

Memorandum 99-8

Administrative Rulemaking: Draft Tentative Recommendation

In July, 1996, the Commission decided on the basic scope and organization of the administrative rulemaking project. Issues for Commission review were identified and organized into general categories, as follows:

- (1) Exemptions from rulemaking procedure.
- (2) Revision of rulemaking procedure.
- (3) Administrative review procedure and standards.
- (4) Public access to regulations.
- (5) Miscellaneous matters.

This memorandum discusses all of the unresolved issues in categories (1) and (5). A draft tentative recommendation incorporating prior Commission decisions, the recommendations made in this memorandum, and the recommendations made in Memorandum 98-71, is attached. Because Memorandum 98-71 was not considered by the Commission, Staff Notes have been used in the draft tentative recommendation to discuss changes recommended in that memorandum. After deciding the issues presented in this memorandum and in Staff Notes in the draft tentative recommendation, the Commission should decide whether the tentative recommendation is ready to be circulated for public comment.

Except as otherwise indicated, statutory references are to the Government Code.

EXEMPTIONS

There are dozens of agency-specific exemptions from the APA rulemaking requirements. See, e.g., Section 18215 (State Personnel Board exempt from APA rulemaking requirements, with specific exceptions). In enacting these exemptions, the Legislature presumably determined that the benefits of applying the rulemaking requirements to particular agency rules were outweighed by other policy considerations. **As a general matter, the staff does not believe it**

would be useful for the Commission to second-guess these policy determinations.

CODIFICATION OF *TIDEWATER* EXCEPTIONS

In *Tidewater Marine Western, Inc. v. Bradshaw* (14 Cal. 4th 557, 571 (1996)), the California Supreme Court noted certain exceptions to the application of the APA, stating that the following are not subject to APA rulemaking requirements :

- (1) An advice letter to a private party.
- (2) An interpretation that arises in the course of a case-specific adjudication.
- (3) A “policy manual that is no more than a restatement or summary, without commentary, of the agency’s prior decisions in specific cases and its prior advice letters....”

Professor Asimow suggests that these exceptions be codified. The merits of this suggestion are discussed below:

Advice Letters

The APA arguably already contains an exception for individual advice letters. Section 11343(a)(3) provides that a regulation need not be transmitted to OAL for filing with the Secretary of State if it “is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.” In turn, the APA’s notice and comment procedures do not apply to a regulation that is not required to be filed with the Secretary of State. See Section 11346.1(a). Thus, it would appear that an individual advice letter, comprising specific advice to a named person or group of persons, would not be subject to the rulemaking procedures.

However, OAL has interpreted Section 11343(a)(3) narrowly. For example, in its Determination Number 12 of 1989, OAL determined that a letter mailed by the Board of Examiners in Veterinary Medicine (Board) to three pet groomers, advising them that certain types of teeth-cleaning constituted dentistry and could not be practiced without the proper license, did not fall within the exception provided in Section 11343(a)(3). OAL concluded that the Board’s letter applied generally, despite the fact that it was only delivered to three persons (one as a warning prior to enforcement and the other two in response to requests for advice), because the Board’s statement could be applied to an identifiable class of

persons — “all non-veterinarians statewide, who clean animals’ teeth or who may clean animals’ teeth in the future.” See *Tidewater* at 571 (a rule applies generally so long as it declares how a certain class of cases will be decided). OAL also determined that the letters were not “directed to a specifically named person or to a group of persons,” apparently because the content of the letters could apply to a broader class of persons, of whom the letter recipients were only members. In other words, OAL seems to have interpreted “directed to” to mean “relating to” rather than “delivered to.” In order to qualify for the Section 11343(a)(3) exception under this analysis, an advice letter would need to apply uniquely to the person requesting the advice or to an unclassifiable group. If the advice could apply to any identifiable class of persons, no matter how small, then it is must be adopted as a regulation.

This narrows the exception too far. An agency should be able to provide individual advice in response to a request for such advice, without adopting a regulation, even if the advice might also apply to an identifiable class of other persons. To deny advice to a member of the public, simply because the requested advice might apply to others (to whom the advice is not transmitted), would not serve the public interest. This is particularly true considering that OAL interprets “regulation” to include oral statements. See OAL Regulatory Determination Number 6 of 1986 at 14. Agencies should be free to offer advice in response to personal or telephone inquiries without first determining that the advice would not apply to an identifiable class of persons.

Because Section 11343(a)(3) may be construed too narrowly, the staff recommends codifying an “individual advice” exception by adding subdivision (e) to proposed Section 11340.9 (exceptions):

11340.9. The requirements of this chapter do not apply to any of the following:

...

(e) An agency statement made to a person or group of persons to provide advice in response to a request for advice from that person or group of persons.

Comment. Subdivision (e) codifies the rule noted in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996) (individual advice letter is not subject to rulemaking provisions).

Adjudicative Decisions

The *Tidewater* court noted that “interpretations that arise in the course of case-specific adjudication are not regulations....” *Tidewater* at 571. This is a recognition of the fact that agencies must interpret the law in applying it to specific circumstances. This exception could be justified on at least two statutory grounds: (1) A case-specific interpretation does not fall within the APA definition of “regulation” because it does not apply generally. (2) A case-specific interpretation is not subject to the APA adoption requirements under Sections 11343(a)(3) and 11346.1(a), because it is directed to a specific person or group of persons and does not apply generally throughout the state.

However, reliance on these statutory justifications for the exception raises the same problem discussed above in the context of advice letters — if an interpretation expressed in an adjudicative decision could be applied to an identifiable class of persons, it might be considered to apply generally. **For this reason, the staff recommends codifying the *Tidewater* exception for interpretations arising in the course of adjudication. This could be done by adding another subdivision to proposed Section 11340.9, as follows:**

11340.9. The requirements of this chapter do not apply to any of the following:

...

(f) An agency interpretation of law arising in the course of a case-specific adjudication.

Comment. Subdivision (f) provides that an interpretation arising in the course of a specific adjudication is not subject to rulemaking requirements. This codifies the rule noted in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996). Note, however, that an agency may not rely on an adjudicative decision as a precedent unless it has been designated a precedent decision. See Section 11425.60.

As the proposed Comment points out, the fact that an adjudicative interpretation need not be adopted as a regulation does not mean that the agency can rely on that decision as a precedent. In order to do so, the agency must designate the decision as a precedent and make it make it available to the public pursuant to Section 11425.60.

Agency Restatement of Individual Advice and Adjudicative Decisions

The *Tidewater* court noted that the rulemaking requirements do not apply to a “policy manual that is no more than a restatement or summary, without commentary, of the agency’s prior decisions in specific cases and its prior advice letters....” *Tidewater* at 571. This conclusion seems to be based on simple extrapolation — if a single advice letter or adjudicative decision is not a regulation, then an unannotated collection of prior decisions and advice would not be a regulation either.

However, there are problems with such extrapolation. The exception for individual advice letters is based on a statutory requirement that the advice be “directed to a specific person or group of persons.” See Section 11343(a)(3). As discussed above, the exception for interpretations arising in the course of case-specific adjudication may also be based on Section 11343(a)(3). If individual interpretive decisions and advice are compiled and published generally then they are no longer directed to specific persons. Similarly, the exceptions for individual interpretive decisions and advice are based on the fact that they are not generally applicable. While an agency’s restatement of its individual advice and adjudicative decisions would “be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes” (*Tidewater* at 571), the utility of such a manual depends on it having some general predictive value — why else would an agency publish it? In a sense, a manual of this type would be announcing general rules. This makes it difficult to justify the exception based on the existing statute.

