Study N-302 September 11, 1998

Memorandum 98-59

Consent Regulations: Comments on Tentative Recommendation

In April 1998, the Commission circulated a tentative recommendation to simplify the procedures for adoption of noncontroversial regulations (proposed regulations that elicit no adverse public comment). This memorandum reviews comments we have received regarding the tentative recommendation. Comment letters are attached in the Exhibit as follows:

Unless otherwise indicated, all statutory references are to provisions of the Government Code.

GENERAL REACTION

Public response was light but favorable. The Committee on Administration of Justice of the State Bar of California supports the proposed law without reservation. See Exhibit p. 1. The State Board of Control ("Board") supports the proposed law, and suggests ways that it could be improved. See Exhibit pp. 2-3. Those suggestions are discussed below. The Office of Administrative Law (OAL) has raised some concerns informally with the staff. These concerns are also discussed.

DEFINITION OF "ADVERSE COMMENT"

Under the proposed law, the streamlined procedures may only be used if an agency receives no adverse comments in response to a proposed regulation. This gives the public an effective "veto" over use of the streamlined procedure, ensuring that it will only be used where a proposed regulation is truly noncontroversial. However, this veto power creates the potential for abuse. A person could submit an adverse comment that is irrational, off-topic, or based on

general hostility to the agency. Such comments might still fit the definition of "adverse comment," thereby blocking use of the streamlined procedure.

In an earlier draft of the proposed law, the staff suggested narrowing the definition of adverse comment to exclude comments that do not address the substance of the proposed regulation. The Commission decided against including such a provision because it might give the adopting agency too much latitude to dismiss legitimate adverse comments.

The Board would like the Commission to reconsider that decision, suggesting that the definition of "adverse comment" should be limited to exclude comments that are not specifically directed at the agency's proposed action or the procedures followed by the agency in proposing the action. See Exhibit p. 3. This would parallel an existing rulemaking provision that only requires an agency to respond to public comments that are "specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action." See Gov't Code § 11346.9(a)(3). If agencies are entrusted to exercise discretion in determining which comments require a response, then perhaps they should also be authorized to apply the same standard in deciding which comments are adverse.

However, an agency's discretion to decide which comments are substantive enough to merit a response is checked by OAL review of all proposed regulations. If OAL finds that an agency did not respond to a comment that merited response it can disapprove the proposed regulation. There would not be such a direct check on agency discretion in the consent regulation procedure, because consent regulations are not subject to automatic OAL review. OAL would only review a consent regulation on the request of an interested person.

What's more, there is little incentive to characterize comments as nonsubstantive under the existing rulemaking procedure. The only benefit of such a characterization is that the agency does not need to respond to the comment. Under the consent regulation procedure an adverse comment stymies the entire process, creating a strong incentive to characterize comments as non-adverse. Because the consent regulation procedure would create an incentive for agencies to characterize "close calls" in the agency's favor, and because those characterizations would not be routinely reviewed by OAL, **the staff recommends against revising the definition of "adverse comment" in the manner proposed by the Board.**

IMPACT DETERMINATIONS

The consent regulation procedure requires an agency to determine "the potential financial impact of the proposed regulatory action on California businesses, individuals, housing costs, state agencies, local agencies, and school districts." See proposed Section 11365.020(b). The Comment to that subdivision provides as follows:

> The requirements of subdivision (b) are comparable to the requirements of Section 11346.5(a)(5) (determination of local agency mandate), (a)(6) (estimate of cost or savings to state agency), (a)(9) (statement of potential cost to private person or business), (a)(10) (assessment of adverse economic impact), (a)(11) (statement of effect on housing costs).

The Board correctly reads this Comment to mean that the impact determination requirements in the consent regulation procedure are similar to requirements in the existing rulemaking procedure, but not identical. The Board would like the points of similarity and difference between the proposed impact determination requirements and existing impact determination requirements to be spelled out. See Exhibit p. 3.

The intent in drafting proposed Section 11365.020(b) was to require that an agency proposing a consent regulation consider all of the *kinds* of impacts that must be considered under the regular rulemaking procedure, without specifying in detail the requirements of the analysis. This would give an adopting agency flexibility to determine what procedures are appropriate in analyzing the potential impacts of a proposed consent regulation. This is consistent with the overall goal of relaxing the procedures governing the adoption of a consent regulation. Such procedural simplification is appropriate because it is checked by the "veto power" of the public. If an agency's impact determination seems erroneous or seems to have been reached carelessly, a commentator can bar use of the consent regulation procedure by submitting an adverse comment.

