

**State of California
Office of Administrative Law**

In re:
**Department of Alcoholic Beverage
Control**

Regulatory Action:

Title 04, California Code of Regulations

Adopt sections: 160, 161, 162, 163, 164,
165, 166, 167, 168,
168.1, 168.2, 168.3, 169,
170, 171, 172, 173

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2019-1119-02

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

On November 19, 2019, the Department of Alcoholic Beverage Control (Department) submitted its regulatory action to the Office of Administrative Law (OAL) by which it proposed to adopt regulations implementing the Responsible Beverage Service Training Program Act of 2017 (Bus. & Prof. Code, §§ 25680 *et seq.*).

On January 6, 2020, OAL notified the Department that OAL disapproved the proposed regulations. This Decision of Disapproval of Regulatory Action explains OAL's reasons for disapproval pursuant to the Administrative Procedure Act (APA).

DECISION

OAL disapproved the regulatory action because the proposed regulations failed to comply with the following standards of the APA: (1) clarity; (2) necessity; and (3) procedural standards. The Department must resolve all APA issues before OAL approves any resubmission.

DISCUSSION

The Department's regulatory actions must satisfy requirements of the part of the APA governing 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 Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a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. Before any non-exempt regulation may become effective, OAL reviews the regulation for compliance with the APA's substantive and procedural standards. (Gov. Code, §§

11340.5, 11346, 11349.1.) The APA's six substantive standards are clarity, necessity, consistency, authority, reference, and nonduplication. (Gov. Code, § 11349.)

1. Clarity

Clarity means regulations are written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them. (Gov. Code, § 11349, subd. (c).) A proposed regulation is presumed not to comply with the clarity standard if any of the following conditions exist:

- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning;
- (2) the language of the regulation conflicts with the agency's description of the effect of the regulation;
- (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;
- (4) the regulation uses language incorrectly, including but not limited to incorrect spelling, grammar or punctuation;
- (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. (Cal. Code Regs., tit. 1, § 16, subd. (a)(1)-(6).)

The following proposed regulations do not comply with the clarity standard.

1.1. Sections 167(a)(12)(A), 168.2(a), and 168.2(b)

"To be valid, each fingerprinting shall be verified by a governmental body such as a notary or through an electronic fingerprinting service such as Live Scan ..."
[Sections 167(a)(12)(A), 168.2(a).]

"The department must receive the results of the verified fingerprints of all owners and officers prior to the training provider being placed upon the department's approved training-provider list." [Section 168.2(b).]

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. (See Cal. Code Regs., tit. 1, § 16(a)(3).) The term *verified* is vague in that it does not adequately describe what verifying a fingerprint means. Also, the regulation requires verification by a governmental body, but a notary is not an example of a governmental body. Without defining *verified*, it is unclear which governmental bodies may verify a fingerprint.

Further, the regulation conflicts with the agency's description of the effect of the regulation. (See Cal. Code Regs., tit. 1, § 16(a)(2).) The initial statement of reasons (ISOR) describes validating criminal history by fingerprint, but the regulation does not require validation of

criminal history, just that fingerprints are “verified.” (Dept. of Alcoholic Beverage Control, ISOR, Necessity: Section 167, Subsection (a)(12) and Section 168.2, pp. 11, 18.)

1.2. Sections 167(a)(2) and 168.1(b)(2)

“To seek approval to be an accreditation agency, a business entity must submit the following information to the department: ... Legal structure of the business entity...” [Section 167(a)(2).]

“... the training provider must provide the following registration information to the department ...: Legal structure of the business entity...” [Section 168.1(b)(2).]

This regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(1).) The term *legal structure* is vague and could mean the type of business entity, an organizational hierarchy within a business entity, types of stock, etc.

1.3. Sections 167(a)(4) and 168.1(b)(4)

“To seek approval to be an accreditation agency, a business entity must submit the following information to the department: ... A list of owners and officers, their contact information, personal identification information, and titles ...” [Section 167(a)(4).]

“... the training provider must provide the following registration information to the department ...: A list of owners and officers, their contact information, personal identification information, and titles ...” [Section 168.1(b)(4).]

This regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(1).) The terms *contact information* and *personal identification information* are vague. *Contact information* could mean a physical address, mailing address, telephone number, email address, etc., or any combination of those things. *Personal identification information* could mean *contact information* as well as social security numbers, maiden names, driver license numbers, bank account numbers, passport numbers, etc., or any combination of those things.

1.4. Sections 167(a)(5)-(8) and 168.1(b)(5)-(7)

“To seek approval to be an accreditation agency, a business entity must submit the following information to the department: ...

(5) Email contact information;

(6) Telephone contact information;

(7) Business address;

(8) Mailing address if different ...” [Section 167(a)(5)-(8).]

“To seek departmental approval to be a training provider, an individual or business entity must submit the following information to the department ... :

- (5) Telephone contact information;
- (6) Business address; and
- (7) Mailing address if different ...” [Section 168.1(b)(5)-(7).]

The regulation presents information in a format that is not readily understandable by persons directly affected. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(5).) The regulation does not adequately define whose information must be submitted.

1.5. Section 167(a)(9)

“To seek approval to be an accreditation agency, a business entity must submit the following information to the department: ... A list of any arrests or convictions for crimes of moral turpitude by owners or officers of the business entity ...”

This regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(1).) The phrase *arrests or convictions* may be inclusive (i.e. the list must include both arrests and convictions) or exclusive (i.e. the list must at least include either arrests or convictions, but not necessarily both). The phrase *owners or officers* is similarly problematic.

1.6. Section 167(b)(4)

“An accreditation agency shall have the ability to provide technical support to training providers it accredits ...”

The regulation uses a term which does not have a meaning generally familiar to those directly affected by the regulation, and that term is defined neither in the regulation nor in the governing statute. (See Cal. Code Regs., tit. 1, § 16(a)(3).) The term *technical support* is vague.

1.7. Section 168(b)(1)

“A training provider must meet the background and expertise requirement in Business and Professions Code § 25681 (b)(1)(A), meaning a training provider must have at least one owner, employee, or consultant with degrees, work experience, or certifications in alcohol, training, hospitality, and psychology included in the creation of its RBS training course ...”

This regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(1).) The phrase *with degrees, work experience, or certifications* could qualify the term *consultant* exclusively or could also qualify the terms *owner* and *employee* inclusively. Further, the phrase *in alcohol, training, hospitality, and psychology* could qualify the term *certifications* exclusively or could also qualify the terms *degrees* and *work experience* inclusively. Additionally, the regulation may (1) require all qualifying degrees, work experience, or certifications in alcohol, training, hospitality, and

psychology to be vested entirely in a single individual owner, employee, or consultant to meet the background and expertise requirement; or (2) allow the qualifications to be shared collectively among any number of individual owners, employees, or consultants if the training provider, as a whole, covers all of the requirements.

Further, the meaning of the regulation will not be easily understood by those persons directly affected by them. (See Gov. Code, § 11349, subd. (c).) The proposed regulation, on its face, applies to *all* training providers but also tethers the scope of the background and expertise requirements to the scope of the applicable statute, which applies only to *unaccredited* training providers. The scope of the regulation is unclear as to whether the requirement applies to all training providers or to only unaccredited training providers.

The regulation also 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. (See Cal. Code Regs., tit. 1, § 16(a)(3).) The phrase *in alcohol* is vague.

1.8. Section 168(b)(3)-(5)

“Training providers must comply with [*sic*] requirement in Business and Professions Code § 25681 (b)(1)(B) for keeping records of alcohol server certifications issued...” [Section 168(b)(3).]

“Training providers must comply with the requirement in Business and Professions Code § 25681 (b)(1)(C) to have the ability to give technical support required for alcohol servers to complete their RBS training course ...” [Section 168(b)(4).]

“Training providers must comply with the requirement in Business and Professions Code § 25681 (b)(1)(D) for data security protocols for any collected alcohol server information, online payments, and alcohol server certification records kept outside the department’s online certificate system ...” [Section 168(b)(5).]