Regardless of whether the exception can be justified under existing law, the Commission should consider whether such an exception would be good policy. It is clear that a compilation of agency advice and adjudicative decisions can provide useful guidance to the public. For example, OAL makes its regulatory determinations available to the public and provides a detailed index to aid in research. The staff has found these materials very valuable in researching how OAL interprets various provisions of the APA. What’s more, it isn’t clear how it would benefit the public to require that such material be adopted as a regulation before it can be distributed to the public. The rulemaking process is intended to provide the public with an opportunity to participate in the formulation of a rule before it takes effect and provide the agency with useful information to improve the proposed rule. Where an agency is simply restating its previous advice and

adjudicative decisions, there is no proposed rule for the public to influence — the agency is reciting decisions that have already been made. For these reasons, it may make sense to add an exception for agency an agency restatement of advice and adjudicative decisions.

On the other hand, the Commission has recommended procedures that would serve much the same purpose as the exception announced in *Tidewater*. Section 11425.60, which was recently enacted on the Commission’s recommendation, permits an agency to designate an adjudicative decision as a “precedent decision.” Precedent decisions may be relied on by the agency in future adjudications and must be published in a publicly available compilation. This effectively codifies the *Tidewater* exception as it applies to the restatement of adjudicative interpretations, with the improvement that an agency must acknowledge the precedential value of a decision in order to publish it. This provides better guidance to the public than would an unadorned restatement of prior (and possibly contradictory) decisions. Similarly, the Commission’s advisory interpretation proposal is intended to provide a streamlined procedure for the general distribution of nonbinding interpretive advice. It may be that these procedures provide adequate methods for an agency to publish its advice and adjudicative decisions. Adding an express exception along the lines discussed above might encourage agencies to circumvent those procedures.

The Commission should consider whether to add a provision creating an exception to the rulemaking procedures for an unannotated restatement of agency advice and adjudicative decisions.

INTERNAL MANAGEMENT EXCEPTION

General Rule

The APA definition of “regulation” does not include an agency rule that “relates only to the internal management of the state agency.” See Section 11342(g). This makes sense. An agency should have discretion to make internal operational decisions without adopting a regulation. However, the courts have construed “internal management” narrowly, holding that an agency decision that affects those outside the agency is not an “internal management” decision. See, e.g., *Armistead v. State Personnel Board*, 22 Cal. 3d 198, 203 (1978) (state employee resignation policy concerned “a matter of import to all state employees” and was therefore not “a rule governing the State Personnel Board’s internal affairs.”), *Grier v. Kizer*, 219 Cal. App. 3d 422, 435-438 (1990) (decision by Department of

Health Services to use statistical sampling in auditing Medi-Cal claims was not “internal management” decision because it “might cause a provider to leave the Medi-Cal program to avoid the potential for large recoupments based on probability sampling”).

Criticism of the Rule as Interpreted by the Courts

Professor Asimow believes that the courts have narrowed the exception too far:

The court should reconsider the scope of the “internal management” exception to the definition of regulation. In *Armistead*, with little analysis, the California Supreme Court held that an interpretive rule that affects persons outside the agency did not fall under the internal management exception. *Armistead* also approved a case suggesting that a regulation relating exclusively to employees of the agency, but which involved an issue of significance to the public [tenure of college faculty], should not be treated as internal management. This seems incorrect. A rule concerning the personnel practices of an agency toward its own personnel should be considered internal management regardless of the substantive issue involved.

The *Armistead* analysis does not clearly prevent a court from treating an agency’s instructions to its own staff as internal management. For example, the *Grier* case involved instructions to auditors about how to construct a statistical sample of provider claims. I believe that such instructions should fall under the internal management exception. The agency is simply telling its own employees how to go about their business of enforcing the law. It is rationing its available and highly limited staff resources, deploying them to best advantage.

Of course, instructions to staff *could* be used as a concealed way to impose a new legal obligation (or remove an existing obligation) on regulated parties, in which case they would not be internal management, but this was not the case in *Grier*. It seems perfectly appropriate that instructions to staff concerning the correct means for enforcing the agency’s statute, without adding any new legal requirements or obligations that are binding on members of the public, should be treated as internal management. Such rules affect persons outside the agency, of course, but do not require them to do anything they were not otherwise required to do or otherwise affect their legal rights.

See Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43, 73-74 (Winter 1992) (footnotes omitted).

Rules That Do Not Affect Legal Rights or Obligations

Professor Asimow suggests that an internal management rule should not be considered a regulation if it does not impose obligations on the public or affect the public's legal rights. If such a rule were applied to the examples discussed above, the results would be as follows:

- The decision in *Grier* to use statistical sampling to audit Medi-Cal claims would probably not be a regulation. The audited doctors would not be subject to any new requirements and their underlying right to compensation for valid claims would not be affected. This does not mean that doctors could not contest the procedure if it were mathematically flawed or applied unfairly — they simply couldn't challenge the procedure as being an underground regulation.
- The result in *Armistead* would not be changed. A rule that limits the ability of all state employees to withdraw a letter of resignation before its effective date would affect the legal rights of employees outside the adopting agency and would be a regulation.

These results seem reasonable. They provide an agency with discretion to order its own operations without formally adopting a regulation so long as its internal rules do not constitute de facto regulation of the public.

However, there will still be cases that present line-drawing problems. For example, an agency may adopt an internal guideline for enforcing a particular prohibition, setting a threshold for prosecution. Such a rule would arguably not affect the legal rights or obligations of the public. The public has no right to engage in the prohibited activity and should not complain when prosecuted. Under the rule proposed above, this policy would probably be an internal management rule and exempt from the rulemaking requirements. However, it can be argued that the enforcement standard is really a sentencing guideline, attaching different penalties to different degrees of misconduct and therefore affecting the legal rights of those who violate the statute. Under this analysis, the rule is not an internal management matter, but a regulation and should be adopted as such. Note that the latter analysis is consistent with the provision, adopted on the Commission's recommendation, prohibiting use of sentencing guidelines unless they have been adopted as a regulation. See Section 11425.50(e).

The Commission should consider expanding the internal management exception along the lines discussed. This could be done by deleting the “internal management” language from the definition of “regulation” and adding an exemption along the following lines:

11340.9. The requirements of this chapter do not apply to any of the following:

...

(d) An agency rule that relates to the internal management of the agency and does not affect the legal rights or obligations of a person other than an officer or employee of the agency.

...

Comment. Subdivision (d) continues the “internal management” exception to the definition of “regulation” in former Section 11342(g). The exception is expanded to provide that it applies to rules that affect persons outside the agency, so long as it does not alter the legal rights or obligations of those persons. This reverses case law holding that the exception does not apply if an agency’s internal management rule has any effect on persons outside the agency. See, e.g., *Grier v. Kizer*, 219 Cal. App. 3d 422, 435-438 (1990) (decision by Department of Health Services to use statistical sampling in auditing Medi-Cal claims was not “internal management” decision because it “might cause a provider to leave the Medi-Cal program to avoid the potential for large recoupments based on probability sampling.”).

Rules that Affect a Significant Public Interest

One possible problem with the language set out above is that it creates a bright line between the effect of an internal management rule on employees and officers of the agency and the effect on persons outside the agency. This would be contrary to the result in *Poschman v. Dumke*, which held that a rule governing the faculty tenure process was not an internal management rule, despite the fact that it only applied to employees of the university, because tenure at a public university is a matter of serious consequence involving an important public interest. See *Poschman v. Dumke*, 31 Cal. App. 3d 932, 943 (1973). This raises the question of whether there could be agency rules that would not affect the legal rights and obligations of persons outside of the agency, but would still be of such significant public interest to justify requiring the adoption of a formal regulation. Faculty tenure policies at a public university might be one example. Another might be an internal policy of the Department of Fish and Game on how to

manage predator populations. While the public would not be directly subject to such rules, it might have a significant interest that is affected. **If the Commission decides to modify the internal management exception along the lines discussed above, it should consider adding language to exclude internal management rules that affect a significant public interest.** This could be implemented by modifying the language proposed above, to read as follows:

11340.9. The requirements of this chapter do not apply to any of the following:

...

