

Study N-302

October 8, 1997

**First Supplement to Memorandum 97-69****Administrative Rulemaking: Direct Final Rulemaking**

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We received the attached letter from Professor Gregory L. Ogden, a Commission consultant for the Administrative Rulemaking study. He writes to express his agreement with the recommendations made in Memorandum 97-69.

Respectfully submitted,

Brian Hebert  
Staff Counsel



# PEPPERDINE

PEPPERDINE UNIVERSITY SCHOOL OF LAW

October 6, 1997

Law Revision Commission  
RECEIVED

Executive Director Nat Sterling  
California Law Revision Commission  
4000 Middlefield Road, ROOM D-1  
Palo Alto, CA 94303-4739

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Re: Memorandum 97-69, Administrative Rulemaking: Direct Final Rulemaking

Dear Nat:

I have read Memorandum 97-69, Administrative Rulemaking: Direct Final Rulemaking, and have the following comments about the recommendations in that memorandum:

1. Terminology: I like the use of the term "consent regulation" to indicate a noncontroversial rule.
2. Integrated Procedures: I support the use of integrated procedures, for efficiency reasons. Agencies may not be able to predict with any degree of accuracy which regulations will be noncontroversial so using the same procedures will provide needed flexibility.
3. Scope of Exception: I support the recommendations to follow all of the existing rulemaking procedures except for post-comment analysis, for the reasons stated in the memorandum. While this eliminates only one procedural step, it is a significant one.
4. Definition of Adverse Comment: I support the staff definition of adverse comment, that an adverse comment has to address the substance of the comment, and should not include the intent to comment procedure used under federal rulemaking law. While there may be a lack of clarity as to what comments would satisfy the substance requirement, an agency's decision to interpret whether a comment is substantive, and therefore adverse, is reviewable by OAL. Similarly, it is a useful safeguard to provide for OAL review of an agency determination that no adverse comment was received. This role is very similar to OAL's existing role.
5. Modification of Consent Regulation: Although some regulations may be easily severable because they deal with distinct subjects, other regulations may be difficult to divide, so that on balance I support the recommendation that there can be no substantive modification of a proposed regulation that is adopted as a consent regulation.

The proposed legislation, Gov't Code § 11347, implements the recommendations in a

clear and understandable fashion.

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Very Truly Yours,

Gregory L. Ogden  
Professor of Law