



Board of Behavioral Sciences

Memo

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To: Board Members

Date: February 14, 2024

From: Christy Berger, Regulatory Manager

Subject: Regulatory Process Presentation

The attached slides provide an overview of the regulation (aka rulemaking) process. This memo includes the information on the slides, as well as details that are expected to be presented verbally during the Board meeting, and is provided for the benefit of stakeholders who did not attend the meeting.

Overview of the Regulation Process

What is a Regulation?

- A regulation has the force of law, and is defined in the Administrative Procedure Act (APA) as:
 - “Every rule, regulation, order, or standard of general application, or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.”
- The Board’s regulations are located in Division 18, Title 16 of the California Code of Regulations.
- State agencies are required to adopt regulations following the process specified in the APA.

Why are Regulations Necessary?

- Regulations are necessary whenever a law enacted by the legislature (statute) is not “self-executing”; and
- A regulation is needed to implement, interpret or make the law more specific.
 - For example: Some statutes clearly cannot be implemented without a regulation:
 - “The Board may set the application fee up to \$500.00”
 - Is the Board’s fee \$20 or \$499 to process an application?
 - Some statutes are subject to more than one interpretation.
 - *To qualify for licensure, each applicant shall complete 3,000 hours of supervised experience.*

- What does the supervision consist of? Who can supervise?

What Standards Must a Regulation Meet?

- Regulations must meet six standards (in addition to all requirements of the APA): Authority (basis in statute), Clarity, Consistency, Necessity, Non-Duplication, and Reference (sections of law that are being interpreted, implemented or made specific).

Who Reviews the Proposed Regulation Once it is Approved by the Board?

- **DCA Office of Legal Affairs Regulations Counsel and Staff** work alongside BBS staff to review and provide input/guidance at all stages of the regulation process.
- **DCA Budgets Office**
- **DCA Director** (*except regulations relating to exams & qualifications for licensure per BPC section 313.1*).
- **Business, Consumer Services and Housing Agency (BCSH aka “Agency”)**
- **Department of Finance (DOF)** (*if required due to fiscal or economic impacts*).
- **Office of Administrative Law (OAL)** reviews proposals, ensures the regulation process complies with the APA, and makes the final decision whether to approve or deny a proposed regulation (*an OAL disapproval may be appealed to the Governor*).

What are the Initial Steps of the Rulemaking Process?

- Concept Phase:
 - Need for a regulation is identified by staff or stakeholders.
 - Staff analyze the issue and discuss with stakeholders (typically at a committee meeting).
 - Staff drafts legal text with assistance from DCA Regulations Counsel.
 - Text is vetted (and possibly revised) with stakeholder input at a public meeting.
 - Board approval of proposed language by affirmative vote at a Board meeting is required for initial approval of proposed regulatory language (text) and to initiate the rulemaking process.
- Production Phase:
 - Staff prepares required production documents to accompany the proposed text for review and possible approval by DCA Legal, Director, and Agency:
 - Notice of Proposed Regulatory Action, Initial Statement of Reasons (describes purpose, rationale and benefits of proposal), Form 399 (Fiscal/Economic Impact Statement), Form 400 (request to OAL for notice publication and regulations submission/approval).
- After DCA Legal, the Director and Agency approve the initial rulemaking documents submitted by the Board for filing:

- The regulation is submitted to OAL for public notice and opportunity for comment (45 days).
- Public comments are considered by the Board at a public Board meeting.
- If modifications to text are determined necessary and are approved by the Board, a 15-day modified text notice and comment period is provided to the public.

What are the Final Steps of the Rulemaking Process?

- Staff compiles final package, including responses to comments received.
- Staff submits package for final review and possible approval by DCA Legal, the Director, Agency, and if necessary, the Department of Finance.
- If approved, submitted to OAL for possible final approval.
- If OAL approves, it is filed with Secretary of State and takes effect on the specified date (quarterly or upon filing if requested by the Board).
- If disapproved or OAL requires revisions, it may be withdrawn OR resubmitted to OAL after the Board reviews and approves OAL's changes at a public meeting after another public comment period (either 15-days or 45-days).

What is an Underground Regulation?

- When a state agency sets a general rule or standard that it applies to its regulated population (as opposed to making decisions on case-by-case basis), and the rule or standard is not set in law, it is considered an underground regulation and could be challenged via petition to the Office of Administrative Law.
- For example: The law (statute) requires its regulated licensees to provide a written notice to clients before initiating services. The law also says the delivery of the notice must be documented.
 - The Board can suggest best practices for such documentation.
 - However, the Board cannot require any specific type of documentation without a regulation (or legislation) to authorize it.