(d) An agency rule that relates to the internal management of the agency and does not affect either of the following:

(1) The legal rights or obligations of a person other than an officer or employee of the agency

(2) A significant public interest.

...

Comment. Subdivision (d) continues the “internal management” exception to the definition of “regulation” in former Section 11342(g). The exception is expanded to provide that it applies to rules that affect persons outside the agency, so long as it does not alter the legal rights or obligations of those persons. This reverses case law holding that the exception does not apply if an agency’s internal management rule has any effect on persons outside the agency. See, e.g., *Grier v. Kizer*, 219 Cal. App. 3d 422, 435-438 (1990) (decision by Department of Health Services to use statistical sampling in auditing Medi-Cal claims was not “internal management” decision because it “might cause a provider to leave the Medi-Cal program to avoid the potential for large recoupments based on probability sampling.”). Subdivision (d)(2) is consistent with case law holding that agency rules affecting a significant public interest are not eligible for the internal management exception. See, e.g., *Poschman v. Dumke*, 31 Cal. App. 3d 932, 943 (1973) (public university tenure policy not matter of internal management because of significant public interest in tenure decisions).

ONLY TENABLE INTERPRETATION

OAL and Professor Asimow both recommend that a provision be added making clear that an agency statement interpreting a provision of law is not a “regulation” if the agency’s interpretation is the only legally tenable one. This makes sense. If a provision of law is so clear that there is only one reasonable

interpretation, then an agency is not really regulating when it states its understanding of that law. **The staff sees no problem with the suggested change and would add another subdivision to proposed Section 11340.9, as follows:**

11340.9. The requirements of this chapter do not apply to any of the following:

...

(g) An agency interpretation of law that is the only legally tenable interpretation of that law.

Comment. Subdivision (g) is new. It provides that an agency is not subject to rulemaking requirements where stating the only legally tenable interpretation of a provision of law.

BUILDING STANDARDS

There are special provisions in the APA governing the adoption of building standards. These provisions present technical problems that should be corrected.

Definition of “Building Standard”

The APA is inconsistent in how it refers to “building standards.” Sections 11343(a)(4) and 11346.1(c) expressly incorporate the definition of “building standard” provided in Health and Safety Code Section 18909. Sections 11343(e) and 11356 do not. This raises the question whether the term “building standard” is intended to have the same meaning in all of these sections. **The staff assumes that it is and recommends clarifying this by adding a separate definition of “building standard” to the definitions governing the chapter:**

11342.530. “Building standard” has the meaning given in Section 18909 of the Health and Safety Code.

The references to “building standard” in Sections 11343, 11346.1, and 11356 would be revised to use the defined term.

Approval of the California Building Standards Commission

Section 11356(a) provides as follows:

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.

The last phrase of that provision implies that the exemption from Article 6 is conditioned on approval of the State Building Standards Commission (now the California Building Standards Commission). That does not seem to be the rule. Health and Safety Code Section 18930(a) provides that a building code must be reviewed and approved by the California Building Standards Commission. The last phrase of Section 11356(a) is probably intended as a cross-reference to that requirement. The staff recommends eliminating this ambiguity by revising Section 11356(a) as follows:

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.~~

Comment. Section 11356(a) is amended to eliminate the implication that the exemption of building standards from review by the Office of Administrative Law is conditioned on approval of the California Building Standards Commission. Note, however, that building standards are subject to review by the California Building Standards Commission under Health and Safety Code Section 18930.

Application of Notice and Comment Procedures

Section 11356(b) expressly provides that, with a minor exception, a building standard is subject to Article 5 of the rulemaking chapter (notice and comment procedures). This is consistent with Health and Safety Code Sections 18930 (building standard shall be adopted in compliance with Article 5 prior to review by California Building Standards Commission) and 18935 (Article 5 applies to adoption of building standard, with the same minor exception).

However, Section 11346.1(a) appears to exempt a building standard from Article 5 entirely. That section exempts a regulation that is not required to be filed with the Secretary of State under the APA. Section 11343(a)(4) provides that a building standard is not required to be transmitted to OAL for filing with the Secretary of State. Thus, a building standard is not subject to Article 5.

This inconsistency should probably be resolved in favor of Section 11356(b). It expressly provides that Article 5 applies to the adoption of a building standard and is consistent with the relevant Health and Safety Code provisions. The exemption provided in Section 11346.1(a) is more general, in that it applies to a class of regulations, rather than to building standards in particular. It seems

likely that the express exemption of building standards from the requirement that regulations be transmitted to OAL for filing with the Secretary of State is simply a recognition of the fact that the California Building Standards Commission is responsible for filing building standards with the Secretary of State. See Health & Safety Code § 18938(a). This shift in filing responsibility was probably not intended to undo other express provisions regarding the application of Article 5. **The staff recommends revising Section 11356(b) as follows:**

11356. ...

(b) Notwithstanding subdivision (a) of Section 11346.1, 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.

Comment. Subdivision (b) is amended to eliminate an inconsistency between that subdivision and Section 11346.1 (which provides that building standards, as regulations that are not required to be submitted to the Office of Administrative Law for filing with the Secretary of State, are not subject to Article 5 (commencing with Section 11346)).

NEGOTIATED RULEMAKING

Background

Professor Asimow suggests that some form of negotiated rulemaking procedures be added to the APA. Negotiated rulemaking is a process developed for use in federal rulemaking in the early 1980's and codified in 1990. See 5 U.S.C.A. § 561 *et seq.* The rulemaking agency convenes a negotiating committee comprised of representatives of all parties that would be interested in a proposed regulation. That committee attempts to develop consensus on the terms of the proposed regulation. If consensus is reached, the consensus regulation is introduced by the agency as a proposed regulation and the notice and comment process proceeds normally from that point on.

The principal perceived advantages of negotiated rulemaking are as follows:

(1) *A better rule.* The flexibility required to reach consensus may produce creative solutions that would not have arisen otherwise.

(2) *Faster rulemaking.* Because the agency will have considered all sides of the issues before proposing a rule, the time involved in the notice and comment process should be significantly reduced. Professor Asimow is also proposing that the regular rulemaking process be streamlined for a rule developed through negotiated rulemaking. This would further expedite negotiated rulemaking.

(3) *Fewer judicial challenges.* By involving all interested parties in the development of the rule, and requiring a consensus in order to proceed, negotiated rulemaking should substantially reduce dissatisfaction with the rule and therefore the likelihood of a judicial challenge.

Criticism of Negotiated Rulemaking

Negotiated rulemaking has been criticized by those who question whether it actually achieves the benefits attributed to it or who question whether it is appropriate as a matter of policy, regardless of any benefits it may provide. These criticisms are discussed below:

Failure to achieve time savings. A recent empirical assessment of experience under the federal negotiated rulemaking procedure raises doubts about whether the procedure really achieves any significant time savings. See Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L.J. 1255 (1997). While acknowledging the small size of the sample (12 negotiated rules) and the fact that many factors can affect the time required to adopt a rule, Coglianese found no clear difference in the “chronological” time (the number of days from start to finish) required to adopt a rule through the regular notice and comment procedure and the negotiated rulemaking procedure. However, the study does suggest that negotiated rulemaking may require more “aggregate” time (hours committed by agency staff and public participants) because the effort involved in negotiation is “compressed” at the beginning of the rulemaking process.

