

**State of California  
Office of Administrative Law**

**In re:**  
**Division of the State Architect**

**Regulatory Action:**

**Title 21, California Code of Regulations**

**Adopt sections:** 133, 134, 135, 136, 137,  
138, 141, 151, 161, 162,  
163, 164, 165, 171

**Amend sections:** 111, 112, 113, 114, 121,  
131, 133 (renumbered to  
132)

**Repeal sections:** 132, 134, 135, 136, 141,  
151, 152, 153

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL Matter Number: 2015-1123-01**

**OAL Matter Type: Regular Resubmittal  
(SR)**

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**SUMMARY OF REGULATORY ACTION**

On November 23, 2015, the Division of the State Architect (Division) submitted to the Office of Administrative Law (OAL) its proposed regulatory action to make comprehensive amendments to the certified access specialist (CASp)<sup>1</sup> program in title 21, division 1, chapter 1, subchapter 2.5 of the California Code of Regulations (CCR) by adopting, amending, and repealing numerous sections, adding two articles under subchapter 2.5, and adopting six incorporated by reference forms and two documents.<sup>2,3</sup> The proposed action clarifies and updates requirements for CASp eligibility, examination, certification, certification renewal, continuing education and disciplinary actions, and establishes professional standards for the administration of CASp services.

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<sup>1</sup> A CASp is a person certified by the State Architect to review building plans or inspect building sites of public accommodations for compliance with state and federal accessibility standards for the disabled, and to issue inspection reports and disability access inspection certificates, which give defendants to accessibility lawsuits certain legal benefits, as authorized under the Construction-Related Accessibility Standards Compliance Act in Civil Code sections 55.51 - 55.545.

<sup>2</sup> These two documents are titled the *CASp Examination, Certification, and Practice Standards Handbook* (CASp Handbook) and the *ADA Test Accommodation(s) Guidelines for the CASp Examination* (Accommodation Guidelines). They are documents mentioned in five of the six incorporated by reference forms being adopted in this action.

<sup>3</sup> Unless the context of the discussion in this decision requires otherwise, the six primary incorporated by reference forms and CASp Handbook and the Accommodation Guidelines will be collectively referred to as the incorporated by reference documents.

On January 8, 2016, OAL notified the Division that OAL disapproved the proposed regulatory action for failure to comply with specified standards and procedures of the California Administrative Procedures Act (APA). The reasons for the disapproval are summarized below.

### **DECISION**

OAL disapproved the Division's regulatory action for the following reasons:

- A. The proposed regulations and incorporated by reference documents fail to comply with the necessity standard of Government Code section 11349.1(a)(1) and title 1, CCR, section 10(b);
- B. The proposed regulations and incorporated by reference documents fail to comply with the clarity standard of Government Code section 11349.1(a)(3) and title 1, CCR, section 16;
- C. The proposed regulations and the CASp Handbook fail to comply with the consistency standard of Government Code section 11349.1(a)(4);
- D. The Division failed to comply with APA procedural requirements regarding:
  1. Incorporation by reference of documents pursuant to title 1, CCR, section 20;
  2. An updated informative digest that meets the requirements of Government Code sections 11346.9(b) and 11347.3(b)(2);
  3. The final statement of reasons inaccurately lists the documents incorporated by reference in the proposed regulations, and inaccurately identifies an incorporated by reference document<sup>4</sup> as a document relied upon;
  4. Inclusion of an incorporated by reference form in the rulemaking file and in the regulation text attached to the STD. 400 pursuant to Government Code section 11343(a) and title 1, CCR, section 6(a);
  5. Inclusion of two public notices in the rulemaking file of 15-day availability periods pursuant to Government Code section 11347.3(b)(2);
  6. Documents identified in the second Update to the Initial Statement of Reasons as being in the rulemaking file are not in the rulemaking file;
  7. The table of contents to the rulemaking file required by Government Code section 11347.3(b)(12) does not accurately identify each item contained in the rulemaking file;
  8. The affidavit of the rulemaking file required by Government Code section 11347.3(b)(12) contains inaccurate information;

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<sup>4</sup> This document is the CASp Handbook, which the Division will need to incorporate by reference as discussed below.

9. The content of the statement of mailing notice required by title 1, CCR, section 86 is inaccurate; and

10. The CASp Handbook must comply with the nonduplication standard of Government Code section 11349.1(a)(6) and title 1, CCR, section 12.

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

### **DISCUSSION**

The adoption, amendment, or repeal of regulations by the Division must satisfy requirements established by the APA governing rulemaking by state agencies. 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 the APA. (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.

