trust for one or more unrelated charitable entities?” Although other changes to the form were accurately indicated, this addition was not underlined or italicized as required by the APA.

Also, as previously discussed, the Department proposes to repeal Form CT-11CF and adopt a new version of that form with a different title. Section 308, subdivision (d), incorporates this form by reference; however, it does not reflect the proposed change of Form CT-11CF’s title in any way. Indeed, the APA requires the current wording “to Solicit for Charitable Purpose” in section 308, subdivision (d), to be stricken-out and the term “to Provide Services Related to Charitable Solicitation” to be added and underlined or italicized.

Moreover, the Department proposes to repeal Form RRF-1 as well as its instructions and adopt a new version of these documents. The Department then made some changes to Form RRF-1 and its instructions and provided a 15-day notice to the public. However, the modifications are not clearly indicated. Page 2 of the instructions to the form is entirely underlined, making it difficult to decipher which portions remain the same and which is modified. The Department must accurately indicate the additions and deletions with proper underline/italics and strikeouts.

3. Written Comments

Government Code section 11347.3, subdivision (b)(6), requires the rulemaking file to include “[all] data and other factual information, any studies or reports, and *written comments*, submitted to the agency in connection with the adoption, amendment, or repeal of the regulation.” (Emphasis added.)

The Department’s rulemaking file does not contain the written comments submitted to the Department during the public comment period. Although the Department forwarded them to OAL upon OAL’s request, these comments must be included in the rulemaking file. (Gov. Code, sec. 11347.3, subds. (b)(6) and (b)(12).)

4. Documents Incorporated by Reference

The California Code of Regulations, title 1, section 20, subdivision (a), states that an incorporation by reference is “the method whereby a regulation printed in the [CCR] makes provisions of another document part of that regulation by reference to the other document.” The forms included in the rulemaking file are incorporated by reference, with the exception of forms CT-1, the Initial Registration Form, and CT-TR-1, the Annual Treasurer’s Report.

Although the forms incorporated by reference meet the conditions set forth in subdivision (c) of section 20, title 1 of the CCR, the Department failed to provide six additional copies of the forms pursuant to subdivision (d) of section 20, title 1 of the CCR as well as the one copy required to be filed with the Secretary of State pursuant to Government Code section 11343.

Before these regulations may be resubmitted to OAL, the Department would have to ensure that the adopted, amended and repealed forms are attached to each of the seven Notice Publication/Regulations Submission forms (STD. 400), along with the proposed regulation text, provided to OAL upon resubmission.

E. SUMMARY AND ADEQUATE RESPONSE TO PUBLIC COMMENTS

Government Code section 11346.9, subdivision (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, subdivision (a)(3), requires that the final statement of reasons include:

(a)(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....

In this rulemaking action, the Department provided a 45-day public comment period for its originally proposed text. During that period, a number of written comments were received and the Department adequately summarized and responded to most of these comments. However, three written comments were not summarized and responded to.

1. Assets as of the Last Day of the Organization’s Fiscal Year

Ward S. Pynn, BBR, LLP, Certified Public Accountants, made the following comment:

A further problem that I see is that the proposed asset level is more than \$50,000 at any time during the year. That will create confusion or noncompliance because

the gross receipts are for the full year but the gross assets are at any time during the year. I believe you should simply say assets as of the last day of the organization's fiscal year.

This comment was not summarized or responded to in the final statement of reasons.

2. Governmental Agencies Sharing Information

Edward Murphy, President of The Sunrise Optimist Club of San Diego, wrote to the Department:

Small charities with volunteer staff would be critically impacted by the massive report required by subject proposed rulemaking. Small charities annually e-file reports to the California Franchise Tax Board (FTB) and the IRS. Small charities already annually submit paper reports to you, the Registrar of Charitable Trust (RCT), and if incorporated, to the California Secretary of State (SOS)... The current filing requirement should satiate the AG's mandate to protect the donor's interests... Governmental agencies (SOS, FTB and IRS) have long shared information.

This comment was not summarized or responded to in the final statement of reasons.

3. Additional Filing Requirement Provides No Benefit

David T. Dickerson, Club President of the Optimist Club of Allied Gardens, Edward Murphy, President of the Sunrise Optimist Club of San Diego, Alma E. Vinson, Enrolled Agent at Classic Accounting, Constance J. Pellock of Optimist International, and Alan Zimmer, all argued that the Attorney General's Office is already unable to provide customer service due to budget cuts. Adding the proposed filing requirement would impose additional expenses in order to have adequate staff to review these forms.

This comment was not summarized or responded to in the final statement of reasons.

The Department is required to summarize and respond to the written comments mentioned above before resubmitting the rulemaking action to OAL for review.

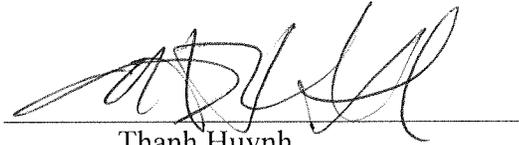
MISCELLANEOUS

For future reference, the Department must ensure that the exact title of the documents incorporated by reference is used when these documents are being mentioned.

CONCLUSION

For the reasons stated above, OAL disapproved this regulatory action proposed by the Department. If you have any questions, please contact me at (916) 323-6824.

Date: June 17, 2013

A handwritten signature in black ink, appearing to read 'Thanh Huynh', is written over a horizontal line.

Thanh Huynh
Staff Counsel

FOR: DEBRA M. CORNEZ
Director

Original: Kamala Harris
Copy: Erica Goerzen, Belinda Johns