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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

2015 OAL DETERMINATION NO. 6
(OAL MATTER NO. CTU2014-1110-01)

REQUESTED BY: Darrell J. Vienna

CONCERNING: Memorandum titled: "Instructions Pursuant to Rule 1855, Medication Procedures and Related Instructions," dated February 28, 2014 and issued by the California Horse Racing Board.

**DETERMINATION ISSUED PURSUANT TO GOVERNMENT
CODE SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "regulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations (CCR), title 1, section 250.¹ OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

CHALLENGED RULE

Memorandum titled: "Instructions Pursuant to Rule 1855, Medication Procedures and Related Instructions," dated February 28, 2014, and issued by the California Horse Racing Board (hereafter "Board"), which is attached hereto as Exhibit A (hereafter "Instructions Pursuant to Rule 1855").

¹ As defined by title 1, section 250(a), an

"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.

DETERMINATION

OAL determines that the “Instructions Pursuant to Rule 1855” memorandum, meets the definition of “regulation” that should have been adopted pursuant to the APA but was not; and, therefore, is an underground regulation.

FACTUAL BACKGROUND

On November 10, 2014, Darrell Vienna (Petitioner) submitted a petition to OAL challenging the Instructions Pursuant to Rule 1855, dated February 28, 2014, and issued by the Board’s Equine Medical Director, as an underground regulation.

OAL accepted the petition for consideration on January 9, 2015. The petition was published in the California Regulatory Notice Register on January 23, 2015. Comments from the public were solicited until February 23, 2015. No comments were received. A response to the petition from the Board was due no later than March 9, 2015. On January 8, 2015, during the preliminary review and prior to acceptance, OAL received an email from the Board, detailing their position. On March 24, 2015, OAL received an email from the Board stating that their position remained the same as that stated in the email of January 8, 2015. Petitioner indicates that he received a copy of the January 8th email on March 25, 2015. In that OAL informed the Board that a response was due by March 9, 2015, and section 270(h) of title 1 of the CCR states that the agency must simultaneously provide a copy of their response to the petitioner in order for it to be considered, OAL will not address the response of the Board in this determination.

The Instructions Pursuant to Rule 1855 contain procedures for how and when quarter horses will be placed on the Veterinarian’s List when clenbuterol is prescribed for the horse, as well as the procedures for removing a horse from the list once it has been placed on it. Specifically, it states among other things that:

1. “Quarter horses prescribed clenbuterol will be placed on the Veterinarian’s List for veterinary treatment until the horse tests clear of clenbuterol in both blood and urine after a workout to demonstrate its physical fitness.”
2. “Quarter horses on the Veterinarian’s List for clenbuterol administration will not be allowed to enter until the horse is removed from the Veterinarian’s List.”
3. “Scheduling for workouts and clenbuterol testing for removal of quarter horses from the Veterinarian’s List must be made with the CHRB official veterinarian at least 5-7 days in advance and will be subject to personnel and receiving barn space availability. The horse will not be removed from the Veterinarian’s List and allowed to enter until the laboratory reports the test have cleared.”

Regulations regarding the Veterinarian’s List are at section 1866 of title 4 of the CCR. Section 1866 of title 4 of the CCR provides for the maintenance of a Veterinarian’s List of horses that “are determined to be unfit to compete in a race due to veterinary treatment, physical distress, injury, lameness, unsoundness or infirmity.” Regulations regarding Authorized Medications are in section 1844 and elsewhere in title 4 of the

CCR; and, regulations for Medication Procedures and Related Instructions are contained in section 1855.

Since February 28, 2014, the Board has amended section 1866 to provide that a horse placed on the Veterinarians' List as sick or having received veterinary treatment shockwave therapy may not workout for 72 hours after being placed on the list without the permission of the official veterinarian. Additionally, the amendments required that a horse remain on the Veterinarian's List for a specific number of days after being placed on the list as lame or unsound before the horse is eligible to be removed from the list. A recent amendment to section 1844 was filed with the Secretary of State on September 15, 2014, which changed the allowable amount of clenbuterol in the official urine test, among other things. The amendments filed in 2015 to sections 1866 and 1844 do not substantively change OAL's underground regulation analysis. Therefore, this determination will address sections 1866 and 1844 as of the date of the issuance of the challenged rule on February 28, 2014.

