

Memorandum 94-35

**Administrative Adjudication: Exemptions From APA**

The Commission previously reviewed requests of various agencies for exemption from the Administrative Procedure Act. The Commission has also been informed that the State Military Department requires an exemption in order to conform to federal standards, but we have not received any submission from the department.

**Exempt Hearings**

The Commission decided that hearings of the following agencies should be exempt from the administrative adjudication provisions of the proposed APA:

**Agricultural Labor Relations Board (election certification)**

**Alcoholic Beverage Control Appeals Board**

**Department of Corrections and related entities (Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Addict Evaluation Authority)**

**Public Employment Relations Board (election certification)**

**Public Utilities Commission**

**Commission on State Mandates**

A draft of these provisions is attached as Exhibit pp. 1-5.

**Pending Exemption Requests**

The Commission deferred deciding whether hearings of the following agencies should be exempt:

**California Coastal Commission**

**San Francisco Bay Conservation and Development Commission**

**Student Aid Commission**

The Commission also received a renewed request for exemption of all hearings from the following agency:

**Agricultural Labor Relations Board**

Considerations affecting these exemption requests are analyzed in this memorandum.

## **Agricultural Labor Relations Board**

The Agricultural Labor Relations Board emphasizes its need for an exemption for election certification proceedings, and renews its request for an exemption for all its proceedings. Exhibit pp. 6-9.

The basis of its request is that agency special hearing procedures must satisfy separation of functions requirements, which preclude a person from serving as presiding officer if the person is subject to the authority of a person who has served as an investigator in a pre-adjudicative stage of the proceeding. The Executive Secretary of ALRB supervises administrative law judges and also advises the Board concerning requests for injunctive relief, which may be considered a form of "investigation".

Since it is beyond the jurisdiction of our administrative law judges to grant injunctive relief, we cannot conceive of any real conflict between the Executive Secretary's assisting the Board in considering the propriety of the General Counsel's request for injunctive relief and the fact that an administrative law judge whom he supervises will preside over the unfair practice case in which such relief has been requested; nevertheless, as written, the criteria of this particular template create a problem where none existed. Since we believe the Executive Secretary should supervise administrative law judges, we believe the problem is an unnecessary one.

ALRB also expresses general concern about unforeseen consequences of application of the new APA to it, and the likelihood that parties regulated by ALRB will take advantage of every opportunity presented to them to challenge ALRB procedures. "Since our statute is modeled after the National Labor Relations Act, and has consistently passed due process muster, we cannot see how our inclusion in the proposed restructuring will benefit the parties who practice before us. Accordingly, we continue to request exemption from the proposed restructuring."

The staff agrees with ALRB's general position. In any case, we believe the ALRB's situation illustrates that the separation of functions provisions are too narrowly drawn. **We would revise the draft to read:**

### **§ 643.330. When separation not required**

643.330. (a) Unless a party demonstrates other statutory grounds for disqualification:

(1) A person who has participated in a determination of probable cause , *injunctive or other pre-hearing relief*, or other equivalent preliminary determination in an adjudicative proceeding may serve as presiding officer or *as a supervisor of the presiding officer or may assist or advise the presiding officer* in the same proceeding.

....

### **California Coastal Commission and San Francisco Bay Conservation and Development Commission**

The Coastal Commission and San Francisco Bay Conservation and Development Commission can adopt regulations under the draft statute to use the special hearing procedure, because no statute requires either Commission to use ALJs from OAH. There are two possible objections to applying the new APA to these commissions:

(1) A cost is associated with adopting regulations to use the special hearing procedure. But this cost is not unique to these commissions, but applies to every agency that wishes to use the special hearing procedure.