When negotiated rulemaking compresses staff time in this way and still ends up taking at least as long as conventional rulemaking, it is impossible to conclude that it has successfully increased the speed of the regulatory process.

Id. at 1286.

Failure to reduce litigation. Coglianese also disputes the assertion that negotiated rulemaking reduces the likelihood that a regulation will be challenged

in the courts. A study of USEPA regulations (USEPA is a leading agency in the use of negotiated rulemaking) revealed no difference between negotiated rules and conventionally adopted rules with regard to the number of petitions filed challenging a regulation or the number of challenges actually adjudicated. *Id.* at 1286-1309. As with the study of time savings, the sample used by Coglianese is necessarily small (there have been relatively few negotiated rules to date) and there are obvious problems finding data that can be usefully compared. Nonetheless, the result does raise doubts about the efficacy of negotiated rulemaking as a way to avoid litigation.

Subversion of the public interest. Critics have also argued that it is inappropriate for agencies to formally negotiate with the public regarding the content of regulations. See, e.g., Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 *Duke L.J.* 1351 (1997). Professor Funk argues that negotiated rulemaking subverts a number of important principles of administrative law. It undermines the rule of law by reducing the law from its central role as the “source and reason” for an agency’s actions to being just a limitation on the range of bargaining. *Id.* at 1374. It undermines the agency’s role as the primary actor — an agency is not “merely an enforcer of private agreements,” it is “the authority responsible for and empowered to achieve the statutory design.” *Id.* at 1376. It undermines the legitimacy of regulations, by shifting the emphasis from a rational determination of facts and law to a search for political consensus. It also encourages *post hoc* rationalization to provide “factual” justification for political compromises *Id.* at 1380-82. As Judge Posner observed, in response to a complaint that the Department of Education did not abide by a promise to propose whatever rule resulted from a negotiated rulemaking process it initiated:

The propriety of such a promise may be questioned. It sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the “capture” theory of administrative regulation.

USA Group Loan Services, Inc. v. Riley, 82 F.3d 708, 714 (7th Cir. 1996). These criticisms raise valid concerns.

Conclusion

Agencies already have authority to consult with the public before proposing a regulation. If it seems useful, an agency could conduct roundtable discussions

with the various interested parties in an attempt to find a rule that is acceptable to all concerned. If the agency is confident that an informal process of this type has resulted in a noncontroversial rule the agency can proceed under the “consent regulation” procedure proposed by the Commission. This would result in expedited adoption.

Professor Coglianese’s empirical study of negotiated rulemaking raises doubts about the utility of negotiated rulemaking in terms of increasing procedural efficiency or reducing litigation. Of course, we could increase the efficiency of negotiated rulemaking by streamlining the regular rulemaking procedures that follow, but this may not be appropriate. The fact that an agency has reached consensus with public representatives, chosen by the agency, does not mean that there aren’t others who have concerns about the rule. Furthermore, the fact that the negotiating committee reaches consensus does not mean that the rule meets the standards applied by OAL in reviewing proposed regulations (necessity, authority, clarity, consistency, reference, and nonduplication). Recall that the Commission recently decided that “consent regulations” should still be subject to OAL review, reasoning that public acceptance of a proposed regulation does not necessarily mean that it satisfies the OAL review standards.

The staff also believes that the objections raised by Professor Funk, Judge Posner, and others regarding the appropriateness of negotiated rulemaking have merit and cannot be easily dismissed.

The staff recommends against creating a formal negotiated rulemaking procedure.

EMERGENCY RULEMAKING

Background

The APA contains a procedure for the expedited adoption of temporary regulations, where needed to address an “emergency.” See Section 11346.1. To do so, an agency must prepare a written statement of the specific facts showing the need for immediate action. This statement must also include elements of the notice of proposed action. OAL reviews the statement to determine whether the emergency is real and whether the proposed rule satisfies the statutory standards for OAL review of a regulation. See 11349.6(b). If approved by OAL, the rule is submitted to the Secretary of State and becomes effective immediately (unless a later date is specified).

An emergency regulation remains effective for 120 days. This provides time for an agency to adopt a permanent rule under the regular rulemaking procedures. If the agency does not complete the regular adoption procedure before the end of the 120 day period, the emergency regulation lapses. An agency may not extend the effective period of an emergency regulation by adopting an equivalent emergency regulation to take effect when the first one ends, except with the prior approval of the Director of OAL. This prevents the perpetual extension of the effect of temporary emergency rules.

Professor Asimow proposes that the effective period of an emergency regulation be extended and that the definition of an “emergency” justifying use of the emergency regulation procedure be expanded. He also passes along a suggestion made by one of the persons he interviewed in conducting his study of rulemaking procedures — agencies should give one week’s notice of a pending emergency regulation, unless impractical to do so. These proposals are discussed below.

Extension of the Effective Period

The 120 day effective period was set at a time when the procedures for adopting a regulation were less complex and time-consuming than they are now. See 1957 Cal. Stat. ch. 1919, § 1 (setting 120 day limit). Professor Asimow believes that the period should be extended to at least 180 days to enable an agency to adopt a permanent regulation before the emergency regulation expires. **The staff agrees that the effective period of an emergency regulation should be long enough to allow the adoption of a permanent regulation before the temporary regulation expires. Unless new evidence suggests that more or less time is required, the staff recommends extending the period to 180 days, as suggested by Professor Asimow. This could be implemented by making changes in Section 11346.1.**

Emergency Standard

Emergency regulations may be adopted where the regulation “is necessary for the immediate preservation of the public peace, health and safety or general welfare. ... Enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.” Section 11346.1(b). This standard is fairly strict, in that it is categorical (i.e., it does not include a catch-all provision allowing

exercise of discretion by the adopting agency) and it is policed by OAL, who has the final say on whether an emergency exists.

Professor Asimow suggests expanding the emergency standard to encompass the following: (1) A public interest in the immediate enactment of a regulation. (2) An economic emergency. (3) The need to comply with an imminent statutory deadline. These suggestions are discussed below.

(1) *Public interest.* Adding a public interest catch-all to the emergency standard would allow use of the emergency regulation procedure in cases where there is a need for immediate regulation but that need does not fall within any of the specific categories of emergency. This would be very useful, however, it would undoubtedly lead to wrangling between agencies and OAL over the nature of the public interest in a particular situation. Such wrangling would consume agency resources and would delay adoption of a rule that might well be urgently needed. The only clear way to eliminate this inefficiency would be to require OAL to defer to an agency finding of emergency based on the public interest. This would probably not be wise (or politically feasible). The history of the emergency regulation procedure reveals a pattern of abuse by agencies attempting to adopt emergency regulations in the absence of any real emergency. In response to this abuse, the Legislature progressively restricted access to the procedure — by requiring a statement of facts justifying the finding of emergency, authorizing judicial review of emergency findings, limiting the effective period of an emergency regulation, providing that an urgency statute does not constitute an emergency, and requiring OAL approval of a finding of emergency. Establishing a rule favoring agency discretion in finding an emergency would run counter to this long-standing policy of constraining agency discretion. **The staff recommends against adding a public interest catchall to the emergency standard. A better way to proceed would be to identify the categories of emergency that might arise and add those categories to the standard specifically. The staff requests the assistance of the public in identifying such categories.**

(2) *Economic emergency.* An example of the foregoing approach would be to add an economic emergency category to the standard. This would allow a quick response to significant changes in the state's economy and finances. This could be implemented by making the following changes to Section 11346.1(b) and 11349.6(b):

11346.1. ...

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

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

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

For the purposes of this subdivision, an emergency exists if the adoption of a regulation or an order of repeal is immediately necessary for either of the following purposes:

(1) To preserve the public peace, health and safety, or general welfare.

