Study N-302 April 22, 1998

First Supplement to Memorandum 98-30

Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations

We received a letter from Professor Clark Kelso, a Commission consultant on administrative rulemaking. The letter is attached.

Professor Kelso states his general support for the draft tentative recommendation, indicating that he does not believe that "private sector interests would find anything objectionable in the policies that underlie the proposal." See Exhibit p. 1. In particular, he approves of the change to the definition of "adverse comment." A previous draft had attempted to exclude from the definition of "adverse comment" objections that are frivolous or purely obstructionist. Professor Kelso and others felt that this gave too much discretion to agencies to interpret whether an objection was substantive enough to be considered "adverse."

Professor Kelso also makes a few technical suggestions, which the staff will discuss at the April 23, 1998, meeting. See Exhibit pp. 1-2.

Respectfully submitted,

Brian Hebert
Staff Counsel

INSTITUTE FOR LEGISLATIVE PRACTICE

McGEORGE SCHOOL OF LAW

J. CLARK KELSO, DIRECTOR

April 22, 1998

Mr. Nathaniel Sterling
Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Memorandum 98-30 -- Administrative Rulemaking

Dear Nat:

The tentative recommendation on consent regulations and other noncontroversial regulations is in very good shape, and I do not believe that private sector interests would find anything objectionable in the policies that underlie the proposal.

You may recall that I had concerns about an earlier draft because it defined "adverse comment" in such a way as to require, in essence, substantive objections (and therefore required the agency to make a determination whether an objection to a proposed regulation was on the merits or was simply frivolous). The current draft avoids that problem by defining an adverse comment in Section 11347(c)(1) as including an "assertion[] . . . [that] [t]he proposed regulatory action should not be taken or should be changed." With this change, the proposal is limited only to those regulations where there truly is evidence of consent (or, more properly, an absence of objection).

A few technical points. Section 11346.9(a)(2) requires that the agency make a determination whether a regulation imposes a reimbursable mandate. That subdivision provides in the last sentence that "If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding." Section 11346.5(a)(5) requires that the notice of adoption contain the determination of whether the proposed regulation imposes a mandate, but it does *not* require the statement of reasons that is

3200 Fifth Avenue, Sacramento, CA 95817 • Phone (916) 739-7104 • FAX (916) 739-7072 • E-mail address: ckelso@uop.edu

required by Section 11346.9(a)(2) (I have not research why a statement of reasons is not required in the notice of adoption -- perhaps a statement of reasons should be required here). As currently drafted, Section 11347 would *not* require a statement of reasons for noncontroversial regulatory action. Should a statement of reasons be required? I note that a statement of reasons *is* required for consent regulations under Section 11365.040(b)(5), so perhaps there should be parallel requirements.

Continuing with my fascination with mandates, is there a difference between the "assessment[s]" required by Section 11365.040 and the "determinations" made under Section 11346.5(a)(5)? If there is a difference, does it need to be clarified in the comment to Section 11365.040?

The reference in Section 11365.020(g) to "paragraph (5)" (page 7, line 31) is spurious and probably should be changed to "paragraph (e)".

Sincerely,

J. Clark Kelso