

**State of California  
Office of Administrative Law**

**In re:**  
**Veterinary Medical Board**

**Regulatory Action:**

**Title 16, California Code of Regulations**

**Adopt sections:**

**Amend sections: 2043**

**Repeal sections:**

**DECISION OF DISAPPROVAL OF  
REGULATORY ACTION**

**Government Code Section 11349.3**

**OAL Matter Number: 2016-0125-04**

**OAL Matter Type: Regular (S)**

---

**SUMMARY OF REGULATORY ACTION**

This proposed rulemaking action by the Veterinary Medical Board (Board) amends section 2043 of title 16 of the California Code of Regulations, which governs the assessment of civil penalties for violation of the Board's rules. This amendment would reclassify the existing three categories of citations issued by the Board, including accompanying fines, and add new rules regarding orders of abatement and public disclosure of citations.

**DECISION**

On March 8, 2016, the Office of Administrative Law (OAL) notified the Board of the disapproval of this regulatory action. The reason for the disapproval was failure to comply with the "clarity" standard of Government Code section 11349.1.

**DISCUSSION**

Regulations adopted by the Board must generally be adopted pursuant to the rulemaking provisions of the California Administrative Procedure Act (APA), Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code (Gov. Code, secs. 11340 through 11361). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the regulation from compliance with the APA (Gov. Code, sec. 11346). No exemption or exclusion applies to the regulatory action here under review. Consequently, before these regulations may become effective, the regulations and rulemaking record must be reviewed by OAL for compliance with the substantive standards and procedural requirements of the APA, in accordance with Government Code section 11349.1.

## **A. CLARITY**

OAL must review regulations for compliance with the “clarity” standard of the APA, as required by Government Code section 11349.1. Government Code section 11349, subdivision (c), defines “clarity” as meaning “...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 California Code of Regulations (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.

In this “Civil Penalties for Citation” rulemaking, a number of proposed regulatory provisions fail to comply with the “clarity” standard. These clarity problems are discussed below.

### **1. Section 2043, first paragraph**

This regulatory action proposes to amend the opening paragraph of section 2043, which currently reads:

“Where citations issued pursuant to Section 4875.2 and 125.9 of the Code include an assessment of a civil penalty, they shall be classified according to the nature of the violation and shall indicate the classification on the face thereof as follows[.]”

Proposed regulation section 2043 begins:

“When the executive officer determines that a violation has occurred and issues a citation to a licensee or an unlicensed person, that citation shall include its classification and an assessment of a civil penalty. The classification of the citation shall be as follows[.]” [Highlighted changes from existing CCR text omitted.]

Pursuant to section 16 of title 1 of the CCR, *supra*, proposed regulatory language must be consistent with the effect of the proposed regulatory language as described by the rulemaking agency. The existing CCR text in this case is discretionary, providing that if a citation includes a civil penalty, the citation shall reflect the amount. Implicit in the existing text is that citations without civil penalties may be issued by the Board. By contrast, the proposed new text eliminates the Board’s discretion and plainly mandates that for every violation, the citation issued shall include a civil penalty.

The Board’s Initial Statement of Reasons (ISOR) identifies the general purpose of this amendment to the opening paragraph of section 2043 as clarification of who issues citations and to whom citations may be issued. The Board reasons that this amendment “would make it easier for someone who is reading this section alone to understand it.” (ISOR, p.2.) The ISOR does not provide any specific information in support of the apparent change in policy from discretionary to mandatory fines. This lack of substantial evidence for a substantive regulatory change would ordinarily be a violation of the “necessity” standard of the APA (Gov. Code, sec. 11349(a)).

However, page 7 of the ISOR states: “If a citation is resolved by payment of the civil penalty *or compliance with the order of abatement* [...]” [Emphasis added.] Thus, the ISOR provides no reason for the substantive change in policy and simultaneously demonstrates the Board’s intent to issue citations without civil penalties when such penalties are unwarranted. Considering this evidence, OAL believes that the apparent shift from discretionary to mandatory civil penalties was unintended by the Board; however, a clarity problem remains because the proposed text and related record materials are inconsistent. The Board must harmonize the text and record in order to resolve the clarity issue.

## **2. Section 2043, subdivision (g)**

Two clarity issues result from ambiguous phrasing in proposed section 2043, subdivision (g), which provides:

“(g) An order of abatement issued pursuant to section 4875.2 of the Code shall fix a reasonable time for abatement of the violation. An order of abatement may require any or all of the following:

(1) That the individual to whom the citation was issued demonstrate how future compliance with the laws and regulations governing veterinary medicine

will be accomplished. The demonstration may include, but is not limited to, submission of a written corrective action plan.

(2) That the individual to whom the citation was issued take a course approved by the Board related to the violation for which the citation was issued. Any courses required by the order of abatement shall be in addition to those required as continuing education for license renewal.”

First, subdivision (g)(1) can reasonably be interpreted as requiring a cited individual to demonstrate how future compliance with all laws and regulations governing veterinary medicine will be achieved. This subdivision may also be interpreted as requiring a showing of how future compliance with only those laws related to the specific violation will be achieved. A directly affected person should not be left to guess as to which meaning the Board intended.

Second, subdivision (g)(2) is unclear regarding approval of the course. A directly affected person reading subdivision (g)(2) as a whole might reasonably assume that all continuing education courses offered by Board-approved continuing education providers are, by extension, Board-approved, and that no further feedback from the Board is required when selecting an appropriate course. However, another reasonable interpretation is that the Board must approve each course on a case-by-case basis, to ensure that the cited individual selected a course appropriately related to the violation, and will satisfy the order of abatement by effectively educating and rehabilitating the individual. As above, the Board must modify the proposed text to resolve all ambiguity.

### CONCLUSION

For the foregoing reasons, OAL disapproves this regulatory action. Pursuant to Government Code section 11349.4(a), the Board may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval. Any changes made to the regulation text to address the clarity issues discussed above must be made available for at least 15 days for public comment pursuant to Government Code section 11346.8 and section 44 of title 1 of the CCR prior to adoption by the Board.

Date: March 15, 2016



Eric J. Partington  
Attorney

For: Debra M. Cornez  
Director

Original: Annemarie Del Mugnaio  
Copy: Elizabeth Bynum