

**State of California
Office of Administrative Law**

AUG 18 2016

In re:
**Department of Corrections and
Rehabilitation**

Regulatory Action:

Title 15, California Code of Regulations

Amend sections: 3000, 3306, 3323

**NOTICE OF APPROVAL OF REGULATORY
ACTION**

Government Code Section 11349.3

OAL Matter Number: 2016-0713-04

OAL Matter Type: Regular (S)

This action by the Department of Corrections and Rehabilitation (CDCR) amends sections in title 15 of the California Code of Regulations to better align the regulations with Penal Code section 4576. Specifically, this action provides that any accessory or component of a cellular telephone or wireless communication device (e.g., SIM card, memory storage device, cellular phone battery, wired or wireless headset, or cellular phone charger) is "contraband," and reduces the penalty for possession to a Division "F" offense, which can result in 0-30 days of credit forfeiture. This action further clarifies that any cellular telephone or wireless communication device capable of making or receiving wireless communications is "dangerous contraband," and the penalty for possession of said devices is a Division "D" offense, which can result in 61-90 days of credit forfeiture.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 8/17/2016.

Date: August 17, 2016



Nicole C. Carrillo
Attorney

For: Debra M. Cornez
Director

Original: Scott Kernan
Copy: Anthony Carter

STD. 400 (REV. 01-2013)

per agency request

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-2016-0328-03	REGULATORY ACTION NUMBER 2016-0713-O/S	EMERGENCY NUMBER
------------------	---	--	------------------

For use by Office of Administrative Law (OAL) only

NOTICE	REGULATIONS
--------	-------------

ENDORSED - FILED
in the office of the Secretary of State of the State of California

AUG 17 2016
3:46 pm

2016 JUL 13 P 3:23
OFFICE OF ADMINISTRATIVE LAW

AGENCY WITH RULEMAKING AUTHORITY
California Department of Corrections and Rehabilitation

AGENCY FILE NUMBER (If any)
15-0276

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER 2016, 16-2	PUBLICATION DATE 4/15/2016

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Cell Phone Accessories and Inmate Discipline	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) Z-2016-0328-03 per agency request
--	--

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)
ADOPT
AMEND 3000, 3306, and 3323
REPEAL
TITLE(S) 15

3. TYPE OF FILING			
<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code §11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §11349.3, 11349.4) <input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) <input type="checkbox"/> File & Print <input type="checkbox"/> Other (Specify) _____	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) <input type="checkbox"/> Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a)) <input checked="" type="checkbox"/> Effective on filing with Secretary of State <input type="checkbox"/> \$100 Changes Without Regulatory Effect <input type="checkbox"/> Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY	
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660) <input type="checkbox"/> Other (Specify) _____	<input type="checkbox"/> Fair Political Practices Commission <input type="checkbox"/> State Fire Marshal

7. CONTACT PERSON Anthony Carter	TELEPHONE NUMBER (916) 445-2220	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) Anthony.Carter@CDCR.ca.gov
-------------------------------------	------------------------------------	-----------------------	---

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE 7-12-16
TYPED NAME AND TITLE OF SIGNATORY Ralph M. Diaz, Undersecretary-Operations, CDCR	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

AUG 17 2016

Office of Administrative Law

TEXT OF PROPOSED REGULATIONS

In the following, underline indicates added text and ~~strikethrough~~ indicates deleted text.

California Code of Regulations, Title 15. Crime Prevention and Corrections Division 3. Rules and Regulations of Adult Institutions, Programs, and Parole

Chapter 1.

Article 1.

3000 Definitions.

Section 3000 is amended to read:

*

*

Dangerous contraband means materials or substances that could be used to facilitate a crime or could be used to aid an escape or that have been altered from their original manufactured state or purpose and which could be fashioned into a weapon. Examples would include, but not be limited to, metal, plastic, wood, or wire. Also included are: sharpened objects such as scissors or other tools not authorized to be in the inmate's possession, as well as poison, caustic substances, flame producing devices (i.e., matches or lighters) or cellular telephones or wireless communication devices capable of making or receiving wireless communications ~~or any components thereof, including, but not limited to, a subscriber identity module (SIM card), memory storage device, cellular phone charger.~~