(2) To address a substantial and sudden change in economic or financial conditions.

Comment. Section 11346.1(b) is amended to provide that an emergency regulation may be adopted to address an emergency arising from a change in economic or financial conditions.

11349.6....

(b) Emergency regulations adopted pursuant to subdivision (b) of Section 11346.1 shall be reviewed by the office within 10 calendar days after their submittal to the office. The office shall not file the emergency regulations with the Secretary of State if it determines that the regulation is not necessary for the immediate preservation of the public peace, health and safety, or general welfare to address an emergency as provided in subdivision (b) of Section 11346.1, or if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines the agency failed to comply with subdivisions (b) and (c) of Section 11346.1.

Comment. Section 11349.6(b) is amended to conform to a change in the scope of what constitutes an emergency under Section 11346.1(b).

The staff would like to receive input on this proposed change.

(3) *Statutory deadline.* Professor Asimow proposes expanding the emergency standard to permit its use where immediate enactment of a regulation is

necessary to meet a statutory deadline for adoption of regulations. This would be useful where a statute sets a deadline for adoption of a regulation that realistically cannot be met. However, there may be cases where the Legislature sets a reasonable deadline which the agency is unable to meet due to its own procrastination. Treating such cases as emergencies, justifying circumvention of public participation, would be inappropriate. It is difficult to see how to draft a provision that would authorize use of emergency regulations in the first case, but not in the second.

An alternative solution is for the Legislature, where establishing a very short deadline for the adoption of a regulation, to expressly provide that the emergency regulation procedure can be used. In fact, this happens frequently — a quick search of the statutes turns up more than 100 sections providing that particular regulations may be adopted as emergency regulations. See, e.g., Corp. Code § 14024 (“The adoption of these regulations is an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare within the meaning of subdivision (b) of Section 11346.1 of the Government Code.”). Although this approach isn’t ideal (due to its *ad hoc* nature and its reliance on a legislative fiction) it does seem to work in those cases where the Legislature requires expedited adoption of regulations.

Given the difficulty in drafting a provision that wouldn’t create an incentive to procrastinate, and the availability of a legislative alternative, the staff recommends against the suggested change.

Notice

It has been suggested that agencies should provide one week’s notice of a pending emergency regulation before it becomes effective (unless the nature of the emergency makes this delay unworkable). **The staff sees no problem with this suggestion, so long as the decision to set an immediate effective date rests with the adopting agency. This could be accomplished by amending Section 11346.1(d) as follows:**

~~(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.~~

If the adopting agency specifies an effective date in a written instrument filed with, or as a part of, the regulation or order of repeal, the emergency regulation or order of repeal becomes

effective on that date. If an effective date is not specified, the emergency regulation or order of repeal becomes effective 7 days after it is filed with the Secretary of State.

Comment. Section 11346.1(d) is amended to change the default effective date from the date of filing to 7 days after filing. This is intended to provide advance notice to interested persons in cases where immediate effect is not required.

FINANCIAL CODE PROVISIONS

Financial Code Sections 3373 and 8054 establish exceptions to the regular rulemaking procedures. Parallel provisions in the APA (Sections 11346.1(a) and 11343.4(b)) present technical problems that should be corrected.

Financial Code Section 3373

Applicability of emergency regulation procedures. Section 11346.1(a) provides that regulations adopted under Financial Code Section 3373 are subject to the same procedural requirements as emergency regulations (i.e., they are exempt from all APA rulemaking provisions except Sections 11343.4, 11346.1, and 11349.6). Before 1996, this provision was redundant, because Financial Code Section 3373 contained substantively identical provisions. This redundancy was apparently intended to highlight the special procedures applicable to these regulations.

In 1996, Financial Code Section 3373 was amended to provide that regulations adopted under that section were *not* subject to Section 11343.4, Article 5 (commencing with Section 11346.1), or Article 6 (commencing with Section 11349). Section 11346.1 was not amended to reflect this change. This created an inconsistency between these two sections. **Considering that Financial Code Section 3373 was the last amended provision, the staff recommends resolving the inconsistency in favor of Section 3373, i.e., regulations adopted under that section should not be subject to the specified APA provisions.** This could be done by amending Section 11346.1 to remove the reference to Financial Code Section 3373.

Effective date. Section 11343.4(b) provides that a regulation adopted under Financial Code Section 3373 becomes effective on filing, unless the adopting agency specifies a later date. This is an exception to the general rule that regulations become effective 30 days after filing. Section 11343.4 was added in 1994 and has not been amended since.

As discussed above, Financial Code Section 3373 was amended in 1996 to expressly exempt regulations adopted under that section from Section 11343.4. This leaves a gap, as there is now no provision governing the effective date of regulations adopted under Section 3373. Although it isn't entirely clear what the Legislature intended in amending Section 3373, the staff believes that the rule formerly provided in Section 11343.4(b) should be continued. This would be consistent with another Financial Code provision, Section 753, that provides special procedures for the adoption of certain regulations. See Financial Code Section 753(c)(3) ("Any regulation adopted under subdivision (b) shall become effective on the date when it is filed with the Secretary of State unless the commissioner prescribes a later date in the regulation or in a written instrument filed with the regulation.") **The staff recommends removing the reference to Financial Code Section 3373 from Section 11343.4(b) and amending Section 3373 to add an equivalent effective date provision. See draft tentative recommendation at pp. 16, 50.**

Financial Code Section 8054

Financial Code Section 8054 provides procedures for the adoption of regulations under that section. Government Code Section 11346.1(a) provides a substantively identical provision. This redundant provision in Section 11346.1(a) creates the potential for the same kind of inconsistency that developed in the context of Financial Code Section 3373. **The staff recommends that it be deleted.**

Regulations adopted under Financial Code Section 8054 are subject to the emergency regulation procedures. See Fin. Code § 8054(c); Gov't Code § 11346.1(a). The emergency rulemaking procedure contains a provision governing the effective date of emergency regulations. See Section 11346.1(d). This provision should govern any regulation adopted under Financial Code Section 8054. Nonetheless, there is a substantively identical provision in Section 11343.4(b). **The staff recommends deleting that provision of Section 11343.4. It is redundant and creates the potential for the development of an inconsistency of the type that arose with regard to Financial Code Section 3373.**

EFFECTIVE DATE OF REGULATIONS

In general a regulation becomes effective 30 days after it has been filed with the Secretary of State. See Section 11343.4. An adopting agency may submit a

written request to OAL for an earlier effective date, but must demonstrate “good cause” to do so.

Professor Asimow believes that an agency should not need to petition OAL in order to set an earlier effective date. He believes that the rulemaking procedure provides enough warning to the affected public so that they will know in advance that the rule is approaching and that they need to conform their practices to it.

The problem with this suggestion is that the effectiveness of a regulation is contingent on OAL approval. The public may expect that a regulation will go into effect only to learn that it has been disapproved. Disapproval may only signal a further delay in the process while the agency corrects procedural defects and resubmits the regulation, or the basis for the disapproval may be so serious that the regulation is never resubmitted. There can be no certainty that a regulation will take effect until the regulation is transmitted to the Secretary of State for filing. At that point it seems appropriate to provide some period of notice before effectiveness, absent good cause for an earlier effective date. **The staff recommends against the suggested change.**

APPLICATION OF PROVISIONS TO REPEALS

Some provisions of the APA appear to treat the adoption or amendment of a regulation differently from the repeal of a regulation. In some cases this is implied from the definition of “regulation,” which includes an adoption or amendment, but not a repeal. See, e.g., Section 11349.1 (“the office shall review all regulations” adopted under APA). In other cases, the distinction is stated more directly. See, e.g., Section 11346.3(a) (agencies proposing to “adopt or amend” a regulation must assess potential economic effects).