Because the intent was to grant discretion to the agency in how it assesses potential impacts, it is not possible to identify specific points of similarity and difference between the proposed procedure and similar provisions of existing law. **Perhaps the best approach would be to replace the current Comment language with the following:**

> Subdivision (b) requires an agency to determine the potential effects of a proposed regulatory action. A public comment asserting that the agency's determination is incorrect or that the basis for the determination is flawed is an adverse comment as defined in Section 11365.030(b)(1)(B).

Such language would clarify the public's role in reviewing the adequacy of an agency's determinations. Note that notice of a proposed consent regulation includes both the agency's impact determinations and a statement of the basis for those determinations. See proposed Section 11365.040(b)(5).

RULEMAKING FILE REQUIREMENTS

With a few specific exceptions, the consent regulation procedure incorporates the rulemaking file requirements of Section 11347.3. The Board notes that paragraph (b)(2) (which is not one of the excluded provisions) requires that the updated informative digest, the initial statement of reasons, and the final statement of reasons be included in the rulemaking file. None of these documents is required under the consent regulation procedure. The Board is concerned that incorporation of the requirement that these documents be included in the rulemaking file might be read as requiring their preparation as part of the consent regulation procedure. See Exhibit p. 4.

The Board makes a good point. **The staff recommends that proposed Section 11365.070 be revised as follows:**

> 11365.070. (a) Except as provided in subdivision (b), an agency taking a regulatory action under this article is subject to Section 11347.3.
>
> (b) The requirements of paragraphs (2), (3), (4), (5), and (8) of subdivision (b) of Section 11347.3 do not apply to a rulemaking file prepared pursuant to this section.
>
> (c) The rulemaking file prepared pursuant to this Section shall include the published notice of the proposed regulatory action.

Subdivision (c) is necessary to preserve an appropriate element of Section 11347.3(b)(2).

FINAL STATEMENT OF REASONS

In addition to creating a new procedure for the adoption of consent regulations, the proposed law also eliminates superfluous reporting requirements

from the regular rulemaking procedure. This is achieved by exempting a noncontroversial regulation (i.e. a regulation adopted under the regular procedure that does not elicit an adverse comment) from the requirements of Section 11346.9. That section requires the preparation of a final statement of reasons and an updated informative digest, which are intended to summarize public comments and to update documents prepared earlier in the process. Where there has been no adverse comment in relation to a proposed regulation, the requirements of Section 11346.9 are largely superfluous.

However, there is an element of the final statement of reasons that may be relevant even if a proposed regulation is noncontroversial. The *initial* statement of reasons must contain a determination as to whether a regulation imposes a local mandate, and if so, whether the mandate requires reimbursement. See Section 11346.5(b)(5). The *final* statement of reasons requires the same determination, but also requires that an agency explain a finding that a mandate is not reimbursable. See Section 11346.9(a)(2). If an agency were simply exempted from the requirements of Section 11346.9 where a proposed regulation is noncontroversial, the agency would never be required to explain a finding that the regulation imposes a nonreimbursable local mandate.

This inconsistency is addressed in the proposed law by requiring that the *initial* statement of reasons also include an explanation for a determination that a local mandate is nonreimbursable. This is a simple way to ensure that the agency explains its finding even if a regulation proves noncontroversial.

However, according to OAL, the initial statement of reasons does not require an explanation of a finding that a local mandate is not reimbursable because the initial statement of reasons is intended only to invite public comment on that point, rather than explain the agency's ultimate findings. Requiring all agencies to explain their findings before receiving public comment would add to the procedural burden without any real benefit.

The staff disagrees. Why invite comment on an agency's assertion that a local mandate is not reimbursable, without disclosing the agency's rationale for that assertion? It seems more sensible to provide the rationale to the public for their review and comment. The agency's rationale might persuade some members of the public who would otherwise disagree with the agency's determination. If a person does disagree with the rationale that person can submit an adverse comment. The agency would then be required to address that comment in the final statement of reasons. This seems appropriate. It is also consistent with the

approach taken with regard to an agency finding that a regulation will not have a significant adverse economic impact on business — the *initial* statement of reasons must include both the finding and the evidentiary basis for the finding. See Section 11346.5(b)(8). **The staff recommends no change in the proposed law.**

PREPUBLICATION REVIEW OF NOTICE

The existing rulemaking procedure requires OAL approval of a notice of proposed rulemaking action, before the notice is published in the California Regulatory Notice Register ("Notice Register"). See Section 11346.4(d). This is efficient because OAL is able to catch defects early, before the adopting agency has wasted its resources attempting to adopt a regulation that would probably be disapproved by OAL.