#### **A. Necessity.**

Government Code section 11349.1(a)(1) requires OAL to review all regulations for compliance with the necessity standard. Government Code section 11349(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, CCR, section 10(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.  
[Emphasis added.]

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 (ISR). (Gov. Code, sec. 11346.2, subd. (b).) The ISR must include a statement of the specific purpose for each adoption, amendment, or repeal, and the rationale for the determination by the agency that each regulation is reasonably necessary to carry out the purpose for which it is proposed or, simply restated, “why” a regulation is needed and “how” this regulation fills that need. (Gov. Code, sec. 11346.2, subd. (b)(1).) The ISR must 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.

Material proposed to be incorporated by reference shall be reviewed in accordance with the same procedures and standards for a regulation published in the CCR. (1 CCR, sec. 20(b).) Therefore, the ISR must provide necessity for the content of the incorporated by reference documents as well as the regulation text.

In the rulemaking file, the Division submitted an ISR and two updates to the ISR with this regulatory action (collectively, ISRs). Reviewing the ISRs in relation to the final adopted text and incorporated by reference documents, the ISRs addressing the regulatory provisions discussed below are inadequate for purposes of meeting the necessity standard.

### **1. Delinquency Fee.**

In the proposed regulations, the Division establishes a one-year delinquency period in which a CASp may renew his or her certification if it expires. The Division imposes a \$150.00 fee for renewing during the delinquency period that is “a penalty to the holder of the expired certification for failure to complete the certification renewal process prior to expiration” (proposed section 141(c);<sup>5</sup> emphasis added.) This fee is in addition to all other fees required for renewing the certification, which includes a \$200 fee for reassessment of CASp eligibility (section 141(b)(1)) and a \$300 fee for the CASp certification (section 141(b)(2)).

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<sup>5</sup> DSA uses unconventional numbering of subdivisions in the proposed regulations. The subdivision numbering cited in this decision reflects appropriate numbering of subdivisions, as will be corrected in the proposed regulations.

The ISR justification for the delinquency fee states that the fee is based on similar delinquency fees for other types of licensure, covers administrative costs for the Division in processing delinquency certifications, and provides incentive for CASps to renew certifications in a timely manner. These explanations do not provide sufficient necessity for the delinquency fee.

“[P]ermissible fees must be related to the overall cost of the governmental regulation.”

(*California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421.) The Division needs to demonstrate what additional costs result from processing a renewal during the one-year delinquency period that would justify the additional fee of \$150.00 per renewal.

Additionally, OAL notes that pursuant to Government Code section 11145, a state agency may not impose a fine for violation of a regulation unless the fine is specifically authorized by statute. There does not appear to be any statutory authority for imposing a fine for delinquent renewals under the governing statutes for CASps in Government Code sections 4459.5 – 4459.8.

## **2. Incorporation of Standards from the Business and Professions Code into Section 161.**

Section 161 pertains to grounds for disqualification of eligibility of CASps. The ISR necessity statements for subdivisions (c), (f), (g), and (h) of section 161 all say that the provisions in these subdivisions are the embodiment of the only legally tenable interpretation of a provision law found in various sections of the Business and Professions Code. The Division is not, however, subject to the sections of the Business and Professions Code cited in the ISR; the Business and Professions Code sections apply only to boards and bureaus under the Department of Consumer Affairs. Therefore, the APA exemption provided by Government Code section 11340.9(f) (the only legally tenable interpretation of law) does not apply to laws to which the Division is not subject. Additionally, the Government Code section 11340.9(f) exemption is not an appropriate rationale for why a regulation is needed to effectuate the purpose of a statute.

## **3. Requirement for Verified Factual Complaint in Section 161(h).**

Under existing CASp regulations, the Division may consider a “factual complaint” against a CASp from a member of the public for possible disciplinary action against the CASp. In section 161(h) of the proposed regulations, the Division will now require a “verified factual complaint.” There is nothing in the record that provides necessity as to what the Division means by a “verified” complaint or why the complaint needs to be verified.

## **4. Penalty of Perjury Provisions.**

For the initial application for certification (Form DSA 600-A), the renewal application (Form DSA 600-R), and one of the forms for test accommodations (Form DSA 603), the applicant is required to certify under penalty of perjury as to the information entered in the form. There is nothing in the record that provides necessity for the penalty of perjury provisions in these three forms.