*

*

Note: Authority cited: Sections 243(f)(4), 2717.3, 3000.03, 5058, 5058.3 and 1170.05, Penal Code; Section 10115.3(b), Public Contract Code; and Sections 4525(a), 4526 and 14837, Government Code. Reference: Sections 186.22, 243, 314, 530, 532, 600, 646.9, 653m, 832.5, 1170.05, 1203.8, 1389, 2080, 2081.5, 2600, 2601, 2700, 2717.1, 2717.6, 2932.5, 3003.5(a), 3020, 3450, 3550, 4570, 4576, 5009, 5050, 5054, 5068, 7000 et seq. and 11191, Penal Code; Sections 1132.4 and 1132.8, Labor Code; Sections 10106, 10108, 10108.5, 10115, 10115.1, 10115.2, 10115.3 and 10127, Public Contract Code; and Section 999, Military and Veterans Code; Section 391, Code of Civil Procedure; Section 297.5, Family Code; Sections 8550, 8567, 12838 and 12838.7, Government Code; Governor's Prison Overcrowding State of Emergency Proclamation dated October 4, 2006; *In re Bittaker*, 55 Cal.App. 4th 1004, 64 Cal. Rptr. 2d 679; Section 11007, Health and Safety Code; *Madrid v. Cate* (U.S.D.C. N.D. Cal. C90-3094 TEH); *Sassman v. Brown* (E.D. Cal. 2015) 99 F.Supp.3d 1223; *Mitchell v. Cate*, USDC ED 2:08-CV-01196-TLN-EFB; and *In re Garcia* (2012) 202 Cal.App.4th 892.

3006. Contraband.

Subsection 3006(a) is amended to read:

Inmates may possess only the personal property, materials, supplies, items, commodities and substances, up to the maximum amount, received or obtained from authorized sources, as permitted in these regulations. Possession of contraband as defined in section 3000 may result in disciplinary action and confiscation of the contraband.

(a) Dangerous Property. Inmates may not possess or have under their control or constructive possession any weapons, explosives, explosive making material, poisons or any destructive devices, nor shall they possess or assist in circulating any writing or voice recording which describes the making of any weapons, explosives, poisons, destructive devices, or cellular telephones or wireless communication devices ~~or any component thereof including, but not limited to, a subscriber identity module (SIM card) or memory storage devices and cellular phone chargers~~capable of making or receiving wireless communications.

Section 3006(b) through 3006(c)(19) remains unchanged.

Subsection 3006(c)(20) is adopted to read:

(c) Except as authorized by the institution head, inmates shall not possess or have under their control any matter which contains or concerns any of the following:

*

*

(20) Any cellular telephone or wireless communication device accessory and/or component including, but not limited to, a subscriber identity module (SIM card), memory storage device, cellular phone battery, wired or wireless headset, and cellular phone charger.

Subsection 3006(d) remains unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 2600, 2601, 2772, 2790, 4574, 4576, 5030.1, 5054 and 5057, Penal Code.

Subchapter 4.

Article 5. Inmate Discipline

3323. Disciplinary Credit Forfeiture Schedule

Subsections 3323(a) through 3323(f)(14) remain unchanged.

Subsection 3323(f)(15) is amended to read:

(f) Division "D" offenses; credit forfeiture of 61-90 days.

*

*

(15) Possession and/or constructive possession of a cellular telephone or wireless communication device ~~or any component thereof including, but not limited to, a~~

~~subscriber identity module (SIM card), memory storage devices or cellular telephone chargers capable of making or receiving wireless communications.~~

Subsections 3323(f)(16) through 3323(h)(6) remain unchanged.

Subsection 3323(h)(7) is amended to read:

(h) Division “F” offenses; credit forfeiture of 0-30 days.

*

*

~~(7) Possession of dangerous contraband as identified in section 3000 excluding cell phones or wireless communication devices or any component or accessory thereof capable of making or receiving wireless communications.~~

Subsections 3323(h)(8) through 3323(h)(13) remain unchanged.

Subsection 3323(h)(14) is adopted to read:

(14) Possession and/or constructive possession of a cellular telephone or wireless communication device accessory and/or component including, but not limited to, a subscriber identity module (SIM card), memory storage device, cellular phone battery, wired or wireless headsets, and cellular phone chargers.

Subsection 3323(i) through 3323(k)(4) remain unchanged.

Note: Authority cited: Sections 5058, 5058.3 and 1170.05, Penal Code. Reference: Sections 148, 241, 243, 295-300.3, 314, 647, 1170.05, 2932, 2933, 4500, 4501, 4501.1, 4573.6, 4576, 4600, 5054 and 12020, Penal Code.

FINAL STATEMENT OF REASONS:

The Initial Statement of Reasons (ISOR) is incorporated by reference.

UPDATES TO THE INITIAL STATEMENT OF REASONS:

The Notice of Regulations was published in the California Regulatory Notice register on April 15, which began the public comment period. The Notice of Change to Regulations 16-04 was mailed out by April 15, 2016 and also posted on the Department's Internet and Intranet websites. .

