

**State of California  
Office of Administrative Law**

**In re:  
Department of Rehabilitation**

**Regulatory Action: Title 9  
California Code of Regulations**

**Adopt sections:  
Amend sections: 7330, 7333  
Repeal sections: 7334**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL File No. 2014-1106-02 S**

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**SUMMARY OF REGULATORY ACTION**

This regulatory action by the Department of Rehabilitation (Department) proposes to amend sections 7330 and 7333 and repeal section 7334 in title 9 of the California Code of Regulations (CCR) to remove the Department's ability to subgrant funds provided under Title 1 of the Rehabilitation Act of 1973.

On November 6, 2014, the Department submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On December 23, 2014, OAL notified the Department that OAL disapproved the proposed regulations because the Department failed to follow procedures required by the California Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

**DECISION**

OAL disapproved the above-referenced regulatory action because the Department failed to follow the required APA procedures by omitting to provide a sufficient Economic Impact Assessment pursuant to Government Code section 11346.3. All APA issues must be resolved prior to OAL's approval of any resubmission.

**DISCUSSION**

The Department'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 Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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.

### **Failure to Follow Required APA Procedures**

The APA requires agencies to follow specific procedures. In this regulatory action, the Department failed to follow the required procedures by neglecting to include in the rulemaking file a sufficient Economic Impact Assessment.

### **Insufficient Economic Impact Assessment**

On September 19, 2013, 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 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

Government Code section 11346.3, subdivision (e) further provided:

(e) Analyses conducted pursuant to this section are intended to provide agencies and the public with tools to determine whether the regulatory proposal is an efficient and effective means of implementing the policy decisions enacted in statute or by other provisions of law in the least burdensome manner. Regulatory impact analyses shall inform the agencies and public of the economic consequences of regulatory choices, not reassess statutory policy. The baseline for the regulatory analysis shall be the most cost-effective set of regulatory measures that are equally effective in achieving the purpose of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation. [Emphasis added.]

The Economic Impact Assessment (EIA) required by Government Code section 11346.3, mandates an analysis of the economic impact assessment described in subdivisions (b)(1)(A) through (C), and the benefits of the regulation described in subdivision (b)(1)(D). The EIA in the rulemaking record is not sufficient because it fails to include an analysis of any of the elements required by subdivisions (b)(1)(A) through (D) of Government Code section 11346.3. The EIA provided only includes a mere statement that there is no affect on the elements found in subdivision (b)(1)(A) through (D) of Government Code section 11346.3.

To address the missing elements of its EIA, the Department 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 Department must also assess the benefits of the regulations to worker safety and the state's environment (subdivision (b)(1)(D)).

The Department 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 Department 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 Department's EIA must be considered by the Department and summarized and responded to in the final statement of reasons. (Gov. Code, sec. 11347.1, subd. (d).)

### **Additional Issue**

OAL also notes the following issue in this regulatory action.

According to the rulemaking record, the Department proposes to remove some language from existing regulations because, "the sections are unnecessary and duplicative of requirements that can be found in the Requests for Applications and contracts." (Emphasis added.)

Government Code section 11349, subdivision (d), defines "Consistency" as meaning "... being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." The Department explains the reason for repealing the language is because the requirements can be found in the Requests for Applications and contracts; however, there is no evidence in the record that the requirements in the Requests for Applications or contracts have been duly adopted pursuant to the APA or are restatements of existing statutory law. Without such evidence in the record, the proposed repeal of existing regulatory language is inconsistent with Government Code section 11340.5.

Government Code section 11340.5, subdivision (a), provides that:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government

Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] .

Furthermore, when an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

In the record, statements made by the Department in its initial statement of reasons explain that it is repealing section 7334 and removing other provisions “because of the following: they are duplicative of federal regulations, and in violation of Government Code section 11349(f) [nonduplication standard]; only concern the Department’s internal process; and/or concern the Department’s legal obligations as state participant in the federal vocational rehabilitation program.” Additionally, elimination of these regulations “are beneficial because the sections are unnecessary and duplicative of requirements that can be found in the Requests for Applications and contracts. Consolidating the requirements of individuals applying for establishment projects or innovation and expansion projects to these two locations makes it easier for applicants and awardees to understand their legal obligations and the obligations of the Department.” (Emphasis added.) The Department also states that the repeal of the language is proposed because “it is overly restrictive and restricts the flexibility provided in federal statutes and regulations.” “The Department further proposes the repeal of this regulation because the information will be available in each Request for Proposal and the contract, thereby limiting the sources of information in which the applicant or awardee must search for pertinent information.”

Government Code section 11349.1 limits OAL’s review to the record and the regulation itself when reviewing a regulatory action for compliance with the APA. In this action, the record is silent as to what is contained within the Request for Applications/Proposals and the contracts, how the federal regulations are being duplicated, or how the requirements and procedures in the regulation text fall within the internal management exemption of Government Code section 11340.9. In the record, the Department identifies a few federal statutes and regulations, however, the existing regulation text proposed to be removed is not a mere restatement of the federal statutes and federal regulations identified in the record, and therefore, the text is not duplicative of the federal law. The existing regulatory language proposed for removal further implements, interprets or makes specific the federal statutes or federal regulations identified, and therefore, is not duplicative. Pursuant to Government Code section 11340.5 an agency may not issue, utilize or enforce a rule of general application unless it has been adopted pursuant to the APA. There is no evidence in the record that requirements in the Requests for Applications/Proposals and contracts have been adopted pursuant to the APA or merely restate existing law; no evidence in the record that the regulatory text proposed to be repealed merely restates the identified federal law; and no evidence in the record that the existing regulatory text proposed for removal falls within the internal management exemption of Government Code section 11340.9.

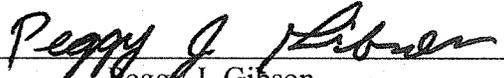
The proposed removal of existing regulation text with only the explanation that the requirements in the text will now appear in documents that do not appear to have been duly adopted pursuant

to the APA, or the statement that the regulation text duplicates federal law when the regulatory text does not appear to be mere restatements of the federal law identified, or a statement that the regulatory text amounts to internal procedures of the Department with no analysis or evidence as to how the procedures fall within the APA internal management exemption, is inconsistent with Government Code section 11340.5, and therefore, fails to meet the Consistency standard of Government Code section 11349.1.

### CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the Department may resubmit revised regulations and record within 120 days of its receipt of this Decision of Disapproval. The Department shall make all substantial regulatory text changes, which are sufficiently related to the original text, and any documents to be added to the record, available for at least 15 days for public comment prior to adoption pursuant to Government Code sections 11346.8 and 11347.1. If you have any questions, please contact me at (916) 323-6803.

Date: December 30, 2014

  
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