

Memorandum 98-30

**Administrative Rulemaking: Consent Regulations and
Other Noncontroversial Regulations**

The current rulemaking procedure does not differentiate between a proposed regulatory action that elicits adverse public comments and one that does not. This is inefficient because some procedures that make sense when adopting a controversial regulation make little or no sense when a regulation is noncontroversial. The Commission proposes two reforms that would improve efficiency:

- (1) Minor procedural streamlining applicable where an agency receives no adverse comments in response to a proposed regulatory action.
- (2) The creation of a simplified notice and comment procedure that an agency may use when proposing a regulation that it expects will be noncontroversial (a "consent regulation"). However, if any adverse public comment is received in response to a regulatory proposal, the simplified procedure may not be used.

A staff draft tentative recommendation implementing these proposals is attached. If the Commission approves this draft, a tentative recommendation will be distributed for public comment.

The proposed legislation is substantively the same as that presented in Memorandum 98-11, with one exception: At the March 1998 meeting, the Commission decided that use of the consent regulation procedure should not be conditioned on a finding that a proposed regulation will have no adverse financial impact on businesses, individuals, housing costs, or local agencies. Instead, the proposing agency must assess the potential financial impact and report its findings in the notice of the proposed regulatory action. Anyone who believes that agency's findings are inadequate can bar the use of the consent regulation procedure by submitting a comment in opposition to the use of the procedure.

Respectfully submitted,

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations

April 1998

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 15, 1998.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

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This recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

CONSENT REGULATIONS AND OTHER NONCONTROVERSIAL REGULATIONS

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MINOR PROCEDURAL STREAMLINING

The California Administrative Procedure Act¹ specifies the procedure a state agency must follow in order to take a regulatory action.² In greatly simplified form, the procedure is as follows:

- (1) Perform various preliminary analyses.
- (2) Distribute public notice.
- (3) Receive public input, through written comments and, in some cases, by holding a public hearing.
- (4) Update the preliminary analyses, in light of public input.
- (5) Submit the proposed regulatory action and the record of the rulemaking process to the Office of Administrative Law (OAL) for review and approval.³

1. Gov’t Code §§ 11340-11359. Note that certain agencies are partially or entirely exempt from the rulemaking requirements of the APA, either by the terms of the APA or by an exemption in the agency’s authorizing statutes. See, e.g., Gov’t Code §§ 11342(g) (legal rulings of Franchise Tax Board are not regulations subject to APA procedures), 19817.1 (partial exemption of Department of Personnel Administration from APA rulemaking provisions). The proposed law would not affect these exemptions.

2. The proposed law uses the term “regulatory action” to mean the adoption, amendment, or repeal of a regulation. See proposed amendment to Gov’t Code § 11342(h) (“regulatory action” defined).

3. Gov’t Code §§ 11346-11347.3 (rulemaking procedure). See also Gov’t Code §§ 11349-11349.6 (OAL review procedure).

Redundant Requirements

Of the procedures discussed above, number (4) is unnecessary when there is no adverse comment in response to a proposed regulatory action. Government Code Section 11346.9 requires that an agency revisit and update documents prepared before the public comment period, to take public commentary into account. If there is no adverse public comment, then there is no reason to update these preliminary documents. In many cases, the agency will simply take the preliminary document, make minor labeling changes and resubmit it as the updated document.

Exemption

Under the proposed law, if an agency does not receive any adverse comments in response to a proposed regulatory action, the proposed regulatory action is not subject to Government Code Section 11346.9.⁴ Instead the agency forwards the proposed regulatory action, along with certification that no adverse comments were received, to OAL for review and approval.⁵ This eliminates the need to issue boilerplate restatements of documents prepared earlier in the process. While the savings to the state from eliminating these unnecessary steps might be minor in any particular rulemaking, the cumulative effect of eliminating them from all noncontroversial rulemaking proceedings should be significant.

CONSENT REGULATION PROCEDURE

In some cases an agency may be relatively certain, before beginning the rulemaking process, that a proposed regulatory action will be noncontroversial — for example, where a regulatory action has a very minor or generally beneficial effect, or where the agency has obtained consensus among all interested parties before formally proposing a regulatory action. In such cases, a simplified notice and comment procedure should be adequate to provide public notice of the pending rule, confirm the agency's belief that the regulatory action is noncontroversial, and provide other useful feedback to the agency.⁶ The proposed law creates such a procedure.⁷

4. An adverse comment is a comment suggesting that the regulation should not be adopted or should be changed, or asserting that the agency has not satisfied the requirements of the rulemaking procedure. See proposed Gov't Code § 11347(c).