During the 45-day public comment period 9 comments were received. These comments are discussed below under the heading "*Summaries and Responses To Written Public Comments.*"

Additionally, the Department made some non-substantive revisions and grammatical corrections to the final regulation text in the form of punctuation and added existing reference citations that were mistakenly omitted.

DETERMINATIONS, ASSESSMENTS, MANDATES, AND FISCAL IMPACT:

The Department has determined that no alternative considered would be more effective in carrying out the purpose for which this regulation is proposed, or would be as effective and less burdensome to affected private persons, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law, than the action proposed. No reasonable alternatives were brought to the attention of the Department that would alter the Department's initial determination.

Regarding benefits, these regulations will protect the health and safety of California residents, worker safety, and the State's environment by providing a safe environment that will encourage visitation for families, which will have a positive impact on inmates, and increase worker safety. The proposed amendment promotes standardization and fairness, and is necessary to adequately reflect current legal standards, and to bring CDCR in line with PC 4576. The changes reclassify any cellular telephone or wireless communication device accessories and/or components, as contraband rather than dangerous contraband.

The Department has made an initial determination that the action will not have a significant adverse economic impact on business. Additionally, there has been no testimony or other evidence provided that would alter the CDCR's initial determination.

The Department has determined that this action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement pursuant to Part 7 (Section 17561) of Division 4 of the Government Code.

PUBLIC HEARING COMMENTS:

A public hearing was held on June 3, 2016, at 10:00 a.m. No one provided public comment at the hearing.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:

Commenter # 1

Comment 1A - Commenter states that neither the current nor proposed text of subsection 3006(a) prohibits cellular telephones or wireless devices. Commenter states that the language in section 3006(a) is written to prohibit the circulation of writing(s) of cellular telephones, not the actual possession of such items. Commenter suggests, and offers an example of reorganization of Section 3006(a) to more clearly describe the intent and solve the problem.

Response to Comment 1A:

The Department believes the commenter has misinterpreted 3006(a), as both the current and proposed regulations prohibit the possession of a cellular telephone or wireless communication devices. In 2012, Section 3006(a) was amended to add cell phones or any wireless communication devices or components thereof as dangerous property under “Contraband”. This was stated with the intent that cell phones in the hands of inmates present an immediate threat to the safety and security of the correctional setting, public, staff and inmates because of the unmonitored nature of those communications.

The proposed revision to section 3006(a) simply removes the “components thereof including but not limited to, a subscriber identity module (SIM card) or memory storage device and cellular phone chargers”.

The Department appreciates the commenter’s suggestion of reorganization, but disagrees as the proposed revisions adequately interpret the department’s intent with the regulatory change.

Comment 1B- Commenter states that section 3006(c) prohibits speech not objects and the Department’s use of the word “matter” is used in the sense of subject matter (written materials, categories of speech, etc.), so the inclusion of cellular telephones and wireless device accessories and components do not fit logically or semantically under this section. Commenter suggests that further corrections to existing text are in order, specifically, 3006(c)(10) and 3006(c)(18) which identifies diskettes and tobacco. Commenter states that these items are physical objects and do not belong in Subsection 3006(c). Commenter suggests that the two mentioned paragraphs and new proposed paragraph be placed in a more logical place outside of 3006(c) and into either 3006(a) or (b). Commenter suggests, and offers an example of reorganization of Section 3006(b).

Response to Comment 1B:

The commenter has restricted his interpretation of “matter,” and is presumptive in his analysis that in its context “matter” is defined and restricted to items written, printed or recorded only. Inmates are restricted from possession of any indicated kind of item listed under section 3006 (c) as contraband. Furthermore, the commenter’s point regarding tobacco products and diskettes does not directly address the proposed revisions in this regulatory change. Therefore, the Department is unable to accommodate the comment.

Comment 1C- Commenter states that there is an inconsistency between the proposed regulations and two memorandum issued by the Division of Adult Institutions dated October 12, and December 15, 2015, permitting inmates to possess tablet computers and MP3 players, which contain, “encrypted memory cards,” or “memory storage devices.” Commenter states that these memorandum conflict with proposed subsections 3006(c)(2) and 3323(h)(14) which prohibit memory storage devices. Commenter suggests further amendments be made to these sections to assure that memory storage

devices for cellular telephones and wireless communication devices are prohibited, while memory storage devices for tablets and MP3 players are permitted.

Response to Comment 1C:

The commenters reference to Title 15 Section 3006 (c)(2), does not directly address the proposed revision in this regulatory change. Therefore, the Department is unable to accommodate the comment.

