

## Memorandum 97-69

### **Administrative Rulemaking: Direct Final Rulemaking**

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#### INTRODUCTION

This memorandum introduces the next element in the Commission's ongoing study of administrative rulemaking. It discusses implementation of some form of a "direct final rule" exception to California rulemaking law.

Direct final rulemaking is a streamlined process, developed by federal agencies, for the adoption of regulations that are entirely noncontroversial. Under this process, an agency publishes the "final" text of a regulation that it believes to be noncontroversial. It solicits public comment (typically for thirty days). If no adverse comment is received in the public comment period, the rule becomes effective after an additional prescribed period has elapsed (typically another thirty days). However, if even a single adverse comment is received, the proposed rule is withdrawn and does not become effective. Typically the agency then pursues adoption of the rule through the full rulemaking procedure.

Professors Michael Asimow and Gregory Ogden both recommend adding a direct final rule exception to California rulemaking law. Such an exception would increase the efficiency of rulemaking when an agency adopts a noncontroversial rule, while preserving the benefits of public notice and comment. Specific issues relating to such an exception are discussed below. A preliminary staff draft of a direct final rulemaking exception is attached as a starting point for discussion.

#### ISSUES

##### **Terminology**

The term "direct final rule" apparently refers to the manner in which the policy is implemented in the context of federal rulemaking procedure — a direct final rule is published "directly" in the final rules section of the Federal Register, circumventing publication as a proposed rule. California rulemaking procedure does not require publication of "final rules," so this procedurally-based term does not make sense in the California rulemaking context. The preliminary staff draft uses the term "consent

regulation,” which goes to the substance of the exception, and suggests an analogy to the legislative consent calendar. This memorandum uses the term “direct final rule” only when referring to federal rulemaking practice.

### **Integrated procedure**

In federal practice, direct final rulemaking procedure is distinct from the regular rulemaking process. That is, if a proposed direct final rule is withdrawn due to adverse comment the process ends and the agency may not “switch tracks” and proceed as if the notice and comment process had been completed under the full rulemaking procedure. If the agency wants to proceed with the proposed rule it must reintroduce the rule under the full rulemaking procedure.

This procedural distinction appears to be founded on the need to fit direct final rulemaking within the “good cause” exception to federal rulemaking law. See 5 U.S.C.A. § 553(b) (notice of proposed rulemaking not required “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”). In a sense, the direct final rulemaking process is a test by the adopting agency to discover whether a rule is controversial. If not, then good cause exists to believe that full rulemaking procedures are unnecessary and the rule is adopted under the abbreviated procedure. If, on the other hand, adverse comment is received, then the good cause exception is probably unavailable and the agency pursues the rule under the full rulemaking procedure instead.

There is no “good cause” exception in California’s rulemaking law to constrain our formulation of a consent regulation exception. The question then is whether there is any reason to treat the exception as a distinct procedure, separate from regular rulemaking procedure, or whether the proposed exception can be directly integrated into existing rulemaking procedures.

The staff sees no reason why an agency should be required to follow a separate procedural path in order for the consent regulation procedures to apply. If a rule is noncontroversial then certain procedures are superfluous, regardless of whether the agency predicted that the rule would be noncontroversial and committed to a particular procedural path. The staff recommends that the exception be integrated into the regular rulemaking procedure — if no adverse comment is received during the public comment period then the rule is noncontroversial and abbreviated procedures apply. If adverse comment is received then abbreviated procedures do not apply. This is the approach taken in the preliminary staff draft.

## **Scope of Exception**

Direct final rulemaking is efficient because it allows an agency to forego procedures that are unnecessary when adopting an entirely noncontroversial rule. The following discussion considers which requirements of California rulemaking procedure are unnecessary and can be circumvented under a consent rulemaking exception.

An important point to keep in mind in determining which procedures are unnecessary in adopting a consent regulation is that a consent regulation will not necessarily be a trivial regulation. In some cases an important or complex regulation may not draw any adverse comment, perhaps because the adopting agency reached consensus with all interested parties before starting the formal rulemaking process. The only thing that distinguishes a consent regulation from any other regulation is that there is consensus that it should be adopted, without change, in the form in which it was introduced.

**Notice and comment procedures.** Notice and comment procedures must be maintained for consent rulemaking. Such procedures ensure that interested members of the public receive meaningful notice of a proposed regulation and have an opportunity to raise an objection if the regulation is in fact controversial.

**Post-comment analysis.** There does not appear to be any reason to require an agency to respond to comments or reassess the analyses submitted as part of the initial notice if the regulation as proposed is noncontroversial. The preliminary staff draft dispenses with these procedures, which are laid out in Section 11346.9 of the Government Code. This is the principal effect of the consent regulation exception.

**OAL review.** OAL reviews all proposed regulations to determine whether they satisfy specified criteria (necessity, authority, clarity, consistency, reference, non-duplication, and procedural compliance). It makes sense to require similar OAL review of a regulation adopted under the consent rulemaking procedure. Just because a regulation is noncontroversial does not mean that it satisfies the criteria considered by OAL. For example, a regulation may receive no adverse comment but may have some nonsubstantive defects in clarity that can be corrected during the OAL review process, or a proposed regulation may have some fatal defect in terms of necessity, authority, or consistency that should preclude adoption of the regulation regardless of whether it is controversial. The preliminary staff draft preserves OAL review.

**Effective date and publication.** Existing provisions relating to the effective date of regulations and publication of an adopted regulation in the California Code of Regulations should apply to a consent regulation as they do to any other regulation.