5. See proposed Gov't Code § 11347.

6. Note that regulations that lack substantive effect may already be adopted under a streamlined procedure as "regulations without regulatory effect." See 1 CCR § 100. However, many regulations with a very minor effect will still have some substantive effect and are therefore not eligible for adoption as a regulation without regulatory effect.

7. The procedure is similar to the direct final rulemaking procedure increasingly used in federal administrative rulemaking. See discussion in Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1 (1995). "The purpose of the direct final rulemaking technique is to streamline the rulemaking process in situations in which a rule is considered so noncontroversial that the most minimal procedures should be adequate." *Id.* at 2. Expanded use of the direct final rulemaking procedure by federal agencies has been

Consent Regulation Procedure

Under the proposed law, an agency may choose to take a regulatory action that it believes will be noncontroversial (a “consent regulation”) by means of a simplified alternative procedure:

- (1) Prepare and distribute public notice of the proposed regulatory action, making clear that it is being taken under the consent regulation procedure.
- (2) Accept written public comment for at least 45 days.
- (3) If no adverse comments are received, submit the text of the proposed regulatory action and certification that no adverse comments were received, to OAL.
- (4) OAL then files the regulatory action with the Secretary of State and publishes it in the California Code of Regulations.

If an adverse comment is received, the proposed regulatory action may not be taken under the consent regulation procedure.⁸ In other words, any person can block an agency’s use of the consent regulation procedure by submitting a written comment opposing the regulatory action, recommending a change in the regulatory action, asserting that the agency has not followed required procedures, or asserting that the consent regulation procedure should not be used to take the regulatory action.⁹ This ensures that the consent regulation procedure will only be used to take a regulatory action that is entirely noncontroversial.

The fact that the resources expended in proposing a consent regulation will be wasted if the consent regulation elicits any adverse comment creates a substantial incentive for agencies to restrict their use of the procedure to those cases where the agency is virtually certain that the proposed regulatory action will be noncontroversial. This self-interested restraint will help ensure that the procedure is not overused.

Review of a Consent Regulation

Although OAL review is not an automatic feature of the consent regulation procedure, any interested person may request that OAL review a regulatory action taken under the consent regulation procedure.¹⁰ If OAL determines that the requirements of the consent regulation procedure were not satisfied, or that the regulatory action does not satisfy the standards by which all regulations are

recommended by the Administrative Conference of the United States. ACUS Recommendation 93-4, 59 Fed. Reg. 4670 (1994).

8. See proposed Gov’t Code § 11365.030. If the agency still wishes to adopt a regulation that has been blocked by an adverse comment, it may do so under the regular rulemaking procedure. See Gov’t Code §§ 11346-11347.3.

9. See proposed Gov’t Code § 11365.030(b).

10. See proposed Gov’t Code § 11365.080.

judged,¹¹ OAL may order the effect of the regulatory action reversed. The validity of a consent regulation is also subject to judicial review, in the same manner as any other regulation.¹²

11. Gov't Code § 11349 (regulatory standards defined).

12. See, e.g., Gov't Code § 11350 and the proposed amendment to Gov't Code § 11350.3.

PROPOSED LEGISLATION

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

SEC. _____. 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 make an exception for regulations that do not elicit any adverse comment. See Section 11347 (noncontroversial regulatory action).

Gov't Code § 11347 (added). Noncontroversial regulatory action

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

11347. (a) If no adverse comment is received in relation to a proposed regulatory action, the proposed regulatory action is not subject to Section 11346.9.

(b) The final text of a regulatory action that is not subject to Section 11346.9 pursuant to subdivision (a) shall be submitted to the office for review, along with certification that no adverse comment was received.

(c) For the purposes of this section, "adverse comment" means a written comment, received during the public comment period provided under Sections 11346.4 and 11346.8, that makes any of the following assertions:

(1) The proposed regulatory action should not be taken or should be changed. This does not include a comment suggesting that a proposed regulatory action be applied to other matters, unless support for the regulatory action is expressly conditioned on its being applied to other matters.