A number of these provisions require an agency proposing a regulatory action to assess the potential economic effects of the proposed action. It isn’t clear why these assessments should be limited to adoption or amendment. It is true that an adoption or amendment may be more likely than a repeal to have a substantial economic effect because an adoption or amendment is adding new law. However, it is also true that repeals can have economic effects. A regulatory provision may establish an exception from general requirements or may limit one group’s activity in a way that benefits another group economically. The economic effect of repealing such a provision could be substantial.

Similar issues arise in other contexts:

- Section 11349.1 provides for OAL review of “regulations.” Read strictly, this would not include review of repeals. However, there is one provision in the section that expressly refers to a “regulation or order of repeal.” This suggests that the entire section is intended to govern review of repeals. This should be made clearer.
- Section 11346.9(a)(1) requires that an agency provide time for additional public comment if relying on new data in adopting or amending a regulation. The staff can see no reason for limiting this requirement to adoptions and amendments.
- Sections 11350 and 11350.3 provide for judicial review of a “regulation.” It is clear that this includes review of the procedure used in adopting the regulation, as well as the validity of the underlying regulation itself. As a matter of policy, the courts should have authority to review the procedural legitimacy of a repeal as well.

The draft tentative recommendation revises Sections 11346.3, 11346.5(a)(7)-(8), 11346.54, 11346.9(a)(1)-(2), 11349.1(a), 11350(a), and 11350.3 to provide that they apply to the repeal of a regulation, as well as the adoption or amendment of a regulation.

MISCELLANEOUS TECHNICAL ISSUES

Use of the Term “Agency”

The APA frequently uses the term “state agency.” “State agency” is defined for the purposes of Title 2 of the Government Code (of which the APA rulemaking provisions are part) in Section 11000, which provides in relevant part:

As used in this title, “state agency” includes every state office, officer, department, division, bureau, board, and commission.

The meaning of “state agency” is further elaborated, for the purposes of the APA rulemaking provisions, in Section 11342(a):

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

This is really a substantive exception to the general definition of “state agency.” In the draft tentative recommendation this provision has been moved to

a new section that collects exceptions to the requirements of the chapter. See proposed Section 11340.9(a).

The APA frequently uses the term “agency,” as an apparent shorthand for “state agency.” This is technically a problem because Section 11342(a) does not expressly equate “agency” and “state agency,” and “agency” is not included in the general definition of “state agency” provided in Section 11000. **The staff recommends that “agency” be defined to mean “state agency.” See proposed Section 11342.530.**

Use of the Term “Branch”

Four APA sections use “branch” when referring to the primary divisions of state government (e.g., executive branch). See Sections 11340, 11340.1, 11346.3, 11346.54. One section uses the term “department” for the same purpose. See Section 11342(a) (“judicial or legislative departments”). **For the sake of consistency, the draft replaces the term “department” with the term “branch” in that provision. See proposed Section 11340.9(a).**

Definition of “Small Business”

The APA’s definition of “small business” refers to specific maximum gross receipt figures. See proposed Section 11342.600 (continuing Section 11342(h)). These dollar amount limits were set in 1979 and have not been updated since. It may make sense to increase these limits. **The staff recommends including a note in the tentative recommendation soliciting advice on whether these limits should be increased and if so, by how much.**

OAL Publications

OAL suggests amending Section 11344 to change the name of the “California Regulatory Code Supplement” to the “California Code of Regulations Supplement.” This would be consistent with the name of the “California Code of Regulations,” which it supplements. **The staff sees no problem with this suggestion and has implemented it in the draft tentative recommendation.**

The heading of Article 4, “The California Administrative Register and Code,” is obsolete as it does not reflect changes in the names of those publications. **The draft tentative recommendation updates the article heading to reflect the new names.**

Section 11344.2 provides that OAL must provide complete sets of the California Code of Regulations and its Supplement to named entities, “in the

form provided by the State Printer.” OAL asserts that it has controlled the form of these publications for years and requests that we remove the language quoted above. **This has been done in the draft tentative recommendation, with a staff note soliciting input as to whether the change presents any problems.**

Drafting Problems

A few sections are unclear or have other drafting problems. These problems have been corrected in the draft tentative recommendation. See proposed amendments to Sections 11343.4(a) (reference error), 11344.1(a)(4) (awkward and ambiguous), 11346.1(e) (underinclusive reference), 11346.1(h) (awkward), 11349.6(a) (underinclusive reference), 11350(a) (ambiguous reference).

Respectfully submitted,

Brian Hebert
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Administrative Rulemaking

February 1999

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 May 15, 1999.

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.

California Law Revision Commission
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Palo Alto, CA 94303-4739
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SUMMARY OF TENTATIVE RECOMMENDATION

The California Law Revision Commission recommends a number of minor changes to the APA rulemaking provisions to improve the efficiency of the regulatory process while preserving the important benefits it provides. The principal reforms are:

- (1) Providing for the use of electronic communications in the rulemaking process.
- (2) Clarifying the scope of existing exceptions to the rulemaking requirements.
- (3) Expanding the application and effect of the emergency rulemaking procedure.
- (4) Correcting inconsistencies, ambiguities, and other technical defects.

This recommendation was prepared pursuant to Resolution Chapter 91 of the Statutes of 1998.

ADMINISTRATIVE RULEMAKING

The rulemaking provisions of the Administrative Procedure Act (APA) govern the adoption, publication, review, and use of state agency regulations.¹ These provisions serve important goals. They provide the public with notice and an opportunity to comment on rules that affect them, reduce needless regulation, and improve the quality of regulations that are adopted.

However, the rulemaking procedures are complex and impose costs and delays on rulemaking agencies. Where these procedures can be simplified without compromising the goals of the APA, they should be. The California Law Revision Commission recommends a number of minor changes to the APA rulemaking provisions to improve the efficiency of the regulatory process without compromising the important benefits it provides.

ELECTRONIC COMMUNICATIONS

Electronic communications can significantly increase the efficiency of the rulemaking process. Delivery of rulemaking notices by email and Internet publication of rulemaking documents would be quicker and less expensive than delivery by regular mail or publication in the print media. The proposed law authorizes the use of electronic communication in the rulemaking process (where the recipient has consented to electronic communication) and requires agencies with websites to publish rulemaking notices on their websites.² Website publication supplements other required forms of publication.

EXCEPTIONS TO RULEMAKING REQUIREMENTS

The definition of a “regulation” subject to the APA rulemaking requirements is very broad.³ However, the application of the APA has been narrowed through a

1. Chapter 3.5 (commencing with Section 11340) of Part 2 of Division 3 of Title 2 of the Government Code.

2. See proposed Gov’t Code § 11340.8 (electronic communications in rulemaking).

3. See Gov’t Code § 11342(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.

number of statutory exceptions.⁴ These exceptions reflect a recognition that not all agency statements that implement, enforce, or interpret the law should be subject to the formal adoption process. For example, an agency policy that relates only to the internal management of the agency is excluded from the definition of “regulation.”⁵ Applying these exceptions can involve difficult line-drawing questions. The proposed law would make minor changes to a few of these exceptions, in order to clarify their application.

