

Memorandum 96-65

Administrative Rulemaking: Revision of Rulemaking Procedure

BACKGROUND

The Commission has decided to focus on specific identified problems in the existing rulemaking statute, rather than a comprehensive review of the entire field of rulemaking and the rulemaking process. The Commission has initially organized the issues for review into the following general categories:

- (1) Exemptions from rulemaking procedure.
- (2) Revision of rulemaking procedure.
- (3) Administrative review procedure and standards.
- (4) Public access to regulations.
- (5) Miscellaneous matters.

This memorandum begins the process by assembling proposals for revision of the basic rulemaking procedure. We plan to build the recommendation in this fashion until we have a complete proposal ready to be circulated for comment.

This area is selected for initial consideration because it is relatively small, noncontroversial, and easy to deal with in the context of the limited time for discussion available at the September Commission meeting.

REVISION OF RULEMAKING PROCEDURE

“Revision of Rulemaking Procedure” refers to the basic procedures followed by a state agency in promulgating a regulation. It does not include the matter of Office of Administrative Law review of the regulation, which will be treated under the topic of “Administrative Review Procedure and Standards”.

Notice of Proposed Rulemaking

Existing law prohibits a regulation that requires a business to make a report unless the agency has made a finding that the report is necessary for health, safety, or welfare, but the law does not indicate how this finding is to be

reported. Proposed Government Code § 11346.5(a)(11) would require that the finding be included in the notice of proposed rulemaking.

Agency Hearing

After an agency announces its proposed rulemaking, it must expose itself to public comment on the proposal. Under Government Code Section 11346.8(a), if the agency does not schedule a public hearing, it must afford interested persons the opportunity to comment in writing. In addition, any interested person may demand a public hearing. “If a public hearing is held, statements, arguments, or contentions, either oral or in writing, or both, shall be permitted.” Gov’t Code § 11346.8(a) (1st sent.).

It appears from the context of this provision that an agency must permit oral comments at the public hearing. However, the provision could be read literally to give the agency an option to limit comment at the public hearing to written comment. Of course such a reading would be inconsistent with the purpose of the statute — what is the purpose of a public hearing if it only serves as a forum in which to receive *written* commentary? But Office of Administrative Law informs us that they recently encountered an interpretation of this provision to the effect that the rulemaking agency has the option of allowing only written comments or only oral comments at the public hearing.

Office of Administrative Law suggests that the law be made clear that oral testimony must be allowed, subject to reasonable time limitations. The staff agrees, and we have set out amendatory language in the draft of Section 11346.8.

Supplements to Rulemaking File

Proposed new Government Code § 11347.1 would provide detailed procedures to conform to existing practice where an agency discovers documents it wishes to rely on after issuance of the notice of proposed rulemaking.

Public Access to Rulemaking File

The proposed amendment to Government Code § 11347.3(a) would make clear that the rulemaking file is available for public inspection throughout the rulemaking process, consistent with the purpose of the APA to maximize public input in the process.

Final Statement of Reasons

The law prohibits an agency from adding any material to the rulemaking file after public comment, but also requires an agency to add a final statement of reasons to the rulemaking file after public comment. Compare Gov't Code § 11346.8(d) with 11347.3(a)(2). The attached draft resolves this logical inconsistency by making clear that the addition of the final statement of reasons is an exception to the prohibition on adding material to the rulemaking file after public comment. See proposed amendment to Section 11346.8(d).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

TENTATIVE RECOMMENDATION

relating to

ADMINISTRATIVE RULEMAKING

REVISION OF RULEMAKING PROCEDURE

The administrative rulemaking procedure contemplates a public notice and comment process.¹ The Commission recommends the following revisions and clarifications of this process.

Notice of Proposed Rulemaking

If an agency intends to adopt a regulation that will impose a report requirement on businesses, the agency must make a finding that this is necessary for the health, safety, or welfare of the people of the state.² However, the statute fails to indicate the time and place of such a finding. The proposed law makes clear that the finding is to be included in the rulemaking notice.³ This will put the public on notice that the proposed regulation will require businesses to file a report. Interested parties may submit comments questioning the terms of the regulation or finding, where appropriate.