Title 4, section 1855 of the CCR has not been amended since its first adoption in 1973. It states:

The Board may issue orders governing medication procedures and related instructions, which orders amplify the provision of this article.

On February 28, 2014, section 1866, "Veterinarian's List," stated:

- (a) The official veterinarian shall maintain a Veterinarian's List of those horses **determined to be unfit to compete in a race due to veterinary treatment, physical distress, injury, lameness, unsoundness or infirmity.**
 - (1) When a horse is placed on the Veterinarian's List, the trainer of such horse shall be notified within 72 hours.
 - (b) A horse placed on the Veterinarian's List as injured, unsound, or lame, may not workout for 72 hours after being placed on the list without the permission of the official veterinarian.
 - (1) The official veterinarian may require any horse placed on the Veterinarian's List to undergo a veterinary examination prior to resuming training at any facility under the jurisdiction of the Board.
 - (c) A horse placed on the Veterinarian's List shall be removed from the list only after having established or demonstrated to the satisfaction of the official veterinarian or the racing veterinarian that the horse is then raceably sound and in fit physical condition to exert its best effort in a race.
 - (d) A horse may be required to perform satisfactorily in a workout or qualifying race to demonstrate its physical fitness, and if so a blood and/or urine post-work test sample shall be taken from the horse and the provisions of this article shall apply to such official workout in the same manner as to a scheduled race.
 - (e) For the purpose of this regulation, "workout" means an exercise session near full, or close to full speed. [Bolding added.]

On February 28, 2014, section 1844, "Authorized Medication," stated:

Consistent with the intent of these rules, drug substances and medications authorized by the Board for use may be administered to safeguard the health of the horse entered to race provided that:

(a) No person shall administer a drug substance to any horse entered to race except upon authorization of the official veterinarian in conformance with these rules.

...

(e) **Official urine test samples may contain** one of the following drug substances, their metabolites or analogs, in an amount that does not exceed the specified levels:

...

(6) Clenbuterol; 5 nanograms² per milliliter

... [Bolding added.]

The Instructions Pursuant to Rule 1855 contain procedures for how and when quarter horses will be placed on the Veterinarian's List when clenbuterol is **prescribed** for the horse. It states that any quarter horse will be placed on the Veterinarian's List for veterinary treatment if it is prescribed clenbuterol and will not be removed from the list until the horse tests clear of clenbuterol in both blood and urine after a workout. It also provides for procedures as to how to have the horse removed from the list.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency has issued, utilized, enforced, or attempted to enforce a rule that meets the definition of "regulation" as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA (Gov. Code sec.11340(b)). An OAL determination is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any

² Pursuant to an amendment filed with the Secretary of State on September 15, 2014, the amount changed to 140 picograms (OAL file number 2014-0822-02S).

subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule is a "regulation" subject to the APA. This analysis will determine (1) whether the challenged rule is a "regulation" within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 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.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).³

As stated in *Tidewater*, the first element used to identify a "regulation" is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.⁴

The Instructions Pursuant to Rule 1855 contain procedures for how and when quarter horses will be placed on the Veterinarian's List when clenbuterol is prescribed for the horse. It is directed to Official Veterinarians, Racing Officials, Horsemen and Veterinarians and was from the Board's Equine Medical Director. The challenged rule applies to all quarter horses that may want to race at raceways under the jurisdiction of the California Horse Racing Board and their owners.

Therefore, the Instructions Pursuant to Rule 1855 apply generally to the defined class of quarter horses that may race in California and their owners.

³ Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

⁴ See also *Roth v. Department Of Veterans Affairs*, (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency’s procedure.