## 5. Other Necessity Needed.

In addition to the insufficient necessity statements discussed above, the ISRs submitted with this regulatory action that address the changes to the following proposed sections and incorporated by reference documents are inadequate for purposes of meeting the necessity standard:

- a. Repeal of section 134(f).
- b. Amendments to introductory paragraph to section 134.
- c. Addition of titles I and IV of the Americans with Disabilities Act of 1990 in section 134(a)(1).
- d. Addition of section 134(a)(7).
- e. Section 136(a)(2) and (3).
- f. Section 136(c) (provision stating “A CASp shall maintain records of completion of continuing education for three years from the date of certification renewal ...”).
- g. Addition of section 161(d)(6) and amendments of section 161(i).
- h. Amendment in section 163(b)(2) (change from 60 to 90 days in the Division notifying an appeal requestor of the State Architect’s determination of an appeal).
- i. Amendment in section 163(b)(7) (provision stating “Service of the written notice of decision shall be by registered/certified mail within 90 days of the hearing. The decision may be extended an additional 30 days, as necessary to conclude any research or investigation required, at the discretion of the State Architect or Designee.”)
- j. The boxes for “Hours per week” under the “Education and Experience” heading in the DSA 600-A form for eligibility categories A, B, and C. (Existing text in section 132, which pertains to these eligibility categories, only requires specified years of employment, not the number of hours per week or hours for any other time period. The DSA 600-A form already has a box for entering the number of years of employment, next to the box for “Hours per week.” If the “Hours per week” boxes are kept in the DSA 600-A form, the Division will need to establish necessity for them and, additionally, will need to revise the text in section 132 to specify the number of hours required during a weekly or other time period for a CASp candidate to establish eligibility.)
- k. Regulatory provisions under the heading “Background Information” on page five of the DSA 600-A form, page two of the DSA 600-R form, and page four of the CASp Handbook.
- l. The second full paragraph under the heading “Request Test Accommodation(s)” on page one of the DSA 601 form.
- m. All of the regulatory provisions under the headings “Guidelines for the Report by the Healthcare Professional” and “Notification of Offered Accommodation” on page one of the Accommodation Guidelines.
- n. The regulatory provisions in the second paragraph under the heading “Appeals Process to the Denial of Candidate Eligibility” on page five of the CASp Handbook. (These provisions further implement section 163(a) and present a possible new form, “My Candidate Application.” These provisions are also discussed in the clarity section, below.)

- o. The regulatory provisions in the first paragraph under the heading “Admission into the Testing Room” on page 14 of the CASp Handbook.

In some cases, the ISRs merely describe the effect of the new or revised provisions in the regulations and incorporated by reference documents rather than explain the reasons for the various provisions. This does not meet the necessity standard of Government Code section 11349.1(a)(1) and 1 CCR section 10(b). In other cases, necessity is missing or is inadequate. The ISR either omits to address a proposed provision or only addresses the necessity for a portion of the proposed provision.

Thus, before this regulatory action is resubmitted to OAL, the Division must draft a supplemental statement of reasons to correct the lack of necessity in the ISRs. Pursuant to Government Code section 11347.1, this supplemental statement of reasons, which would provide the necessity missing from the ISRs, must be made available to the public for at least 15 days prior to the Division’s adoption of the proposed regulations. Government Code section 11347.1 provides in part:

- (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available as required by this section.
- (b) At least 15 calendar days before the proposed action is adopted by the agency, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:
  - (1) Persons who testified at the public hearing.
  - (2) Persons who submitted written comments at the public hearing.
  - (3) Persons whose comments were received by the agency during the public comment period.
  - (4) Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation.
- (c) The document shall be available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency....

Additionally, any comments submitted to the Division about the supplemental statement of reasons must be considered by the Division and summarized and responded to in the final statement of reasons prior to resubmitting the regulations to OAL. (Gov. Code, sec. 11347.1, subd. (d).)

## **B. Clarity.**

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(b).) Government Code section 11349.1(a)(3) requires that OAL review all regulations for compliance with the clarity standard. Section 11349(c) of the Government Code defines “clarity” to mean “...written or displayed so that the meaning of the regulations will be understood by those persons directly affected by them.” Title 1, CCR, section 16 states in part that:

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

(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

...

(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.

As discussed below, a number of the proposed regulatory provisions do not satisfy the clarity standard.

### **1. Submission of Record of Disability Access Inspection Certificates for Renewing CASps.**

Section 137(a)(3), page four of the DSA 600-R form (under the heading “Record of Disability Access Inspection Certificates”), and page 21 of the CASp Handbook (under the heading “Record of Disability Access Inspection Certificates”) all contain provisions requiring a renewing CASp to submit a record of the status of all disability access inspection certificates (DAICs) issued to a CASp “during the certification period.” While this regulatory provision is consistent with the statements of the effect of this regulation in the ISRs, it is inconsistent with the Division’s response to an inquiry made by a commenter during the first 15-day comment period. The commenter’s inquiry states:

Please Clarify - What is the Term Period of the log to be submitted for renewal? Will the Log be any and all prior certificates that were issued and in possession, since 2008 (Start of the CASp Program)? Or is it only a log, that is for the past current three year period of prior term or from the year that the modifications/amendment is passed to the Program?