(2) Applying the new separation of functions provisions to these commissions may require more personnel and thus increase costs. In Memorandum 94-34, the staff recommends softening the separation of functions provisions by revising Section 643.330 to permit a person who has served as investigator or advocate in nonprosecutorial proceedings of the Coastal Commission or BCDC to give policy advice to the presiding officer. And at the June meeting, the Commission revised Section 632.020 to permit the informal hearing procedure to be used by the Coastal Commission and BCDC for land use planning or environmental matters, without the need to adopt regulations. The staff believes these revisions will allow these commissions to function under the new APA without serious disruption. **The staff recommends that neither the Coastal Commission nor the San Francisco Bay Conservation and Development Commission be exempted from the new APA.**

### **Student Aid Commission**

Attached is a letter of May 6, 1994, from the Student Aid Commission requesting exemption from the new APA. Exhibit pp. 10-12. The letter says the Student Aid Commission

is implementing a federal law, 20 USC 1095a, that prescribes hearing requirements in connection with administrative wage

garnishment by guarantee agencies to collect defaulted student loans. If it is not exempted from the new APA, the Commission would be faced with the formidable task of reconciling a number of incompatible federal and state requirements.

The federal statute is set out in the Exhibit at pp. 13-15. The procedural requirements of the statute are skeletal: The debtor must be given notice by mail with an explanation of his or her rights. The debtor has a right to a hearing "in accordance with such procedures as the Secretary or the head of the guaranty agency, as appropriate, may prescribe." The hearing

may not be conducted by an individual under the supervision or control of the head of the guaranty agency, except that nothing in this sentence shall be construed to prohibit the appointment of an administrative law judge. The hearing official shall issue a final decision at the earliest practicable date, but not later than 60 days after the filing of the petition requesting the hearing.

As authorized by the statute, the U. S. Department of Education has issued regulations governing the hearing. The Student Aid Commission sent us a copy of these regulations. Although there are more than 30 pages of material, most of it prescribes forms — notice prior to wage withholding, request for hearing or exemption, order of withholding from earnings, employer acknowledgment of wage withholding, employer notice of change in employment, second notice of order of withholding from earnings, release of order of withholding from earnings, employer acknowledgment of release of order of withholding, and rules for payment processing. The rules for the hearing itself are brief, and are set out in the Exhibit at pp. 16-17.

Since these hearings will not be required to be conducted by an ALJ from OAH, the Student Aid Commission will be able to adopt regulations to provide a special hearing procedure consistent with federal regulations. Interim regulations may be adopted without the usual notice, hearing, and OAL review, and permanent regulations, although subject to OAL review, are not subject to review for necessity. Section 610.940. Although the key due process protections of the draft statute will apply — freedom of presiding officer from bias, separation of functions, public hearings, right to present and rebut evidence, restriction on ex parte communications, written decision, and designation and indexing of precedent decisions — it is not obvious why these would cause

serious problems for the Student Aid Commission. **The staff recommends the Student Aid Commission not be exempted from the new APA.**

Should the Commission decide to exempt the Student Aid Commission notwithstanding the foregoing recommendation, the following is draft language to do this:

**Educ. Code § 69522 (added). Administrative Procedure Act inapplicable**

69522. The administrative adjudication provisions of Division 3.3 (commencing with Section 600) of Title 1 of the Government Code do not apply to a wage garnishment hearing of the Student Aid Commission pursuant to 20 U. S. Code Section 1095a.

**Comment.** Section 69522 makes the administrative adjudication provisions of the Administrative Procedure Act inapplicable to a wage garnishment hearing of the Student Aid Commission. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

Respectfully submitted,

Robert J. Murphy  
Staff Counsel

Exhibit

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**Administrative Adjudication: Exemptions From APA**

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AGRICULTURAL LABOR RELATIONS BOARD (ELECTION CERTIFICATION)

**Lab. Code § 1144.5 (added). Exemption from Administrative Procedure Act**

1144.5. The provisions of Division 3.3 (commencing with Section 600) of Title 1 of the Government Code governing adjudicative proceedings do not apply to a hearing by the board under this part, except a hearing to determine an unfair labor practice charge.

