State of California
Office of Administrative Law

In re: **Veterinary Medical Board**	**DECISION OF DISAPPROVAL OF REGULATORY ACTION**
Regulatory Action: Title 16 California Code of Regulations	**Government Code Section 11349.3**
Adopt sections: 2090, 2090.1, 2091, 2091.1, 2092, 2092.1, 2093, 2093.1, 2094, 2095, 2095.1, 2095.2, 2095.3 **Amend sections:** **Repeal sections:**	**OAL File No. 2014-1028-01 S**

SUMMARY OF REGULATORY ACTION

This rulemaking action by the Veterinary Medical Board (Board) proposes to adopt thirteen new sections in title 16 of the California Code of Regulations (CCR) related to the California Pet Lovers License Plate Program (Program). These regulations provide a framework for the California Spay and Neuter License Plate Fund, Inc. (Fund) to approve and issue grants for no and low cost animal sterilization services.

On October 28, 2014, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On December 12, 2014, OAL notified the Board that OAL disapproved the proposed regulations. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

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

1. The proposed regulations failed to comply with the authority standard of Government Code section 11349.1, subdivision (a)(2);
2. The proposed regulations failed to comply with the necessity standard of Government Code section 11349.1, subdivision (a)(1);
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 follow the required Administrative Procedure Act (APA) procedures by omitting to:
   a. provide a sufficient Economic Impact Assessment pursuant to Government Code section 11346.3, subdivision (b)(1); and
   b. provide a sufficient explanation for nonsubstantive revisions to the regulation text pursuant to Government Code section 11346.8, subdivision (c).

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

DISCUSSION

The Board's regulatory action must satisfy requirements established by the part of the APA 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 Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 APA 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. Authority Standard

OAL must review regulations for compliance with the authority standard of the APA, as required by Government Code section 11349.1, subdivision (a)(2). Government Code section 11349, subdivision (b), defines "authority" to mean: "the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation."

Each proposed regulation section must include "authority" and "reference" citations at the end of the section. (Gov. Code, sec. 11344, subd. (e); Gov. Code, sec. 11346.2, subd. (a)(2).) OAL reviews the "authority" and "reference" citations at the end of each proposed regulation section to verify that the agency has been granted the regulatory power to adopt the regulation and to verify that the proper sources of "authority" and "reference" for the regulation are cited.

OAL's regulation in subdivision (a) of section 14 of title 1 of the CCR states that authority:

> shall be presumed to exist only if an agency cites in its "authority" note proposed for printing in the California Code of Regulations:

> (1) a California constitutional or statutory provision which expressly permits or obligates the agency to adopt, amend, or repeal the regulation; or
> (2) a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted.

Regarding the review of authority and reference citations, subdivision (c) of section 14 of title 1 of the CCR adds:

> OAL shall use the same analytical approach employed by the California Supreme Court and the California Court of Appeal, as evidenced in published opinions of those courts.
> (1) For purposes of this analysis, an agency's interpretation of its regulatory power, as indicated by the proposed citations to "authority" or "reference" or any supporting documents contained in the rulemaking record, shall be conclusive unless:
> (A) the agency's interpretation alters, amends or enlarges the scope of the power conferred upon it; ...

In this rulemaking action, the Board fails to comply with the "authority" standard of the APA by improperly delegating rulemaking authority to the Fund, thus enlarging the scope of power conferred upon it by the Legislature.

The Board relies upon Vehicle Code section 5156 and Business and Professions Code section 4808 as authority to promulgate these regulations. Vehicle Code section 5156 contains the requirements for a state agency to apply to the Department of Motor Vehicles in order to sponsor a specialized license plate program. Business and Professions Code section 4808 provides general rulemaking authority for the Board to adopt, amend, or repeal rules and regulations in accordance with the APA.

The proposed regulatory language and the rulemaking file define the Board's role as the sponsoring state agency of the Program and establish that the Fund, a non-profit organization, will act as the administrator of the Program. Under the Program, revenue generated by the issuance, renewal, transfer, and substitution of pet lovers license plates will be distributed to approved entities in the form of grants, for the purpose of providing no and low cost animal sterilization services. The proposed regulations are intended to establish a framework for the Fund to distribute those grants to approved entities. However, in this rulemaking action, the Board has not exercised its authority and judgment to define necessary Program standards and procedures, opting instead to rely on the Fund's discretion in order to establish these standards and procedures.

