Study N-300 October 24, 1996

Memorandum 96-79

Administrative Rulemaking: Revision of Rulemaking Procedure

Background

The Commission has divided issues to be considered in the administrative rulemaking study into five 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 continues Commission consideration of item (2) — revisions to the basic rulemaking procedure. Decisions previously made by the Commission on this topic are collected in the attached draft.

Also attached to this memorandum is Asimow, *Rulemaking Under the California Administrative Procedure Act: Proposals for Reform* (Sept. 16, 1996). This is a paper prepared by Professor Michael Asimow for the Commission. The paper raises issues on a number of the study categories. This memorandum discusses Professor Asimow's issues related to revision of rulemaking procedure. Other issues related to other study categories will be considered in future memoranda.

Text of Proposed Regulation

An agency starts the formal process of promulgation of a regulation by submitting to Office of Administrative Law and making available to the public the text of the proposed regulation.

If the regulation affects small business, the agency must draft the regulation in "plain English". Gov't Code § 11346.2(a)(1). Plain English is defined as language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English. Gov't Code § 11342(e). If it is not feasible to draft the regulation in plain English due to the technical nature of the regulation, the agency must prepare a noncontrolling plain English summary of the regulation. Gov't Code § 11346.2(a)(1).

Professor Asimow notes that agencies treat this requirement as just another boilerplate finding. A sufficient means of ensuring that the regulation is written in understandable language is the authority of Office of Administrative Law to reject a regulation for lack of "clarity". Gov't Code § 11349.1. Clarity is defined as a formulation so that the meaning of the regulations will be easily understood by those persons directly affected by them. Gov't Code § 11349(c). However, OAL has taken a narrower view of the meaning of "clarity" in its regulations on the subject. 1 CCR § 16(a).

In this connection, the staff notes the existence of Government Code Section 6215, relating to "governmental linguistics":

> 6215. (a) Each department, commission, office or other administrative agency of state government shall write each document which it produces in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style.
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> (b) As used in this section, a "state agency document" means any contract, form, license, announcement, regulation, manual, memorandum, or any other written communication that is necessary to carry out the agency's responsibilities under law.

Statement of Reasons

Along with the text of a proposed regulation an agency must submit and publicize an initial statement of reasons. Gov't Code § 11346.2. After going through notice and comment procedures and promulgating the final text of the regulation, the agency must prepare and submit a final statement of reasons. Gov't Code § 11346.9. Professor Asimow argues that these statements of reasons need to be streamlined — they require too many certifications and analyses.

The initial statement of reasons must include (among other things):

> (1) A description of the public problem, administrative requirement, or other condition or circumstance that each adoption, amendment, or repeal is intended to address.
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> (2) A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed. Where the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive standards are required.

(3) An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies in proposing the adoption, amendment, or repeal of a regulation.

(4) (A) A description of the alternatives to the regulation considered by the agency and the agency's reasons for rejecting those alternatives. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

(B) A description of any alternatives the agency has identified that would lessen any adverse impact on small business. It is not the intent of this paragraph to require the agency to artificially construct alternatives or to justify why it has not identified alternatives.

(5) Facts, evidence, documents, testimony, or other evidence upon which the agency relies to support a finding that the action will not have a significant adverse economic impact on business.

The final statement of reasons must include:

(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.

(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.

Professor Asimow believes many of these requirements are costly makework. Generally only a conclusion is needed, not supporting backup information. He would dispense with the elaborate justifications, and replace them a bare minimum of criteria. Under this scheme, the agency would simply estimate the costs of each alternative for solving the problem and choose the least-cost alternative, and identify any mandates imposed on local government. "Let's get back to a straightforward requirement of a statement of reasons for the initial and final rule without all the window dressing. The only required findings must be ones that are really significant, not just makework, and factual backup for these findings should be required."

Professor Asimow indicates that agencies would support this approach, and that some private practitioners would agree as well that the certifications required by present law are costly and serve little useful purpose. However, there are others who support the impact statement requirements, and would mandate a serious cost/benefit analysis for every rule that would be judicially reviewable for sufficient evidence in the record to support the agency's conclusions.

Assuming that the required analysis a useful exercise for an agency promulgating a regulation, then the question becomes whether the agency's disclosure of its supporting documentation is helpful. Requiring the documentation to be laid out ensures that the agency has actually conducted the required analysis, and is not simply reciting compliance. On the other hand, Professor Asimow argues that if a commentator complains about a negative impact of a proposed rule, the agency will be required to respond with the specifics; this will provide a sufficient check on the agency.

Notice of Proposed Action

Notice of the proposed rulemaking must be published in the California Regulatory Notice Register, as well as mailed to a large number of persons. Gov't

Code § 11346.4. Professor Asimow would add a provision drawn from federal law that dispenses with published notice if affected persons receive actual notice of the proposed rulemaking:

> General notice of proposed rule making shall be published in the Federal Register unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.
> 5 USC § 553(b).

The staff thinks there may be some value to publication even if directly affected parties receive actual notice. Even though regulations may directly affect a particular industry with only a limited number of producers, for example, consumers may nonetheless be interested in the rulemaking. As far as we know, publication does not slow the process and the cost of publication is borne by subscribers to the Regulatory Notice Register.

Electronic Communications

The existing statutes speak in terms of mailed notices and oral and written communications. Professor Asimow suggests that the statute require agencies to contact persons electronically and receive comments electronically. Written comments should be accompanied by computer disk to make it easy to add the comments to the data base. Electronic notices should be given whenever anything is added to the rulemaking file. The status of a rulemaking proceeding should be available to the public on an agency's home page.

Public Hearing

Existing law contemplates a public hearing on the proposed rulemaking. An agency may elect not to hold a public hearing and instead receive written comments, but on timely demand by an interested person the agency must schedule a public hearing. Gov't Code § 11346.8. By comparison, federal law leaves the hearing question to agency discretion, and the 1981 Model State APA requires a hearing on demand of 25 persons.

Professor Asimow notes a number of problems with the existing statutory scheme:

(1) Despite the fact that an agency may determine it is unnecessary to hold a hearing, as a practical matter the agency may end up having to schedule one anyway. This is because under existing law, an agency must give extensive notice

of proposed rulemaking with a 45 day public comment period. If the agency elects not to hold a hearing but a person demands one, the agency must give another 45 day advance notice of the hearing. This effectively doubles the notice expense and the notice period. "As a result, agencies routinely schedule the public hearing at the time of the initial notice to avoid having to send a second notice."