The regulation presents information in a format that is not readily understandable by persons directly affected. (See Cal. Code Regs., tit. 1, § 16(a)(5).) The regulations, as drafted, apply to *all* training providers but also tether the scope of the recordkeeping requirement to the scope of the applicable statute, which applies only to *unaccredited* training providers. The scope of the regulation is unclear as to whether the requirement applies to all training providers or to only unaccredited training providers.

Also, the regulations use 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. (See Cal. Code Regs., tit. 1, § 16(a)(3).) The regulatory terms *technical support* and *data security protocols* are vague because they do not describe what support or protocols will satisfy the statute.

1.9. Section 168.3(a)

“A training provider shall maintain current contact information within the department’s online certification system and notice from the department is deemed effective if it contacts the training provider using the information on record.”

This regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(1).) The term *contact information* is vague. Also, the phrase *if it contacts the training provider* is vague and does not adequately describe criteria upon which a notice from the Department is deemed effective.

1.10. Section 169(a)

“An ABC on-premises licensee can only establish the validity of its employees’ alcohol server certifications within the department’s online certification system.”

The regulation uses grammar incorrectly, causing it to conflict with the agency’s description of its effect. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(2), (4).) The regulation limits ABC on-premises licensees to performing only a single permissible act: establishing the validity of certifications. The ISOR does not describe the effect of this regulation as restricting these licensees to only a single act. The ISOR describes the intended effect of the regulation as if it instead says, “An ABC on-premises licensee *may establish* the validity of its employees’ alcohol server certifications *only within* the department’s online certification system.” (Dept. of Alcoholic Beverage Control, ISOR, Necessity: Section 169, Subsection (a), p. 23.)

1.11. Section 169(e)(2)

“If an ABC on-premises licensee wishes to use the affirmative defense found in Business and Professions Code § 25682 (b)(2), the ABC on-premises licensee must provide to the department:

- (1) The date and records of the alcohol server’s initial employment; and
- (2) Six preceding months of payroll records for all employees.”

The regulation presents information in a format that is not readily understandable by persons directly affected. (See Cal. Code Regs., tit. 1, § 16(a)(5).) The phrase *six preceding months* is vague in that the regulation does not provide a date certain from which to begin counting the months.

1.12. Section 160(b)(9)

“‘Manages or supervises’ means any person who trains, hires, or oversees alcohol servers at an ABC licensed premises ...”

The regulation uses grammar incorrectly. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(4).) The terms *manages* and *supervises* are verbs but are defined as a person, which is a noun.

1.13. Section 160(b)(10)

“‘Onsite’ for the purposes of Business and Professions Code § 25682(c) means being engaged and directly overseeing the service of alcohol ...”

The regulation uses grammar incorrectly. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(4).) The term *onsite* is vague in that, as an adjective, it cannot mean *engaged*, which is a verb.

1.14. Section 166(b), (c)

The regulation presents information in a format that is not readily understandable by persons directly affected. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(5).) This regulation has two subdivisions labeled (b) and two subdivisions labeled (c).

1.15. Section 167(a)(13)

“To seek approval to be an accreditation agency, a business entity must submit the following information to the department: ... The initial review fee set forth in this section, subsection (m)(1) ...”

The regulation conflicts with the agency’s description of its effect. (See Cal. Code Regs., tit. 1, § 16, subd. (a)(2).) The regulation requires the business entity to submit *information about the fee*, but not the fee itself. However, the ISOR states this regulation requires the business entity to submit the required initial review fee. (Dept. of Alcoholic Beverage Control, ISOR, Necessity: Section 167, Subsection (a)(13), p. 11.)

1.16. Sections 160(b)(5); 168.3(c), (k); and 173(b)(3)

“... RBSTPA ...”

The term *RBSTPA* is undefined.

1.17. Section 168(a)

To the extent proposed Section 168(a) and its subparts use the same or similar regulatory language and statements of necessity as Section 167(a), cumulatively *supra*, it is similarly unclear.

2. Necessity

Necessity means 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. (Gov. Code, §§ 11349, subd. (a).) The ISOR supporting a regulatory action must include (1) a statement of the specific purpose of each adoption, amendment, or

repeal; (2) a statement of the problem the agency intends to address; and (3) the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it proposed. (Gov. Code, §§ 11349.1, subd. (a)(1), 11346.2, subd. (b)(1), Cal. Code Regs., tit. 1, § 10.)