The Division responded to this comment on page 11 of the final statement of reasons:

For a subsequent certification period, the CASp will only need to report the status of all certificates issued in the name of the CASp since the last certification renewal cycle, with the exception of the DAIC that were indicated as unissued in the previous renewal cycle and were subsequently issued or voided, or have an unchanged status of “unissued”.

[Emphasis added.]

Because of this inconsistency in the effect of above-cited regulatory provisions for renewing CASps, there is a clarity issue. The Division needs to resolve this inconsistency in the record (the exception as stated in the Division’s response to the comment) before resubmitting the regulations.

## **2. Requirements for Obtaining CASp Certification in Section 138(b).**

Proposed section 138 pertains to CASp certification expiration. Subdivision (b) of this section provides:

(b) A certification which is not renewed within one year after its expiration may not be renewed. The holder of the expired certification may obtain a new certification by establishing anew the requirements as set forth in Section 135.

[Emphasis added.]

A CASp cannot “establish anew” the “requirements” of the CASp certification process. The phrase “establishing anew” in the regulation is unclear. By the use of “establishing anew,” does the Division mean “by complying with the requirements” or “by meeting the requirements”? Additionally, the requirements of the certification process are not exclusively “set forth in section 135,” thereby creating potential confusion as to what requirements need to be met to obtain CASp certification once it has expired. Section 133, which pertains to CASp examination eligibility, also appears to be pertinent to the CASp certification process.

OAL takes note of the clear language found on page 23 of the CASp Handbook, under the heading “Expired Certification,” which provides:

The holder of the expired certification may obtain a new certification by meeting the requirements set forth in the current certification process, including passing the entirety of the CASp Examination and paying examination and certification fees.

[Emphasis added.]

## **3. Requirement for Verified Factual Complaint in Section 161(h).**

As discussed above, the new requirement for a “verified” factual complaint in section 161(h) is not supported by adequate necessity. But it also fails to meet the clarity standard as the term does not have meaning generally familiar to those directly affected by the regulation and the term is not defined in the regulation or in the governing statute. If a “verified” factual complaint is retained as a requirement for the public submission of complaints against CASps, the Division

needs to add language in section 161(h) or elsewhere in the proposed regulations defining what is required for a complaint to be “verified.”

OAL notes that page 30 of the CASp Handbook, under the heading “Receipt of CASp Complaint,” there is no reference to a complaint needing to be “verified” or “factual.” The language under this heading in the CASp Handbook must be consistent with whatever the Division determines should be the outcome of section 161(h) regarding complaints.

#### **4. Non-renewal of CASp Certification that is Suspended and not Reinstated prior to Expiration in Section 162(b).**

Section 162(b) provides:

(b) Certification that is suspended and not reinstated prior to expiration of certification may not be renewed.

This provision is inconsistent with section 165(c), which provides:

(c) ... If reinstatement of eligibility for the Program is granted by the State Architect or Designee after certification expiration, the individual can obtain certification by fulfilling anew the requirements as set forth in Article 3 Sections 133 through 135, except as provided in Section 165(d).  
[Emphasis added.]

The last clause of section 165(c) is inconsistent with the provision in section 162(b), thereby creating a clarity issue. The provisions need to be consistent.

#### **5. Requirements for CASp Certification after Reinstatement in Section 165(c).**

As quoted above, section 165(c) states in pertinent part “the individual can obtain certification by fulfilling anew the requirements as set forth in Article 3 Sections 133 through 135. ...” (Emphasis added.) Because of the word “through,” this provision would include as a requirement for CASp certification section 134. Section 134 only sets forth the references upon which the CASp examinations are based; there are no requirements specified in section 134. Because of this discrepancy, there is a clarity issue.

#### **6. Provision in DSA 600-A Form for Entering Education Background for a Category C Applicant.**

On the third page of the printed DSA 600-A form, there is a place for entering the education background for a CASp candidate eligible under “Category C,” as defined in section 132(c), whether the applicant has a high school diploma or a GED. The addition of this requirement was added in the first 15-day modified text for section 132(c), but was withdrawn in the final text. The Division apparently overlooked withdrawing the same requirement in the DSA 600-A form. The provisions for section 132(c) and the DSA 600-A form are currently inconsistent. This creates a clarity issue, and needs to be resolved upon resubmittal.