(2) Some agencies have found the public hearing requirement largely a waste of time, since people merely read or restate their written comments. The hearing process also raises the false expectation in the public that their comments will be responded to immediately.

Professor Asimow believes the agency should be able to dispense with a hearing unless one is requested by a significant number of people — e.g., 10.

An alternative approach that also has been suggested by commentators is that the right to demand a hearing be limited to regulatory actions that would have a significant impact on the public, the state, or the regulated group. The Commission decided not to investigate this possibility absent an indication that the right to demand a hearing is being abused. Professor Asimow's suggestion would in effect provide a mechanical means of limiting demand to matters in which there is significant interest.

Response to Comments

The agency must summarize and respond to each objection or recommendation directed to the proposed action or the procedures followed by the agency in proposing the action. Gov't Code § 11346.9(a)(3). By comparison, the federal APA requires only a response to significant problems raised by the comments, and the 1981 Model State APA has no response requirement.

The Commission has considered the possibility of limiting the response requirement to "primary considerations" or of narrowing the review standard to "good faith" response. However, the Commission decided not to investigate this based on information that the Office of Administrative Law is acting reasonably in its review of agency responses to comments and is encouraging agencies to act reasonably in responding to comments.

Professor Asimow encourages the Commission to seek further agency and private sector input on this matter. He thinks that a preferable approach would be to require summary and response to comments that are actually relevant to the legal, factual, or policy issues under consideration. This would allow the

agency to dispense with summary and response to comments that raise irrelevant issues or do little more than express anger.

At a minimum, Professor Asimow suggests that the law should be amended to provide that irrelevant comments can be grouped, swiftly summarized, and summarily dismissed without having to name each of the commentators. This would codify present practice in some agencies, which is accepted by OAL.

Ex Parte Contacts

The extent to which ex parte communications may be considered in administrative rulemaking is not clear. The rulemaking file must include written communications received by the agency and factual data (as opposed to policy considerations) on which the agency relies in adopting the regulation. Gov't Code § 11347.3(a).

The Commission has previously considered the suggestion of Dugald Gillies that the rulemaking file be expanded to refer to any material the agency relies on, and that it deal with ex parte communications. The Commission deferred decision on these issues in order to give Mr. Gillies an opportunity to develop them in writing and in order to allow the Office of Administrative Law an opportunity to consider and comment on them.

Professor Asimow agrees that the statute should clarify the rules as to ex parte communications. He distinguishes among three different phases in the promulgation of a regulation. During the period the agency is initially developing the proposed regulation, he would not limit ex parte communications. "During that period, the agency normally consults and negotiates with its various constituents to decide what rule to propose."

Once the public comment period starts, he would require all written comments to be included in the rulemaking record, but not oral ex parte contacts, regardless whether the oral communications are factual or policy-based.

> In adjudication of course, such comments are improper. However, rulemaking is more like legislation than it is like adjudication. People have no basis for assuming that rules are being made on some sort of exclusive record confined to inputs furnished in writing or at the public hearing. And such inputs may be helpful to the agency, either in getting the rule right factually or in measuring political support for and against it. Moreover, a prohibition of contact by agency decisionmakers with the public would be very difficult to enforce, much more so than a comparable provision in adjudication. Rulemaking goes on for a long time and

> covers broad issues, yet the agency must remain in contact with its various constituents all the time. Memorialization of comments is possible but is very burdensome; besides it is problematic. Few people believe that the real thrust of a long conversation with find its way into the memo.

After the close of the public comment period, however, Professor Asimow would limit the agency's ability to receive written and oral comments. Additional post-comment period communications should be placed in the record and the public should have an opportunity to respond to them.

One-year Rule

The agency has one year from the date of its notice of proposed action to complete its rulemaking process. If the rulemaking is not completed within a year, the agency must start over. Gov't Code § 11346.4(b).

Professor Asimow believes the rulemaking process should be allowed to extend beyond one year. There may be voluminous comments that take more time to process, and rushing the rulemaking to completion may result in the comments not being properly considered. He would permit Office of Administrative law to grant an extension of the one year period on a showing of good cause (i.e., the agency has not procrastinated and the particular rulemaking is unusually time-consuming).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

ADMINISTRATIVE RULEMAKING

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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 a business, 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 limitations.[9] This is

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1. Gov't Code §§ 11346-11347.3.
2. Gov't Code § 11346.3.
3. See proposed new Gov't Code § 11346.5(a)(11), *infra*.
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).
9. See proposed amendment to Gov't Code § 11346.8(a), *infra*.

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 that 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]

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10. Gov't Code § 11347.3.
11. See proposed amendment to Gov't Code § 11347.3(a), *infra*.
12. Gov't Code § 11346.9(a)(1).
13. Gov't Code § 11346.8(d).
14. See proposed Gov't Code § 11347.1, *infra*.
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), *infra*.

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.

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) <u>The finding prescribed by subdivision (c) of Section 11346.3, if required.</u>

<u>(12)</u> 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 presentations. 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. <u>This subdivision does not apply to the final statement of reasons.</u>

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), 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).

RULEMAKING UNDER THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT: PROPOSALS FOR REFORM

by

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September 16, 1996

RULEMAKING UNDER THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT: PROPOSALS FOR REFORM

by Michael Asimow*

Executive Summary

This report suggests incremental reforms to the APA's rulemaking provisions. The proposals are as follows:

A. Reforms to the rulemaking process

1. Simplification of the initial and final statement of reasons.

2. Provide for actual notice of proposed rule

3. Allow cancellation of public hearing unless a hearing is requested by a significant number of persons.

4. Simplify requirement of response to public comments.

5. Liberalize provision for emergency regulations and extend the time during which post-adoption notice and comment must occur.

6. Provide for direct final regulations.

7. Clarify the permissibility of ex parte contact to rulemakers.

8. Permit rulemaking to extend past one-year with OAL permission.

9. Provide for adoption of guidance documents without

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prior notice and comment procedure.