Individual Advice

The California Supreme Court recently noted that an individual advice letter, provided by an agency to a private person, is not subject to the rulemaking provisions of the APA.⁶ This observation was based on the statutory exceptions providing that agency statements that are directed to a specific person or group of persons and that do not apply generally throughout the state are not subject to the rulemaking provisions.⁷ In the past, the Office of Administrative Law has construed this exception narrowly, determining that an individual advice letter is subject to rulemaking requirements if the advice it contains could be applied to an identifiable class of persons.⁸ The Supreme Court’s interpretation of the exception reflects the better policy. An agency should be free to offer advice to members of the public who request that advice without adopting a regulation, even if the advice given could be applied to others as well. The proposed law adds a provision to that effect.⁹

4. To improve accessibility, the Commission has collected a number of these exceptions in a single section. See proposed Government Code Section 11340.9.

5. See Gov’t Code § 11342(g).

6. See *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996).

7. See Gov’t Code §§ 11343(a)(3) (regulation directed to specific persons that does not apply generally need not be filed with Secretary of State), 11346.1 (regulation that is not required to be filed with Secretary of State is not subject to rulemaking procedures).

8. For example, in OAL Determination Number 12 of 1989, OAL determined that a letter mailed by the Board of Examiners in Veterinary Medicine (Board) to three pet groomers, advising them that certain types of teeth-cleaning constituted dentistry and could not be practiced without the proper license, did not fall within the exception provided in Government Code Section 11343(a)(3). OAL concluded that the Board’s letter applied generally, despite the fact that it was only delivered to three persons (one as a warning prior to enforcement and the other two in response to requests for advice), because the Board’s statement could be applied to an identifiable class of persons — “all non-veterinarians statewide, who clean animals’ teeth or who may clean animals’ teeth in the future.” See *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996) (a rule applies generally so long as it declares how a certain class of cases will be decided). OAL also determined that the letters were not “directed to a specifically named person or to a group of persons,” apparently because the content of the letters could apply to a broader class of persons, of whom the letter recipients were only members. In other words, OAL seems to have interpreted “directed to” to mean “relating to” rather than “delivered to.” In order to qualify for the Section 11343(a)(3) exception under this analysis, an advice letter would need to apply uniquely to the person requesting the advice. If the advice could apply to any identifiable class of persons, no matter how small, then it must be adopted as a regulation.

9. See proposed Gov’t Code § 11340.9(e).

Interpretation Arising in Case-Specific Adjudication

The Supreme Court has also noted that an agency interpretation arising in the course of case-specific adjudication is not a regulation.¹⁰ This acknowledges the fact that agencies often must interpret the law in applying it to specific circumstances. This exception could be justified on at least two statutory grounds: (1) A case-specific interpretation does not fall within the APA definition of “regulation” because it does not apply generally.¹¹ (2) A case-specific interpretation is not subject to the APA adoption requirements because it is directed to a specific person or group of persons and does not apply generally throughout the state.¹² However, reliance on these statutory justifications for the exception raises the same problem discussed above in the context of individual agency advice — if an interpretation expressed in the course of adjudication could be applied to an identifiable class of persons, it might be considered to apply generally. The proposed law adds a provision codifying the rule announced by the Supreme Court.¹³

Despite this exception to the rulemaking procedure, an agency cannot rely on an interpretation arising in a case-specific adjudication as a precedent unless it has been designated a precedent decision.¹⁴

Only Tenable Interpretation

An agency should not be required to adopt a regulation in order to express its interpretation of law where there is only one legally tenable interpretation of that law. This reflects the current practice of the Office of Administrative Law in determining what agency statements are regulations subject to the rulemaking requirements.¹⁵ The proposed law adds an exception to the rulemaking requirements for an agency statement that is the only legally tenable interpretation of a law.¹⁶

Emergency Rulemaking

The APA provides a procedure for the expedited adoption of temporary “emergency regulations” where such regulations are immediately required to preserve the public peace, health and safety, or general welfare.¹⁷ The proposed law would also authorize adoption of an emergency regulation where a

10. See *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996).

11. See Gov’t Code § 11342(g) (“regulation” defined).

12. See *supra* note 7.

13. See proposed Gov’t Code § 11340.9(f).

14. See Gov’t Code § 11425.60 (precedent decisions).

15. See e.g., OAL Determination Number 1 of 1993 at 36 (“We agree that the challenged rule would not constitute a ‘regulation’ if it were merely a restatement of law or the only tenable interpretation of the law.”)

16. See proposed Gov’t Code § 11340.9(g).

17. See Gov’t Code § 11346.1(b).

regulation is immediately necessary to address a substantial change in economic or financial conditions.¹⁸ Economic emergencies may require as quick a regulatory response as an emergency threatening public safety.

Emergency regulations are only valid for 120 days. This provides time for the agency to adopt a permanent regulation to replace the emergency regulation. The 120-day limit was added in 1957, when rulemaking procedures were substantially simpler and less time consuming.¹⁹ Under existing law, 120 days may be insufficient time to adopt a permanent regulation. The proposed law increase the effective period of an emergency regulation to 180 days.²⁰

The proposed law also makes minor technical changes to the emergency regulation provisions.²¹

Financial Code Exceptions

The APA contains specific exceptions for regulations adopted under Sections 3373 and 8054 of the Financial Code. These special provisions contain technical defects that are corrected in the proposed law.²²

Building Standards

The APA and the Health and Safety Code provide special procedures for the adoption of building standards. The proposed law makes technical improvements to the APA provisions governing building standards.²³

RULEMAKING PROCEDURE

The APA requires that regulations be adopted under a detailed public notice and comment procedure.²⁴ The proposed law contains the following revisions and clarifications of that process.

Preliminary Agency Determinations

The existing rulemaking statute requires an agency's notice of proposed rulemaking, or the accompanying initial statement of reasons, to include

18. See proposed amendment to Gov't Code § 11346.1(b).

19. See 1957 Cal. Stat. ch. 1919, § 1.

20. See proposed amendment to Gov't Code § 11346.1(e).

21. See proposed amendments to Gov't Code §§ 11346.1(d) (default effective date of emergency regulation deferred 7 days to provide public notice of pending rule), (e) (underinclusive references corrected), (h) (unclear provision redrafted without substantive change), 11349.6(a)(1) (underinclusive reference corrected).

22. See proposed amendments to Fin. Code § 3373; Gov't Code §§ 11346.1(a), 11343.4(b). These changes eliminate redundant provisions and resolve inconsistencies between what were formerly parallel provisions.

23. See proposed Gov't Code § 11342.530 ("building standard" defined to simplify drafting). See proposed amendments to Gov't Code § 11356 (a) (redrafted for clarity), (b) (inconsistency resolved).

24. Gov't Code §§ 11346-11347.3.

preliminary agency determinations on a number of matters that can only be determined after public comment and hearing has occurred.²⁵ The statute should be revised to make clear that these preliminary determinations may be made on the basis of the agency's information and belief.²⁶

Initial Statement of Reasons

An agency proposing to engage in rulemaking must accompany its notice of proposed action with an initial statement of reasons for proposing the adoption, amendment, or repeal of the regulation.²⁷ The statutory specification of the contents of the initial statement of reasons includes duplicative requirements that should be unified.²⁸

Regulation that Imposes Report Requirement on Business

If an agency intends to adopt a regulation that will impose a report requirement on a business, the agency must make a finding that this is necessary for the health, safety, or welfare of the people of the state.²⁹ However, the statute fails to indicate the time and place of such a finding.

The proposed law makes clear that the finding is to be included in the rulemaking notice.³⁰ This will put the public on notice that the proposed regulation will require businesses to file a report. Interested parties may submit comments questioning the terms of the regulation or finding, where appropriate.

Plain English Requirement

Existing law requires that if a regulation will affect small business it must be drafted in plain English, or a plain English summary must be provided,³¹ and the informative digest prepared by the agency concerning the regulation must include a plain English policy statement overview explaining its objectives.³² These are salutary provisions that should be combined in the informative digest and extended to all regulations, not just those affecting small business. Other provisions applying to regulations that affect small business have also been extended to apply to all regulations.³³

25. See, e.g., Gov't Code §11346.2(b)(5) (agency finding that regulation will not have a significant adverse economic impact on business).