## **7. Regulatory Provisions for CASp Candidate Appeals Process for Denied Eligibility.**

In the first paragraph on the bottom of page five of the CASp Handbook, under the heading “Appeals Process to the Denial of Candidate Eligibility,” there is language that provides:

A candidate that has had a Candidate Eligibility Application denied may request an appeal for reconsideration in writing to the State Architect and may provide additional information to support the request without payment of an additional Application Fee.

This language is consistent with section 163(a), which provides:

An individual may appeal a denial of candidate eligibility, the suspension of certification, or a denial of certification renewal by the State Architect or Designee. The appeals process is as follows:

(a) A candidate that has had a Candidate Eligibility Application denied may request an appeal for reconsideration in writing to the State Architect and may provide additional information to support the request without payment of an additional Application Fee.

However, the language in the first paragraph of the CASp Handbook is followed by additional language in the second paragraph under the “Appeals Process to the Denial of Candidate Eligibility” heading, which provides:

A candidate appeals a denial of candidate eligibility through the CASp Account Login. Select “My Candidate Application”, and at the bottom of the application the candidate should provide all the information he/she [missing word?] is necessary to appeal the decision, and submit the appeal to the State Architect. Notice of confirmation of eligibility or denial of eligibility will be sent to the email address used in setting up the account. If eligibility is confirmed, a candidate will be able to register for the CASp Examination.

This additional language conflicts with section 163(a) and the first paragraph, which provide that a CASp candidate may appeal a denial of eligibility “in writing to the State Architect.” This language suggests that a CASp candidate would submit a written request to the State Architect, with additional information to support their request, to appeal for reconsideration a denial of candidate eligibility. But the second paragraph in the CASp Handbook is written in a manner that the only way to submit a request for reconsideration of eligibility is to be done online through the CASp candidate’s online account and an online form, “My Candidate Application.” This conflict results in a clarity issue, as persons directly affected by the regulations might be confused as to whether a written request submitted to the State Architect by mail is acceptable or the online submission of an appeal using “My Candidate Application” is exclusively required.

Furthermore, it is not clear whether the “My Candidate Application” is the DSA 600-A form or another form. Review of the DSA 600-A form does not show anywhere for entering additional information for an appeal, which suggests that the “My Candidate Application” document is another form. If it is another form and it contains any regulatory provisions that are not restatements of existing law (or exempt from the APA), the Division will need to incorporate the form by reference and make it available to the public for 15-days pursuant to Government Code section 11346.8(c) and title 1, CCR, section 44.

### **8. Extraneous Words in CASp Handbook.**

The last bullet point at the bottom of page nine of the CASp handbook provides:

Assist in identifying technical infeasibility related affecting compliance with accessibility requirements.  
[Emphasis added.]

The word “related” is unclear here and seems extraneous.

Also, the last sentence of the first paragraph under the heading “Reinstatement of Eligibility” on page 31 of the CASp Handbook provides:

If the CASp is has eligibility reinstated prior to certification expiration, no extension of the certification period will be granted, and the CASp will be held to all the requirements of certification renewal, including the requirements for continuing education.  
[Emphasis added.]

The word “is” should be removed.

The Division will also need to modify the proposed text and make any modified text and incorporated by reference documents available for 15 days pursuant to Government Code section 11346.8(c) and title 1, CCR, section 44. Government Code section 11346.8(c) provides:

(c) 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, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9.

Title 1, CCR, section 44 provides:

(a) At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (1) all persons who testified at the public hearing; and
- (2) all persons who submitted written comments at the public hearing; and
- (3) all persons whose comments were received by the agency during the public comment period; and
- (4) all persons who requested notification from the agency of the availability of such changes.

(b) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed and the beginning and ending dates for this public availability period.

(c) If there were no persons in the categories listed in subsections (a)(1) through (a)(4), then the rulemaking record shall contain a confirming statement to that effect.

(d) Whether or not a mailing is required by subsection (a), the agency shall make the notice and text available to the public for at least 15 days at the location where the rulemaking record is maintained, and the confirming statement shall contain the beginning and ending dates for this public availability period.

### **C. Consistency.**

OAL must review regulations for compliance with the consistency standard of the APA in accordance with Government Code section 11349.1(a)(4). Section 11349(d) of the Government Code provides that “consistency” means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.