10. Broaden internal management and forms exceptions.

11. Allow regulations to be effective immediately on filing.

12. Require greater use of the internet.

13. Provide for negotiated rulemaking.

B. Reforms to the OAL review process

1. Clarify question of ex parte contact with OAL

2. Allow for extension of 30-day OAL consideration period.

3. Clarify OAL's consistency review

4. Clarify OAL's necessity review

I. INTRODUCTION

The Commission has decided to recommend only incremental reforms to the APA rulemaking provisions in order to streamline and improve the process. In that spirit, this memorandum suggests a series of issues that the Commission might wish to consider, together with my tentative views on each question. This letter is based upon a series of interviews I conducted with officials at numerous state agencies as well as with persons in the private sector and with OAL's director and staff members.[1] It also reflects statistical material that was generously assembled for me by OAL.

My goal in assembling this list of suggestions is to

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[1]I promised anonymity to everyone I interviewed, so I will not cite particular sources in this memorandum.

preserve the important public values inherent in notice and comment rulemaking and the checking function exercised by the Office of Administrative Law (OAL). All agree that public participation is vital to produce better-informed rules, safeguard democratic values, and create a proper record for judicial review. OAL review is important as a surrogate for judicial review and to improve regulatory drafting.

But agency resources are limited and precious. Agencies (including OAL) have substantial responsibilities and inadequate budgets. Like all government functions, rulemaking should be as efficient as possible; it should not be bogged down by unnecessary steps that consume time and resources without a substantial payoff in producing better rules. The public is not well served by a process that is sluggish and costly and prevents agencies from carrying out tasks delegated to them by the legislature. And, of course, when an agency seeks to deregulate or to modernize outdated regulations, the heavy cost of the rulemaking process often prevents it from doing so or greatly delays the time at which the revision finally occurs.

I would like to make an important observation up front: my interviews with agency personnel indicated a level of satisfaction with OAL review that was much higher than I anticipated. OAL-agency relationships were hostile and suspicious in the late 1980's and early 1990's.[2] This is not

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[2]See "The Agencies of California Speak Out About the Office of Administrative Law: A Startling Survey," 8 Calif. Regul. L. Rptr. No. 4, p. 8 (Fall, 1988); Steven Peter Unger, "A History of

the case today. Agency staff members all indicate that their relationship with OAL is helpful, cooperative and supportive. OAL staff members negotiate with agencies to solve problems quickly and get the regulations approved. Actual disapprovals are relatively rare (well under 10%). OAL does not routinely substitute its judgment for that of the agencies. OAL leadership is entitled to a pat on the back for transforming a bad situation into a good one.

II. COMPARISON OF CALIFORNIA AND FEDERAL APA RULEMAKING PROVISIONS

As background to my suggestions, I want to first emphasize that California's rulemaking provisions are much more onerous than those required under federal law, the 1981 Model State APA, or, I believe, the law of any other state. Often, California lawyers are unaware that our state's practices are quite different from those existing elsewhere. The fact that California law is so much more demanding than that of other states or the federal government suggests that the legislature may have simply piled on requirements without considering their cumulative impact. It also suggests that the APA process could be significantly streamlined without sacrificing the vital importance of rulemaking procedure.

Let me itemize some points of difference between California and federal law.

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the Regulatory Process in California: A Case Study of the Office of Administrative Law," (unpub. masters thesis for CSU Sacramento) 47-64 (1992) (copy on file with author).

1. Under the California APA, the notice of proposed rulemaking (NOPR) is much more heavily regulated than under federal law or under the 1981 Model Act.[3]

a. It must contain the express terms of the proposed regulation in plain, straightforward language, using a coherent and easily readable style; if the regulation affects small business, it must be drafted in plain English.[4]

b. The NOPR must contain an initial statement of reasons for the proposal. This must include, among numerous other elements, an analysis of the specific purpose of each adoption, amendment or repeal, and the rationale for the agency's determination that such adoption, amendment, or repeal is reasonably necessary to carry out that purpose. The agency must identify each technical, theoretical, or empirical study, report, or similar document on which the agency relies.[5]

c. The NOPR must describe the alternatives to the regulation and reasons for rejecting them, including performance standards as an alternative to prescriptive standards, and

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[3]Under federal law, the requirements for the NOPR are quite sparse. APA §553(b)(1) - (b)(3). The same is true of the 1981 MSAPA. §3-103(a).

[4]GC §11346.2(a)(1). If it is not feasible to draft the regulation in plain English due to its technical nature, the agency must prepare a noncontrolling plain English summary. Ibid. "Plain English" means language that can be interpreted by a person who has no more than an 8th grade level of proficiency in English. GC §11342(e).

[5]GC §11346.2(b)(1) to (3). Federal law also requires disclosure of agency methodology and studies but is more flexible. 1 Davis & Pierce, Administrative Law Treatise 305-09 (3d. 1994).

alternatives that would lessen the adverse impact on small business. The agency must state that no alternative considered by it would be more effective in carrying out its purpose or would be as effective and less burdensome to the private sector.[6] Certain agencies (including EPA) must describe their efforts to avoid duplication with federal regulations.[7]

d. The NOPR must state the potential compliance cost impact on private persons or businesses.[8] It must assess the potential for adverse economic impact on business and individuals, avoiding imposition of unnecessary paperwork. This includes the impact on jobs, creation of new business or expansion or elimination of existing business,[9] with additional material if the agency determines that the action may have a significant impact on business.[10] The agency must give facts or other evidence to support a finding that the action will not have

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[6]GC §11346.5(a)(12).

[7]GC §§11346.2(b)(4) to (6), 11346.14.

[8]GC §11346.5(a)(9).

[9]GC §11346.3.