As currently drafted, the consent regulation procedure does not provide for OAL review of notices before publication. OAL suggests that it should. **The staff agrees and recommends revising proposed Section 11365.060 along the following lines:**

> 11365.060. (a) Except as provided in subdivision (b), ~~O~~n on receiving notice of a proposed regulatory action proposed under this article, the office shall publish the contents of the notice in the California Regulatory Notice Register.
>
> (b) The office may refuse to publish a notice of a proposed regulatory action submitted to it pursuant to this article if the agency that submitted the notice has not satisfied the requirements of this article.
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> (c) On receiving the final text of a regulatory action proposed under this article and certification that all timely public comment was read and considered and that no adverse comment was received, the office shall file the final text of the proposed regulatory action with the Secretary of State.

OAL REVIEW PROCEDURE

The proposed law provides for review of a consent regulation on the request of an interested person. Rather than establish yet another review procedure, the proposed law incorporates a substantial part of an existing procedure, which provides for review of previously adopted regulations. OAL finds the incorporated procedure to be cumbersome and would prefer that it not be adapted for use in the proposed law. **The staff sees no real problem with OAL's suggestion and agrees that a more straightforward procedure could be drafted.**

The staff proposes the following as a replacement for proposed Section 11365.080:

> 11365.080. (a) Any interested person may request, in writing, that the office review a regulatory action taken under this article to determine whether it satisfies the requirements of this article and the substantive standards provided in Section 11349.1.
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> (b) On receipt of a notice pursuant to subdivision (a), the office shall mail written notice of the request to the agency that took the regulatory action in question.
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> (c) The office shall issue a determination within 30 working days of receiving a request pursuant to subdivision (a). The determination and an explanation of the basis for the determination shall be published in the California Regulatory Notice Register and mailed to the person who requested the review, the agency that took the regulatory action in question, and the Governor.
>
> (d) The Governor may overrule a determination by mailing notice of a decision to overrule the determination and an explanation of that decision to the office and the agency that took the regulatory action in question, within 30 working days of publication of the determination.
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> (e) On receipt of notice that the Governor has overruled a determination, the office shall publish that notice in the California Regulatory Notice Register.
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> (f) If the office determines that a regulatory action taken under this article does not satisfy the requirements of this article or the substantive standards provided in Section 11349.1, and its determination is not overruled by the Governor, the office shall issue an order nullifying the effect of the regulatory action. The order shall be mailed to the agency that took the regulatory action in question, published in the California Regulatory Notice Register, and transmitted to the Secretary of State for filing.
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> (g) The record for review by the office under this section shall be the rulemaking file prepared pursuant to Section 11365.070.
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> **Comment.** This section is new. An interested person may obtain a judicial declaration as to the validity of a regulatory action nullified under this section. See Section 11350.3.

Respectfully submitted,

Brian Hebert
Staff Counsel

THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

TO: Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

FROM: Kim Zeldin
Committee on Administration of Justice
State Bar of California

DATE: June 15, 1998

RE: Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations, April 1998 (CAJ 98-12)

COMMITTEE POSITION: Support

(1) Summary of existing law:

Current rulemaking procedures do not distinguish between a proposed regulatory action which elicits adverse public comments and one that does not.

(2) Changes to existing law:

The proposal shortens the steps necessary to create a regulation when the regulation proposed is noncontroversial.

(3) Analysis of proposed changes and recommended amendments:

CAJ reviewed an earlier version of this proposed legislation. CAJ approved it and made a suggestion to amend the definition of "adverse comment" because it was worded in such as way as to require substantive objections. The current draft avoids that problem by defining adverse comment in Section 1137(c)(1) as including an "assertion[] . . . [that] [t]he proposed regulatory action should not be taken or should be changed."

The revised proposed legislation also includes several other proposed sections which clarify the original proposal. No objection or concerns were noted with the new sections.