**Comment.** Section 1144.5 makes the administrative adjudication provisions of the Administrative Procedure Act inapplicable to proceedings by the Agricultural Labor Relations Board under this part, except hearings to determine unfair labor practice charges. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

**Bus. & Prof. Code § 23083 (amended). Determination of appeal**

23083. (a) The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties. If any party to the appeal requests the right to appear before the board, the board shall fix a time and place for argument. The board shall not receive any evidence other than that contained in the record of the proceedings of the department.

(b) *The administrative adjudication provisions of Division 3.3 (commencing with Section 600) of Title 1 of the Government Code do not apply to the determination.*

**Comment.** Section 23082.5 makes the administrative adjudication provisions of the Administrative Procedure Act inapplicable to determination of an appeal by the Alcoholic Beverage Control Appeals Board. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

DEPARTMENT OF CORRECTIONS AND RELATED ENTITIES (BOARD OF PRISON TERMS,  
YOUTH AUTHORITY, YOUTHFUL OFFENDER PAROLE BOARD, AND NARCOTIC  
ADDICT EVALUATION AUTHORITY)

**Pen. Code § 3066 (added). Administrative Procedure Act inapplicable**

3066. The administrative adjudication provisions of Division 3.3 (commencing with Section 600) of Title 1 of the Government Code do not apply to a parole hearing or other adjudication concerning rights of an inmate or parolee conducted by the Department of Corrections or the Board of Prison Terms.

**Comment.** Section 3066 makes the administrative adjudication provisions of the Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights of an inmate or parolee conducted by the Department of Corrections or the Board of Prison Terms. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

**Welf. & Inst. Code § 1778 (added). Administrative Procedure Act inapplicable**

1778. The administrative adjudication provisions of Division 3.3 (commencing with Section 600) of Title 1 of the Government Code do not apply to a parole hearing or other adjudication concerning rights of a person committed to the control of the Youth Authority conducted by the Youth Authority or the Youthful Offender Parole Board.

**Comment.** Section 1778 makes the administrative adjudication provisions of the Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights of a ward conducted by the Youth Authority or the Youthful Offender Parole Board. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

**Welf. & Inst. Code § 3158 (added). Administrative Procedure Act inapplicable**

3158. The administrative adjudication provisions of Division 3.3 (commencing with Section 600) of Title 1 of the Government Code do not apply to a release hearing or other adjudication concerning rights of a person committed to the custody of the Director of Corrections conducted by the Narcotic Addiction Evaluation Authority.

**Comment.** Section 3158 makes adjudicative provisions of the Administrative Procedure Act inapplicable to a parole hearing or other adjudication of rights of a civil addict conducted by the Narcotic Addiction Evaluation Authority. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

PUBLIC EMPLOYMENT RELATIONS BOARD (ELECTION CERTIFICATION)

**Gov't Code § 3513 (amended). Definitions**

3513. As used in this chapter:

.....

(g) "Board" means the Public Employment Relations Board. ~~The Educational Employment Relations Board established pursuant to Section 3541 shall be renamed the Public Employment Relations Board as provided in Section 3540.~~ The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter.

.....

**Comment.** Section 3513 is amended to delete a transitional provision that is no longer necessary. The administrative adjudication provisions of the Administrative Procedure Act do not apply to hearings by the Public Employment Relations Board under this chapter except hearings to determine unfair practice charges. Section 3541.3(h). Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

**Gov't Code § 3541.3 (amended). Powers and duties of board**

3541.3. The board shall have all of the following powers and duties:

.....

(h) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and in connection therewith, to issue subpoenas deuces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction. *The administrative adjudication provisions of Division 3.3 (commencing with Section 600) do not apply to a hearing by the board under this chapter, except a hearing to determine an unfair practice charge.*

.....