Public Hearing

Existing law contemplates a public hearing on the proposed rulemaking.⁴ An agency may elect not to hold a public hearing and instead receive written comments,⁵ but on timely demand by an interested person the agency must schedule a public hearing.⁶ If a hearing is held, public comment must be permitted “either oral or in writing, or both”.⁷ A literal reading of this language is susceptible to the interpretation that the agency may preclude oral comment, and in fact this has occurred.⁸ The proposed law revises the statute to make clear that oral testimony must be allowed at a public hearing, subject to reasonable agency

1. Gov’t Code §§ 11346-11347.3.

2. Gov’t Code § 11346.3.

3. See proposed new Gov’t Code § 11346.5(a)(11).

4. Gov’t Code §§ 11346.4(a), 11346.5(a)(16), 11346.8, 11347.3(a)(8), 11349.4(a), 11349.6(d).

5. Gov’t Code § 11346.8(a) (second sentence).

6. Gov’t Code § 11346.8(a) (third sentence).

7. Gov’t Code § 11346.8(a) (first sentence).

8. See letter to California Law Revision Commission from John D. Smith, Director of Office of Administrative Law (May 24, 1996) at 13-14 (letter on file in office of California Law Revision Commission).

limitations.⁹ This is consistent both with the general scheme of the rulemaking statute and with its purpose to promote effective public involvement in the rulemaking process.

Rulemaking File

Public inspection of file. The statutes governing the rulemaking file imply the file is not available to the public until the rulemaking proceeding, and the record of that proceeding, is complete.¹⁰ It is appropriate that the public be able to view the contents of the rulemaking file from the time a regulation is proposed. A major purpose of the rulemaking statute is to promote meaningful public participation in agency rulemaking; for this purpose it is helpful to have the rulemaking file available throughout the rulemaking process. The proposed law would make clear that the rulemaking file is available for public inspection at all times during the rulemaking proceedings.¹¹

Documents added to file. Existing law provides for addition of documents to the rulemaking file after the close of the public hearing or comment period,¹² subject to the agency making “adequate provision” for further public comment.¹³ The proposed law supplements these provisions with specific procedural rules,¹⁴ based on existing practice.¹⁵

Final statement of reasons. Despite the general statutory limitations on adding documents to the rulemaking file after the close of public comment, the law requires an agency to add a final statement of reasons.¹⁶ The proposed law resolves this logical inconsistency by making clear that the addition of the final statement of reasons is an exception to the limitations on adding material to the rulemaking file after public comment.¹⁷

9. See proposed amendment to Gov’t Code § 11346.8(a).

10. Gov’t Code § 11347.3.

11. See proposed amendment to Gov’t Code § 11347.3(a).

12. Gov’t Code § 11346.9(a)(1).

13. Gov’t Code § 11346.8(d).

14. See proposed Gov’t Code § 11347.1.

15. 1 Cal. Code Reg. § 45.

16. Compare Gov’t Code § 11346.8(d) with § 11347.3(a)(2).

17. See proposed amendment to Gov’t Code § 11346.8(d).

PROPOSED LEGISLATION

An act to amend Sections 11346.5, 11346.8, 11346.9, and 11347.3 of, and to add Section 11347.1 to, the Government Code, relating to administrative rulemaking.

The people of the State of California do enact as follows:

Gov't Code § 11346.5 (amended). Notice of proposed rulemaking

SEC. . Section 11346.5 of the Government Code is amended to read:

11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest containing a concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and the effect of the proposed action. The informative digest shall be drafted in a format similar to the Legislative Counsel's digest on legislative bills.

(A) If the proposed action differs substantially from an existing comparable federal regulation or statute, the informative digest shall also include a brief description of the significant differences and the full citation of the federal regulations or statutes.

(B) If the proposed action affects small business, the informative digest shall also include a plain English policy statement overview explaining the broad objectives of the regulation and, if appropriate, the specific objectives.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

(7) If a state agency, in proposing to adopt or amend any administrative regulation, determines that the action may have a significant adverse economic

impact on business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

(A) Identification of the types of businesses that would be affected.

(B) A description of the projected reporting, recordkeeping, and other compliance requirements that would result from the proposed action.

(C) The following statement: “The (name of agency) finds that the (adoption/amendment) of this regulation may have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states. The (name of agency) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

(i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

(ii) Consolidation or simplification of compliance and reporting requirements for businesses.

(iii) The use of performance standards rather than prescriptive standards.

(iv) Exemption or partial exemption from the regulatory requirements for businesses.”

(8) If a state agency, in adopting or amending any administrative regulation, determines that the action will not have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action. In making this determination, the agency shall provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support that finding.

An agency's determination and declaration that a proposed regulation may have or will not have a significant, adverse impact on businesses, including the ability of California businesses to compete with businesses in other states, shall not be grounds for the office to refuse to publish the notice of proposed action.

(9) A statement of the potential cost impact of the proposed action on private persons or businesses directly affected, as considered by the agency during the regulatory development process.

For purposes of this paragraph, “cost impact” means the reasonable range of costs, or a description of the type and extent of costs, direct or indirect, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action.

(10) A statement of the results of the assessment required by subdivision (b) of Section 11346.3.

