



Department of Corrections and Rehabilitation
NOTICE OF CHANGE TO REGULATIONS

Sections: 3000, 3290, and 3315	NCR Number: 22-09	Publication Date: June 24, 2022	Effective Date: TBD
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INSTITUTION POSTING AND CERTIFICATION REQUIRED

This Notice announces the proposed amendment of Sections 3000, 3290, and 3315 of the California Code of Regulations (CCR), Title 15, Crime Prevention and Corrections, Division 3, Chapter 1, regarding Controlled Substance Distribution.

PUBLIC COMMENT PERIOD

The public comment period will close on August 12, 2022. Any person may submit written comments about the proposed regulations by mail to the California Department of Corrections and Rehabilitation (CDCR), Regulation and Policy Management Branch (RPMB), P.O. Box 942883, Sacramento, CA 94283-0001, or by e-mail to RPMB@cdcr.ca.gov. All written comments must be received or postmarked no later than August 12, 2022.

PUBLIC HEARING INFORMATION

A public hearing regarding these proposed regulations will be held on August 15, 2022, from 10:00 a.m. to 11:00 a.m. in the Kern/Colorado Room, located at 1515 S Street, Sacramento, CA 95811. The purpose of the hearing is to receive comments about these proposed regulations. It is not a forum to debate the proposed regulations. No decision regarding the permanent adoption of these regulations will be rendered at this hearing. Written comments submitted during the prescribed comment period are given the same significance and weight as oral comments presented at the hearing. This hearing site is accessible to the mobility impaired.

POSTING

This Notice shall be posted immediately upon receipt at locations accessible to inmates, parolees, and employees in each department facility and field office not later than five calendar days after receipt. Also, institutions and facilities shall make this Notice available for review by inmates in segregated housing who do not have access to the posted copies, and shall distribute it to inmate law libraries and advisory councils. CDCR Form 621-A (Rev. 05/19), Certification of Posting, shall be returned to RPMB by mail or email. See Department Operations Manual Section 12010.6.7 for posting and certification of posting procedures.

CONTACT PERSON

Inquiries regarding this Notice should be directed to D. Kostyuk, by mail to California Department of Corrections and Rehabilitation, RPMB, P.O. Box 942883, Sacramento, CA 94283-0001, by telephone at (916) 445-2276, or e-mail to RPMB@cdcr.ca.gov. Inquiries regarding the subject matter of these regulations should be directed to Bryan Donahoo, Division of Adult Institutions, at (916) 324-1653.

Original signed by:

JEFF MACOMBER
Undersecretary, Operations
California Department of Corrections and Rehabilitation

Attachments

NOTICE OF PROPOSED REGULATIONS
California Code of Regulations
Title 15, Crime Prevention and Corrections
Department of Corrections and Rehabilitation

NOTICE IS HEREBY GIVEN that the Secretary of the California Department of Corrections and Rehabilitation (CDCR or department), proposes to amend Sections 3000, 3290, and 3315 into Title 15, Division 3, Chapter 1, regarding Controlled Substance Distribution.

PUBLIC COMMENT PERIOD

The public comment period begins **June 24, 2022** and closes on **August 12, 2022**. Any person may submit written comments by mail addressed to the primary contact person listed below, or by email to rpmb@cdcr.ca.gov, before the close of the comment period. For questions regarding the subject matter of the regulations, call the program contact person listed below.

CONTACT PERSONS

<u>Primary Contact</u>	<u>Back-Up</u>	<u>Program Contact</u>
D. Kostyuk Telephone: (916) 445-2276 Regulation and Policy Management Branch P.O. Box 942883 Sacramento, CA 94283-0001	Y. Sun Telephone: (916) 445-2269 Regulation and Policy Management Branch P.O. Box 942883 Sacramento, CA 94283-0001	B. Donahoo Telephone: (916) 324-1653 Division of Adult Institutions

PUBLIC HEARING

Date and Time: **August 15, 2022 – 10:00 a.m. to 11:00 a.m.**
Place: Department of Corrections and Rehabilitation
Kern/Colorado Room
1515 S Street – North Building
Sacramento, CA 95811

AUTHORITY AND REFERENCE

Government Code Section 12838.5 provides that commencing July 1, 2005, CDCR succeeds to, and is vested with, all the powers, functions, duties, responsibilities, obligations, liabilities, and jurisdiction of abolished predecessor entities, such as Department of Corrections, Department of the Youth Authority, and Board of Corrections.