**Comment.** Section 3541.3 is amended to make the administrative adjudication provisions of the Administrative Procedure Act inapplicable to proceedings by the Public Employment Relations Board under this chapter, except hearings to determine unfair practice charges. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

**Gov't Code § 3563 (amended). Powers and duties of board**

3563. This chapter shall be administered by the Public Employment Relations Board. In administering this chapter the board shall have all of the following rights, powers, duties and responsibilities:

.....

(g) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and in connection therewith, to issue subpoenas deuces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction, except for those records, books, or papers confidential under statute. *The administrative adjudication provisions of Division 3.3 (commencing with Section 600) do not apply to a hearing by the board under this section., except a hearing to determine an unfair practice charge.*

.....

**Comment.** Section 3563 is amended to make the administrative adjudication provisions of the Administrative Procedure Act inapplicable to proceedings by the Public Employment Relations Board under this chapter, except hearings to determine unfair practice charges. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

PUBLIC UTILITIES COMMISSION

**Pub. Util. Code § 1701 (amended). Rules of procedure**

1701. (a) All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

(b) *The administrative adjudication provisions of Division 3.3 (commencing with Section 600) of Title 1 of the Government Code do not apply to a hearing by the commission under this part.*

**Comment.** Section 1701 is amended to make the administrative adjudication provisions of the Administrative Procedure Act inapplicable to a hearing by the Public Utilities Commission under the Public Utilities Act. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

COMMISSION ON STATE MANDATES

**Gov't Code § 17533 (added). Exemption from Administrative Procedure Act**

17533. The administrative adjudication provisions of Division 3.3 (commencing with Section 600) of Title 1 do not apply to a hearing by the commission under this part.

**Comment.** Section 17533 makes the administrative adjudication provisions of the Administrative Procedure Act inapplicable to hearings by the Commission on State Mandates under this part. Nothing in this provision excuses compliance with procedural protections otherwise required by due process of law.

**AGRICULTURAL LABOR RELATIONS BOARD**

915 CAPITOL MALL, ROOM 335  
SACRAMENTO, CA 95814  
(916) 653-3699  
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June 28, 1994

Law Revision Commission  
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California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

File: \_\_\_\_\_

Re: Comment on Memorandum 94-18

Dear Mr. Sterling,

We appreciate the opportunity to comment on Memorandum 94-18, the latest proposal for the restructuring of administrative adjudication that now incorporates the "template" model.

As you are aware, the Agricultural Labor Relations Board requested an exemption from the original restructuring proposal on the related grounds that our agency's procedures already provided the parties who practice before us with sufficient procedural safeguards to make our inclusion in the proposed restructuring unnecessary and the particular changes contained in the original proposal would be mischievous.

Since the new approach aims at minimizing the disruption to established agency practices which would have resulted from adoption of the "mainline" statute approach, we are encouraged by the Commission's change of direction. However, our review of the proposed statute convinces us that, despite the Commission's change of direction, the net effect of the new approach will likely be disruptive. Before discussing specific kinds of problems posed by the template, we would like to renew our concern about how the statute would affect our certification process.

As we shall explain below, it is arguable that, as drafted, the proposed statute would require the Board to alter its present method of processing election objections. Since this method has already withstood both statutory and constitutional challenges, we think it hardly serves the public interest to expose it to renewed challenges in the name of due process.

As the Commission is aware, the Agricultural Labor Relations Board conducts elections to determine whether or not agricultural employees wish to be represented by a labor organization and enforces certain rules designed to promote fair play among employees, employers and labor organizations. We will certify a labor union as the exclusive bargaining representative of an employer's agricultural employees only if 1) the election has been conducted under certain conditions; 2) has otherwise been conducted properly; and 3) we are satisfied that its outcome represents the

free choice of employees.

Under Labor Code Section 1156.3(c) parties to an election may file a petition objecting to an election on any of the specified grounds. Upon receipt of this petition, the board "shall conduct" a hearing; if the Board finds "on the record of such hearing that any of the assertions made in the petition . . . are correct, or that the election was not conducted properly, or misconduct affecting the results of the election occurred, the board may refuse to certify the results of the election . . . ."