(2) The agency did not satisfy the requirements of this article in proposing the regulatory action.

Comment. Section 11347 is comparable to Article 11 (commencing with Section 11365.010) in that both govern the procedures applicable where a regulation is noncontroversial. Note that an agency's assertion that no adverse comment was received is subject to review by the Office of Administrative Law (OAL). See Section 11349.1(a) (OAL reviews proposed regulations for compliance with requirements of this chapter).

See also Sections 11342(b) ("office" means Office of Administrative Law), 11342(h) ("regulatory action" means the adoption, amendment, or repeal of a regulation).

Gov't Code §§ 11365.010-11365.080 (added). Consent regulation procedure

SEC. _____. Article 11 (commencing with Section 11365.010) is added to Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

Article 11. Consent Regulation Procedure

§ 11365.010. Purpose and application of article

11365.010. (a) The purpose of this article is to provide an efficient procedure that an agency may use when taking a regulatory action that the agency believes will be noncontroversial.

(b) Nothing in this article requires an agency to proceed under this article when taking a regulatory action.

(c) Except as otherwise provided, any regulatory action that is subject to Article 5 (commencing with Section 11346) may instead be taken pursuant to this article.

Comment. Section 11365.010 states the purpose and application of this article. Note that a regulatory action may not be taken under this article if the agency receives an adverse comment in response to the regulatory action. See Section 11365.030 (adverse comment).

Note that a regulatory action affecting a building standard may not be taken under this article. See Section 11356 (building standards).

See also Section 11342(h) (“regulatory action” means the adoption, amendment, or repeal of a regulation).

§ 11365.020. Consent regulation procedure

11365.020. To take a regulatory action under this article, an agency shall do all of the following:

(a) Prepare a preliminary text of the proposed regulatory action.

(b) Assess the potential financial impact of the proposed regulatory action on California businesses, individuals, housing costs, state agencies, local agencies, and school districts.

(c) Give public notice of the proposed regulatory action.

(d) Accept written public comment for at least 45 days after giving public notice.

(e) Certify in writing that all written public comments received in the public comment period were read and considered by the agency and that no adverse comment was received.

(f) Prepare the final text of the proposed regulatory action.

(g) Transmit the final text of the proposed regulatory action, the certification required by paragraph (5), and the rulemaking file to the office.

Comment. Section 11365.020 provides a procedure that an agency may use when proposing a regulatory action that it expects to be noncontroversial. See Section 11365.010 (purpose and application of article). Note that this procedure may not be used if agency receives any adverse comment. See 11365.030 (adverse comment).

See also Sections 11342(b) (“office” means the Office of Administrative Law), 11342(h) (“regulatory action” means the adoption, amendment, or repeal of a regulation).

§ 11365.030. Adverse comment

11365.030 (a) An agency may not take a regulatory action under this article if the agency receives an adverse comment in relation to the proposed regulatory action.

(b) For the purposes of this article, “adverse comment” means a written comment, received during the public comment period provided under Sections 11365.020 and 11365.050, that makes any of the following assertions:

(1) The proposed regulatory action should not be taken or should be changed. This does not include a comment suggesting that a proposed regulatory action be applied to other matters, unless support for the regulatory action is expressly conditioned on its being applied to other matters.

(2) The proposed regulatory action should not be taken under this article.

(3) The agency did not satisfy the requirements of this article in proposing the regulatory action.

Comment. Section 11365.030 is comparable to Section 11347(c) (noncontroversial regulatory action). See also Section 11342(h) (“regulatory action” means the adoption, amendment, or repeal of a regulation).

§ 11365.040. Notice of proposed consent regulation

11365.040. (a) The agency shall mail notice of a proposed regulatory action taken under this article to the office and to any person who has requested notice of agency regulatory actions. If the agency is within a state department, the agency shall also mail or deliver notice to the director of the department.

(b) Notice of a proposed regulatory action shall include each of the following:

(1) Instructions on how to obtain a copy of the preliminary text of the proposed regulatory action and how to submit a written comment relating to the proposed regulatory action. The instructions shall specify the deadline for submission of written comment.