For example, proposed section 2093.1 generally discusses the application for entities to apply for grants to fund no and low cost animal sterilization services and the application review criteria. Section 2093.1 is the only section of the proposed regulations that specifically addresses the grantee application. Proposed section 2093.1 reads as follows:

> The Fund reserves the right, on an annual basis, to approve applications on a 'first come/first served' basis depending on availability of funds and other criteria that promotes the official work of this program.

The non-prescriptive language of proposed section 2093.1 illustrates that the Board intends for section 2093.1 to be supplemented with additional information regarding the application form, application process, application procedures, and grant approval criteria, all of which will presumably be determined by the Fund as the administrator of the Program.[1]

As a general rule, "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void....[Citations.]" (*Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 758.) The Board cites Vehicle Code section 5156 and Business and Professions Code section 4808 as authority to promulgate proposed section 2093.1. However, nothing in Vehicle Code section 5156 or Business and Professions Code section 4808 specifically permits or obligates the Board to delegate its rulemaking authority to the Fund. Additionally, nothing in the statutory scheme assigns any specific powers or responsibilities to the Fund or identifies which, if any, of the Board's powers may be delegated to the Fund, and under what circumstances.

California courts have found that in the absence of express statutory authorization, a power delegated to a state agency may not be further delegated if the delegated power requires the exercise of discretion. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24-25; *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144; *American Federation of Teachers v. Board of Education* (1980) 107 Cal.App.3d 829, 834; 90 Ops.Cal.Atty.Gen. 89 (2007).)

Regarding proposed section 2093.1, the Board has not exercised its discretion, and thus its rulemaking authority, to establish clear application procedures and grant award criteria. In leaving the proposed text of section 2093.1 vague and non-prescriptive, the Board has chosen to allow the Fund to utilize its discretion to determine the grantee application procedure, the application timeline, and the criteria to be used to determine which grantees will receive Program grants. These determinations inherently require broad exercise of the Fund's judgment and discretion. Although the Board retains general oversight authority over the Fund, the regulations ultimately leave the Fund solely responsible for dictating the grant application procedures and approval criteria to be utilized in order to award grants to approved grantees.

As a practical matter, delegating rulemaking authority to a non-profit entity in order to develop state Program procedures and criteria circumvents the opportunity for the public to knowledgeably and meaningfully participate in the rulemaking process.

As such, the Board's attempt to delegate its rulemaking power to the Fund runs afoul of the Board's statutory and implied rulemaking authority. Thus, the Board has failed to comply with the authority standard of the APA.

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[1] The Board confirmed this interpretation and the intended effect of the proposed regulations in two phone conversations that occurred on December 5, 2014 and December 8, 2014.

2. Necessity Standard

OAL must review regulations for compliance with the necessity standard of Government Code section 11349.1, subdivision (a)(1). Government Code section 11349, subdivision (a), defines "necessity" as follows:

> (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.

To further explain the meaning of "substantial evidence" in the context of the necessity standard, subdivision (b) of section 10 of title 1 of the CCR provides:

> (b) In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:
> (1) A statement of the specific purpose of each adoption, amendment, or repeal; and
> (2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the initial statement of reasons (ISOR). The ISOR is the primary document in the rulemaking record that demonstrates that the adoption, amendment, or repeal satisfies the necessity standard. Specifically, Government Code section 11346.2, subdivision (b)(1), states:

> (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.

The ISOR 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 of the information upon which the proposal is based. (Gov. Code, sec. 11346.2, subd. (b); Gov. Code, sec. 11346.5, subds. (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 ISOR 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, sec. 11347.3, subds. (b)(2) and (7).)

The ISOR provided by the Board in this rulemaking action was inadequate to demonstrate the need for a number of the proposed regulatory provisions. As a result, the Board must prepare an addendum to the ISOR that includes an explanation of why each of the regulatory provisions are necessary to carry out the purposes for which they were proposed. The Board will need to add the document to the rulemaking file and must make the document available for 15 days pursuant to Government Code section 11347.1. The following examples illustrate places where statements in the ISOR need to be supplemented in order to satisfy the necessity standard.

2.1 Proposed Section 2092.1 of the CCR

The proposed adoption of section 2092.1 establishes a list of items the Fund is required to report to the Board within 15 working days of occurrence. The ISOR provides:

> The proposed language specifies Fund notification provisions in order to establish the Board's authority over the Fund and provide clear notice to the Fund of specific terms required to be reported to the Board so that the Board may take account of how grant funds are expended.