[10]GC §11346.5(a)(7). A regulatory impact analysis is required by federal law only in the case of "significant regulatory actions," meaning those that would have an impact of at least $100 million on the economy or adversely and materially effect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or local government. Executive Order 12866, §§3(f), 6(a)(3)(B). Under 1981 MSAPA, a "regulatory analysis is required only if requested by a legislative rule review committee, the governor, a political subdivision, another agency, or 300 persons.

a significant adverse business impact.[11] The NOPR must contain an informative digest containing a concise and clear summary of existing law and regulations, including the impact on small business, whether the regulation imposes a mandate on local agencies, and an estimate of the direct or indirect costs or savings to state agencies, local agencies, or school districts.[12] There are still additional requirements relating to effect on housing costs and other impacts.[13]

2. There are elaborate requirements of mailing the NOPR (for example, to a representative sample of small business enterprises).[14] There must be a public hearing if even a single person requests one. The hearing must be preceded by 45 days notice. As a result, agencies routinely schedule the public hearing at the time of the initial notice to avoid having to send a second notice.[15]

3. If there is any substantial change in a proposed rule, there must be an additional 15 day opportunity to comment. If the change is not sufficiently related to the original text so that

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[11]GC §11346.5(a)(8). This finding is judicially reviewable based on the substantial evidence test. GC §11350(b)(2).

[12]GC §11346.5(a)(5), (6).

[13]GC §11346.5(a)(9) to (11).

[14]GC §11346.4(a)(3).

[15]GC §§11346.4(a), 8(a). Federal law leaves it to agency discretion whether to provide an oral hearing. Under the MSAPA, a hearing must be requested either by a legislative rule review committee, a political subdivision, another agency, or 25 persons.

the public was not placed on notice of the change, the agency must start over.[16] The agency cannot place any material in the record after the close of the public comment period.[17]

4. The final rule must contain a summary of each objection or recommendation from the public and an explanation with respect to every such objection or recommendation of how the proposed action has been changed or why it was not.[18] The rule must contain a final statement of reasons including most of the items required in the initial statement of reasons. It must include an update of information and, if it identifies any new data or studies, it must provide an extra 15-day comment period.[19]

5. If the process is not completed within one year from publication of the NOPR, the agency must start over.[20]

6. The contents of the rulemaking file are prescribed in detail, including the requirement of an index.[21] This file will

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[16]GC §11346.8(c).

[17]GC §11346.8(d).

[18]GC §11346.9(a)(3). Federal law requires only a response to significant problems raised by the comments. Rodway v. USDA, 514 F.2d 809, 817 (D.C.Cir. 1975). The Model Act contains no response requirement and its requirement of a final reasons statement is sparse. §§3-110..

[19]GC §11346.9(a)(1). Federal case law requires a substantial statement of reasons for a new rule sufficient to permit adequate judicial review, but it is nowhere near as comprehensive as the California requirement. See 1 Davis & Pierce, note 5 at §7.4.

[20]GC §11346.4(b).

[21]GC §11347.3.

be the exclusive record for judicial review.[22]

7. As further discussed below, every rule must be submitted to the Office of Administrative Law (OAL), which reviews the rule for necessity, authority, clarity, consistency, reference, nonduplication, and compliance with procedural rules. OAL has 30 working days to complete its task.[23] To my knowledge, no state has anything comparable to OAL.[24]

8. Emergency rules are good only for 120 days by which time the agency must complete a notice and comment process or the rule becomes invalid.[25] There is no exception for rules whose impact

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[22]GC §11347.3(c); 11350(b). Under the Model Act, the rulemaking record is not the exclusive basis for judicial review. §3-112.

[23]GC §11349.3(a).

[24]Under Executive Order 12866, OIRA reviews significant rules (see note 9) for conformity to the President's program and to ascertain whether they meet cost benefit criteria. The Model Act provides for selective gubernatorial and legislative review of rules, largely on grounds of political disagreement with the agency. §§3-202 to 3-204.

[25]GC §11346.1(e), (f), (g). OAL must give approval to the agency's finding of emergency. GC §§11346(h), 11349.6. "Emergency" is narrowly defined to cover only "immediate preservation of the public peace, health and safety or general welfare." GC §11346.1(b). The emergency declaration is also judicially reviewable. GC §11350(a). As a practical matter, OAL generally grants extensions of the 120-day period, so according to some agencies the exception has swallowed the rule.

Federal law defines emergency more broadly and does not require any subsequent notice and comment procedure after a rule has been adopted on an emergency basis. Nevertheless, a post-adoption opportunity to comment is customarily provided in the form of what are generally called "interim final rules." APA §553(b)(B) (rulemaking procedure would be "impracticable, unnecessary, or contrary to the public interest"). The Model Act employs the same standard as federal law and does not require post-adoption rulemaking unless requested by a legislative committee or the governor within two years. The agency then has

is so trivial or transitory that rulemaking procedures would be "unnecessary." [26]

9. The rulemaking requirements, including OAL approval, apply to all guidance documents, such as interpretations, policy statements, circulars, rulings, manuals etc.[27] There are no categorical exceptions comparable to those in federal law.[28]

10. The process of petitioning for adoption, amendment, or repeal has more mandatory features than under federal law.[29]

11. Any legislative committee can trigger review of any existing regulation; if OAL finds that the existing rule fails to

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180 days to perform notice and comment procedure. §3-108.

[26]Federal law contains an exception to rulemaking procedures when it would be "unnecessary" to do so. APA §553(b)(B).

[27]See GC §11340.5. See Asimow, "California Underground Regulations," 44 Admin. L. Rev. 43 (1992). Note that this issue is currently under review by the California Supreme Court in Tidewater Marine Western, Inc. v. Labor Commissioner, S048739. Federal law contains a blanket exemption for interpretive rules and policy statements as well as an exception for procedural rules. APA §553(b)(A). The MSAPA has narrower exemptions for guidance documents. §§3-109, 3-116.

[28]California makes an exception for "internal management" rules but this has been interpreted so narrowly that it is of virtually no importance. GC §11342(g); Armistead v. State Personnel Board, 22 Cal.3d 198, 149 Cal.Rptr. 1 (1978). A few agencies are exempt from the APA's rulemaking provisions. See GC §11351 (exempting California Public Utilities Commission and the workers compensation agencies). There are exceptions for forms and for rates, prices and tariffs. GC §11342(g), 11343(a)(1).
The federal APA exempts a large number of rulemaking proceedings from its requirements including those relating to "agency management or personnel or public property, loans, grants, benefits, or contracts." §553(a)(2).