The Board early concluded that the objections procedure outlined above was being used by the parties to delay the certification of election results and the commencement of bargaining. To prevent this, we adopted a procedure which provided full evidentiary hearings only when the objecting party established a prima facie case by declaration or other competent evidence for the Board's refusing to certify the results of an election.

This "screening" procedure, which is in essence a kind of summary judgment hearing, has been upheld by the Supreme Court as both consonant with our statute and consistent with due process and we have utilized it for nearly two decades. While it is our understanding that the Commission decided to exempt our agency's "certification elections" from the "mainline" statute formerly under consideration,<sup>1</sup> there is nothing in the current version of the statute which accomplishes this end. As written, the statute applies to any agency which is required by statute to hold an evidentiary hearing to determine facts upon which legal rights or duties depend.<sup>2</sup>

Since we are an agency which creates rights and duties through our certifications, and since, in considering objections to our certification of a labor organization as exclusive bargaining representative, we act pursuant to a statute which calls for an evidentiary hearing, we anticipate that our "screening" procedures will again be challenged as outside the range of procedures specifically authorized by Section 631.020 and, therefore, as no longer permissible under the "restructuring."

While we do not believe the Commission intended this result, and we do believe that when the two statutes are read together they may be harmonized so as to avoid it -- on the grounds that section 1156.3(c) only requires an evidentiary hearing when an objecting party makes out a prima facie case for setting aside an election,

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<sup>1</sup>See Minutes of Meeting February 10-11, 1994, California Law Revision Commission

<sup>2</sup>While the Comment to Section 631.010 indicates the definition of "decision" is intended to incorporate the concept of final order, the statute does not require this reading.

-- the problem is that the statute does not provide unambiguous support for the first belief and we cannot, therefore, be entirely confident of the second. Moreover, even if we were correct on both points, the fact that the question of the continued viability of the "screening" procedure arises at all, is still a matter of grave concern.

With respect to the template approach itself, we believe that it, too, creates more problems than it solves. When the template model was first discussed in Memorandum 94-16, one of the designs considered was structuring it "loosely" enough to permit a variety of agency procedures to "fit" within it. However, the proposed template which emerged in the latest proposal is not the "loose" model described in 94-16. Rather, with respect to at least some of the "template" requirements, certain minimum criteria are established. For example, the newest proposal requires that presiding officers be free of bias, prejudice, and interest to the extent provided in Section 643.210. Section 643.210(b)(4) then provides that it is not bias for a presiding officer to be subject to the authority, direction, or discretion of someone who has served as "investigator, prosecutor or advocate in the proceeding" if that relationship is not otherwise prohibited by the separation of function provisions.

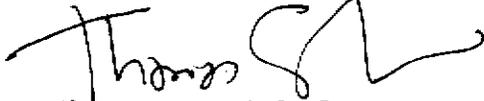
Resort to the separation of function provisions thus becomes necessary to complete the definition of bias. Section 643.320 provides that a person who is subject to the authority, direction, or discretion of a person who has served as investigator in a pre-adjudicative stage of a proceeding may not serve as presiding officer in the same proceeding. This blending of bias and separation of functions creates problems for this agency because the Executive Secretary supervises administrative law judges and advises the Board concerning requests for injunctive relief. If his review of declarations concerning the propriety of injunctive relief be considered an "investigation", no administrative law judge he supervises may hear a case in which injunctive relief has been requested.

Since it is beyond the jurisdiction of our administrative law judges to grant injunctive relief, we cannot conceive of any real conflict between the Executive Secretary's assisting the Board in considering the propriety of the General Counsel's request for injunctive relief and the fact that an administrative law judge whom he supervises will preside over the unfair practice case in which such relief has been requested; nevertheless, as written, the criteria of this particular template create a problem where none existed. Since we believe the Executive Secretary should supervise administrative law judges, we believe the problem is an unnecessary one.