This explanation does not provide sufficient information to explain the need for subdivisions (a) through (d) in proposed section 2092.1. For example, based on the explanation provided, it is unclear why information regarding the departure or appointment of Fund board members is necessary to monitor the expenditure of grant funds. If the Board is requesting information regarding changes to the composition of the Fund's board in order to remain aware of any possible geographic bias held by members of the board, the Board should include that explanation in the ISOR.

2.2 Proposed Section 2093 of the CCR

The proposed adoption of section 2093 establishes eligibility criteria for entities to qualify as grantees of the Program in order to become eligible for grants to provide no and low cost animal sterilization services. The statement provided to support the necessity for the adoption of these provisions states the following:

> The proposed language establishes criteria for grant consideration in order to provide clear requirements to the grantee for determining grant eligibility. Eligibility requirements have been established to ensure funds are granted to specific entities, funds are in compliance with specific control agency laws, and the funds are distributed to specific entities that already provide specified services.

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 2093. For example, subdivision (c) of section 2093 enumerates five eligibility requirements with which entities must comply in order to be eligible to become grantees of the Program. The ISOR does not explain why these specific requirements must be met in order to become a grantee of the Program. Additionally, the ISOR does not explain why the Board is interested in ensuring that "specific entities" are the recipients of the grant funds or what these "specific entities" are.

2.3 Proposed Section 2095.1 of the CCR

The proposed adoption of section 2095.1 requires grantees to keep and maintain all Program funds segregated from all other revenue. Section 2095.1 also provides that monies shall not be diverted to any government entity's general fund. Regarding this language, the ISOR provides:

> The proposed language establishes accounting requirements for grant funds in order to ensure funds cannot be diverted or commingled with other revenue for purposes of funding anything other than what the funds were intended.

This statement fails to provide substantial evidence to support the need to differentiate between the types of entities eligible for grant funds. Based on the grantee eligibility requirements enumerated in proposed section 2093, there are a variety of other entities that are eligible to become grantees of the Program. This statement should explain why the Board felt it necessary to distinguish between governmental entities and the other eligible entities enumerated in proposed section 2093.

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."

The "clarity" standard is further defined in section 16 of title 1 of the CCR, OAL's regulation on "clarity," which provides the following:

> 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; or

(2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
(3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
(4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
(5) the regulation presents information in a format that is not readily understandable by persons "directly affected;" or
(6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be "directly affected" if they:
(1) are legally required to comply with the regulation; or
(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 a number of regulatory provisions in the Board's proposed action that do not meet the clarity standard.

3.1 Proposed Section 2091 of the CCR

Proposed section 2091 states: "The Board may withdraw its recognition of the Fund in the following circumstances: ... (b) If the Fund fails to provide *any documents or records* that are requested by the Board...." (Emphasis added.)

Subdivision (b) is unclear because the regulation presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).) In subdivision (b), the Board fails to identify which specific "documents and records" may be requested by the Board pursuant to this section. Proposed section 2092 requires the Fund to submit specific information, documents, and records to the Board on an annual basis. Neither the text of proposed section 2091 nor the ISOR clarify whether the reporting requirements enumerated in proposed section 2092 are the "documents and records" the Board is referring to in proposed section 2091. As written, subdivision (b) is too vague to provide an entity any meaningful guidance regarding the requirements being imposed. As such, the regulation is unclear.

3.2 Proposed Section 2091.1 of the CCR

Proposed section 2091.1 states: "Prior to taking any action to withdraw recognition of the Fund, the Board shall provide the Fund *due notice and an opportunity to be heard*." (Emphasis added.)

Proposed section 2091.1 is unclear for several reasons. First, the regulation as a whole is unclear because the language of the regulation conflicts with the description of the effect of the regulation in the ISOR. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) The proposed adoption of section 2091.1 establishes a requirement for the Board to notify the Fund prior to withdrawal of recognition of the Fund. Additionally, proposed section 2091.1 provides the Fund an opportunity to be heard prior to the Board taking any action to withdraw said recognition. Regarding this section, the ISOR merely declares:

> The proposed language establishes a notice process for Board withdrawal of Fund recognition in order to provide the Fund the opportunity to contest withdrawal of recognition.