Penal Code (PC) Section 5000 provides that commencing July 1, 2005, any reference to Department of Corrections in this or any code, refers to the CDCR, Division of Adult Operations. **PC Section 5050** provides that commencing July 1, 2005, any reference to the Director of Corrections in this or any other code, refers to the Secretary of the CDCR. As of that date, the office of the Director of Corrections is abolished.

PC Section 5054 provides that commencing July 1, 2005, the supervision, management, and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein are vested in the Secretary of the CDCR. **PC Section 5055** provides that commencing July 1, 2005, all powers and duties previously granted to and imposed upon the Department of Corrections shall be exercised by the Secretary of the CDCR. **PC Section 5058** authorizes the Director to prescribe and amend rules and regulations for the administration of prisons and for the administration of the parole of persons. **PC Section 5058.3** authorizes the Director to certify in a written statement filed with Office of Administrative Law that operational needs of the department require adoption, amendment, or repeal of regulation on an emergency basis.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Amend California Code of Regulations (CCR), Title 15, Division 3, section 3000, Definitions, to enhance and clarify the definition of 'Distribution,' and add cross reference to section 3000 in sections 3290 and 3315 for additional clarity.

This action will:

- Amend the definition of the term "Distribution" to ensure accurate interpretation by the courts in future litigation, and to align more closely with sections of the Health and Safety Code related to drug sales and transportation.
- Sections 3290 and 3315 are revised to add a cross reference to the definition of Distribution for clarity.

DOCUMENTS INCORPORATED BY REFERENCE

None

SPECIFIC BENEFITS ANTICIPATED BY THE PROPOSED REGULATIONS

The department anticipates that these regulations will ultimately reduce the amount of contraband and drugs introduced into and throughout the institutions, creating a safer environment for inmates, staff, visitors, contractors, and their employees and volunteers. The regulations will reduce the strife that is created when inmates are trying to profit from illegal activities, and better allow inmates to focus on rehabilitation, which will result in more productive citizens being released into the community and make the community safer as a whole.

EVALUATION OF INCONSISTENCY/INCOMPATIBILITY WITH EXISTING LAWS AND REGULATIONS

Pursuant to Government Code 11346.5(a)(3)(D), the department has determined the proposed regulations are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the department has concluded that these are the only regulations that concern revising the definition of "Distribution" of a controlled substance.

LOCAL MANDATES

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

FISCAL IMPACT STATEMENT

- Cost or savings to any state agency: *None*
- Cost to any local agency or school district that is required to be reimbursed: *None*
- Other nondiscretionary cost or savings imposed on local agencies: *None*
- Cost or savings in federal funding to the state: *None*

EFFECT ON HOUSING COSTS

The department has made an initial determination that the proposed action will have no significant effect on housing costs.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT ON BUSINESS

The department has made an initial determination that the proposed regulations will not have a significant statewide adverse economic impact directly affecting business, including the ability of

California businesses to compete with businesses in other states, because the proposed regulations place no obligations or requirements on any business.

EFFECT ON SMALL BUSINESSES

The department has determined that the proposed regulations will not affect small businesses. This action has no significant adverse economic impact on small businesses because they place no obligations or requirements on any business.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The department has determined that the proposed regulation will have no effect on the creation of new, or the elimination of existing, jobs or businesses within California, or effect the expansion of businesses currently doing business in California. The department has determined that the proposed regulation will have no effect on worker safety or the state's environment. These regulations may benefit the welfare of California residents by helping to make CDCR institutions safer for inmates, staff, and visitors. Additionally, safer institutions may provide an environment more conducive to rehabilitation, thereby reducing recidivism.

CONSIDERATION OF ALTERNATIVES

The department must determine that no reasonable alternative considered by the department or that has otherwise been identified and brought to the attention of the department would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed regulatory action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law. Interested persons are invited to present statements or arguments with respect to any alternatives to the changes proposed at the scheduled hearing or during the written comment period.

AVAILABILITY OF PROPOSED TEXT AND INITIAL STATEMENT OF REASONS

The department has prepared and will make available the text and the Initial Statement of Reasons (ISOR) of the proposed regulations. The rulemaking file for this regulatory action, which contains those items and all information on which the proposal is based (i.e., rulemaking file) is available to the public upon request directed to the department's contact person. The proposed text, ISOR, and Notice of Proposed Regulations will also be made available on the department's website: www.cdcr.ca.gov.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons may be obtained from the department's contact person.