(11) The finding prescribed by subdivision (c) of Section 11346.3, if required.

(12) A statement that the action would have a significant effect on housing costs, if a state agency, in adopting, amending, or repealing any administrative

regulation, determines that the action would have an effect. In addition, the agency officer designated in paragraph ~~(13)~~ (14), shall make available to the public, upon request, the agency's evaluation, if any, of the effect of the proposed regulatory action on housing costs.

~~(12)~~ (13) A statement that the adopting agency must determine that no alternative considered by the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

~~(13)~~ (14) The name and telephone number of the agency officer to whom inquiries concerning the proposed administrative action may be directed.

~~(14)~~ (15) The date by which comments submitted in writing must be received to present statements, arguments, or contentions in writing relating to the proposed action in order for them to be considered by the state agency before it adopts, amends, or repeals a regulation.

~~(15)~~ (16) Reference to the fact that the agency proposing the action has prepared a statement of the reasons for the proposed action, has available all the information upon which its proposal is based, and has available the express terms of the proposed action, pursuant to subdivision (b).

~~(16)~~ (17) A statement that if a public hearing is not scheduled, any interested person or his or her duly authorized representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Section 11346.8.

~~(17)~~ (18) A statement indicating that the full text of a regulation changed pursuant to Section 11346.8 will be available for at least 15 days prior to the date on which the agency adopts, amends, or repeals the resulting regulation.

(b) The agency officer designated in paragraph ~~(13)~~ (14) of subdivision (a) shall make available to the public upon request the express terms of the proposed action. The officer shall also make available to the public upon request the location of public records, including reports, documentation, and other materials, related to the proposed action.

(c) This section shall not be construed in any manner that results in the invalidation of a regulation because of the alleged inadequacy of the notice content or the summary or cost estimates, or the alleged inadequacy or inaccuracy of the housing cost estimates, if there has been substantial compliance with those requirements.

Comment. A new subdivision (a)(11) is added to Section 11346.5 to include the finding that it is necessary for the health, safety, or welfare of the people of the state that a regulation requiring a report apply to businesses. This implements Section 11346.3(c).

Gov't Code § 11346.8 (amended). Public hearing and comment

SEC. . Section 11346.8 of the Government Code is amended to read:

11346.8. (a) If a public hearing is held, both oral and written statements, arguments, or contentions, ~~either oral or in writing, or both~~, shall be permitted. The agency may impose reasonable limitations on oral testimony. If a public

hearing is not scheduled, the state agency shall, consistent with Section 11346.4, afford any interested person or his or her duly authorized representative, the opportunity to present statements, arguments or contentions in writing. In addition, a public hearing shall be held if, no later than 15 days prior to the close of the written comment period, an interested person or his or her duly authorized representative submits in writing to the state agency, a request to hold a public hearing. The state agency shall, to the extent practicable, provide notice of the time, date, and place of the hearing by mailing the notice to every person who has filed a request for notice thereby with the state agency. The state agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation.

(b) In any hearing under this section, the state agency or its duly authorized representative shall have authority to administer oaths or affirmations. An agency may continue or postpone a hearing from time to time to the time and at the place as it determines. If a hearing is continued or postponed, the state agency shall provide notice to the public as to when it will be resumed or rescheduled.

(c) No state agency may adopt, amend, or repeal a regulation which has been changed from that which was originally made available to the public pursuant to Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action. If a sufficiently related change is made, the full text of the resulting adoption, amendment, or repeal, with the change clearly indicated, shall be made available to the public for at least 15 days before the agency adopts, amends, or repeals the resulting regulation. Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9.

(d) No state agency shall add any material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless adequate provision is made for public comment on that matter. This subdivision does not apply to the final statement of reasons.

Comment. Subdivision (a) of Section 11346.8 is amended to make clear that oral testimony must be allowed at a public hearing, subject to reasonable time, repetition, or other limitations by the agency.

Subdivision (d) is amended to recognize that the final statement of reasons is added to the record of the rulemaking proceeding after the close of the hearing or comment period. See Sections 11346.9 (final statement of reasons and updated informative digest) and 11347.3 (rulemaking file). If the final statement of reasons refers to documents not previously included in the record of the rulemaking proceeding, the addition of those documents to the rulemaking file is governed by Section 11347.1 (documents added to rulemaking file).

Gov't Code § 11346.9 (amended). Final statement of reasons and updated informative digest

SEC. . Section 11346.9 of the Government Code is amended to read:

11346.9. Every agency subject to this chapter shall do the following:

(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

(1) An update of the information contained in the initial statement of reasons. If the update identifies any data or any technical, theoretical or empirical study, report, or similar document on which the agency is relying in proposing the adoption or amendment of a regulation that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period, the agency shall comply with ~~subdivision (d) of Section 11346.8~~ Section 11347.1.