[29]GC §11340.6, 11340.7. Compare APA §553(e): "Each agency shall give an interested person the right to petition for the issuance, amendment or repeal of a rule."

meet its normal statutory criteria (discussed below), it issues an order to show cause to the agency why the rule should not be repealed. This triggers an expedited process that can lead to repeal of the rule.[30]

II. PROPOSED REFORMS OF THE RULEMAKING PROCESS

I suggest the Commission consider the following modifications to the APA's rulemaking process. The modifications in this section concern the pre-OAL stages of the process.

1. Statement of reasons. In my view, the APA should be amen amended to streamline the initial and final statement of reasons. I believe there are too many required certifications and analyses. Agencies I interviewed regarded these requirements as costly makework since generally only a conclusion is required--not supporting backup information.

Some private practitioners agree that the certifications required by present law are costly and serve little useful purpose. Others, however, support the impact statement requirements. They would require a serious cost- benefit analysis for every rule and would make judicially reviewable the issue of whether there was substantial evidence in the record to support the agency's conclusion that benefits outweigh costs and that the agency had chosen the least cost alternative.

I propose dispensing with the elaborate requirements for statements of impact on business, small business, jobs, housing, local government, etc. If commentators complain about these or

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[30]GC §11349.7.

other negative impacts, obviously the agency will be required to respond.

Dispense with the plain-English requirements, which again are treated by agencies as just another boilerplate finding. The "clarity" standard enforced by OAL is sufficient.

Perhaps only a bare minimum of criteria should be maintained, such as the requirement that the agency choose the least-cost alternative for solving the problem (together with a requirement that the agency estimate what the costs of each alternative would be). The requirements relating to mandates and costs imposed on local government should probably also be preserved. Let's get back to a straightforward requirement of a statement of reasons for the initial and final rule without all the window dressing. The only required findings must be ones that are really significant, not just makework, and factual backup for these findings should be required.

2. Actual notice. Add a provision like that in federal law that dispenses with the notice requirement if a person already has actual notice of proposed rulemaking.[31]

3. Public hearing. Some agencies find the public hearing requirement burdensome and largely a waste of time since people read or restate their written comments. One agency asked that the law clearly state that the person conducting the hearing not be required to respond to the public's presentations; members of the public often expect immediate responses and complain when

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[31]APA §553(b).

they are not forthcoming. I believe the agency should have discretion to dispense with an oral hearing (or cancel one previously noticed) unless an oral hearing is requested by a significant number of people--say 10.[32] For example, the NOPR might announce the time and place of the public hearing but also request that anybody who plans to come telephone, fax or email the agency; if a sufficient number of responses are not received, the agency would have discretion to cancel the hearing.

4. Summary and response. Consider changing the requirement that the agency must summarize and respond to every single objection or recommendation in every comment. Sometimes there are tens of thousands of comments, many of them irrelevant to the legal and policy issues at stake. The counter-argument is that it is simple to respond to all of the off-the-wall comments in a single sentence; meanwhile the requirement of individual summary and response insures to the public that every comment is read and considered. Practitioners value the response requirement; one of them urged that the agency be required to respond in good faith rather than to brush off the comment. However, that would be difficult to administer.

It can be argued that, as under federal law, the agency should be required to respond only to significant issues raised by the comments. However, this raises questions as to how one decides whether something is significant. This standard is

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[32]MSAPA §3-104(b)(1) (oral hearing must be requested by legislative rules committee, political subdivision, agency, or 25 persons).

probably too vague to be administered by OAL.

A better alternative might be to require summary and response to objections or recommendations in public comments that are actually relevant to the legal, factual or policy issues under consideration. This would allow the agency to dispense with summary and response of comments that raise irrelevant issues or are little more than screams of outrage. At a minimum, the law should be amended to provide that irrelevant comments can be grouped, swiftly summarized and summarily dismissed without having to name each of the commentators. Accordingly to OAL, this is in fact the present practice in some agencies which OAL accepts.

The Commission should seek agency and private input on this issue, rather than taking it off the table as was apparently decided at the June 13 Commission meeting.

5. Emergency regulations. Liberalize the provision for emergency regulations. The definition of emergency should be broadened along the lines of the Model Act and the 120 day period should be lengthened, at least to 180 days, so that pro forma OAL extensions of the time period will not be needed.[33] The 120-day period dates from a time when rulemaking was much simpler than it is today. Also, the definition of emergency should include economic emergencies and compliance with imminent statutory

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[33]Note that the legislature frequently allows exceptions from the unduly strict emergency reg provisions. See Penal C. §5058(e) (Corrections Dep't can adopt emergency regs without a showing of emergency and has 160 days to complete rulemaking).

deadlines. It should also include situations in which the public interest would be served by making a regulation immediately effective.

It might be a good idea, as proposed by one private sector respondent, for agencies to give one week's notice that an emergency regulation will go into effect unless the nature of the emergency makes it impracticable to do so. The suggestion below concerning the internet could also be very helpful with respect to giving proper notice of emergency regulations.

6. Unnecessary. The statute should also provide for situations in which rulemaking procedure is "unnecessary," because the impact of the rule is trivial or transitory. An excellent model is the "direct final regulation," which is increasingly being used at the federal level.[34] Under that approach, an agency publishes notice that it intends to adopt a rule under the "unnecessary" exception. The notice would contain everything normally present in an initial statement of reasons. If within 30 days anyone files a significant adverse comment, the agency proceeds to normal notice and comment procedure. But if it receives no significant adverse comment within 30 days, the agency adopts the rule without further ado, effective 30 days after the end of the comment period.

California's APA should provide for the direct final regulation procedure. If an agency makes a finding that the

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[34]Ronald M. Levin, "Direct Final Rulemaking," 64 Geo. Wash. L. Rev. 1 (1995); Administrative Conf. of the U.S., Recomm. 95-4.

effect of the rule is trivial or transitory, and no significant adverse comments are received, the regulation would become effective without further procedures or OAL review. Alternatively, OAL review might be limited to consistency but not cover clarity or necessity.

The direct final model might be especially useful if the Commission decides not to create an exception from the APA for guidance documents (see ¶8 below). The vast majority of guidance documents are uncontroversial. Perhaps the APA could provide that an agency could issue a guidance document, clearly labelled as such, and if no significant adverse comment is received, the document could become effective without further procedures.