AVAILABILITY OF CHANGES TO PROPOSED TEXT

After considering all timely and relevant comments received, the department may adopt the proposed regulations substantially as described in this Notice. If the department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text, with the changes clearly indicated, available to the public for at least 15 days before the department adopts, amends or repeals the regulations as revised. Requests for copies of any modified regulation text should be directed to the contact person indicated in this Notice. The department will accept written comments on the modified regulations for at least 15 days after the date on which they are made available.

TEXT OF PROPOSED REGULATIONS

In the following text, all new language is indicated by underline and deleted text is indicated by ~~strikethrough~~.

California Code of Regulations, Title 15: Crime Prevention and Corrections

Division 3. Rules and Regulations of Adult Institutions, Programs and Parole

Chapter 1. Rules and Regulations of Adult Operations and Programs

Article 1. Behavior

3000. Definitions

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Subsection 3000 is amended to read:

Distribution means: (a) the sale or to unlawfully sell, dispersing, furnish, administer, or give away any controlled substance; (b) to offer, to attempt to solicit someone to, or to conspire to perform any act listed in (a); by an inmate or parolee, of (c) to transport or deliver any controlled substance into any CDCR institution or facility in order to perform any act listed in (a); or the solicitation of or conspiring with others in arranging for, the introduction of controlled substances into any institution, camp, contract health facility, or community correctional facility for the purpose of sales or distribution. (d) to possess any controlled substance with the intent to perform any act listed in (a).

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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, 653, 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, 4501.1, 4570, 4576, 5009, 5050, 5054, 5068, 7000 et seq., 11180 and 11191, Penal Code; Sections 1132.4, 1132.8 and 1203(b)(1), Labor Code; Sections 10106, 10108, 10108.5, 10115, 10115.1, 10115.2, 10115.3 and 10127, Public Contract Code; 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; Sections 11007, 11351, 11352, 11378 and 11379, Health and Safety Code; *Madrid v. Cate* (USDC ND 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; *In re Garcia* (2012) 202 Cal.App.4th 892; and *Quine v. Beard*, No. C 14-02726 JST

Subchapter 4. General Institution Regulations

Article 2. Security

3290. Methods for Testing of Controlled Substances or for Use of Alcohol

Subsections 3290(a) through 3290(c) are unchanged.

Subsection 3290(c)(1) is amended to read:

(1) When there is reasonable suspicion to believe the inmate has possessed, distributed, as defined in section 3000, used, or is under the influence of a controlled substance or when there is reasonable suspicion to believe the inmate has possessed, distributed, used, or is under the influence of alcohol.

Subsections 3290(c)(2) through 3290(i) are unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 2932, 4573.6 and 5054, Penal Code.

Subchapter 4. General Institution Regulations

Article 5. Inmate Discipline

3315. Serious Rule Violations.

Subsections 3315(a) through 3315(a)(2)(C) are unchanged.

Subsection 3315 (a)(2)(D) is amended to read:

(D) The introduction, distribution, as defined in section 3000, possession, or use of controlled substances, or the introduction, distribution, possession, or use of alcohol, or dangerous contraband.

Subsections 3315(a)(2)(E) through 3315(i) are unchanged.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 295, 295.1, 295.2, 296, 296.1, 296.2, 297, 298, 298.1, 298.2, 298.3, 299, 299.5, 299.6, 299.7, 300, 300.1, 300.2, 300.3, 314, 530, 532, 646.9, 647, 653, 2931, 2932, 2933, 4501.1, 4573.6, 4576, 5054 and 5068, Penal Code; and Sections 11351, 11352, 11378 and 11379, Health and Safety Code.

INITIAL STATEMENT OF REASONS

The California Department of Corrections and Rehabilitation (CDCR or department) proposes to amend California Code of Regulations (CCR), Title 15, Division 3, section 3000, Definitions, to enhance the definition of 'Distribution,' and sections 3290 and 3315 to add a cross reference to section 3000 for clarity.

The current definition of Distribution in section 3000 omits possession with intent to distribute. This omission has resulted in several recent court decisions against the CDCR because the inmate successfully argued that CDCR regulations do not permit possession with intent to distribute to be a basis for a distribution offense.