Attachment

Regulatory Process Presentation

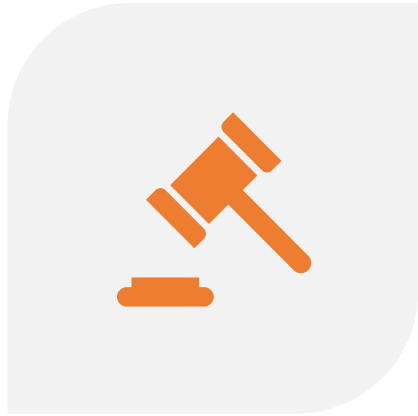
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OVERVIEW OF THE REGULATORY PROCESS

March 2024



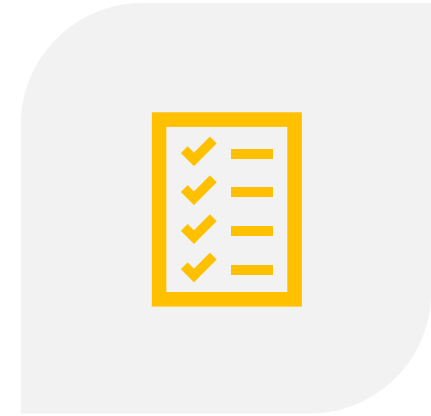
WHAT IS A REGULATION?



A regulation has the force of law and is defined in the Administrative Procedure Act (APA)



BBS Regulations are in Division 18, Title 16 of the California Code of Regulations



State agencies must adopt regulations following the process specified in the APA

WHAT IS A REGULATION?

A regulation is defined in the APA as:

“Every rule, regulation, order, or standard of general application, or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.”

WHY ARE REGULATIONS NECESSARY?

- Regulations are necessary whenever a law enacted by the legislature is not “self-executing” AND
- A regulation is needed to implement, interpret or make the law more specific

WHY ARE REGULATIONS NECESSARY?

Some statutes clearly cannot be implemented without a regulation:

*“The Board may set the application fee **up to \$500.**”*

Is the Board’s fee \$20 or \$499 to process an application?

WHY ARE REGULATIONS NECESSARY?

Some statutes are subject to more than one interpretation:

“To qualify for licensure, each applicant shall complete 3,000 hours of supervised experience.”

- What does the supervision consist of?
- Who can supervise?

WHAT STANDARDS MUST A REGULATION MEET?

Regulations must meet six standards:

-Authority

-Clarity

-Consistency

-Necessity

-Non-duplication

-Reference

WHO REVIEWS THE PROPOSED REGULATION ONCE IT IS APPROVED BY THE BOARD?



DCA Office of Legal
Affairs Regulations
Counsel and Staff



DCA Budgets Office



DCA Director



WHAT ARE THE INITIAL STEPS OF THE RULEMAKING PROCESS?



CONCEPT PHASE



Need for a regulation is identified by staff or stakeholders



Staff analyze the issue and discuss with stakeholders



Staff drafts legal text with assistance from DCA Regulations Counsel



Text is vetted (and possibly revised) with stakeholder input at a public meeting



Board approval at a public meeting

WHAT ARE THE INITIAL STEPS OF THE RULEMAKING PROCESS?



PRODUCTION PHASE



Staff prepares the following documents for approval:



Notice of Proposed Regulatory Action



Initial Statement of Reasons



Fiscal and Economic Impact Statement (Form 399)



Form 400 (OAL)

WHAT ARE THE INITIAL STEPS OF THE RULEMAKING PROCESS?



After DCA Legal, the Director and Agency approve the initial rulemaking documents:



Documents are submitted to OAL



Notice is sent to the public / 45-day comment period



Public comments are considered by the Board at a meeting



If text modifications are determined to be necessary and are approved by the Board:



15-day modified text notice and public comment period

WHAT ARE THE FINAL STEPS OF THE RULEMAKING PROCESS?



Staff compiles final package, including responses to comments received



Staff submits package for final review and possible approval by DCA Legal, the Director, Agency, and if necessary, the Department of Finance



If approved, submitted to OAL for review and possible final approval



If OAL approves, filed with Secretary of State and takes effect on the specified date



If disapproved or OAL requires revisions, may be withdrawn OR resubmitted to OAL after Board reviews and approves OAL's changes and after another public comment period

WHAT IS AN UNDERGROUND REGULATION?



When a state agency sets a general **rule or standard** that it applies to its regulated population AND



The rule or standard is not set in law



The rule or standard may be challenged via petition to OAL

WHAT IS AN UNDERGROUND REGULATION?

→ EXAMPLE:



The law requires the Board's regulated licensees to provide a written notice to clients before initiating services



The law also says the delivery of the notice must be documented



The Board can suggest best practices for such documentation



However, the Board cannot require any specific type of documentation without a regulation to authorize it

QUESTIONS