(2) The following statement:

“This proposed regulatory action is taken under the consent regulation procedure. Unless withdrawn by the proposing agency, the proposed regulatory action will automatically become final if the agency does not receive any adverse comments relating to the proposed regulatory action during the public comment period. See Government Code Sections 11365.010-11365.080.”

(3) A clear overview explaining the purpose and effect of the proposed regulatory action.

(4) Reference to the authority under which the regulatory action is proposed and a reference to a code section or other provision of law that is implemented, interpreted, or made specific by the regulatory action.

(5) An assessment of the financial impact of the regulatory action on California businesses, individuals, and housing costs, an assessment of any costs that the regulatory action will impose on state agencies, or on local agencies or school districts entitled to reimbursement under Part 7 (commencing with Section 17500) of Division 4, and a statement of the basis for these assessments.

Comment. Section 11365.040 is comparable to Sections 11346.4-11346.5 (notice of proposed regulatory action taken under Article 5 (commencing with Section 11346)).

See also Sections 11342(b) (“office” means Office of Administrative Law), 11342(h) (“regulatory action” means the adoption, amendment, or repeal of a regulation).

1 **§ 11365.050. Limitation on final text**

2 11365.050. (a) The final text of a proposed regulatory action taken under this
3 article shall not be changed from the preliminary text, except in the following
4 circumstances:

5 (1) The change is solely grammatical in nature or is otherwise nonsubstantial.

6 (2) The change is substantial, but is sufficiently related to the preliminary text so
7 that the public was adequately placed on notice that the change could result from
8 the originally proposed regulatory action.

9 (b) If a change is made pursuant to paragraph (2) of subdivision (a), the final text
10 of the proposed regulatory action shall be made available to the public for at least
11 15 additional days of written public comment before the agency submits the final
12 text to the office.

13 **Comment.** Section 11365.050 is comparable to Section 11346.8(c). See also Section 11342(h)
14 (“regulatory action” means the adoption, amendment, or repeal of a regulation).

15 **§ 11365.060. Publication and filing**

16 11365.060. (a) On receiving notice of a proposed regulatory action taken under
17 this article, the office shall publish the contents of the notice in the California
18 Regulatory Notice Register.

19 (b) On receiving the final text of a proposed regulatory action taken under this
20 article and certification that all timely public comment was read and considered
21 and that no adverse comment was received, the office shall file the final text of the
22 proposed regulatory action with the Secretary of State.

23 **Comment.** Section 11365.060 is comparable to the publication and filing requirements that
24 apply to regulatory actions taken under Article 5 (commencing with Section 11346). See Sections
25 11346.4(a)(5) (notice publication), 11349.3 (filing with Secretary of State). See also Sections
26 11342(b) (“office” means Office of Administrative Law), 11342(h) (“regulatory action” means
27 the adoption, amendment, or repeal of a regulation).

28 **§ 11365.070. Rulemaking file**

29 11365.070. (a) Except as provided in subdivision (b), an agency taking a
30 regulatory action under this article is subject to Section 11347.3.

31 (b) The requirements of paragraphs (3), (4), (5), and (8) of subdivision (b) of
32 Section 11347.3 do not apply to a rulemaking file prepared pursuant to this
33 section.

34 **Comment.** Section 11365.070 incorporates Section 11347.3 (rulemaking file for regulatory
35 action taken under Article 5 (commencing with Section 11346)), except as specified in
36 subdivision (b). See also Section 11342(h) (“regulatory action” means the adoption, amendment,
37 or repeal of a regulation).

38 **§ 11365.080. Review by Office of Administrative Law**

39 11365.080. (a) Any interested person may request, in writing, that the office
40 review a regulatory action taken under this article to determine whether it satisfies
41 the requirements of this article and the substantive standards set forth in Section
42 11349.1. Within 30 days of receiving the request, the office shall review the

1 regulatory action pursuant to the procedure provided in subdivisions (a) to (e),
2 inclusive, of Section 11349.7, and in subdivision (b) of this section.

3 (b) Notwithstanding Section 11349.7, the following rules govern a review
4 pursuant to this section:

5 (1) Before beginning the review, the office shall notify interested persons of the
6 request for review and publish notice of the request in the California Regulatory
7 Notice Register.