FOUR RECENT COURT DECISIONS

1. The court noted that the charges for the Rules Violation Report (RVR) (accusing the inmate of possessing controlled substances with intent to distribute them) did not match up with the language in section 3016 and the definition of distribution from section 3000 (which, when read together, require actual distribution not just the intent to do so). The court granted the petition, reducing the inmate's credit forfeiture and administrative penalties to those for simple possession.
2. The court found that the definition of "distribute" contained in section 3000 did not prohibit the possession of a controlled substance with intent to distribute, and as a result (coupled with other evidentiary issues including the omission of the testifying officer's training and experience), ordered CDCR to vacate the inmate's finding of guilt.
3. The court found that the definition of "distribute" contained in section 3000 did not prohibit the possession of a controlled substance with intent to distribute and as a result ordered CDCR to vacate the inmate's finding of guilt as to distribution.
4. The court noted that the definition of "distribution" from section 3000 requires actual distribution (not just the apparent intent to do so). The court granted the petition, ordering that the inmate's guilt finding to be modified to that for simple possession.

CONSIDERATION OF ALTERNATIVES

The department must determine that no reasonable alternative considered, or that has otherwise been identified and brought to the attention of the department, would be more effective in carrying out the purpose for which this action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Currently, no reasonable alternatives have been brought to the attention of the department that would alter the department's initial determination.

ECONOMIC IMPACT ASSESSMENT

In accordance with Government Code section 11346.3(b), the department has made the following assessments regarding the proposed regulations:

Significant Adverse Economic Impact on Business

The department has made an initial determination that the proposed regulatory action will not have a significant adverse economic impact on business. Additionally, there have been no facts, evidence, documents, testimony, or other evidence provided that would alter the department's initial determination. The proposed regulations do not have a direct impact on California businesses as the proposed regulations affect the internal management of CDCR only.

Creation of new or the Elimination of Existing Jobs within the State of California

The department has determined that the proposed regulations will have no impact on the creation of new or elimination of existing jobs within California as the proposed regulations affect the internal management of CDCR only.

Creation of New, Expansion or the Elimination of Existing Businesses Currently Doing Business within the State of California

The department has determined that the proposed regulations will have no impact on the creation of new or elimination of existing businesses within the State of California, or affect the expansion of businesses currently doing business in California as the proposed regulations affect the internal management of CDCR only.

BENEFITS OF THE REGULATIONS

The department anticipates that these regulations will ultimately reduce the amount of contraband and drugs introduced into and throughout the institutions, creating a safer environment for inmates, staff, visitors, contractors, and their employees and volunteers. The regulations will reduce the strife that is created when inmates are trying to profit from illegal activities, and better allow inmates to focus on rehabilitation, which will result in more productive citizens being released into the community and make the community safer as a whole.

DOCUMENTS RELIED UPON

The department, in proposing these amendments, has relied upon the following documents:

- Writ granted on August 14, 2017 (Sacramento County Case No. 17HC00156)
- Writ granted on November 8, 2018 (Tuolumne County Case No. CRW56341)
- Writ granted on November 20, 2019 (Kern County Case No. #HC16158)
- Writ granted on March 9, 2021 (Sacramento County Case No. 20HC00354)

SPECIFIC PURPOSE AND RATIONALE FOR EACH SECTION, PER GOVERNMENT CODE SECTION 11346.2(B)(1)

Chapter 1. Rules and Regulations of Adult Operations and Programs

Article 1. Behavior

3000. Definitions

Section 3000, defining “Distribution” is amended to add possession of a controlled substance with the intent to distribute. This revision is necessary to ensure clarity to the courts in the event of future litigation, to align more closely with Health and Safety Code sections 11351, 11352, 11378, and 11379 related to drug sales and transportation, and to support and reinforce the department’s goal of reducing and disrupting drug trafficking within California’s prisons.

Subchapter 4. General Institution Regulations

Article 2. Security

3290. Methods for Testing of Controlled Substances or for Use of Alcohol

Subsections 3290(a) through 3290(c) are unchanged.

Subsection 3290(c)(1) is amended to incorporate reference to section 3000 “Distribution.” The intent in citing section 3000 in subsection 3290(c)(1) is to eliminate the loophole inmates have used to avoid the imposition of drug testing for distribution.

Subsections 3290(c)(2) through 3290(i) are unchanged.

Subchapter 4. General Institution Regulations

Article 5. Inmate Discipline

3315. Serious Rule Violations.

Subsections 3315(a) through 3315(a)(2)(C) are unchanged.

Subsection 3315(a)(2)(D) is amended to incorporate reference to section 3000 “Distribution.” The intent in citing section 3000 is to eliminate the loophole inmates have garnered to avoid a serious rule violation under section 3315, because the current definition of distribution excludes possession with intent to distribute.

Subsections 3315(a)(2)(E) through 3315(i) are unchanged.