Government Code section 11342.2 further provides:

Whenever by express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

Government Code section 4459.8(a) provides a CASp certification “is effective for three years from the date of initial certification and expires if not renewed.” (Emphasis added.) In sections 135(b), 137(c), 165(b), and page 18 of the CASp Handbook, under “Validity of Certification,” the Division uses similar language in various provisions but makes a CASp certification “valid for a three-year period beginning the day of certification completion until the last day of the 36th month.” (Emphasis added.) This language would result in many CASp certifications being

effective longer than the three-year limit imposed by Government Code section 4459.8(a) and is therefore inconsistent with the statute. The Division will need to revise all of the provisions in the regulations and the CASp Handbook that allow for the certification to be longer than three years so that the certification is effective for only three years pursuant to statutory mandate.

#### **D. Failure to Follow APA Procedure.**

##### **1. Incorporation by Reference of Documents.**

The Division includes an instruction in the first page of the DSA 600-A, DSA 600-R, DSA 602, and DSA 603 forms that either says “Please read the CASp Examination, Certification, and Practice Standards Handbook carefully before filling out the application” or “Please read the ADA Test Accommodation(s) Guidelines for the CASp Examination and the CASp Examination, Certification, and Practice Standards Handbook before completing this [form].” The instruction in the above-referenced forms only requires the person to read either the CASp Handbook or the Accommodation Guidelines, as applicable, before completing the related application or form. However, the CASp Handbook and the Accommodation Guidelines contain additional regulatory provisions beyond those set forth in the regulation text that provide additional instructions, criteria, procedures, and rules regarding how to complete the application or form. Therefore, the CASp Handbook and Accommodation Guidelines contain mandatory language for “filling out the application” or form and should be incorporated by reference.

Title 1, CCR, section 20 governs the requirements for incorporating by reference materials into proposed regulations. Section 20(c)(4) provides:

(c) An agency may “incorporate by reference” only if the following conditions are met:

...

(4) The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance. ...

[Emphasis added.]

The CASp Handbook and the Accommodation Guidelines are mentioned in five of the six incorporated by reference forms. The Accommodation Guidelines are also mentioned in the CASp Handbook. However, the text where these documents are mentioned does not state that the documents are incorporated by reference, nor identify the documents by date of publication or issuance. The CASp Handbook is mentioned in the DSA 600-A, DSA 600-R, DSA 602, and DSA 603 forms. The Accommodation Guidelines are mentioned in the DSA 601, DSA 602, DSA 603 forms, and page six of the CASp Handbook. In instances where these documents are mentioned, the Division will need to revise the text to state that the document is “incorporated by reference” and to provide the date of publication or issuance of the documents in compliance with title 1, CCR, section 20(c).

##### **2. Updated Informative Digest.**

An updated informative digest is required by Government Code sections 11346.9(b) and 11347.3(b)(2) to be in the rulemaking file. The Division’s final statement of reasons starts with a

heading “Updated Informative Digest,” but none of the content under that heading provides a “clear and concise summary of the immediately preceding laws or regulations, if any relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation,” as required by Government Code section 11346.9(b). The rulemaking file must contain an updated informative digest that meets the requirements of Government Code sections 11346.9(b) and 11347.3(b)(2).

### **3. Final Statement of Reasons.**

Page one of the Division’s final statement of reasons (FSR) lists the documents incorporated by reference in the proposed regulations; however, the list is incomplete in that it includes the Update My List of Certified Access Specialists Information form, which is not a document incorporated by reference, and does not include the CASp Handbook, which needs to be properly incorporated by reference. The list of documents incorporated by reference in the Division’s FSR should be revised by removing the Update My List of Certified Access Specialists Information form and adding the CASp Handbook. Also, under the heading “Updated Informative Digest” on page one of the FSR is a heading for “Documents Relied Upon.” Under that heading the Division states:

As part of the information noticed for the final 15-day comment period extending from July 10, 2015 through July 27, 2015, the Division of the State Architect included the CASp Examination, Certification, and Practice Standards Handbook (11/2015) as a document relied upon.

While the Division added the CASp Handbook as a document to be incorporated by reference to the regulation text in the second (final) 15-day comment period commencing on July 10, 2015, it was not identified as a document relied upon. Accordingly, the heading “Documents Relied Upon” and the content under that heading should be removed from the FSR.

### **4. Omission of an Incorporated by Reference Form.**

The Division omitted the DSA 600-R form from the final modified text in the rulemaking file and omitted the form in the attachments to the final regulation text attached to the STD. 400 for filing with the Secretary of State. The Division needs to add the DSA 600-R form to the final modified text in the rulemaking file and to the STD. 400 pursuant to Government Code section 11343(a) and title 1, CCR, section 6(a).

### **5. Omission of Two 15-day Notices.**

The Division omitted placing in the rulemaking file the 15-day public notices for both of the 15-day availability periods, as required by Government Code section 11347.3(b)(2). The Division will need to add these two notices to the rulemaking file and list them in the table of contents.