8 (2) A failure to satisfy the requirements of this article shall be treated as a failure
9 to meet the standards set forth in Section 11349.1.

10 (3) As used in Section 11349.7, “regulation” means a regulatory action taken
11 under this article.

12 (4) As used in Section 11349.7, “repeal” means to reverse the effect of a
13 regulatory action.

14 (c) A regulatory action that has been reviewed by the office under this section is
15 not subject to further review by the office under this section.

16 **Comment.** Section 11365.080 incorporates portions of Section 11349.7 (review of existing
17 regulation on request of legislative committee). The introductory paragraphs of Section 11349.7
18 are not incorporated.

19 Subdivision (b) provides rules that are necessary to adapt the incorporated procedure for use in
20 reviewing regulatory action taken under this article.

21 Subdivision (b)(2) provides that a failure to satisfy the requirements of this article has the same
22 effect as a failure to satisfy the substantive standards prescribed in Section 11349.1(a). Thus, if
23 OAL finds that a regulatory action taken under this article does not satisfy the requirements of
24 this article it shall order the “adopting agency to show cause why the regulation should not be
25 repealed.” See Section 11347(a).

26 Subdivision (b)(3) provides that it is a regulatory action, and not necessarily a regulation itself,
27 that is reviewed under this section. For example, an agency may adopt a regulation in 1999 that is
28 unobjectionable, then amend the regulation under this article in 2000, in a manner that does not
29 satisfy the requirements of this article. In such a case, a person may request review of the
30 amendment under this section.

31 On a related point, subdivision (b)(4) provides that the remedy for finding a defect in a
32 regulatory action is reversal of the action and not necessarily repeal of the regulation. In the
33 example in the preceding paragraph, the problematic amendment would be reversed, restoring the
34 original regulation. This is substantially different from repeal of the regulation.

35 Subdivision (c) provides that regulatory action may only be reviewed under this section once.
36 However, review under this section does not preclude review under other applicable provisions of
37 law. See, e.g., Sections 11349.7 (legislatively initiated review), 11349.8 (review of inoperative
38 regulation), 11350 (judicial review of invalidity of regulation), 11350.3 (judicial review of OAL
39 disapproval of a regulation).

40 See also Sections 11342(b) (“office” means Office of Administrative Law), 11342(h)
41 (“regulatory action” means the adoption, amendment, or repeal of a regulation).

CONFORMING REVISIONS

Gov't. Code § 11342 (amended). Definitions

SEC. _____. Section 11342 of the Government Code is amended to read:

11342. In this chapter, unless otherwise specifically indicated, the following definitions apply:

(a) “Agency” and “state agency” do not include an agency in the judicial or legislative departments of the state government.

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

(c) “Order of repeal” means any resolution, order or other official act of a state agency that expressly repeals a regulation in whole or in part.

(d) “Performance standard” means a regulation that describes an objective with the criteria stated for achieving the objective.

(e) “Plain English” means language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English.

(f) “Prescriptive standard” means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means.

(g) “Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency. “Regulation” does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or 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.

(h) “Regulatory action” means the adoption, amendment, or repeal of a regulation.

(i)(1) “Small business” means a business activity in agriculture, general construction, special trade construction, retail trade, wholesale trade, services, transportation and warehousing, manufacturing, generation and transmission of electric power, or a health care facility, unless excluded in paragraph (2), that is both of the following:

(A) Independently owned and operated.

(B) Not dominant in its field of operation.

(2) “Small business” does not include the following professional and business activities:

(A) A financial institution including a bank, a trust, a savings and loan association, a thrift institution, a consumer finance company, a commercial finance

company, an industrial finance company, a credit union, a mortgage and investment banker, a securities broker-dealer, or an investment adviser.

(B) An insurance company, either stock or mutual.

(C) A mineral, oil, or gas broker; a subdivider or developer.

(D) A landscape architect, an architect, or a building designer.

(E) An entity organized as a nonprofit institution.

(F) An entertainment activity or production, including a motion picture, a stage performance, a television or radio station, or a production company.

(G) A utility, a water company, or a power transmission company generating and transmitting more than 4.5 million kilowatt hours annually.

(H) A petroleum producer, a natural gas producer, a refiner, or a pipeline.

