

**State of California
Office of Administrative Law**

**In re:
Physical Therapy Board of California**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

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

Government Code Section 11349.3

**Adopt sections: 1398.14 and 1399.80
Amend sections: 1399.98
Repeal sections:**

OAL File No. 2013-0617-06S

SUMMARY OF REGULATORY ACTION

On June 17, 2013, the Physical Therapy Board of California (the Board) submitted to the Office of Administrative Law (OAL) its proposed regulatory action to adopt sections 1398.14 and 1399.80 and to amend section 1399.98 in Title 16 of the California Code of Regulations (CCR). These regulatory provisions would require licensees to submit a full set of fingerprints to the Department of Justice as a condition of license renewal. Licensees would also be required to disclose to the Board their criminal history information, the existence of any settlement, judgment or arbitration award of over \$3,000 for which they were subject to, and whether they have been denied a license or disciplined by another licensing authority.

On July 30, 2013, OAL notified the Board that OAL disapproved the proposed regulations because the regulations failed to follow procedural requirements of the California Administrative Procedure Act (APA), failed to comply with the necessity and clarity standards of Government Code section 11349.1, 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:

1. The Board failed to meet the APA procedural requirement to prepare an economic impact assessment in the rulemaking file in compliance Government Code section 11346.3;
2. 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);

3. The proposed regulations failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3); and
4. The Board 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 Board 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.

1. Procedural Requirement To Prepare An Economic Impact Assessment

The Board failed to follow required procedures because it failed to prepare an economic impact assessment in accordance with Government Code section 11346.3(b)(1), which states 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.

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.

- (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.

On March 23, 2012, the Board published a public notice of proposed action, which commenced this regulatory action. At that time, the above-mentioned statutory provision was in effect, therefore, the Board is statutorily mandated to prepare an assessment of the economic impacts described in subdivisions (b)(1)(A) through (C), and the benefits of the regulation described in subdivision (b)(1)(D).

The EIA that the Board provided to OAL did not contain the required assessment. Although the EIA does state that the Board determined there is no economic impact described in subdivisions (b)(1)(A) through (C), it does not, however, provide an explanation for this determination. Government Code section 11346.3, subdivision (b)(1) requires an *assessment*. In other words, the Board must perform an analysis, explaining why and how it determined that no jobs in California will be created or eliminated, no businesses in California will be created or eliminated, and no businesses will be expanded as a result of the implementation of the proposed regulations.

Moreover, the EIA states that the proposed regulations would assist the Board in gaining more easy access to criminal history information. Surely, this states the advantages that the proposed regulations would provide to the Board. It does not, however, assess the benefits of the said regulations in accordance with subdivision (b)(1)(D). The Board may list the advantages of the proposed regulations but in doing so, it must explain how these advantages benefit the health and welfare of California residents, worker safety, and the state's environment.

Thus, the Board will need to prepare an EIA that meets the requirements of Government Code section 11346.3, subdivision (b)(1). The Board must then make this revised EIA available to the public for at least 15 days and add it to the rulemaking record before adopting the regulations and resubmitting these regulations to OAL. (Gov. Code, sec. 11347.1) Additionally, any comments made in relation to this revised EIA must be summarized and responded to in the final statement of reasons. (Gov. Code, sec. 11347.1, subd. (d).)

2. Necessity Standard

The Board failed to meet the 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.

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. Specifically, Government Code section 11346.2, subdivision (b)(1) states, in part:

- (b) An initial statement of reasons... shall include...:
- (1) A statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed. The statement shall enumerate the benefits anticipated from the regulatory action, including the benefits or goals provided in the authorizing statute.

In short, the initial statement of reasons must state the problem the Board intends to address, the purpose for the adoption or amendment, and the rationale for the adoption or amendment for *each* regulatory provision. More simply put, the initial statement of reasons must include a statement, for *each* regulatory provision, explaining “why” the proposed regulation is needed and “how” this regulation fills that need. The initial statement of reasons must then 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.

Here, the Board failed to comply with the necessity standard. The initial statement of reasons does not state the problem the Board intends to address, the purpose for the adoption or amendment, and the rationale for the adoption or amendment for *each* regulatory provision.

For example, the Board’s proposed section 1398.14 requires licensees to provide criminal history information within 30 days of the Board’s request and to make available all documents requested by the Board. The rulemaking record’s initial statement of reasons reiterates the language

contained in the proposed regulation and explains that the provision would protect consumers by assisting the Board in ensuring that the licensees are in compliance with the Physical Therapy Practice Act. These statements do not explain the problem the Board intends to address, the purpose of the regulation, and the rationale for adopting this regulation. In other words, the Board did not answer “why” the regulation requiring licensees to provide criminal history information and to make available all documents requested by the Board is needed and “how” the regulation fills that need.

Thus, before this regulatory action is resubmitted to OAL, the Board must draft a supplemental statement of reasons to correct the lack of necessity in the initial statement of reasons. The Board must ensure that the necessity standard is complied with for *each* regulatory provision. Pursuant to Government Code section 11347.1, this supplemental statement of reasons, which would provide the necessity missing from the initial statement of reasons, must be made available to the public for at least 15 days prior to the Board’s adoption, amendment or repeal of the regulations. Additionally, 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).)