This statement does not accurately describe what is accomplished by the adoption of section 2091.1. Contrary to the explanation provided, proposed section 2091.1 does not "establish a notice process" regarding withdrawal of recognition of the Fund. This regulatory language merely acknowledges that a notice process exists and that the Fund should be afforded the opportunity to be heard prior to withdrawal of recognition of the Fund. Section 2091.1 does not contain any specifics regarding the "due notice" to be provided to the Fund sufficient to be classified as a "notice process." As such, the regulation is unclear.

Second, the phrase "due notice" is vague. The phrase is not defined in the regulation or the governing statute, thus the phrase does not have a meaning generally familiar to those "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(3).) With this language, the Board may provide any form of "due notice" it desires, because no specific method of notice is prescribed. Without further clarification, it is not readily apparent whether notice will be provided to the Fund orally or in writing, within three days of taking action to withdraw recognition of the Fund or within three weeks. Because the method in which notice must be provided and the timeline in which notice must be delivered are left unspecified, the regulation is unclear.

Third, the phrase "opportunity to be heard" is vague. The phrase is not defined in the regulation or the governing statute, thus the phrase does not have a meaning generally familiar to those "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(3).) With this language, the Board is affording the Fund an opportunity to be heard, but the manner in which the Fund will be heard is not defined. Because this procedure is left unspecified, the regulation is unclear.

3.3 <u>Proposed Section 2092 of the CCR</u>

Subdivision (g) of proposed section 2092 states: "(g) The number of animal sterilization procedures performed by Grantees with Program funds, *per geographic region*." (Emphasis added.)

On its face, the phrase "per geographic region" can be reasonably interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1).) With this language, it is unclear whether the Board is requesting information regarding the number of no and low cost animal sterilization procedures performed by Grantees with Program funds in all California counties, in all California cities, in all of Northern and Southern California, or in some other defined

"geographic area." Because this language is subject to more than one meaning, the regulation is unclear.

3.4 Proposed Section 2093 of the CCR

Proposed section 2093 states:

> An entity is eligible to be a Grantee of the Program if it meets the following criteria:
> (a) An entity is eligible to be a Grantee of the Program if it is at least one of the following: ...
> (b) An entity is eligible to be a Grantee of the Program if it does at least one of the following: ...
> (c) An entity is eligible to be a Grantee of the Program if it complies with all of the following *as applicable*:
> (1) The Veterinary Medicine Practice Act;
> (2) The U.S. Internal Revenue Service;
> (3) The California Franchise Tax Board; and
> (4) The California Veterinary Public Health Section, including *mandated rabies control activities* and reporting for the Local Rabies Control Activities Annual Report;
> (5) Hold a valid veterinary premises registration as required by Section 4853 of the Business and Professions Code. [Emphasis added.]

Proposed section 2093 is unclear for two reasons. First, the regulation as a whole is unclear because, on its face, the regulation can be reasonably interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1).) From the language of the proposed regulation, it is not clear whether an entity must comply with subdivisions (a), (b), *and* (c), or (a), (b), *or* (c) in order to be eligible to become a grantee of the Program. Because the regulation may be interpreted two different ways, the regulation is unclear.

Second, subdivision (c) is unclear because the regulation presents information in a format that is not readily understandable by persons "directly affected" and the regulation does not use citation styles which clearly identify published material cited in the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5) and (6).) Subdivisions (c)(1) through (c)(4) of proposed section 2093 identify legal requirements with which entities must comply in order to be eligible to serve as approved grantees of the Program. As written, the requirements enumerated in subdivisions (c)(1) through (c)(4) are too vague to provide an entity any meaningful guidance regarding the requirements being imposed and how an entity would be able to comply with the requirements.

For example, subdivision (c)(3) requires an entity to comply with the "California Franchise Tax Board." This reference is not accompanied by a supporting citation. If the Board is attempting to require entities to comply with specific regulations implemented and enforced by the California Franchise Tax Board, the Board should cite to those specific sections.

Another example, subdivision (c)(4) requires an entity to comply with "mandated rabies control activities." The phrase "mandated rabies control activities" is not accompanied by a supporting citation and is not defined elsewhere in the regulations. Based on the proposed language, it is not clear what activities qualify as "mandated rabies control activities." If the Board is attempting to require entities to comply with specific rabies control statutes or regulations, the Board should cite to those specific sections.