## **Definition of “Adverse Comment”**

Under federal practice, a rule may be adopted as a direct final rule if no adverse comments are received regarding the rule in the public comment period. The definition of “adverse comment” varies somewhat between agencies. The following is a fairly typical definition (used by the Animal and Plant Health Inspection Service of the Department of Agriculture):

By “adverse comments” we mean comments that suggest that the rule should not be adopted, or that suggest that a change should be made to the rule. A comment expressing support for the rule as published would obviously not be considered adverse. Neither would a comment suggesting that requirements in the rule should, or should not, be employed by APHIS in other programs or situations outside the scope of the direct final rule.

See Use of Direct Final Rulemaking, 58 Fed. Reg. 47,206 (1993). The preliminary staff draft uses a similar definition of “adverse comment.”

**Unfounded objections.** One problem in defining “adverse comment” is how to characterize comments that express simple opposition, without any explanation or that express irrational opposition. Without some language excluding such comments from the definition of “adverse comments,” a single unfounded letter of opposition could defeat the otherwise appropriate use of the consent regulation exception. This problem has been addressed in the preliminary staff draft by providing that “adverse comment” does not include a comment that does not address the *substance* of the proposed regulation.

**Intent to comment.** A common feature of federal direct final rulemaking procedure is that a person may submit a statement of intent to make an adverse comment, with the same effect on the process as if the person had submitted an actual adverse comment. This makes some sense as it allows a person to prevent expedited adoption of a rule to which they object, even if the person does not have time to prepare a substantive adverse comment. However, the comment period in California rulemaking law is 45 days (as opposed to the typical 30 day period under federal direct final rulemaking practice). If a person cannot formulate an adverse comment in that time it is not clear why the person should be permitted to block adoption under the streamlined process. What’s more, allowing a person to block consent rulemaking by submitting a statement of intent to comment again opens the door to unfounded or obstructionist opposition. The preliminary staff draft does not include a notice of intent to submit an adverse comment within the definition of “adverse comment.”

**OAL review of noncontroversial status.** An agency's determination that there has been no adverse comment will itself be subject to review by OAL as part of OAL's determination of whether the regulation was adopted in compliance with the requirements of rulemaking law. See proposed Section 11347, Comment. This is appropriate as a check on agency discretion. Otherwise an agency could limit applicable rulemaking procedure simply by certifying no adverse comment was received regarding a particular rule.

### **Modification of a Consent Regulation**

In some circumstances, adverse public comment may be received in regard to a portion of a proposed regulation that is arguably severable. In such a case, should the adopting agency be permitted to delete the controversial provision and adopt the remainder as a consent regulation? Some federal agencies do treat provisions of a direct final rule as severable. For example:

If adverse comments clearly apply to only part of a rule, and that part is severable from the remaining portions, as for example, a rule that deletes several unrelated regulations, the Coast Guard may adopt as final those parts of the rule on which no adverse comments were received. The part of the rule that was the subject of adverse comment would be withdrawn.

See Coast Guard Rulemaking Procedures, 60 Fed. Reg. 31,267, 31,268 (1995).

The efficiency of such an approach is clear. However, it may be difficult in practice to determine when a controversial provision is severable. In fact, making such a determination would likely require analysis similar to that which the noncontroversial rule exception seeks to avoid, that is, a reassessment of the effect of the overall regulatory proposal. Furthermore, allowing severance of controversial provisions would require complex drafting. For these reasons, the preliminary staff draft does not permit substantive modification of a proposed regulation that is adopted as a consent regulation.

Respectfully submitted,

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## PROPOSED LEGISLATION

**Gov't Code §11346.9 (amended). Post-comment analysis**

SECTION 1. Section 11346.9 of the Government Code is amended to read:

11346.9. Every Except as provided in Section 11347, 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.

(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 allow an exception for consent regulations. See Section 11347.

**Gov't Code § 11347 (added). Consent regulations**

SEC. 2. Section 11347 is added to the Government Code, to read:

11347. (a) If the adopting agency receives no adverse comments regarding the proposed regulation during the public comment period, the agency shall follow the procedures provided in this subdivision instead of the procedures provided in Section 11346.9:

(1) Certify to the office that no adverse comment regarding the proposed regulation was received during the public comment period.

(2) Submit the adopted regulation to the office for review.

(b) This section does not apply if the substance of the proposed regulation is changed after submission to the public pursuant to Section 11346.5.

(c) For the purposes of this section, an “adverse comment” is a comment suggesting that the proposed regulation should not be adopted or should be changed. “Adverse comment” does not include any of the following:

(1) A comment in favor of the proposed regulation.

(2) A comment suggesting that the proposed regulation be applied to other matters, unless support for the proposed regulation is expressly conditioned on the regulation being applied to such matters.

(3) A comment that does not address the substance of the proposed regulation.

**Comment.** Section 11347 creates an exception to the procedures provided in Section 11346.9. Certification that no adverse comment is received regarding a regulation is subject to review by the Office of Administrative Law. See Section 11349.1(b) (OAL review standards include compliance with Chapter 3.5 of Division 3 of Title 2 of the Government Code).

Paragraph (2) of subdivision (b) provides that this section does not apply if the adopting agency has changed the substance of the regulation after circulation of the proposed regulation for comment. This does not preclude application of this section after making purely grammatical or other nonsubstantive changes.

Paragraph (3) of subdivision (c) provides that a comment is not adverse for the purpose of this section if it does not address the substance of the proposed regulation. For example, a simple statement of opposition, without any explanation, or a statement of opposition based on clearly irrelevant grounds would not constitute an adverse comment.

“Office” means the Office of Administrative Law. See Section 11342(b).