2.1. Section 169(e)(2)

“If an ABC on-premises licensee wishes to use the affirmative defense found in Business and Professions Code § 25682 (b)(2), the ABC on-premises licensee must provide to the department:

- (1) The date and records of the alcohol server’s initial employment; and
- (2) Six preceding months of payroll records for all employees.”

The referenced affirmative defense applies when an employed alcohol server falls within the safe harbor period to become certified based upon that server’s dates of employment. However, to utilize this affirmative defense as to any one or more specific employees at issue, the regulation requires the licensee to provide payroll records for *all* employees. The ISOR lacks necessity for this provision in that it does not demonstrate by substantial evidence the need for this regulation to effectuate the purpose of the statute. (Dept. of Alcoholic Beverage Control, ISOR, Necessity: Section 169, Subsection (e), p. 24; Addendum to the ISOR, Necessity: Section 169, pp. 3-4.)

2.2. Sections 167(a)(12)(B) and 168.2(c)

“The department is not responsible for the payment of any fees associated with the review or validation of criminal history by fingerprint of any owner or officer.”

The regulation addresses fees related to review or validation of criminal history by fingerprint. However, none of the regulations purport to require any “review” or “validation” of criminal history by fingerprint. This regulation lacks necessity because the ISOR does not demonstrate by substantial evidence the need for the regulation. (Dept. of Alcoholic Beverage Control, ISOR, Necessity: Section 167, Subsection (a)(12), & Section 168.2, pp. 11, 18.)

3. Procedural Standards

The APA requires rulemaking agencies to follow specific rulemaking procedures. In this action, the Department did not follow the required procedures as set forth below.

3.1. Form 399¹

The rulemaking record must contain the estimate, together with the supporting data and calculations, required by Government Code section 11346.5, subdivision (a)(6). This must include the estimate of the cost or savings to any state agency, using of the STD. 399 *Economic*

¹ OAL notes that the Department subsequently obtained a DOF-signed STD. 399, which must be included in any resubmission.

and Fiscal Impact Statement. (Gov. Code, §§ 11347.3, subd. (b)(5); 11346.5, subd. (a)(6); 11357; State Admin. Manual (SAM), §§ 6600 *et seq.*)

When a rulemaking agency checks one or more of the STD. 399 checkboxes labeled A.1, A.2, A.3, A.6, B.1, B.2, or B.4, indicating that its proposed regulatory action will result in an increase in costs, then the rulemaking agency must submit its STD. 399 to the Department of Finance (DOF) and obtain a DOF signature on the STD. 399, indicating concurrence, before submitting its STD. 399 to OAL for review as part of the rulemaking record. (SAM, § 6615.)

The Department checked boxes A.6, B.1, and B.4 of the Fiscal Impact Statement portion of the STD. 399. However, the STD. 399 in the rulemaking record lacks the required signature indicating DOF concurrence.

3.2. Authority and Reference Citations in the Regulatory Text

The agency shall include a notation following the express terms of each regulatory section, listing the specific statutes or other provisions of law authorizing its adoption and the specific statutes or other provisions of law being implemented, interpreted, or made specific by that section in the California Code of Regulations (Gov. Code, § 11346.2, subd. (a)(2).) The Department omitted these citations from the regulatory text.

CONCLUSION

For the reasons discussed above, the Department has not complied with the substantive and procedural standards of the APA. Thus, OAL disapproved this regulatory action. On January 13, 2020, OAL emailed a copy of this decision to the Department.

The Department must resolve these issues through modified regulatory text and an addendum to the ISOR, making the modified text and addendum available to the public for comment for at least 15 calendar days before resubmitting this regulatory action to OAL for review. (Gov. Code, §§ 11346.8, subd. (c), 11347.1; Cal. Code Regs., tit. 1, § 44.)

Date: January 13, 2020



Mark Storm
Senior Attorney

For: Kenneth J. Pogue
Director

Original: Jacob Appelsmith, Director
Copy: Robert de Ruyter
Department of Finance