

**State of California
Office of Administrative Law**

In re:
Department of Public Health

Regulatory Action:

Title 17, California Code of Regulations

Adopt sections:

Amend sections: 1215.1, 1216, 1216.1,
1218, 1219, 1219.1,
1219.2, 1220, 1220.1,
1220.2, 1220.3, 1220.4,
1221, 1221.1, 1221.4

Repeal sections: 1215, 1217, 1217.1,
1217.2, 1217.3, 1217.4,
1217.5, 1217.6, 1217.7,
1217.8, 1218.1, 1218.2,
1219.3, 1221.2, 1221.3,
1222.2

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-0516-04

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

The Department of Public Health (Department) submitted to the Office of Administrative Law (OAL) its proposed rulemaking action to amend and repeal existing sections of Title 17 of the California Code of Regulations (CCR), which govern forensic alcohol testing laboratories. The changes would amend the regulations regarding the requirements laboratories are held to when performing forensic alcohol testing and would update the regulations to reflect changes in the applicable Health and Safety Code statutes.

DECISION

OAL disapproved the above-referenced regulatory action because the Department did not meet APA procedural requirements due to its failure to accurately indicate changes to the regulations, pursuant to Government Code sections 11343 and 11346.8, and California Code of Regulations, title 1, sections 8 and 46.

This APA issue must be resolved prior to OAL's approval of any resubmission.

DISCUSSION

The adoption, amendment, or repeal of regulations by the Department must satisfy requirements established by the part of the California Administrative Procedure Act 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 Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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 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.

The Department failed to comply with the following APA procedure:

Failure to accurately indicate modifications to the regulations

Government Code section 11343, subdivision (a)(1) requires state agencies to transmit to OAL for filing with the Secretary of State a certified copy of every regulation adopted or amended by it. Title 1, section 8, subdivision (b) of the CCR provides that the “final text of the regulation shall use underline or italic to accurately indicate additions to, and strikeout to accurately indicate deletions from, the [CCR].” The term “final text” is defined as the certified copy of the regulation transmitted to OAL for filing with the Secretary of State. (1 Cal. Code Regs., sec. 8, subd. (a)(2).)

The Department’s final text of the proposed regulations contained a significant amount of additions to and deletions from the CCR that were not accurately indicated. For example, proposed sections 1215(b), 1215(l), 1215(n), 1216.1, 1217, and other sections, contain text that is illustrated with both double underline and double strike through markings. Therefore, the illustrations do not clearly show which text is to be inserted and which text is to be deleted.

Also, Government Code section 11346.8, subdivision (c), requires changes to text originally made available to the public to be “clearly indicated” so the public will know what modifications were made by the agency and to be able to comment knowledgeably. (See also title 1, California Code of Regulations, section 46.) The proposed text for each of the three 15-day public comment periods failed to accurately indicate modifications to the proposed regulations. Changes to the regulation text for the first 15-day public comment period are indicated in double strike-through for deletions, and double underline for additions. However, the proposed regulation text includes text that is both double underlined and double stricken, such as in section

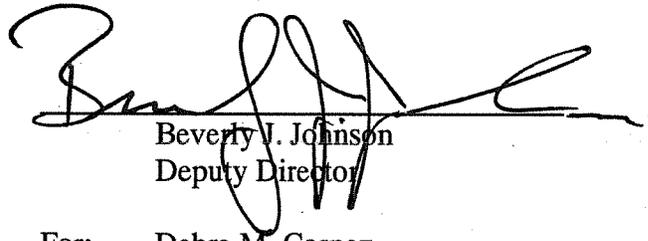
1215(l) and 1220.4(b). Changes to the text for the second 15-day public comment period are indicated by double underline for additions, double strike-through for deletions, and are highlighted in yellow. However, the proposed regulation text includes text that is both double underlined and double stricken, with and without yellow highlighting, as in section 1215(b) and (l), 1216.1(b)(3)(E) and (c)(1), and 1220.4(b). Changes for the third 15-day public comment period are only highlighted in yellow. However, the proposed regulation text includes text that is both double underlined and double stricken, as in sections 1215(b), (l), and (n), 1216.1(b)(3)(E), (c)(1) and (d), 1217(a), and 1220.4(b). Section 1216.1(c)(3) contains text that is both single underlined and single stricken. Some of these changes are highlighted in yellow, while others are not. With the text illustrated as it is for each of the 15-day public comment periods, as well as in the final proposed regulation text, it is not ascertainable by the public by examining the text whether text is being added or deleted.

Before these regulations can be resubmitted to OAL for another review, the Department must ensure that the additions and deletions are accurately indicated and the underlying text matches the text printed in the CCR. Also, for the reasons cited above, because the public has not had the full opportunity to review and comment on the proposed regulation text, the Department shall make the final properly illustrated text available for at least 15 days prior to resubmission to OAL, pursuant to Government Code section 11346.8 and section 44 of title 1 of the California Code of Regulations.

CONCLUSION

For these reasons OAL disapproved the above-referenced rulemaking action. If you have any questions, please do not hesitate to contact me at (916) 323-8915.

Date: July 5, 2016



Beverly J. Johnson
Deputy Director

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Director

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