## **6. Other Missing Documents.**

The following documents identified in the Division's second Update to the Initial Statement of Reasons are not in the rulemaking file:

- a. Create New DSA Account document.
- b. DGS Privacy Policy document.
- c. Conditions of Use document.
- d. Update My List of Certified Access Specialists Information form.<sup>6</sup>

## **7. Table of Contents.**

The Division's table of contents to the rulemaking file, required by Government Code section 11347.3(b)(12), does not accurately identify each item contained in the rulemaking file. First, in tabs E. and H., it identifies the documents as "Statement of 15-day Notice of Availability of Modified Text." However, in both 15-day notices, the Division added updates to the ISR. The documents in tabs E. and H. should be revised to say, "Statement of 15-day Notice of Availability of Modified Text and of Adding Documents." (Emphasis added.)

Also, because the two 15-day notices and the four missing documents need to be added to the rulemaking file (discussed above), the Division will need to list these in the table of contents.

## **8. Affidavit of the Rulemaking File.**

The Division's affidavit of the rulemaking file required by Government Code section 11347.3(b)(12) contains inaccurate information. First, it identifies the Division's notice file number as 2014-1110-03, when it should be Z-2014-1110-03. While there is no APA requirement to identify an agency's notice file number in the affidavit, if the Division opts to put it in the affidavit it should be identified accurately. Second, the Division identifies three OAL file numbers as "All Previous Regulatory Action Numbers." Two of the three OAL file numbers are related to two OAL actions preceding this regulatory action and are not technically related to the current action. Only OAL file number 2015-0226-03S should be listed as a previous regulatory action number to this one. Also, there is a typographical error in citing this OAL file number in the affidavit (it currently reads "2015-02260-03," when it should read "2015-0226-03S"). While there is no APA requirement to identify previous OAL file numbers in the affidavit, if the Division opts to put the one previous OAL file number in the affidavit, it should be identified accurately.

## **9. Contents of the Statement of Mailing Notice is Inaccurate.**

In tab A. of the rulemaking file, the Division has the statement of mailing notice that is required by title 1, CCR, section 86. The statement indicates that the 45-day notice "was mailed on

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<sup>6</sup> While this last document is included in the rulemaking file with second 15-day modified text and the final modified text, it should be included separately in the rulemaking file with the other documents identified in the Division's second Update to the Initial Statement of Reasons.

November 21, 2015.” However, this is not the correct year. The Division will need to revise this statement so that it correctly reflects mailing of the 45-day notice on November 21, 2014.

**10. CASp Handbook Fails to follow Proper Procedures to Comply with the Nonduplication Standard.**

Pages 27 through 29 of the CASp Handbook include text that duplicates law in the Civil Code that is applicable to CASps. This fails to comply with the nonduplication standard imposed by Government Code section 11349.1(a)(6). “Nonduplication” is defined in Government Code section 11349(f), which provides:

(f) “Nonduplication” means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.

Title 1, CCR, section 12(a) further elaborates on what the nonduplication standard is, as defined in Government Code section 11349(f), by providing:

(a) A regulation shall “serve the same purpose,” as that term is used in Government Code Section 11349(f), where it repeats or rephrases in whole or in part a state or federal statute or regulation.

However, title 1, CCR, section 12(b)(1) provides:

(b) A regulation which duplicates a state or federal statute or regulation shall, nonetheless, meet the "nonduplication" standard of Government Code Section 11349.1 if any one of the following conditions is met:  
(1) The proposed regulation duplicates or overlaps a state or federal statute or regulation which is cited as “authority” or “reference” for the proposed regulation and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code Section 11349.1(a)(3). Justification for such duplication shall be provided by inclusion of facts, explanations, expert opinions or other information in the rulemaking record which establish that the overlap or duplication is necessary in order for the regulation to satisfy the requirements of Government Code Section 11349.1(a)(3); ...

Thus, the Division is allowed to keep the duplicated law from the Civil Code in the CASp Handbook provided it justifies the duplication of law in compliance with title 1, CCR, section 12(b)(1). The statements justifying the duplication should be placed in the FSR, under a heading that indicates a justification for the duplication of law.

OAL also notes that “Notice to Private Property Owner/Tenant” that a CASp is required to provide pursuant to Civil Code section 55.53(c) is quoted inaccurately on page 28 of the CASp Handbook. In the CASp Handbook, the second and third paragraphs of this notice are quoted as follows:

...