Additionally, based on the language of subdivision (c) and the explanation in the ISOR, it is unclear what the Board means by the phrase "as applicable."

Because section 2093 may be interpreted to have more than one meaning, does not present information in a format that is readily understandable by persons directly affected, and does not use citation styles which clearly identify published material cited in the regulation, section 2093 is unclear.

3.5 Proposed Section 2093.1 of the CCR

Proposed section 2093.1 states: "The Fund reserves the right, *on an annual basis*, to approve applications on a *'first come/first served' basis* depending on availability of funds and *other criteria that promotes the official work of this program.*" (Emphasis added.)

Proposed section 2093.1 is unclear for several reasons. First, the regulation as a whole is unclear because the language of the regulation conflicts with the description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) The proposed adoption of section 2093.1 establishes that the Fund may annually approve grant applications on a first come, first served basis, depending on the availability of funds and "other criteria that promotes the official work of this program." Regarding this section, the ISOR states:

> The proposed language establishes application approval criteria in order to provide clear notice regarding the basis for approving grantee applications and ensure that available funds are equitably distributed.

This statement does not accurately describe what is accomplished through the adoption of section 2093.1. Contrary to the explanation provided, proposed section 2093.1 does not "establish application approval criteria" to be used in order to award grants to fund no and low cost animal sterilization services. This regulatory language merely acknowledges that an application is required and that the Board will annually approve applications on a first come, first served basis. Also contrary to the explanation provided, section 2093.1 does not provide "clear notice" to grantees regarding the criteria upon which award determinations will be made. As such, the regulation is unclear.

Second, the term "applications" is vague and does not present information in a format that is readily understandable to persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).) In proposed section 2093.1, the Board refers to an application for grantees to apply for grants to fund no and low cost animal sterilization services. However, the Board does not include any pertinent specifics regarding the application process. For example, the Board does

not identify the application form, where to obtain the application, the information requested as part of the application process, or where to submit completed applications. Because the Board failed to include any details regarding the application process such that those directly affected would be informed of the requirements imposed, this regulation is unclear.

Third, the proposed regulatory language regarding the review of applications on a "'first come/first served' basis" is vague and does not present information in a format that is readily understandable to persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).) The Board does not identify when the application process will begin or how potential grantees will know that the application period has commenced. Because the application procedure and timeline for the application process is vague and provides little guidance to those directly affected, this regulation is unclear.

Fourth, the phrase "other criteria that promotes the official work of this program" is vague and does not present information in a format that is readily understandable to persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5). The regulations do not explicitly define what criteria "promotes the official work of the Program." This lack of specificity leaves entities without any meaningful guidance regarding the criteria to be evaluated in determining which entities will be awarded grants under the Program. As such, the regulation is unclear.

3.6 Proposed Section 2094 of the CCR

Proposed section 2094 states:

> Every Grantee shall agree to the following Program requirements prior to receipt of funding:
> (a) Grantee shall provide *information and records* as requested by the Fund, including but not limited to, receipts and records of sterilization procedures.
> (b) Grantee shall *maintain its operations and records as open for inspection or audit by the Fund.* [Emphasis added.]

Subdivision (a) is unclear because the regulation presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).) In subdivision (a), the Board fails to identify which specific "information and records" may be requested by the Board pursuant to this section. If the Board is attempting to require grantees to provide information and records related to the Program requirements enumerated in proposed section 2095, subdivisions (b) and (c), the Board should rephrase subdivision (a) to specifically refer to section 2095, subdivisions (b) and (c). As written, subdivision (a) is too vague to provide an entity any meaningful guidance regarding the requirements being imposed. As written, the regulation is unclear.

Additionally, subdivision (b) uses language incorrectly and is confusing as written. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(4).) If the Board is attempting to require grantees to maintain operations and records *for purposes of* inspection or audit by the Fund, the Board should rephrase subdivision (b) to specify this request. Furthermore, it is unclear how a grantee is to "maintain its operations and records." Does the Board intend that the grantee merely make its

operations and records "available" for inspection or audit by the Fund? As written, the regulation is unclear.

3.7 Proposed Section 2095 of the CCR

Subdivision (a) of proposed section 2095 states: "Grantees receive funding to provide specific services in addition to existing services already funded and provided by that Grantee."

Subdivision (a) presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).) Based on the express language of subdivision (a), it is not clear what services qualify as "existing services already funded and provided by that Grantee," or how this standard should be applied in practice. As written, subdivision (a) is unclear.