(2) A determination as to whether the regulation imposes a mandate on local agencies or school districts. If the determination is that the regulation does contain a local mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding.

(3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.

(5) An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses.

(b) Prepare and submit to the office with the adopted regulation an updated informative digest containing a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation. The informative digest shall be drafted in a format similar to the Legislative Counsel's Digest on legislative bills.

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with this section if a statement to the effect that a federally mandated regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found, is included in the notice of proposed adoption or amendment prepared pursuant to Section 11346.5. However, the agency shall comply fully with this chapter with respect to any provisions in the

regulation which the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

Comment. Section 11346.9 is amended to cross-refer to the newly-created procedure governing addition of documents to the rulemaking file. See Section 11347.1.

Gov't Code § 11347.1 (added). Documents added to rulemaking file

SEC. . Section 11347.1 is added to the Government Code, to read:

11347.1. (a) An agency that adds any technical, theoretical, or empirical study, report, or similar document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the adoption, amendment, or repeal of the regulation shall make the document available as required by this section.

(b) At least 15 calendar days before the adoption, amendment, or repeal of the regulation, the agency shall mail to all of the following persons a notice identifying the added document and stating the place and business hours that the document is available for public inspection:

- (1) Persons who testified at the public hearing.
- (2) Persons who submitted written comments at the public hearing.
- (3) Persons whose comments were received by the agency during the public comment period.
- (4) Persons who requested notification from the agency of the availability of changes to the text of the regulation.
- (c) Documents shall be available for public inspection at the location described in the notice for at least 15 calendar days before adoption of the regulation.
- (d) Written comments on the documents or information received by the agency during the availability period shall be summarized and responded to in the final statement of reasons as provided in Section 11346.9.
- (e) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date on which the notice was mailed.

(f) If there are no persons in categories listed in subdivision (b), then the rulemaking record shall contain a confirming statement to that effect.

Comment. Section 11347.1 implements Section 11346.9(a)(1) by prescribing a more detailed procedure than that provided in Section 11346.8(d). It is drawn from 1 California Code of Regulations § 45.

Gov't Code § 11347.3 (amended). Rulemaking file

SEC. . Section 11347.3 of the Government Code is amended to read:

11347.3. (a) Every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding. Commencing no later than the date that the rulemaking notice is published in the California Regulatory Notice Register, and during all subsequent periods of time that the file is in the agency's possession, the agency shall make the file available to the public for inspection and copying during regular business hours. The file shall include:

(1) Copies of any petitions received from interested persons proposing the adoption, amendment, or repeal of the regulation, and a copy of any decision provided for by subdivision (d) of Section 11340.7, which grants a petition in whole or in part.

(2) All published notices of proposed adoption, amendment, or repeal of the regulation, and an updated informative digest, the initial statement of reasons, and the final statement of reasons.

(3) The determination, together with the supporting data required by paragraph (5) of subdivision (a) of Section 11346.5.

(4) The determination, together with the supporting data required by paragraph (8) of subdivision (a) of Section 11346.5.

(5) The estimate, together with the supporting data and calculations, required by paragraph (6) of subdivision (a) of Section 11346.5.

(6) All data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation.

(7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation, including any cost impact estimates as required by Section 11346.3.

(8) A transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation.

(9) The date on which the agency made available to the public for 15 days prior to the adoption, amendment, or repeal of the regulation the full text as required by subdivision (c) of Section 11346.8 if the agency made changes to the regulation noticed to the public.

(10) The text of regulations as originally proposed and the modified text of regulations, if any, that were made available to the public prior to adoption.

(11) Any other information, statement, report, or data that the agency is required by law to consider or prepare in connection with the adoption, amendment, or repeal of a regulation.

(12) An index or table of contents that identifies each item contained in the rulemaking file. The index or table of contents shall include an affidavit or a declaration under penalty of perjury in the form specified by Section 2015.5 of the Code of Civil Procedure by the agency official who has compiled the rulemaking file, specifying the date upon which the record was closed, and that the file or the copy, if submitted, is complete.

(b) Every agency shall submit to the office with the adopted regulation, the rulemaking file or a complete copy of the rulemaking file.

(c) The agency file of the rulemaking proceeding shall be made available by the agency to the public, and to the courts in connection with the review of the regulation.

Comment. Subdivision (a) of Section 11347.3 is amended to make clear that the rulemaking file is available to the public throughout the rulemaking process. Cf. subdivision (c) (file shall be made available to the public).