7. Ex parte contacts. It is unclear whether rulemaking agencies can receive ex parte written or oral contacts from outsiders. Perhaps there is a distinction between ex parte contacts that include factual presentations and contacts that are confined to matters of policy. If agency heads or agency staff can receive oral ex parte contacts, it is unclear whether they are obligated to summarize them in memo form and include the summaries in the record. Similarly unclear is whether the rules relating to ex parte contact differ in the three time frames: before the comment period, during the comment period, and after the comment period.

The APA could be interpreted to prohibit ex parte contact, because it requires the rulemaking file (which serves as the record on judicial review) to include "all data and factual

information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation."[35]

In dictum which preceded enactment of the present APA, the Court of Appeals said: "Generally, an administrative agency, directed to fix rates or price levels after a hearing, may not base its decision upon evidence outside the record and not made available for rebuttal by the affected parties...Directed by law to hold public hearings, government officials may not resort to invitational gatherings with selected members of an affected business..."[36]

Similarly, in another pre-1979 case, the Court referred to the case just cited and noted: "...the agency may not utilize the public proceeding as a facade for a private decision resting upon privately acquired data...post-hearing evidence, if any, must be incorporated in an identified body of evidence and preserved for possible judicial review."[37]

Under federal law, some cases prohibited ex parte contacts during rulemaking.[38] However, later cases from the same court

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[35]GC §11347.3(a)(6). For judicial review purposes, the record shall be deemed to consist of all material maintained in the rulemaking file. GC §11350(b).

[36]Calif. Ass'n of Nursing homes v. Williams, 4 Cal.App. 3d 800, 811, 814, 84 Cal.Rptr. 590, 597, 599 (1970).

[37]Calif. Optometric Ass'n v. Lackner, 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744 (1976).

[38]Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C.Cir. 1977), cert.den. 434 U.S. 829 (1977).

(but involving different panels) have strongly suggested that ex parte contact is permissible unless specifically prohibited by some statute other than the APA.[39] However, some recent authority indicates that submission of critical factual material to the agency after the comment period closes violates the right of the public to comment.[40]

A revised EPA should clarify the law relating to ex parte comment. There needs to be a balance based on considerations of accuracy (agencies should get as much information and input as possible), efficiency (we should avoid additional burdensome procedures), and acceptability (the public may want the agency insulated from all inputs other than those furnished on the record).

In my view, there should be no limitation on oral or written ex parte comment with an agency before the comment period begins. During that period, the agency normally consults and negotiates with its various constituents to decide what rule to propose.

During the comment period, I believe that all written materials relevant to the rulemaking received by agency staff or agency heads should be included in the rulemaking record. However, I would not restrict the ability of the public to make oral ex parte contacts with the agency staff or agency heads. Such comments should be permissible and need not be summarized

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[39]Sierra Club v. Costle, 657 F.2d 298 (D.C.Cir. 1981); Action for Children's TV v. FCC, 564 F.2d 458 (D.C.Cir. 1977).

[40]Ober v. EPA, 84 F.3d 304, 314 (9th Cir. 1996).

and included in the record, whether they are factual inputs or policy inputs. In adjudication, of course, such comments are improper. However, rulemaking is more like legislation than it is like adjudication. People have no basis to assuming that rules are being made on some sort of exclusive record confined to inputs furnished in writing or at the public hearing. And such inputs may be helpful to the agency, either in getting the rule right factually or in measuring political support for and against it. Moreover, a prohibition of contact by agency decisionmakers with the public would be very difficult to enforce, much more so than a comparable provision in adjudication. Rulemaking goes on for a long time and covers broad issues, yet the agency must remain in contact with its various constituents all the time. Memorialization of comments is possible but is very burdensome; besides it is problematic. Few people believe that the real thrust of a long conversation will find its way into the memo. So based on considerations of accuracy, efficiency, and acceptability, I believe that oral ex parte contact during the comment period should be permissible.

After the close of the comment period, however, I would limit the agency's ability to receive written and oral comments. I concede that I am less certain about this part of my recommendation. I think people appropriately assume that end of the comment period signals an end to the public's ability to influence agency decisionmakers. If there are additional post-comment period written inputs, those should be placed in the

record and the public should be given an opportunity to respond to them. And post-comment period oral ex parte comments should either be prohibited or, if they occur, memorialized in a memo that the public should have an opportunity to respond to.

8. One-year rule. Allow rulemaking to continue past one year from the initial notice if OAL grants an extension. The one year requirement is valuable in discouraging procrastination but in cases where there are voluminous comments, it may be difficult to complete the process within one year. Rushing the rule to completion is a bad idea since it insures that comments will not be properly considered. And starting over is very wasteful. A good compromise here is to allow OAL to grant an extension of the one-year period upon a showing of good cause (i.e. that the agency has not procrastinated and that the particular rulemaking is unusually time-consuming).

9. Guidance documents. Allow guidance documents such as interpretations and policy statements to be adopted by agencies without going through the rulemaking process. My arguments in favor of this position are set forth in my 1992 article on underground regulations.[41] I also enclose a copy of an amicus brief I filed in the pending Tidewater Marine case that sets forth my views of the public policy implications of existing California law. I should add that some of the private sector people I interviewed disagree with me very strongly on this issue. Also the OAL personnel I interviewed disagree with me.

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[41]See note 26. See also Unger, note 2 at 78-80.

Essentially I believe that present law discourages agencies from providing badly needed guidance to the public. It encourages agencies to cheat by adopting guidance documents in some other form and therefore drives them underground, which worsens the problem. Finally, because vast numbers of illegal guidance documents already exist, and more are issued all the time, the law is almost completely unenforceable. OAL can afford to expend few of its limited resources on making determinations concerning questioned guidance documents. Yet when an agency gets caught with an underground regulation, there are serious implications on judicial review.

I suggest the Commission consider something like the recent Washington statute, summarized in my article.[42] It creates a category of interpretive statements and policy statements which it distinguishes from rules and allows to be adopted without rulemaking procedure. Such guidance documents must be clearly labelled as such and are made advisory only.

The Commission should also insure that such guidance documents be conveniently published, although not necessarily in the Calif. Code of Regulations. It should solicit comments on how the publication requirement should be satisfied. Probably each agency could be required to periodically publish its guidance documents in a generally available format.