By placing all horses on the Veterinarian’s List when prescribed clenbuterol and by further setting forth how and when horses will be removed from that list, the Instructions Pursuant to Rule 1855 further implement, interpret and make specific sections 1844, 1855 and 1866 of title 4 of the CCR, as well as the provisions of the Business and Professions Code implemented and interpreted by sections 1844, 1855 and 1866.

Business and Professions Code section 19440 states:

(a) The board shall have all powers necessary and proper to enable it to carry out fully and effectually the purposes of this chapter. Responsibilities of the board shall include, but not be limited to, all of the following:

- (1) Adopting rules and regulations for the protection of the public and the control of horse racing and parimutuel wagering.
- (2) Administration and enforcement of all laws, rules, and regulations affecting horse racing and parimutuel wagering.
- (3) Adjudication of controversies arising from the enforcement of those laws and regulations dealing with horse racing and parimutuel wagering.
- (4) Licensing of each racing association and all persons, other than the public at large, who participate in a horse racing meeting with parimutuel wagering.
- (5) Allocation of racing dates to qualified associations in accordance with law.

(b) The board may delegate to stewards appointed pursuant to Article 5 (commencing with Section 19510) any of its powers and duties that are necessary to carry out fully and effectuate the purposes of this chapter.

Business and Professions Code section 19580 states:

(a) The board shall adopt regulations to establish policies, guidelines, and penalties relating to equine medication in order to preserve and enhance the integrity of horse racing in the state. Those policies, guidelines, and penalties shall include, at a minimum, the provisions set forth in this article.

(b) It is the intent of the Legislature that the board, in its testing efforts to determine illegal or excessive use of substances, recognize the greater importance of conducting complete and thorough testing of a lesser number of samples in preference to conducting less thorough testing on a greater number of samples.

The Board, through its Equine Medical Director, is implementing, interpreting and making specific Business and Professions Code section 19440 by providing for the regulation of horseracing when issuing the Instructions Pursuant to Rule 1855. The Board, through its Equine Medical Director, is implementing, interpreting and making specific Business and Professions Code section 19580 by establishing policies and guidelines relating to equine

medication by mandating the placement of all horses on the Veterinarian's List when prescribed clenbuterol.⁵

Having met both elements of the *Tidewater* test, the Instructions Pursuant to Rule 1855, therefore, meet the definition of "regulation" in Government Code section 11342.600.

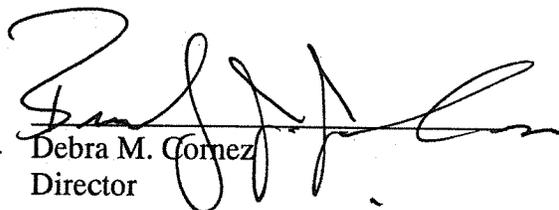
The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*" (Emphasis added.)

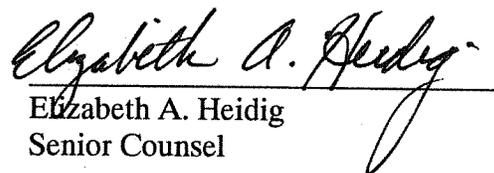
The Board has not identified an express statutory exemption from the APA that would apply to the Instructions Pursuant to Rule 1855, nor did OAL find such an exemption.⁶

CONCLUSION

In accordance with the above analysis, OAL determines that the Instructions Pursuant to Rule 1855 memorandum meets the definition of "regulation" that should have been adopted pursuant to the APA but was not; and, therefore, is an underground regulation.

Date: May 26, 2015

for 
Debra M. Gomez
Director


Elizabeth A. Heidig
Senior Counsel

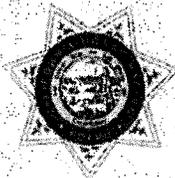
Copy: Rick Baedeker, Executive Officer
Robert Miller, Esq.