3. 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.”

In this regulatory action, the Board failed to comply with the clarity standard of the APA.

3.1. Application Form in Proposed Section 1399.98(e)(1)

Proposed section 1399.98, subdivision (e)(1), states that inactive licensees who seek to restore their inactive license to an active status are required to submit “a completed Inactive/Active application form.” Surely, this language indicates that licensees must use a single application form.

However, within the same paragraph, the provision further states that the “application shall be made on forms prescribed by the board and shall contain [the name of the licensee, license type and number, etc.]” Here, the language suggests that there is more than one form, the Board may prescribe other forms at its discretion, and the forms may contain more than the items listed in the regulation.

Pursuant to title 1, California Code of Regulations, section 16, subdivision (a)(1), a “regulation shall be presumed not to comply with the ‘clarity’ standard if [...] the regulation can, on its face,

be reasonably and logically interpreted to have more than one meaning.” In this proposed section, the number of application forms required to be used and the content of the form or forms are unclear.

3.2. Clarity of Display for Proposed Section 1399.80

In the regulation text submitted to OAL, the Board indicated its intent to place proposed section 1399.80 under article 13. However, the numbering of section 1399.80 does not fit in article 13. The last section in article 12, which immediately precedes article 13, is numbered 1399.85.

Proposed section 1399.80 would not fit in article 12 either. Section 1399.85 was renumbered to fit in another place in the CCR but article 12 still contains the section 1399.85 heading and includes the history of the regulation. Although the numbering of section 1399.80 may fit into article 12, placing the content of section 1399.80 into article 12 would be unclear because the subject matter of section 1399.80 does not fall within the subject matter as described by the heading of article 12, nor does it fall within the subject matter of article 13; thus, the Board must find a new home for section 1399.80 for purposes of clarity of display (perhaps under a new article heading).

3.3. Proposed Amendment to Title of Article 13 of Division 13.2

Currently, article 13 is entitled “Continuing Competency and Inactive License Status.” In the regulation text submitted to OAL, the Board is proposing to strikeout the phrase “Continuing Competency and Inactive License Status” in order to replace it with “Requirement for Renewal.”

As discussed above, the Board is proposing to adopt a new section 1399.80, which is entitled “Fingerprint and Disclosure Requirements for Renewal of License,” and place it under article 13. However, article 13 currently includes existing sections that contain the language “continuing competency” and “inactive license” in the title as well as in the text. Thus, striking out the existing title to replace it with “Requirement for Renewal” may cause confusion because the article does not address renewal of licenses exclusively.

3.4. Waived Requirement in Proposed Section 1399.80(a)(3)

Proposed section 1399.80 provides, in part:

- (a) As a condition of renewal for a license... a licensee who was licensed prior to January 1, 1998... shall furnish... a full set of fingerprints...
 - (1) The licensee shall pay any costs for furnishing the fingerprints and conducting the searches.
 - (2) The licensee shall certify when applying for renewal whether his or her fingerprints have been furnished to the Department of Justice in compliance with this section

(3) This requirement is waived if the license is renewed in an inactive status, or if the licensee is actively serving in the military outside the country.

The term “this requirement” in subdivision (a)(3) is unclear. While subdivision (a) refers to the fingerprint requirement, subdivision (a)(2) refers to a certification requirement. On its face, the term “this requirement” in subdivision (a)(3) can reasonably and logically be interpreted to mean either the fingerprint requirement or the certification requirement or possibly both.

For the reasons discussed above, the Board failed to comply with the clarity standard of the APA. Thus, the Board 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 adopting the regulations and resubmitting this regulatory action to OAL for review. Additionally, any comments made in relation to these proposed modifications must be summarized and responded to in the final statement of reasons. (Gov. Code, sec. 11347.1, subd. (d).)

4. 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.... [Emphasis added.]

In this rulemaking action, the Board held a public hearing during which an individual made several comments. Included in the rulemaking file are the minutes for that hearing, which state the following:

Dr. Syms, CPTA President, asked the Board to address the following questions during the hearing: 1) why 30 days was chosen for a licensee to respond to the Board, 2) when the 30 day window to respond to Board inquiries begins and 3) whether the Board means 30 calendar days or 30 working days. Ms. Barker [the Board’s Legal Counsel] advised Dr. Syms that the purpose of the public hearing was for the Board to receive comment and that it would be helpful if he framed his questions as comments on the problems/issues perceived with the regulation.

After the hearing closed, Dr. Syms also inquired as to the need of this regulation to require fingerprinting. The Board indicated this is addressed in the rulemaking file.

Although Dr. Syms framed his objections and recommendations in the form of questions, the questions are nevertheless comments. In other words, Dr. Syms commented on the necessity for a 30-day time frame, the clarity of when the 30-day begins and when it ends, and the necessity for a fingerprint requirement. These comments were not summarized or responded to in the final statement of reasons. The Board is required to summarize and respond to these comments before resubmitting the rulemaking action to OAL for review.

CONCLUSION

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

Date: August 5, 2013



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