(I) A business activity exceeding the following annual gross receipts in the categories of:

(i) Agriculture, one million dollars (\$1,000,000).

(ii) General construction, nine million five hundred thousand dollars (\$9,500,000).

(iii) Special trade construction, five million dollars (\$5,000,000).

(iv) Retail trade, two million dollars (\$2,000,000).

(v) Wholesale trade, nine million five hundred thousand dollars (\$9,500,000).

(vi) Services, two million dollars (\$2,000,000).

(vii) Transportation and warehousing, one million five hundred thousand dollars (\$1,500,000).

(J) A manufacturing enterprise exceeding 250 employees.

(K) A health care facility exceeding 150 beds or one million five hundred thousand dollars (\$1,500,000) in annual gross receipts.

Comment. The definition of “regulatory action” is added to Section 11342 for drafting convenience. The term is used extensively in Article 11 (commencing with Section 11365.010) (consent regulation procedure).

Gov’t. Code § 11343 (amended). Transmittal and certification

SEC. _____. Section 11343 of the Government Code is amended to read:

11343. Every state agency shall:

(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:

(1) Establishes or fixes rates, prices, or tariffs.

(2) Relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the order determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.

(3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

(4) Is a building standard, as defined in Section 18909 of the Health and Safety Code.

1 (b) Transmit to the office for filing with the Secretary of State a certified copy of
2 every order of repeal of a regulation required to be filed under subdivision (a).

3 (c) Deliver to the office, at the time of transmittal for filing a regulation or order
4 of repeal six duplicate copies of the regulation or order of repeal, together with a
5 citation of the authority pursuant to which it or any part thereof was adopted.

6 (d) Deliver to the office a copy of the notice of proposed action required by
7 Section 11346.4 or 11365.020.

8 (e) Transmit to the State Building Standards Commission for approval a certified
9 copy of every regulation, or order of repeal of a regulation, that is a building
10 standard or administrative regulation that applies directly to the implementation or
11 enforcement of building standards, together with a citation of authority pursuant to
12 which it or any part thereof was adopted, a copy of the notice of proposed action
13 required by Section 11346.4, and any other records prescribed by the State
14 Building Standards Law (Part 2.5 (commencing with Section 18901) of Division
15 13 of the Health and Safety Code).

16 (f) Whenever a certification is required by this section, it shall be made by the
17 head of the state agency or his or her designee which is adopting, amending, or
18 repealing the regulation and the certification and delegation shall be in writing.

19 **Comment.** Section 11343 is amended to extend the application of the section to regulations
20 adopted pursuant to Article 11 (consent regulation procedure).

21 **Gov't. Code § 11346.1 (amended). Application of article**

22 SEC. _____. Section 11346.1 of the Government Code is amended to read:

23 11346.1. (a) This article does not apply to any of the following:

24 (1) A regulation that is not required to be filed with the Secretary of State under
25 this chapter, and only this section and Sections 11343.4 and 11349.6 apply to an.

26 (2) An emergency regulation adopted pursuant to subdivision (b), or to any
27 except that this section and Sections 11343.4 and 11349.6 do apply.

28 (3) A regulation adopted under Section 8054 or 3373 of the Financial Code.

29 (4) A regulatory action taken under Article 11 (commencing with Section
30 11365.010).

31 (b) Except as provided in subdivision (c), if a state agency makes a finding that
32 the adoption of a regulation or order of repeal is necessary for the immediate
33 preservation of the public peace, health and safety or general welfare, the
34 regulation or order of repeal may be adopted as an emergency regulation or order
35 of repeal.

36 Any finding of an emergency shall include a written statement which contains
37 the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of
38 Section 11346.5 and a description of the specific facts showing the need for
39 immediate action. The enactment of an urgency statute shall not, in and of itself,
40 constitute a need for immediate action.

41 The statement and the regulation or order of repeal shall be filed immediately
42 with the office.

(c) Notwithstanding any other provision of law, no emergency regulation that is a building standard, as defined in Section 18909 of the Health and Safety Code, shall be filed, nor shall the building standard be effective, unless the building standards are submitted to the State Building Standards Commission, and are approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety Code.

(d) The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal.