10. Internal management and forms exceptions. I suggest that some of the categorical exemptions from rulemaking be

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[42]44 Admin. L. Rev. 69-70.

expanded. For example, the exception for "internal management" was narrowed almost to the point of invisibility by a court decision.[43] That decision said that if a rule involved the interests of persons outside the agency, it could not be considered internal management. However, if a rule (in the form of a manual, memorandum, guideline or whatever) only tells agency staff members (or staff members of a related agency) how to do their jobs, without imposing substantive regulation on the conduct of the public, it should be exempt as internal management.[44] For example, if an agency voluntarily decides to include a system of risk assessment or cost benefit analysis as part of its rulemaking process, its decision to do so should not itself by subject to rulemaking.

Similarly, the requirement relating to "forms" seems to have been unduly narrowed.[45] The adoption or modification of a form,

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[43]Armistead v. State Personnel Board, 22 Cal.3d 198, 149 Cal.Rptr. 1 (1978).

[44] A good example is an agency's adoption of statistical methods that its officials should utilize for conducting audits of private sector personnel. These should be regarded as internal management even though they obviously have an impact on persons outside the agency, since they simply tell agency employees what to do in carrying out their chores. Grier v. Kizer, 219 Cal.App.3d 422, 268 Cal.Rptr. 244 (1990) should be disapproved. Under federal law, a rule falls under the exemption for "procedure" if it does not modify substantive legal rights. APA §553(b)(B); Department of Labor v. Kast Metals Corp., 744 F.2d 1145 (5th Cir. 1984).

[45]Under §11342(g), rulemaking procedure does not apply to "any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued."

or instructions for filling out a form, should not be the subject of mandatory rulemaking procedure, even if the form is referred to in a regulation, unless the form is a disguised attempt to impose substantive regulation on the conduct of the public.

11. Effective date. Regulations are effective on the 30th day after they are filed with the Secretary of State unless the agency makes a written request to OAL demonstrating good cause for an earlier effective date.[46] This seems unnecessary. An agency can set whatever later effective date for its rule that it wishes[47], but it should not have to seek leave from OAL to make the rule effective immediately. Under present rulemaking law and practice, affected members of the public have plenty of opportunity to learn that a new rule is coming along and to conform their business practices to it. The rulemaking process is long enough. Why prolong it for an additional 30 days?

12. Internet. The statute should require agencies to make appropriate use of the internet. For example, rather than mail proposed regulations to a long list of people or organizations on a mailing list, agencies should be required to get a list of email addresses and contact persons through the internet rather

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Agencies complain that if a regulation refers to a form and they wish to change the form or instructions, they must readopt the regulation. Although this can normally be done under simplified procedures as a change without regulatory effect, OAL Reg. §100, it probably should be completely exempt from rulemaking under the "forms" exemption of §11342(g), whether the form is mentioned in the reg or not.

[46]GC §11343.4.

[47]GC §11343.4(c).

than by direct mail. Similarly, the agency should receive comments through the internet; they could insist that written comments (other than from individual members of the public) be accompanied by a computer disk to make it easy to add the comment to the data base. Agencies should inform everyone on the electronic mailing list whenever anything has been added to the rulemaking file. The home page should indicate quickly the status of a rule--such as whether it has been sent to OAL. Emergency regs should be announced on the internet. Agencies should be required to place all proposed and final rules, all material in the rulemaking file, and all guidance documents, on their internet home page.

13. Negotiated rulemaking. The statute should encourage negotiated rulemaking, as does the federal APA.[48] Negotiated rulemaking can reduce the expense, delay and adversariness of the present rulemaking process. It can also come up with creative, synergistic solutions to problems that otherwise might never have surfaced. Negotiated rulemaking helps to assure that regulated parties have bought into the rule and minimizes the likelihood that anyone will seek judicial review.

Although some forms of negotiation are presently employed (numerous agencies informally employ negotiation techniques and workshops), a negotiated rulemaking statute would give further encouragement to the process. Such a statute would follow in the

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[48]APA §§561-70 (these provisions were added to the APA in 1990 and are currently due to be sunsetted out in November, 1996).

footsteps of the ADR provisions of the adjudication statute.[49]

A negotiated rulemaking statute would establish the appropriate procedures for convening and conducting the process, including fair representation of all affected interests. The statute should allow the agency to dispense with many of the hurdles to rulemaking contained in present law if both agency officials and the various interest group negotiators reach a consensus. For example, the public notice and comment procedure could be truncated, the requirements of explanation and justification could be lessened, and OAL review partially or completely dispensed with, if a rule has been successfully negotiated.[50]

III. REFORMS IN THE OAL REGULATION REVIEW PROCESS

OAL presently has a staff of 22. At its peak, it had a staff of 51 (the number of lawyers was not reduced as sharply as was the overall staff but it was reduced significantly). Yet rulemaking has not slowed down. We should consider OAL's relative lack of resources when we think about its assigned workload. My previous suggestion about underground rules reflected the fact that OAL has the resources to issue very few determinations as to whether a rule is an illegal underground reg.

1. Ex parte contact. OAL maintains that written and oral ex

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[49]GC §11420.10 et. seq.

[50]For example, OAL review for necessity might be dispensed with.

parte contact with reviewers is not tolerated. OAL considers only material in the rulemaking record,[51] except in the case of emergency regulations (where there is no agency record).[52] However, there is a widespread perception that outsiders can and do contact the director of OAL or OAL staff reviewers. Perhaps that perception reflects practices from an earlier time; perhaps it is based on salesmanship by lobbyists.[53] OAL also assured me that the governor's office never attempts to influence OAL consideration of rules.

The statute should make clear that oral or written ex parte contact with OAL and its reviewers is not permitted,[54] whether it comes from regulated parties or other members of the public, other agencies, the legislature, or the Governor or his staff,[55]

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[51]See OAL Rule 55(h).

[52]OAL Regs. §55(a) to (g).

[53]One OAL staff member overheard a lobbyist assure a client that the lobbyist could influence OAL's consideration of a particular rule. Of course, no communication was actually received from the lobbyist concerning that rule. One can only speculate about how the client was billed.

[54]However, the existing process whereby OAL staff members negotiate with agencies that have proposed rules in order to clear up drafting problems or gaps in the record is very constructive and should be encouraged. Such contacts should not be treated as ex parte contacts and need not be memorialized in the record.