Subdivision (b) of proposed section 2095 states: "(b) Grantees shall use Program funds for no or low cost sterilization of only dogs, cats, and rabbits."

Subdivision (b) of proposed section 2095 is unclear because the language of subdivision (b) conflicts with the description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) Subdivision (b) specifies that Program funds must be utilized for the limited purpose of funding no and low cost sterilization of dogs, cats, and rabbits. However, the ISOR further narrows the applicable use of grant funds, stating:

> The proposed language establishes the grantee provide specific services and defines the ineligible use of funds in order to ensure funds are only spent on no or low-cost sterilization of cats, dogs, and rabbits, *in that order*.... [Emphasis added.]

Based on the language of subdivision (b), nowhere is it stated that grant funds are to be spent on no or low cost sterilization services for specific animals in a specific order, with a priority on using grant funds for services for cats. As such, the language of the regulation conflicts with the Board's description of the effect of the regulation and is unclear.

Subdivision (c) of proposed section 2095 also violates the clarity standard of the APA. Subdivision (c)(2) of proposed section 2095 states: "(c) Grantees shall not use Program funds for any of the following: ... (2) To fund overhead and/or *operational costs*...." (Emphasis added.)

Subdivision (c) is unclear because the regulation presents information in a format that is not readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).) Based on the text of proposed section 2095 and the explanation in the ISOR, it is unclear how a grantee may use Program funds to provide no or low cost sterilization services to cats, dogs, and rabbits without expending any of the funds on "operational costs." If surgical operational costs such as the price of labor, tools, and office space cannot be paid for using grant funds, it is unclear what grant funds are actually intended to be used for. This phrasing is not readily understandable to those directly affected and thus, is unclear.

3.8 Proposed Section 2095.1 of the CCR

Proposed section 2095.1 states:

> Grantees, including governmental entities, shall keep and maintain all Program funds segregated from all other revenue, such that there shall be no commingling of Program funds with other revenue. Grantees, including governmental entities, may segregate these funds by use of "special" funds, trust funds, or other methods to prevent these funds from being commingled with general fund revenue. In no event shall the monies from the Fund be diverted to any *governmental entity's* general fund. [Emphasis added.]

Proposed section 2095.1 is unclear because the language of the regulation conflicts with the Board's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) Proposed section 2095.1 establishes that grantees must keep all Program grant funds separate from all other revenue in order to prevent the commingling of funds. Regarding this section, the ISOR states:

> The proposed language establishes accounting requirements for grant funds in order to ensure funds cannot be diverted or commingled with other revenue for purposes of funding anything other than what the funds were intended. [Sic.]

This statement does not accurately describe what is accomplished through the adoption of section 2095.1. Contrary to the explanation provided, proposed section 2095.1 does not "establish accounting requirements for grant funds." This regulatory language merely states that Program grant funds shall be kept separate from other revenue, in order to ensure there is no commingling of funds. Section 2095.1 does not contain any specifics regarding grantee accounting procedures sufficient to be classified as "accounting requirements."

Additionally, there is no description in the ISOR to explain why the Board drew a distinction between governmental entities and the rest of the entities eligible for grant funds.

As such, the language of proposed section 2095.1 conflicts with the Board's statement of the effect of the regulation and thus, is unclear.

3.9 Proposed Section 2095.2 of the CCR

Subdivision (e) of proposed section 2095.2 states: "(e) Total revenue for administrative services and the *detail of services required*." (Emphasis added.)

This subdivision uses language incorrectly and is confusing as written. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(4).) If the Board is interested in collecting information regarding the cost of the administrative services rendered by the Department of Motor Vehicles and the services actually administered to justify said cost, the Board should rephrase subdivision (e) to specify its request clearly. As written, the regulation is unclear.

3.10 Proposed Section 2095.3 of the CCR

Proposed section 2095.3 states: "The Board shall request transfer of funds on no less than an annual basis and may request quarterly or biannual fund transfers. The Board may request funds be transferred directly to the Fund."

This regulation is unclear for two reasons. First, the proposed language of section 2095.3 conflicts with the Board's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) The proposed adoption of section 2095.3 establishes a requirement for the Board to request the transfer of funds no less than once per year. The statement provided to support necessity for the adoption of this provision states the following:

> The proposed language establishes a transfer frequency of funds from the Fund and *sets expenditure limits* in order to ensure funds are consistently distributed, protect the integrity of the program, and maximize the number of animal sterilizations. [Emphasis added.]