To some extent, we can anticipate how the proposed restructuring will affect our processes and we have tried to indicate some of those effects; obviously, we cannot anticipate them all. What we can be sure of is that the parties we regulate will take advantage

of every opportunity presented to them to challenge our procedures. Since we are a small agency, struggling to fulfill our statutory purposes with a limited staff in the face of severe budget cuts, we cannot help but believe that the opportunities for litigation created by the proposed restructuring will detract from our capacity to perform our essential statutory functions. Since our statute is modelled after the National Labor Relations Act, and has consistently passed due process muster, we cannot see how our inclusion in the proposed restructuring will benefit the parties who practice before us. Accordingly, we continue to request exemption from the proposed restructuring.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Thomas M. Sobel". The signature is written in dark ink and is positioned above the typed name.

Thomas M. Sobel  
Chief Administrative Law Judge

## CALIFORNIA STUDENT AID COMMISSION

P.O. BOX 510845  
SACRAMENTO, CA 94245-0845

Law Revision Commission  
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MAY - 9 1994

May 6, 1994

File: \_\_\_\_\_

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Re: Exemption of the California Student Aid  
Commission from the provisions of the  
proposed Administrative Procedure Act;  
appearance at meeting on May 12-13, 1994

Dear Members of the Commission:

I wish to thank the Commission for permitting me to appear, even though I was not on the agenda, at the meeting on February 10, 1994, to present reasons why the California Student Aid Commission should be listed among the state agencies to be exempted from the administrative hearing requirements imposed by the proposed new Administrative Procedure Act (APA). At that meeting you deferred action on our request for exemption. I am now presenting this letter in support of our request. My understanding was that our request would be taken up at the meeting on May 12-13, 1994, and I will attend that meeting to answer any questions you may have.

As I stated in February, the Commission is implementing a federal law, 20 USC 1095a, that prescribes hearing requirements in connection with administrative wage garnishment by guarantee agencies to collect defaulted student loans. If it is not exempted from the new APA, the Commission would be faced with the formidable task of reconciling a number of incompatible federal and state requirements.

Under Section 1095a, notice of an agency's intent to garnish an individual's disposable earnings must be sent by mail to the individual's last known address at least 30 days before garnishment may begin and the individual must be provided an opportunity to inspect and copy records, an opportunity to enter into a written repayment agreement, and an opportunity for a hearing in accordance with Section 1095a(b) concerning the existence of the debt, the amount of the debt, and the terms of the repayment schedule. Under Section 1095a(b), garnishment may commence on the 30th day if the individual fails to request a hearing on or before the 15th day following the mailing of the notice. Furthermore, if a hearing is requested, the hearing official must issue a final decision at the earliest practicable date, but not later than 60 days after the request for a hearing

is received. The clear congressional intent was to expedite the resolution of student loan debt disputes.

Under the new APA, the Commission would be required to accommodate a long list of provisions in this very short timeframe. It would be impossible for the Commission to provide for discovery (645.110 et seq.), prehearing conferences (646.110 et seq.), settlement conferences (646.210 et seq.), continuances (642.420), intervention (644.110 et seq.), etc. Moreover, some provisions, such as those governing extensions of time for notice or response to notice (613.230) and the issuance of decisions (649.110 et seq.), directly conflict with the requirements of Section 1095a. At the very least, the Commission would be required to make confusing adaptations to federal procedures regarding, for example, service (613.210 et seq.), venue (642.430), pleadings (642.310 et seq.), affidavits (648.340), the qualifications of hearing officers (643.110 et seq.), interpreters (648.210 et seq.), defaults (648.130), etc. Every provision of the new APA would need to be assessed to determine whether it can or cannot be accommodated into the federal scheme and, if so, how. Given the number of deviations between federal and APA requirements, it would be impracticable for the Commission to seek exemption from the APA on a chapter by chapter basis. It would be a complicated and confusing task requiring great amounts of time and expense.

