

**State of California
Office of Administrative Law**

**In re:
California Horse Racing Board**

**Regulatory Action: Title 4
California Code of Regulations**

**Adopt sections:
Amend sections: 1588
Repeal sections:**

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2014-1201-02 S

SUMMARY OF REGULATORY ACTION

This rulemaking action by the California Horse Racing Board (Board) proposes to amend section 1588 in title 4 of the California Code of Regulations (CCR) to state that a horse on the Veterinarian's List in another racing jurisdiction is ineligible to start in a race, except with prior approval of the stewards.

On December 1, 2014, the Board submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On January 14, 2015, OAL notified the Board that OAL disapproved the proposed regulation. This Decision of Disapproval of Regulatory Action explains the reason for OAL's action.

DECISION

OAL disapproved the above-referenced rulemaking action because the proposed regulation failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3).

All Administrative Procedure Act (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 Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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. 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 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: ...
 - (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or ...
 - (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;”
- (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.

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

Proposed subdivision (j) of section 1588 states that a horse is ineligible to start in a race “when, *except with prior approval of the stewards*, such horse is on the Veterinarian's List in another racing jurisdiction....” (Emphasis added.)

Proposed subdivision (j) is unclear for two reasons. First, subdivision (j) 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).) As written, the express language of subdivision (j) provides the stewards with unrestricted discretion to allow a horse to race, despite the fact that the horse is on a Veterinarian's List in another racing jurisdiction.

However, the rulemaking record does not describe a delegation of broad discretionary power to the stewards. To the contrary, it is evident from the rulemaking record that the Board has specific circumstances in mind that may justify allowing a horse to race. For example, the notice of proposed action states:

Recognizing that unforeseen problems with administrative procedures, as well as the time of relocation of the horse to California, may delay the removal of the horse from another jurisdiction's Veterinarian's List, the proposed addition of subsection 1588(j) provides California stewards the flexibility to approve the race eligibility of a horse found on another jurisdiction's Veterinarian's list.

This explanation is also reiterated in the initial statement of reasons. Based on the explanation provided, it appears that the Board is delegating power to the stewards to override the Veterinarian's Lists of other jurisdictions if a horse is *erroneously listed* on a Veterinarian's List. As such, the stewards' approval power is limited in scope and has been delegated by the Board in an effort to ensure that horses that were approved to race are allowed to do so. By identifying the aforementioned circumstances in the rulemaking file, the Board has implied that the steward approval power should be based on good cause, or at a minimum, that stewards should not exert approval power arbitrarily. However, the express language of subdivision (j) does not align with this interpretation.

Another example, the rulemaking record contains a transcript from the October 23, 2014 Board meeting, wherein the Board voted to approve the proposed regulatory language. During this meeting, Dr. Rick Arthur, Equine Medical Director for the Board, stated that the steward approval clause in subdivision (j) is intended to aid communication between jurisdictions and encourage reciprocity of Veterinarian Lists. He explained:

[W]e can communicate, we can understand why the horse is on the [Veterinarian's List] and, if necessary, we can take the steps that we would require in California to be satisfied that that horse is safe and fit to race in California.... [Sic.]

This explanation implies that the stewards will be responsible for conducting an investigation in order to determine whether a horse should be allowed to race in California. This investigation inherently requires communication between racing jurisdictions, in effort to determine whether adequate cause exists to allow a horse to race. It appears that the Board intends for the steward approval clause to be used as a mechanism to correct racing eligibility errors that are identified during the course of the investigation and communication process. However, this explanation fails to align with the express language of subdivision (j), which delegates unlimited approval power to the stewards.

As a practical matter, if the Board intends for the stewards to take specific steps in order to determine whether a horse should be allowed to race, those standards of general application should be promulgated in regulation and adequately explained in the rulemaking record.

For the aforementioned reasons, the contents of the rulemaking record do not align with the regulation text or the intended effect of the regulation. As such, the regulation is unclear.

Second, subdivision (j) 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).) Subdivision (j) allocates the power to allow a horse to race, despite the fact that the horse is on a Veterinarian’s List in another jurisdiction, to the stewards. However, it is not clear what procedures or criteria, if any, the stewards will use in order to determine whether a horse should be allowed to start in a race. Furthermore, it is unclear whether the stewards are required to have good cause in order to allow a horse to start in a race. Subdivision (j) refers only to the sole and absolute discretion of the stewards, leaving those directly affected without any meaningful guidance regarding the steward approval process. As written, subdivision (j) is unclear.

OAL notes that the existing language of section 1588, subdivisions (c) and (k) (formerly subdivision (j)), also provide the stewards with the power to override a horse’s ineligibility to start in a race. Subdivisions (c) and (k) state that a horse is ineligible to start in a race:

(c) *unless the stewards permit otherwise*, the certificate of foal registration, eligibility papers, or other registration issued by the official registry for such horse is not on file with the racing secretary at the time of entry; ...

(k) when, *except with prior approval of the stewards*, such horse has not been on the grounds of the association or its approved auxiliary stable area for at least 24 hours prior to the time the race is to be run. [Emphasis added.]

Although these subdivisions contain language that is similar, if not identical, to the language utilized by the Board in proposed subdivision (j), subdivisions (c) and (k) were adopted by the Board in 1973, prior to OAL’s creation in 1979. As such, subdivisions (c) and (k) were not subject to OAL review pursuant to the APA, including the clarity standard.

For the reasons discussed above, the Board failed to comply with the clarity standard of the APA. The Board must make all substantial regulatory text changes, which are sufficiently related to the original text, 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. (Gov. Code, sec. 11346.8, subd. (c); Gov. Code, sec. 11346.9, subd. (a)(3).)

2. Miscellaneous

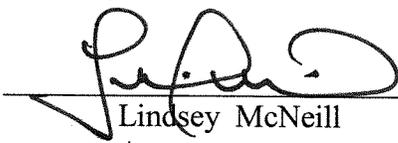
OAL also notes the following issues that must be addressed prior to any resubmission of this rulemaking action:

- 2.1 **Regulation Text.** The regulation text contains a number of underline and strikethrough illustration errors, as well as one place where the regulation text does not align with the existing CCR text.
- 2.2 **Board Meeting Transcript.** The October 23, 2014 Board meeting transcript is missing one or more relevant pages that include discussion regarding the amendments to section 1588.
- 2.3 **Final Statement of Reasons.** The reasonable alternatives determination does not contain the supporting information required by Government Code section 11346.9, subdivision (a)(4).

CONCLUSION

For the foregoing reason, 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. If you have any questions, please contact me at (916) 323-6820.

Date: January 21, 2015



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