Contrary to the explanation provided, proposed section 2095.3 does not "set expenditure limits" on the distribution of funds. Thus, the regulation is unclear.

Second, proposed section 2095.3 does not present information in a format that is readily understandable by persons "directly affected." (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(5).) Based on the language of the proposed regulation, it is not clear where the Board should direct its request to facilitate the transfer of funds. As such, the regulation is unclear.

OAL also notes that the transfer procedure described in proposed section 2095.3 does not align with the presently utilized procedure for the appropriation of revenues derived from the issuance, renewal, transfer, and substitution of specialized license plates in the Specialized License Plate Fund. Vehicle Code section 5157, subdivision (c), provides:

> (c) Except as provided in paragraph (5) of subdivision (a), and after deducting its administrative costs under this section, the department shall deposit the additional revenue derived from the issuance, renewal, transfer, and substitution of the specialized license plates in the Specialized License Plate Fund, which is hereby established in the State Treasury. *Upon appropriation by the Legislature, the moneys in that fund shall be allocated to each sponsoring agency, in proportion to the amount in the fund that is attributable to the agency's specialized license plate program.* Except as authorized under Section 5159, the sponsoring agency shall expend all funds received under this section exclusively for projects and programs that promote the state agency's official policy, mission, or work. [Emphasis added.]

Proposed section 2095.3 seeks to establish a procedure for distribution of revenue derived from the issuance, renewal, transfer, and substitution of specialized license plates issued under the Program that appears to bypass the need for legislative appropriation. Pursuant to Vehicle Code section 5157, funds remain in the Specialized License Plate Fund until the funds are formally

appropriated by the Legislature as part of the Budget Act. Absent an act by the Legislature, the Board cannot establish an alternative transfer procedure to govern the distribution of Program funds. The Board must revise the regulation text to be consistent with the aforementioned provision of the Vehicle Code.

For the reasons discussed above, the Board failed to comply with the clarity standard of the APA. 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 CCR 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 presented to the Board for consideration and be summarized and responded to in the final statement of reasons (FSOR). (Gov. Code, sec. 11347.1, subd. (d).)

Based on the modifications to the regulation text, the Board must also correct the description of the effect of the regulations in an addendum to the ISOR. The Board must include an explanation of why each of the revised regulatory provisions are necessary to carry out the purposes for which they were proposed. The Board will need to add the document to the rulemaking file and must make the document available for 15 days pursuant to Government Code section 11347.1.

Furthermore, because the Board falls within the Department of Consumer Affairs, Business and Professions Code section 313.1, subdivision (b), requires:

> (b) The director shall be formally notified of and shall be provided a full opportunity to review, in accordance with the requirements of Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, and this section, all of the following: ...
> (2) Any notices of sufficiently related changes to regulations previously noticed to the public, and the text of proposed regulations showing modifications to the text....

Thus, the Board must also make all proposed modifications to the regulation text available to the director of the Department of Consumer Affairs prior to resubmitting this regulatory action to OAL for review.

4. <u>Failure to Follow Required APA Procedures.</u>

The APA requires agencies to follow specific procedures. In this rulemaking action, the Board failed to follow the required procedures by neglecting to include in the rulemaking file a sufficient Economic Impact Assessment and neglecting to include an explanation for all nonsubstantive revisions made to the regulation text following the close of the 45-day public comment period.

4.1 Insufficient Economic Impact Assessment

On August 23, 2013, the Board 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 assessment that assesses whether and to what extent it will affect the following:
> (A) The creation or elimination of jobs within the state.
> (B) The creation of new businesses or the elimination of existing businesses within the state.
> (C) The expansion of businesses currently doing business within the state.
> (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 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 in the rulemaking record is not sufficient because it fails to comply with all of the elements required by subdivisions (b)(1)(A) through (C) of Government Code section 11346.3. The EIA provided includes an assessment of the benefits of the regulations to the health and welfare of California residents, worker safety, and the state's environment that is required in subdivision (b)(1)(D) of Government Code section 11346.3. However, the EIA does not contain the economic impact assessments that are required in subdivisions (b)(1)(A) through (C) of Government Code section 11346.3.

