

First Supplement to Memorandum 98-71

Administrative Rulemaking: Miscellaneous Issues

Memorandum 98-71 discusses a number of miscellaneous issues relating to the APA's rulemaking provisions. This supplement discusses three more. All statutory references are to the Government Code.

Effective Period of Notice of Proposed Action

Existing law provides that a notice of proposed action is only effective for one year. If a proposed action has not been completed in that year, the adopting agency must issue a new notice. See Section 11346.4(b). Professor Asimow has noted that there may be good reasons why a regulatory proposal would take more than a year to complete (e.g., where voluminous comments have been received and must be summarized and responded to). He proposes adding a provision that would allow an extension to be granted for good cause. The Commission considered this proposal previously and instructed the staff to draft implementing language.

The staff has spoken with the Office of Administrative Law (OAL) regarding this proposal. OAL is skeptical about the need for an extension provision. If the Commission does decide to recommend such a provision, OAL suggests that it not provide for more than a 90-day extension.

A provision allowing for an extension of the effective period of a notice of proposed action could be added by amending Section 11346.4(b) as follows:

~~(b) The effective period of a notice issued pursuant to this section shall not exceed one year from the date thereof. If the adoption, amendment, or repeal of a regulation proposed in the notice is not completed and transmitted to the office within the period of one year, a notice of the proposed action shall again be issued pursuant to this article.~~

Except where its effective period is extended pursuant to this subdivision, a notice of proposed action shall not be effective for more than one year from the date it was issued. For good cause, the director of the office may extend the effective period of a notice of proposed action by an additional 90 days. If the action proposed in a notice is not completed and transmitted to the office within the effective period of the notice, a new notice shall be issued pursuant to this article.

A conforming change to Section 11349.3(c) would also be required:

(c) If an agency determines, on its own initiative, that a regulation submitted pursuant to subdivision (a) should be returned by the office prior to completion of the office's review, it may request the return of the regulation. All requests for the return of a regulation shall be memorialized in writing by the submitting agency no later than one week following the request. Any regulation returned pursuant to this subdivision shall be resubmitted to the office for review within the ~~one-~~year effective period specified in subdivision (b) of Section 11346.4 or shall comply with Article 5 (commencing with Section 11346) prior to resubmission.

Internet Publication of Notices

The Commission previously considered the use of the Internet in rulemaking proceedings and approved a provision that would authorize the use of electronic communication, but would not require it. See proposed Section 11340.8. Commissioner Hemminger has suggested that an agency that maintains a website should be required to publish rulemaking notices on that website as a supplement to other required forms of publication. This seems reasonable. It could be implemented by revising proposed Section 11340.8 to read:

11340.8. (a) As used in this section, "electronic communication" includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

(b) Notwithstanding any other provision of this chapter that refers to mailing or to oral or written communication:

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may make available in electronic form a document required by this chapter, but shall not make that the exclusive means by which the document or a copy of a document is made available.

(3) A communication required or authorized by this chapter, including a notice, public comment, request, or petition, may be made electronically with the consent of the recipient.

(c) An agency that maintains a website or other forum for the electronic publication or distribution of written or graphical material shall publish any notice required under this chapter on that website or other forum. Publication under this subdivision is in addition to any other required form of publication. This subdivision does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written or graphical material.

Repeal of Regulations Declared Invalid by Court

Certain provisions of existing law require the repeal of a regulation that has been determined by OAL to be invalid. See Sections 11349.6 (repeal of emergency regulation), 11349.7 (repeal of regulation reviewed on request of Legislature), 11349.8 (repeal of regulation for lack of statutory authority). However, there is no provision requiring the repeal of a regulation that has been declared to be invalid in a judicial proceeding. In theory, a regulation that is held invalid by a court might remain published in the California Code of Regulations (CCR) indefinitely, without any indication of its invalidity. Commissioner Hemminger asked the staff to consider whether this is a significant problem. It doesn't appear to be. According to OAL, most agencies are prompt in removing invalid regulatory provisions from the CCR. This makes sense considering that deletion of regulatory provisions held invalid by a court can be done using the fast and simple procedures for making changes to the CCR that lack "regulatory effect." See 1 C.C.R. § 100 (changes without regulatory effect).

Respectfully submitted,

Brian Hebert
Staff Counsel