Moreover, after the February meeting the Commission received new information which effectively precludes the Commission from achieving any meaningful compliance with the new APA. The United States Department of Education recently issued "administrative wage garnishment procedures" that "must be used for any wage garnishment initiated on or after March 1, 1994." A copy of those procedures is enclosed for your review. Through its mandated procedures, the Department seeks to protect federal taxpayer's interests and to ensure equitable treatment of borrowers throughout the country. The Department "will not permit an agency to alter these procedures unless the proposed change is a truly minor one that is justified because of a unique administrative requirement of the agency. Any proposed change must be submitted for the Department's review and approval."

In sum, both Section 1095a and the USDE-mandated procedures present the Commission with an inflexible framework for its administrative adjudication of student loan debt disputes. We

California Law Revision Commission  
May 6, 1994  
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respectfully submit that in our case, for everyone involved, the advantages of exemption outweigh the advantages of inclusion.

Please call me at 916-322-8934 if you have any questions.

Sincerely,

*Ted*

Dennis Theodore O'Toole  
General Counsel

Enclosure

Exhibit

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**FEDERAL STATUTE GOVERNING STUDENT AID COMMISSION  
20 U. S. CODE (EDUCATION)**

**§ 1095a. Wage garnishment requirement**

**(a) Garnishment requirements**

Notwithstanding any provision of State law, a guaranty agency, or the Secretary in the case of loans made, insured or guaranteed under this subchapter that are held by the Secretary, may garnish the disposable pay of an individual to collect the amount owed by the individual, if he or she is not currently making required repayment under a repayment agreement with the Secretary, or, in the case of a loan guaranteed under part B of this subchapter on which the guaranty agency received reimbursement from the Secretary under section 1078(c) of this title, with the guaranty agency holding the loan, as appropriate, provided that--

(1) the amount deducted for any pay period may not exceed 10 percent of disposable pay, except that a greater percentage may be deducted with the written consent of the individual involved;

(2) the individual shall be provided written notice, sent by mail to the individual's last known address, a minimum of 30 days prior to the initiation of proceedings, from the guaranty agency or the Secretary, as appropriate, informing such individual of the nature and amount of the loan obligation to be collected, the intention of the guaranty agency or the Secretary, as appropriate, to initiate proceedings to collect the debt through deductions from pay, and an explanation of the rights of the individual under this section;

(3) the individual shall be provided an opportunity to inspect and copy records relating to the debt;

(4) the individual shall be provided an opportunity to enter into a written agreement with the guaranty agency or the Secretary, under terms agreeable to the Secretary, or the head of the guaranty agency or his designee, as appropriate, to establish a schedule for the repayment of the debt;

(5) the individual shall be provided an opportunity for a hearing in accordance with subsection (b) of this section on the determination of the Secretary or the guaranty agency, as appropriate, concerning the existence or the amount of the debt, and, in the case of an individual whose repayment

schedule is established other than by a written agreement pursuant to paragraph (4), concerning the terms of the repayment schedule;

(6) the employer shall pay to the Secretary or the guaranty agency as directed in the withholding order issued in this action, and shall be liable for, and the Secretary or the guaranty agency, as appropriate, may sue the employer in a State or Federal court of competent jurisdiction to recover, any amount that such employer fails to withhold from wages due an employee following receipt of such employer of notice of the withholding order, plus attorneys' fees, costs, and, in the court's discretion, punitive damages, but such employer shall not be required to vary the normal pay and disbursement cycles in order to comply with this paragraph;

(7) if an individual has been reemployed within 12 months after having been involuntarily separated from employment, no amount may be deducted from the disposable pay of such individual until such individual has been reemployed continuously for at least 12 months; and

(8) an employer may not discharge from employment, refuse to employ, or take disciplinary action against an individual subject to wage withholding in accordance with this section by reason of the fact that the individual's wages have been subject to garnishment under this section, and such individual may sue in a State or Federal court of competent jurisdiction any employer who takes such action. The court shall award attorneys' fees to a prevailing employee and, in its discretion, may order reinstatement of the individual, award punitive damages and back pay to the employee, or order such other remedy as may be reasonably necessary.

