

**OFFICE OF ADMINISTRATIVE LAW**

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DEBRA M. CORNEZ  
Assistant Chief Counsel/Acting Director

*Debra Bowen*  
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SECRETARY OF STATE

Date: August 2, 2011

To: Mike Price

From: Chapter Two Compliance Unit

Subject: **2011 OAL DETERMINATION NO. 13(S)**  
**(CTU2011-0607-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation California Code of Regulations, title 15, section 3315.

On June 7, 2011, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations (CCR), title 15, section 3315 constitutes an underground regulation. The specific provision of section 3315 you challenged is section 3315(f)(5)(J):

Violation of subsections 3016(a), 3016(c), and 3290(d) shall result in:

1. For the first offense, the inmate shall be required to attend Alcoholic Anonymous or Narcotic Anonymous meetings or assigned to a substance abuse education program to the extent such programs are available in the institution/facility.
2. For the second offense, the inmate shall be referred for endorsement to a substance abuse program, provided that program eligibility criteria is met.
3. For the third offense, the inmate shall be referred for endorsement to a substance abuse program, provided that program eligibility criteria is met, and mandatory treatment shall be a condition of parole.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,<sup>1</sup> which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

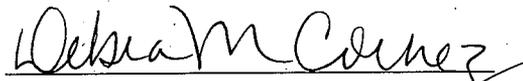
<sup>1</sup> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

The following definitions shall apply to the regulations contained in this chapter:  
(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, *but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA* and is not subject to an express statutory exemption from adoption pursuant to the APA... (Emphasis added.)

The section you challenge as an underground regulation, California Code of Regulations, title 15, section 3315 was properly adopted and filed with the Secretary of State pursuant to the APA on February 24, 1977. The section has been amended several times since 1977. The most recent substantive amendment to the section was properly adopted pursuant to the APA and filed with the Secretary of State on October 6, 2009.

For the reason discussed above, we find that the rule challenged by your petition is not an underground regulation.<sup>2</sup>

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

  
Debra M. Cornez  
Assistant Chief Counsel  
Acting Director

  
Elizabeth A. Heidig  
Staff Counsel

Copy: Matthew Cate  
Tim Lockwood

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<sup>2</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be issued to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
- (A) The challenged rule has been superseded.
  - (B) The challenged rule is contained in a California statute.
  - (C) *The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.*
  - (D) The challenged rule has expired by its own terms.
  - (E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule. (Emphasis added.)