To address the missing elements of its EIA, the Board must perform an analysis explaining why and how it made the initial determinations stated in its 45-day notice that the proposed regulatory action would not have an impact on the creation or elimination of jobs (subdivision (b)(1)(A)), creation of new businesses or the elimination of existing businesses (subdivision (b)(1)(B)), or the expansion of businesses currently doing business within the state (subdivision (b)(1)(C)).

The Board will need to prepare an addendum to its EIA that assesses all of the required elements addressed in Government Code section 11346.3, subdivision (b)(1). The Board must then make this document 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 addendum to the Board's EIA must be considered by the Board and summarized and responded to in the FSOR. (Gov. Code, sec. 11347.1, subd. (d).)

4.2 Insufficient Explanation of Nonsubstantive Revisions to the Regulation Text

Government Code section 11346.9, subdivision (a)(1), requires an agency to prepare a FSOR that includes, among other requirements, "An update of the information contained in the initial statement of reasons...." In this rulemaking action, the Board prepared the FSOR, which

includes an "Updated Information" section wherein the Board enumerates the nonsubstantial revisions to the regulation text that were made following the close of the 45-day public comment period.

Government Code section 11346.8, subdivision (c), states:

> No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature....

Section 40 of title 1 of the CCR defines "nonsubstantial changes" as changes to the regulation text that "clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text."

The "Updated Information" section of the FSOR does not enumerate all of the nonsubstantial revisions made to the regulation text following the close of the 45-day public comment period, nor does the FSOR include statements explaining why these additional revisions qualify as nonsubstantial revisions.

Following the close of the 45-day public comment period, the Board added "Article 11. Specialty License Plate Fund" to the proposed regulation text. The Board does not list this change in the "Updated Information" section of the FSOR and does not explain why this change qualifies as a nonsubstantial change.

Additionally, the Board added "Vehicle Code section 5159" to the list of reference citations in proposed section 2092.1 and revised the heading and first paragraph of proposed section 2095.2 to change the existing references to the "DMV" to "the California Department of Motor Vehicles." The Board does not list these changes in the "Updated Information" section of the FSOR and does not explain why these are nonsubstantial changes. The Board should amend the FSOR to list these changes and should provide an explanation why all changes qualify as nonsubstantial revisions to the regulation text.

5. <u>Miscellaneous</u>

OAL also notes the following issues that must be addressed prior to any resubmission of this rulemaking action:

5.1 <u>Regulation Text</u>. The proposed regulations contain a number of grammatical and underline and strikeout illustration errors.

5.2 <u>Reference Citations</u>. The Board should reexamine the sections listed as reference citations in proposed section 2092.1 to ensure that all of the sections cited are being implemented, interpreted, or made specific by the regulation.

5.3 Corrections on the Form STD 400. Section B.2 of the Form 400 must be corrected by adding "2093.1" as an adopted regulation.

5.4 Form STD 399. The checked box next to section A.5 of the Fiscal Impact Statement is hole-punched through. The Board must provide a form copy that is not hole-punched through.

5.5 Unclear References in the Rulemaking Record. The notice of proposed rulemaking, the ISOR, and the FSOR make several references to the Board's authority to sponsor a DMV specialized license plate program at the request of a tax exempt organization, pursuant to Vehicle Code section 5060. Vehicle Code section 5060 is not cited as authority for the Board to promulgate these regulations, so it is unclear why these references are included in the rulemaking file.

5.6 Good Cause Request for Early Effective Date. The Board must provide additional information in the good cause request to explain why the application process for the issuance of grant funds should take effect prior to the quarterly effective date prescribed in Government Code section 11343.4.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced rulemaking action. Pursuant to Government Code section 11349.4, subdivision (a), the Board may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval. After approval by the Board, the Board shall make all substantial regulatory text changes, which are sufficiently related to the original text, and the addendum to the ISOR providing rationale for the modifications, available for at least 15 days for public comment pursuant to Government Code sections 11346.8 and 11347.1. Any comments made in relation to these proposed modifications must be presented to the Board for consideration and be summarized and responded to in the FSOR and the Board must approve the final version of the regulation text. Additionally, the Board must make all proposed modifications to the regulation text available to the director of the Department of Consumer Affairs prior to resubmitting this regulatory action to OAL for review. If you have any questions, please contact me at (916) 323-6820.

Date: December 19, 2014

Lindsey McNeill
Attorney

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