**(b) Hearing requirements**

A hearing described in subsection (a)(5) of this section shall be provided prior to issuance of a garnishment order if the individual, on or before the 15th day following the mailing of the notice described in subsection (a)(2) of this section, and in accordance with such procedures as the Secretary or the head of the guaranty agency, as appropriate, may prescribe, files a petition requesting such a hearing. If the individual does not file a petition requesting a hearing prior to such date, the Secretary or the guaranty agency, as appropriate, shall provide the individual a hearing under subsection (a)(5) of this section upon request, but such hearing need not be provided prior to issuance of a garnishment order. A hearing under subsection (a)(5) of this section may not be conducted by an individual under the supervision or control of the head of the guaranty agency, except that nothing in this sentence shall be construed to prohibit the appointment of an administrative law judge. The hearing official shall issue a final decision at the earliest practicable date, but not later than 60 days after the filing of the petition requesting the hearing.

**(c) Notice requirements**

The notice to the employer of the withholding order shall contain only such information as may be necessary for the employer to comply with the withholding order.

**(d) "Disposable pay" defined**

For the purpose of this section, the term "disposable pay" means that part of the compensation of any individual from an employer remaining after the deduction of any amounts required by law to be withheld.

## Payment Processing

All payments received from employers will be applied to the debtor's account effective the date of receipt.

## Hearing Procedures

Hearings will be scheduled and conducted by the Collection Department. \_\_\_\_\_ will be represented at the hearing by a designated department official. Individuals who are not under the supervision or control of the head of the guarantor will serve as Administrative Hearing Judges for our hearings. The following provides a basic description of the hearing process.

### Procedures

Step	Action	
1.	The debtor will receive a "Request for Hearing" form along with the "Notice Prior to Wage Withholding" form. The debtor will be required to complete the form and return it to _____.	
2.	_____ will review the request and schedule a time and date for the hearing to take place.	
3.	The debtor is notified of the time and date of the hearing.	
4.	The hearing is held at the agreed time, either in person, by telephone, or in writing.	
	If	then
	the debtor does not appear for his/her in-person hearing or is not available at the agreed time for his/her telephone hearing.	he/she will be notified in writing by _____ that no further hearings will be offered. That debtor will then be subject to wage withholding, and their account file noted to that effect.
	the hearing is held as scheduled	the debtor will be informed of the hearing officer's decision within 60 days of the date the hearing was requested.

## Collection Procedures

Step	Action	
1.	Account is referred for Administrative Garnishment proceedings.	
2.	Check account against criteria. * Correct current address. * Employment verified, including salary and address of payroll dept.	
3.	Send "Notice Prior to Wage Withholding" form to debtor. This notice will include deadlines within which the debtor must respond in order to avoid withholding.	
4.	Review the account on the 15-day deadline stated in the debtor's Notice. The debtor's response will determine the next action. The debtor can respond by contacting the guarantor for repayment arrangements, a request for a hearing, or may make no response.	
	If	Then
	the debtor contacts the guarantor to enter repayment	establish voluntary repayment agreement.
	the debtor fails to make a scheduled payment within a ten (10) day grace period, or provide a credible reason for the above,	perform steps 1-3. The debtor will not be given the opportunity to enter into a voluntary repayment agreement a second time.
	the debtor's request for a hearing is received between the 15-30 day deadline,	document the account, suspend the activity, and coordinate hearing date.
	the debtor makes no response, or responds after the 30th day,	proceed to Step 5
5.	Review the account on the 30-day deadline stated in the Notice. If there has been no response, send the signed "Order of Withholding from Earnings" form along with the "Employer's Handbook" via certified mail to the employer. The employer will have ten (10) business days to complete and return the "Acknowledgement of Wage Withholding."	
6.	Payment should commence within 30 to 45 days.	