CCR Section 3323(h)(14) states, “Possession and/or constructive possession of a cellular telephone or wireless communication device or any component thereof including, but not limited to, a subscriber identity module (SIM card), memory storage devices or cellular telephone chargers.” This text should be read in conjunction with the paragraph as a whole in context and referring to the preceding sentence as memory storage devices associated with cellular telephones.

Commenter # 2

Comment 2A- Commenter states that they wish their comment be published in the rulemaking file and that any modifications the Department makes to the originally proposed text be made available to the commenter, and provide a copy of the Final Statement of Reasons and the entire rulemaking file at the promulgation of these regulations. Commenter requests that these records be mailed to him as he has no access to the internet or e-mail services.

Response to Comment 2A:

Accommodation: Partially Granted

All adopted changes, including the Final Statement of Reason will be made available to the commenter as requested. However, the request for the entire rulemaking file is irrelevant to the rulemaking action and subject to Section 3260.1 Public Records Duplication Services. “The Department shall charge 12 cents per page, plus postage, to duplicate and mail a public record as defined in the California Public Records Act, Government Code Sections 6250, et seq.”

Comment 2B- Commenter states that in the “Notice,” there is mention of a petition in Sacramento County Superior Court that challenged the validity of disciplinary proceedings resulting from the regulations. The Notice, however, does not offer the public a court case number, case number, or docket number for reference, and that the public has the right to know this information and be informed of the judicial decision pertaining to this matter to ensure the proposed action conforms with the orders of the court.

Response to Comment 2B:

On July 7, 2014, the Sacramento County Superior Court issued an order for an informal response to a petition for writ of habeas corpus from an inmate in Case No. 14HC00279.

Comment 2C- Commenter states that the regulations define “accessory and/or components” as including “memory storage device.” Commenter states this is vague and ambiguous to have this term without additional information that provides better clarification as to what these items could be considered so that that the inmates and staff are properly trained on what exact items are not allowed in the facility.

Response to Comment 2C:

The new proposed change does include descriptive information as it pertains to “accessory and/or components” and “memory storage device.” Proposed CCR Title 15, Section 3006(c)(20), states, “Any cellular telephone or wireless communication device accessory and/or component including, but not limited to, a subscriber identity module (SIM card), memory storage device, cellular phone

battery, wired or wireless headset, and cellular phone charger.” A SIM card is one description of a memory storage device. Cellular phone accessories are described as a cellular telephone battery, wired or wireless headset, and cellular phone charger, etc. The text is descriptive and offer examples for staff and inmates.

Commenter # 3

Comment 3A- Commenter states they believe the change is a good one based upon the view of “less time credits loss”. Commenter states that 80% of inmates would get a cellular phone solely to contact loved ones. Additionally, commenter states that the results would not all be good, however “most people and myself that would get or had got one to be closer to family”. Commenter states that time credits should not be so tough, so he agrees with the change.

Response to 3A:

This comment does not directly address the proposed revisions in this regulatory change. Therefore, the Department is unable to accommodate the comment.

Comment 3B- Commenter requests information on if the change affects anyone who gets “busted for a phone now and loses 90 days”, would it make them “able to get their time back in a couple of months under the new rules” (with the 30 day maximum).

Response to 3B:

The Department cannot respond to an individual or hypothetical situation request from the commenter. Existing regulations pertaining to the restoration of forfeited credits at the end of a disciplinary free period exists in CCR, Title 15, Section 3327(b).

Comment 3C- Commenter requests a copy of inmate’s rights when served a violation report.

Response to 3C:

The commenter’s request does not address the proposed revision in this regulatory change. Therefore, the Department is unable to accommodate the comment. Existing disciplinary regulations regarding to inmates rights are found in CCR, Title 15, Section 3320. Hearing Procedures and Time Limitations.

Commenter #4

Comment 4A: Commenter asks if the regulations are adopted, when they will take effect, as the restoration of forfeited credits will have an immediate impact on his incarceration and release. Commenter asks to be put on CDCR’s mailing list for future regulations and also requests a copy of the Final Statement of Reasons.

Response to 4A-

The proposed regulations and Final Statement of Reasons will be reviewed by the Office of Administrative Law (OAL). If found to meet the rulemaking requirements of Government Code and the Administrative Procedures Act, OAL will endorse and approve the regulations and file them with the Secretary of State. The date of approval will become the effective date.

Existing regulations in the California Code of Regulations, Title 15, Section 3327 govern the means in which an inmate may apply for restoration of forfeited credit.

Commenters name and address were placed on CDCR’s Notice of Change to Regulations mailing list, and commenter will also receive a copy of the Final Statement of Reason after the regulations are approved.