⁵ Although the Board suspended the *use* of clenbuterol at all California race tracks for twelve months at its June 20, 2013 meeting pursuant to section 1844.1 of title 4 of the CCR, the challenged rule goes beyond the "use" of clenbuterol and further mandates the placement of all quarter horses that are prescribed clenbuterol on the Veterinarian's List, as well as sets forth the procedures for removal from the Veterinarian's List for any horse that has been placed on the list because of being *prescribed* clenbuterol.

⁶ We note that section 1855 of title 4 of the CCR allows for the Board to issue orders governing medication procedures and related instructions. Any such orders or instructions would necessarily have to go through the APA to be legally valid unless an express *statutory exemption* applies.

EXHIBIT A

CALIFORNIA HORSE RACING BOARD

**Memorandum**

Date : February 28, 2014

To : Official Veterinarians
Racing Officials
Horsemen and Veterinarians

From : Rick M. Arthur, DVM, Equine Medical Director

Subject: **INSTRUCTIONS PURSUANT TO RULE 1855, MEDICATION PROCEDURES AND RELATED INSTRUCTIONS**

- Quarter horses prescribed clenbuterol will be placed on the Veterinarian's List for veterinary treatment until the horse tests clear of clenbuterol in both blood and urine after a workout to demonstrate its physical fitness. Quarter horses on the Veterinarian's List for clenbuterol administration will not be allowed to enter until the horse is removed from the Veterinarian's List. Reference: Rule 1866, Veterinarian's List.
- Veterinarians prescribing clenbuterol must include the diagnosis for the basis of prescribing clenbuterol, the dosage and estimated last dose date. Clenbuterol may only be prescribed to a specific individual horse for a specific diagnosis and for a specific period of time. The horse, diagnosis, dosage and estimated last administration date must be reported to the CHRB Official Veterinarian on form CHRB-24 (Veterinarian Report). Reference: Rule 1842, Veterinarian Report; 1843(c), Medication, Drugs and Other Substances; Rule 1843.3(g), Penalties for Medication Violations.
- Prescribing veterinarians must include the name of the specific horse, the specific dosage and duration of treatment on the label of any clenbuterol dispensed to quarter horses within the CHRB enclosure to be in compliance with CHRB 1864, Labeling of Medication. Reference: Rule 1842, Veterinarian Report and Rule 1864, Labeling of Medication.

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- Administration of clenbuterol to quarter horses must be reported by trainers on CHRB-60 (Trainer Medication Report) to the CHRB official veterinarian. Trainers are advised administering clenbuterol to a horse not prescribed the medication is contrary to 1843(c) and does not meet the criteria of 1843.3(g) if a violation occurs. Any quarter horse administered clenbuterol will be placed on the Veterinarian's List until the horse tests clear of clenbuterol in both blood and urine after a workout to demonstrate its physical fitness. Quarter horses on the Veterinarian's List for clenbuterol administration will not be allowed to enter until the horse is removed from the Veterinarian's List. Reference: 1843, Medication, Drugs and Other Substances; Rule 1843.3, Penalties for Medication Violations; 1887, Trainer to Ensure Condition of Horse; Rule 1894, Duties of Trainer.
- Any quarter horse found to have clenbuterol in either blood or urine in out-of-competition testing that has not been properly reported to the CHRB official veterinarian will be placed on the Veterinarian's List until an investigation has been conducted to determine the circumstances and the horse tests clear of clenbuterol in both blood and urine after a workout to demonstrate its physical fitness. Quarter horses on the Veterinarian's List for an unreported clenbuterol finding will not be allowed to enter until the horse is removed from the Veterinarian's List. Reference: Rule 1866, Veterinarian's List; Rule 1588, Horse Ineligible to Start in a Race.
- Scheduling for workouts and clenbuterol testing for removal of quarter horses from the Veterinarian's List must be made with the CHRB official veterinarian at least 5-7 days in advance and will be subject to personnel and receiving barn space availability. The horse will not be removed from the Veterinarian's List and allowed to enter until the laboratory reports the tests have cleared. Reference: Rule 1866, Veterinarian's List.