(e) No regulation, amendment, or order of repeal adopted as an emergency regulatory action shall remain in effect more than 120 days unless the adopting agency has complied with Sections 11346.2 to 11346.9, inclusive, prior to the adoption of the emergency regulatory action, or has, within the 120-day period, completed the regulation adoption process by formally adopting the emergency regulation, amendment, or order of repeal or any amendments thereto, pursuant to this chapter. The adopting agency, prior to the expiration of the 120-day period, shall transmit to the office for filing with the Secretary of State the adopted regulation, amendment, or order of repeal, the rulemaking file, and a certification that either Sections 11346.2 to 11346.9, inclusive, were complied with prior to the emergency regulatory action, or that there was compliance with this section within the 120-day period.

(f) In the event an emergency amendment or order of repeal is filed and the adopting agency fails to comply with subdivision (e), the regulation as it existed prior to the emergency amendment or order of repeal shall thereupon become effective and after notice to the adopting agency by the office shall be reprinted in the California Code of Regulations.

(g) In the event a regulation is originally adopted and filed as an emergency and the adopting agency fails to comply with subdivision (e), this failure shall constitute a repeal thereof and after notice to the adopting agency by the office, shall be deleted.

(h) A regulation originally adopted as an emergency regulation, or an emergency regulation substantially equivalent thereto that is readopted as an emergency regulation, shall not be filed with the Secretary of State as an emergency regulation except with the express prior approval of the director of the office.

Comment. Section 11346.1 is amended to exempt a regulation adopted as a consent regulation from the requirements of this article. See Article 11 (commencing with Section 11365.010) (consent regulation procedure).

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.

(b) The rulemaking file shall include:

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

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

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

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

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

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

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

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

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

27 (9) The date on which a comment period pursuant to subdivision (c) of Section
28 11346.8 or subdivision (b) of Section 11365.050 began.

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

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

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

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

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

(e) Upon filing a regulation with the Secretary of State pursuant to Section 11349.3 or 11365.060, the office shall return the related rulemaking file to the agency, after which no item contained in the file shall be removed, altered, or destroyed or otherwise disposed of. The agency shall maintain the file unless it elects to transmit the file to the State Archives pursuant to subdivision (f).

(f) The agency may transmit the rulemaking file to the State Archives. The file shall include instructions that the Secretary of State shall not remove, alter, or destroy or otherwise dispose of any item contained in the file. Pursuant to Section 12223.5, the Secretary of State may designate a time for the delivery of the rulemaking file to the State Archives in consideration of document processing or storage limitations.

Comment. Section 11347.3 is amended to extend its application to rulemaking files created pursuant to Section 11365.070 (rulemaking file for action taken under Article 11 (commencing with Section 11365.010) (consent regulation procedure)).

Gov't. Code § 11350.3 (amended). Declaratory review

SEC. _____. Section 11350.3 of the Government Code is amended to read:

11350.3. Any interested person may obtain a judicial declaration as to the validity of a regulation which the office has disapproved or ordered repealed pursuant to Section 11349.3, 11349.6, or 11349.7, or 11365.080 by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure. The court may declare the regulation valid if it determines that the regulation meets the standards set forth in Section 11349.1 and that the agency has complied with this chapter. If the court so determines, it may order the office to immediately file the regulation with the Secretary of State.

Comment. Section 11350.3 is amended to extend its application to review of regulatory actions taken under Article 11 (commencing with Section 11365.010) (consent regulation procedure).

Gov't. Code § 11356 (amended). Building standards

SEC. _____. Section 11356 of the Government Code is amended to read:

(a) Article 6 (commencing with Section 11349) is not applicable to any building standards or administrative regulations that apply directly to the implementation or enforcement of a building standard, subject to the approval of the State Building Standards Commission.

(b) Article 5 (commencing with Section 11346) is applicable to those building standards, except that the office shall not disapprove those building standards nor refuse to publish any notice of proposed building standards if either has been approved by, and submitted to, the office by the State Building Standards Commission pursuant to Section 18935 of the Health and Safety Code.

(c) Article 11 (commencing with Section 11365.010) is not applicable to any regulatory action that affects a building standard or applies directly to the implementation or enforcement of a building standard.

1 **Comment.** Section 11356 is amended to preclude the taking of a regulatory action involving a
2 building standard under Article 11 (commencing with Section 11365.010) (consent regulation
3 procedure).