[55]One private practitioner said there should be an exception to the ban on ex parte contacts for OAL for procedural defects that do not appear in the record. For example, if the agency failed to send out notices, even though it claims to have done so, this defect could be raised in a comment to OAL.

except in the case of emergency regulations.[56]

Ex parte contact with the Governor's office should also be prohibited when the Governor's office considers an agency's appeal from a negative OAL decision.

2. Time period for OAL consideration. OAL has 30 working days to approve or disapprove a rule. Some agency staff told me that OAL reviewers sometimes cannot complete their work within this period when they must deal with large and complex rulemaking packages; as a result, reviewers disapprove the package on pretextual grounds and thus require the agency to resubmit the rule. Perhaps there should be a provision that allows OAL a longer review period (for example, 15 working days) in the case of unusually complex reg packages. The director of OAL would have to sign off on such an extension and would have to explain why additional time was needed.

3. Consistency review. I agree with OAL's suggestion that it must accept an agency's interpretation of a statute when it is one of several reasonable interpretations.[57] In such situations, OAL should not substitute its interpretive judgment. While this may well be the existing practice, it apparently was not the prior practice. Therefore, it would be a good idea to codify it since OAL leadership philosophy may change.

I believe the judicial review statute should be amended to

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[56]See note 45.

[57]Letter from OAL to the Commission, May 24, 1996, p. 15-16.

make it clear that a reviewing court should defer to an agency's interpretation of the statute, not OAL's, where these conflict. On judicial review of an invalidly adopted underground regulation, the court should defer neither to OAL's nor the agency's interpretation of the statute, but should decide the interpretive question as if neither the agency nor OAL had weighed in on the issue.[58]

4. Necessity. OAL's regulations requires that the necessity of "each provision" of a regulation be established.[59] The statute, however, does not seem to require that the necessity of every single part of a lengthy regulation be separately established.

Instead, the statute should be amended to make clear that only the overall necessity for the regulation needs to be established by the rulemaking record. Of course, if a relevant comment questions a particular part of the regulation, the agency's response to that comment would be required to establish the necessity for that particular part. Dispensing with the requirement of establishing necessity for every single unquestioned provision of a regulation should simplify the task of both adopting agencies and OAL staff.[60]

In addition, the statute should make clear that factual

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[58]Thus Grier v. Kizer, note 37, 268 Cal.Rptr. at 251, should be disapproved on this point.

[59]Reg. §10(b)(1) and (2).

[60]See Unger, note 2 at 82-85.

support[61] is not required for an agency's judgment calls or political compromises. An agency is, of course, required to give reasons for its rules but it must be candidly recognized that it is not always possible to furnish factual backup or expert opinion for every judgment.[62]

For example, a statute requires that 25% of solid waste be "diverted" rather than "disposed of." Each day landfills must cover the exposed face of the waste. Landfills can use "green waste" such as lawn clippings as cover. When green waste is used in this manner, has it been "diverted" from landfills or "disposed of" in landfills? The agency compromised; green waste used for cover is "diverted" up to 7% of the total amount of solid waste, but "disposed of" to the extent it exceeds 7% of the total solid waste. OAL disapproved the regulation because the agency failed to justify the 7% figure.[63]

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[61]The statute requires "substantial evidence" of necessity; "evidence includes, but is not limited to, facts, studies, and expert opinion." GC §11349(a). OAL's regulations require "information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision." Information includes, "but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information." Reg. §10(b)(2).

[62]See Marsha N. Cohen, "Regulatory Reform: Assessing the California Plan," 1983 Duke L.J. 231, 271-77.

[63]Integrated Waste Management Board, 1995 Cal. Code of Reg. Dec. 6. Similarly, the Chiropractic Board set up a "preceptorship" program for students, providing that each preceptor could have no more than two students. OAL disapproved this regulation, questioning numerous parts of it. For example, it required the agency to justify why the limit of two students rather than one or three.

But this regulation reads like a political compromise in a situation where no one answer is better than any other; 6% or 8% really would be as justifiable as 7%. Probably many other formulas would be equally justifiable. OAL staff says that they will settle for any kind of statement of reasons that justifies such distinctions; it is the complete absence of any justification that attracts their disapproval. Agency staff members I interviewed generally agreed that OAL staffers seldom try to substitute judgment on necessity issues. However, in the past OAL was much more demanding of factual support for agency compromises or judgment calls. And the statute and regulations do seem to require factual support for every determination.[64]

I am not sure how to draft a statute that allows agencies more elbow room to strike compromises or make essentially political judgments. Perhaps this can be better expressed in a statutory comment. But the idea is that only reasons or rationale, not "information" or "evidence" or other "factual support," is required to back up judgment calls.

Incidentally, I was told that OAL will not permit factual findings in regulations. I see nothing wrong with a regulation that states "The agency finds that..." Such findings might be helpful to an agency when the rule is judicially reviewed. After all, such findings often appear in statutes.

5. Other changes. I agree with the various proposals made by OAL to the Commission to clear up ambiguities in their

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[64]See note 52.

statute. One agency suggested that the statute make clear that an agency can withdraw part of its proposal before submitting the rest of it to OAL without having to treat this as a modification that requires additional 15 day notice. Also the agency should be able to sever a proposal, sending part of it quickly to OAL while continuing to study the balance.

One agency complained about the vagueness of the petition procedure;[65] the suggestion was that a petition to adopt, amend or repeal a rule should contain specifics about what the petitioner wants. I did not look into the provision for legislative reference to OAL for priority review of existing rules.[66] It strikes me that the rigid provisions and timelines here might be disruptive to OAL's and the agency's ability to prioritize their tasks.

IV. CONCLUSION

The notice and comment process for rulemaking is extremely important and must be preserved, Similarly, OAL review of rules is an excellent checking mechanism and should also be preserved. However, in recent years requirements have been piled on top of requirements, so that the rulemaking process is far more costly and much slower than it needs to be. Every rulemaking requirement must be carefully assessed on a cost-benefit basis, in order that unnecessary resources not be consumed in the

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[65]GC §11340.7.

[66]GC §11349.7; joint rules of Senate & Assembly §§37.7, 40.1.

rulemaking process. I hope that my suggestions will provoke such an assessment.

file: oal.clr