IF YOU BECOME A DEFENDANT IN A LAWSUIT THAT INCLUDES A CLAIM CONCERNING A SITE INSPECTED BY A CERTIFIED ACCESS SPECIALIST, YOU MAY BE ENTITLED TO A STAY (TEMPORARY STOPPAGE) OF THE CLAIM AND AN EARLY EVALUATION CONFERENCE.

IN ORDER TO REQUEST THE STAY AND EARLY EVALUATION CONFERENCE, YOU WILL NEED TO VERIFY THAT A CERTIFIED ACCESS SPECIALIST HAS INSPECTED THE SITE THAT IS THE SUBJECT OF THE CLAIM. YOU WILL ALSO BE REQUIRED TO PROVIDE THE COURT AND THE PLAINTIFF WITH THE COPY OF A WRITTEN INSPECTION REPORT BY THE CERTIFIED ACCESS SPECIALIST, AS SET FORTH IN CIVIL CODE SECTION 55.54.

THE APPLICATION FORM AND INFORMATION ON HOW TO REQUEST A STAY AND EARLY EVALUATION CONFERENCE MAY BE OBTAINED AT <http://www.courtinfo.ca.gov/selfhelp/>.

...

However, the actual language of these two paragraphs of the notice required in Civil Code section 55.53(c) states:

...

IF YOU BECOME A DEFENDANT IN A LAWSUIT THAT INCLUDES A CLAIM CONCERNING A SITE INSPECTED BY A CERTIFIED ACCESS SPECIALIST, YOU MAY BE ENTITLED TO A COURT STAY (AN ORDER TEMPORARILY STOPPING ANY LAWSUIT) OF THE CLAIM AND AN EARLY EVALUATION CONFERENCE.

IN ORDER TO REQUEST THE STAY AND EARLY EVALUATION CONFERENCE, YOU WILL NEED TO VERIFY THAT A CERTIFIED ACCESS SPECIALIST HAS INSPECTED THE SITE THAT IS THE SUBJECT OF THE CLAIM. YOU WILL ALSO BE REQUIRED TO PROVIDE THE COURT AND THE PLAINTIFF WITH THE COPY OF A WRITTEN INSPECTION REPORT BY THE CERTIFIED ACCESS SPECIALIST, AS SET FORTH IN CIVIL CODE SECTION 55.54. THE APPLICATION FORM AND

INFORMATION ON HOW TO REQUEST A STAY AND EARLY  
EVALUATION CONFERENCE MAY BE OBTAINED AT  
<http://www.courtinfo.ca.gov/selfhelp-start.htm>.

...

[Emphasis added.]

Emphasized text shows discrepancies in the Division's quoted version of the notice compared to the notice in Civil Code section 55.53(c). The quoted language must accurately reflect what is printed in Civil Code section 55.53(c).

### **11. Miscellaneous.**

There are a number of miscellaneous issues that the Division will need to address in this regulatory action. Among them are:

- a. Minor, technical revisions to the regulation text to address such issues as punctuation, grammar, capitalization and italicization of words, renumbering, underlining and strikeout, and to conform the text to existing CCR text.
- b. In section B.4. of the STD. 400 form, only 15-day availability periods should be entered. The entry for the "Public Hearing 11-10-15" should be removed.
- c. The Division's good cause request for an early effective date, pursuant to Government Code section 11343.4(b)(3), should not be attached to the STD. 400 forms. It should be submitted as a separate document that accompanies the submission of the regulatory action.
- d. The Division included the Update My List of Certified Access Specialists Information form with the attachments to the STD. 400s. This form is not incorporated by reference in the regulations, so it does not belong with the attachments to the STD. 400s.
- e. Page one of the CASp Handbook states "Examination, Certification, and Practice Standards Handbook" in the title. The Division should add the word "CASp" to the beginning of the title as that is the way the title is provided in all of the forms in which the document is referenced.
- f. The top of page two of the DSA 603 form provides:

To document your need for an accommodation as completely as possible, complete write personal statement describing your disability and its impact on your ability to take the exam under standard conditions.

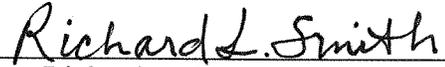
[Emphasis added.]

The Division needs to edit the sentence.

**CONCLUSION**

For the reasons set forth above, OAL has disapproved this regulatory action. Pursuant to Government Code section 11349.4, the Division has 120 days from the date of this decision to resubmit the regulatory action with all issues resolved as discussed above. If you have any questions, please contact me at (916) 323-6809.

Date: January 15, 2016



Richard L. Smith  
Senior Attorney

FOR: DEBRA M. CORNEZ  
Director

Original: Chester A. Widom  
Copy: Ida Clair