

**State of California
Office of Administrative Law**

In re:
Board of Behavioral Sciences

Regulatory Action:

Title 16, California Code of Regulations

Adopt sections: 1805.01, 1805.05,
1822.50, 1822.51,
1822.52, 1829.1, 1829.2,
1829.3, 1877.1, 1877.2,
1877.3

Amend sections: 1805, 1806, 1816,
1816.2, 1816.3, 1816.4,
1816.5, 1816.6, 1816.7,
1829, 1877

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2015-1014-02

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

On October 14, 2015, the Board of Behavioral Sciences (Board) submitted to the Office of Administrative Law (OAL) its proposed regulatory action to make numerous changes in title 16 of the California Code of Regulations (CCR) including adopting several new sections and amending numerous sections. The proposed action would make changes to the examination process. Senate Bill 704 (Chapter 387, Statutes of 2011), Senate Bill 821 (Chapter 473, Statutes of 2013) and Senate Bill 1466 (Chapter 316, Statutes of 2014) restructure the examination process effective January 1, 2016.

DECISION

OAL disapproved the above-referenced regulatory action for failure to comply with the clarity standard of Government Code section 11349.1 and for failure to follow required Administrative Procedure Act (APA) procedures. This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DISCUSSION

The adoption 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 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. CLARITY

OAL is mandated to review each regulation adopted pursuant to the APA to determine whether the regulation complies with the “clarity” standard. (Gov. Code, sec. 11349.1(a)(3).) “Clarity” as defined by Government Code section 11349(c) means “...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, title 1, of the CCR, OAL's regulation on “clarity,” which provides:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

- (a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (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.

The following provisions of title 16 of the California Code of Regulations fail to comply with the clarity standard:

- a. Subdivision (c) of section 1805.05 as adopted by this rulemaking provides:

Waiting periods for national examinations that are accepted by the board shall be determined by that national testing entity.

The Board's regulations contain no information about what national examinations are accepted by the Board; therefore, a person directly affected by section 1805.05 would not easily understand from subdivision (c) which national examinations are acceptable and what waiting periods might apply.

- b. Subdivision (b) of section 1822.50 as adopted by this rulemaking provides:

The clinical examination as described in subsection (a)(2) may be a board administered examination or a national examination determined by the board to be acceptable.

The Board's regulations fail to provide any standards or criteria to determine whether a national examination is acceptable. A person directly affected by section 1822.50 would not easily understand from subdivision (b) what national examination would be acceptable to the Board.

- c. Subdivision (b) of section 1829.2 as adopted by this rulemaking provides:

The clinical examination as described in subsection (a)(2) may be a board administered examination or a national examination determined by the board to be acceptable.

The Board's regulations fail to provide any standards or criteria to determine whether a national examination is acceptable. A person directly affected by section 1829.2 would not easily understand from subdivision (b) what national examination would be acceptable to the Board.

- d. Subdivision (b) of section 1877.1 as adopted by this rulemaking provides:

The clinical examination as described in subsection (a)(2) may be a board administered examination or a national examination determined by the board to be acceptable.

The Board's regulations fail to provide any standards or criteria to determine whether a national examination is acceptable. A person directly affected by section 1877.1 would not easily understand from subdivision (b) what national examination would be acceptable to the Board.

Any changes made to the regulation text to address the clarity concerns discussed above should be made available for a minimum of 15 days for public comment pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations prior to adoption by the Board.

2. INCORRECT PROCEDURE:

The APA requires agencies to follow specific procedures. OAL must review rulemaking records to determine whether all of the procedural requirements of the APA have been satisfied. (Gov. Code, sec. 11349.1.) In this rulemaking action, the Board failed to: (a) submit text as adopted by the Board, (b) include a transcript, recording or minutes that fully and accurately reflected all the proceedings of the adoption hearing relevant to this rulemaking action.

- a. Government Code section 11343 requires that

Every state agency shall: (a) transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one that is a building standard

During the hearing to initiate the APA process to make these rulemaking changes the Board directed staff to make text changes. The Board then adopted the text as amended by the changes discussed at the hearing. The text submitted to OAL for review as the Board's final text does not contain the text amendments as ordered by the Board. Therefore, the text as submitted does not satisfy Government Code section 11343, subdivision (a).

- b. Government Code section 11347.3 requires that:

(a) Every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding.

...
(b) The rulemaking file shall include:

...
(8) A transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation.

...
California Code of Regulations, title 1, section 90, further articulates what constitutes compliance with section 11347.3 (b)(8). It states:

(a) Information submitted in compliance with the requirements of Government Code section 11347.3(b)(8) **shall fully and accurately reflect all proceedings applicable to the rulemaking action under review and shall be adequate:**

(1) to ensure effective review of the record by OAL, in light of the provisions of the APA providing for meaningful public participation; and

(2) to permit effective judicial review of the record.

(c) **“Minutes”** submitted in fulfillment of this requirement shall provide a summary of the proceedings, and in all cases **shall contain information sufficient to meet the requirement specified in subsection (a).**

... [Emphasis added.]

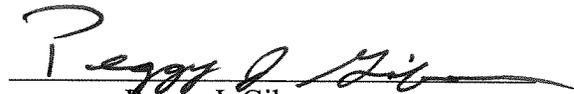
Although minutes of the public hearing were included as part of the rulemaking file, they do not appear to be a complete representation of the public hearing. The minutes indicate that the Board, “moved to direct staff to make any discussed changes, and any non-substantive changes to the attached amendments...” It is not clear from this language what changes were discussed during the hearing. As such, it does not meet the requirements of section 11347.3(b)(8) or section 90.

Any changes made to the text of the regulation to address the concerns discussed above must be made available to the public for comment for at least 15 days pursuant to Government Code section 11346.8(c) and section 44 of title 1 of the California Code of Regulations prior to adoption by the Board.

CONCLUSION

For the reasons set forth above, OAL has disapproved this regulatory action.

Date: December 3, 2015


Peggy J. Gibson
Senior Attorney

FOR: DEBRA M. CORNEZ
Director

Original: Kim Madsen
Copy: Christy Berger