STATE OF CALIFORNIA PETE WILSON, Governor

STATE BOARD OF CONTROL
P.O. BOX 48
SACRAMENTO, CA 95812-0048

July 16, 1998

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

Dear Mr. Sterling:

The Law Revision Commission's proposal for a streamlined rulemaking process for noncontroversial regulations, which balances the value of public participation and the efficient adoption of regulatory policies, offers a welcome alternative to the current process. The Commission's goal of eliminating redundant reporting requirements for regulations receiving no adverse comments would provide needed efficiency to the rulemaking process. However, the tentative recommendation of April 1998 could be revised to further that important goal.

Definition of "adverse comment." As proposed, the receipt of one adverse comment will, in essence "veto" the use of the consent procedure. (Gov. Code, § 11347(c)(1).)[1]. This is appropriate since the consent procedure should be used only if there is no benefit to be gained from broader public input. However, in order to merit this, a comment should pertain to the substance of the regulation or the technical requirements of the rulemaking process. This would parallel the current requirement that an agency need only respond to comments that are ". . . objections or recommendation *specifically directed* at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action." (§ 11346.9(a)(3), emphasis added.) A requirement that an adverse comment be related to the substance of the regulation or rulemaking policy would prevent a comment that is not directed to the specific proposed regulation (e.g., "I oppose this regulation because there are too many regulations already") from derailing the consent rulemaking process. This concept was included in the first discussion draft of February 20, 1998 (lines 69-70) and it should be retained.

Scope of determinations. An agency must determine the potential financial impact of the proposed regulation on businesses, individuals, housing costs, state and local agencies, and school districts. (§§ 11365.020(b), 11365.040(b)(5)). The Commission's comment to section 11365.020 states that this requirement is comparable to those of section 11346.5(a)(5), (6), (9), (10), and (11). This suggests that the Commission intends that the requirements be similar, but not necessarily identical. If this is correct, then the comment should expressly state the areas of similarity and difference. If the Commission intends that the determinations are the same as required by section 11346.5(a), then it should state so.

[1] All citations are to the Government Code, unless otherwise noted.

Requirement of the rulemaking file. Section 11365.070 provides that section 11347.3, pertaining to the rulemaking file, applies, except for (b)(3), (4), (5) and (8). Section 11347.3(b)(2) requires that the rulemaking file contain "an updated informative digest, the initial statement of reasons, and the final statement of reasons." Since the consent procedure does not specify otherwise, it is assumed that the current A.P.A. requirements would apply to the updated informative digest (§ 11346.9(b)), the initial statement of reasons (§ 11346.2(b)), and the final statement of reasons (§ 111346.9(a)). This is inconsistent with the Commission's summary to the tentative recommendation which states that a consent proceeding would not be subject to section 11346.9 [the final statement of reasons] if there are no adverse comments. (Lines 10-12.)

It does not make sense to require an updated informative digest when the consent process does not require an informative digest. In lieu of requiring an informative digest, the consent process requires an overview of the regulation that explains its purpose and effect. (§11365.040(b)(3).) There is no reason to update a statement of the regulation's purpose and effect, as they will not change. An updated informative digest should not be required in the rulemaking file.

If the Commission intends to require a final statement of reasons, it should eliminate the redundant determination that is required. A final statement of reasons requires a determination whether the regulation imposes a mandate on local agencies or school districts (§ 11346.9(a)(2)), which is identical to a determination required by section 11347.3(b)(3) which is excluded by section 11365.070(b). The final statement of reasons required by the consent process should exclude the determination under section 11346.9(a)(2).

If the Commission requires a consent rulemaking to include an initial statement of reasons and a final statement of reasons in its rulemaking file, there is little incentive for an agency to use it. The agency will for the most part have to produce the same documents to begin the rulemaking process (an abbreviated notice of rulemaking and an initial statement of reasons) and to complete the process (a final statement of reasons) as in the current process. Significant time and effort would be wasted if just one adverse comment is received, especially if there is no requirement that an adverse comment must be specifically directed at the proposed regulation. It is likely that many agencies would rather follow the regular rulemaking process than run the risk of not being able to complete the consent process. This would be unfortunate, since an effective consent rulemaking process would benefit the public and state agencies.

Thank you for this opportunity to provide comments on this important effort.

Sincerely,

Judith A. Kopec
Senior Counsel