26. See proposed amendments to Gov't Code §§ 11346.2(b)(5), 11346.5(a)(7)-(8), (11).

27. Gov't Code § 11346.2.

28. See, e.g., Gov't Code § 11346.2(b)(1) and (2).

29. Gov't Code § 11346.3.

30. See proposed new Gov't Code § 11346.5(a)(11).

31. Gov't Code § 11346.2(a)(1).

32. Gov't Code § 11345.5(a)(3)(B).

33. See proposed amendments to Gov't Code §§ 11346.2(b)(3)(B), 11346.9(a)(5).

However, the statutory definition of “plain English” is problematic,³⁴ and the law provides no enforcement mechanism for the plain English requirement. A more effective provision would define plain English as language that is easily understood by those persons directly affected by it.³⁵ Existing law provides an enforcement mechanism for such a requirement by means of review by the Office of Administrative Law.³⁶

Public Hearing

Existing law provides for a public hearing on a proposed regulation.³⁷ An agency may elect not to hold a public hearing and instead receive written comments,³⁸ but on timely demand by an interested person the agency must schedule a public hearing.³⁹ If a hearing is held, the agency must permit public comment that is “either oral or in writing, or both”.⁴⁰ A literal reading of this language is susceptible to the interpretation that the agency may preclude oral comment, and in fact this has occurred.⁴¹

The proposed law revises the statute to make clear that oral testimony must be allowed at a public hearing, subject to reasonable agency limitations.⁴² This is consistent both with the general scheme of the rulemaking statute and with its purpose to promote effective public involvement in the rulemaking process.

Response to Comments

An agency is required to respond to “each objection” made concerning a proposed regulation.⁴³ A response is only required, however, if the comment is directed at the proposed action or the procedures followed by the agency.⁴⁴ Agency practice under these rules has been to aggregate and respond to repetitive comments as a group and to summarily dispose of comments that are irrelevant. The proposed law specifically recognizes this method of dealing with repetitive or irrelevant comments.

34. See Gov’t Code § 11342(e) (“language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English”).

35. See Gov’t Code § 11349(c) (“clarity” defined).

36. Gov’t Code §§ 11349-11349.6.

37. Gov’t Code §§ 11346.4(a), 11346.5(a)(16), 11346.8, 11347.3(a)(8), 11349.4(a), 11349.6(d).

38. Gov’t Code § 11346.8(a) (second sentence).

39. Gov’t Code § 11346.8(a) (third sentence).

40. Gov’t Code § 11346.8(a) (first sentence).

41. See letter to California Law Revision Commission from John D. Smith, Director of Office of Administrative Law (May 24, 1996) at 13-14 (letter on file in office of California Law Revision Commission).

42. See proposed amendment to Gov’t Code § 11346.8(a).

43. Gov’t Code § 11346.9(a)(3)

44. *Id.*

Rulemaking File

Public inspection of file. The statutes governing the rulemaking file imply that the file is not available to the public until the rulemaking proceeding, and the record of that proceeding, is complete.⁴⁵ It is appropriate that the public be able to view the contents of the rulemaking file from the time a regulation is proposed. A major purpose of the rulemaking statute is to promote meaningful public participation in agency rulemaking; for this purpose it is helpful to have the rulemaking file available throughout the rulemaking process. The proposed law makes clear that the rulemaking file is available for public inspection at all times during the rulemaking proceedings.⁴⁶

Documents added to file. Existing law provides for addition of documents to the rulemaking file after the close of the public hearing or comment period,⁴⁷ subject to the agency making “adequate provision” for further public comment.⁴⁸ The proposed law supplements these provisions with specific procedural rules,⁴⁹ based on existing practice.⁵⁰ The proposed law also authorizes the addition of material to the rulemaking file during administrative review of a proposed regulation, so long as doing so does not violate other limitations on the addition of material to the file.⁵¹ This allows an agency to correct inadvertent omissions to the rulemaking file, without requiring disapproval of the rule by the Office of Administrative Law and resubmission of the corrected file.

Final statement of reasons. Despite the general statutory limitations on adding documents to the rulemaking file after the close of public comment, the law requires an agency to add a final statement of reasons and updated informative digest.⁵² The proposed law resolves this logical inconsistency by making clear that the addition of these materials is an exception to the limitations on adding material to the rulemaking file after public comment.⁵³

Application of Requirements to Repeals

Some of the APA rulemaking provisions appear to treat the repeal of regulations differently from the adoption or amendment of regulations.⁵⁴ This distinction does

45. Gov’t Code § 11347.3.

46. See proposed amendment to Gov’t Code § 11347.3(a).

47. Gov’t Code § 11346.9(a)(1).

48. Gov’t Code § 11346.8(d).

49. See proposed Gov’t Code § 11347.1, *infra*.

50. 1 Cal. Code Reg. § 45.

51. See proposed Gov’t Code § 11349.2.

52. Compare Gov’t Code § 11346.8(d) with § 11347.3(a)(2).

53. See proposed amendment to Gov’t Code § 11346.8(d).

54. For example, Section 11346.9(a)(1) requires that an agency provide time for additional public comment if relying on new data in adopting or amending a regulation. There is no clear reason that this requirement should be limited to adoption and amendment.

not make sense. While it is true that a repeal cannot be used to create new legal requirements, this does not mean that a repeal cannot have a substantive effect. For example, a repeal might be used to broaden the scope of an existing requirement, by eliminating an exemption. Or a repeal might eliminate a restriction on one group that is intended to protect another group. In cases such as these, the public will have a significant interest in receiving notice of and an opportunity to comment on a proposed repeal. The proposed law revises a number of these rulemaking requirements so they apply to proposed repeals as well as proposed adoption or amendment.⁵⁵

ADMINISTRATIVE REVIEW OF REGULATIONS

Proposed regulations must be reviewed and approved by the Office of Administrative Law before they become effective.⁵⁶ This review ensures that the regulation satisfies specified standards⁵⁷ and was adopted in compliance with procedural requirements.

Necessity Standard

Clarification of standard. Under the necessity standard, an agency proposing a regulation must demonstrate that the regulation is necessary. The proposed law clarifies the meaning of this standard by requiring that a proposed regulation be shown to be necessary “to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific....”⁵⁸ This change is consistent with other provisions of the APA that relate to the necessity of a regulation.⁵⁹

Scope of standard’s application. Under existing law, an agency must demonstrate the necessity of “each provision” of a proposed regulation.⁶⁰ The proposed law refines the scope of necessity review, providing that an agency proposing a regulation must demonstrate the necessity of “major provisions of

55. See proposed amendments to Gov’t Code §§ 11346.3 (assessment of economic impact), 11346.5(a)(7)-(8) (assessment of economic impact), 11346.54 (assessment of economic impact), 11346.9(a)(1) (reliance on new data in updated informative digest), 11346.9(a)(2) (assessment of local agency mandate), 11349.1(a) (administrative review of regulations), 11350(a) (judicial review of regulations), 11350.3 (judicial review of regulations).

56. See Gov’t Code §§ 11349-11349.6.

57. The standards for review of a proposed regulation are: necessity, authority, clarity, consistency, reference, and nonduplication. See Gov’t Code § 11349.

58. See proposed amendment to Gov’t Code § 11349(a).

59. See Gov’t Code §§ 11342.2 (regulation not valid unless “reasonably necessary to effectuate the purpose of statute” authorizing the regulation), 11350 (court may find regulation invalid if agency determination that the regulation “is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation” is not supported by substantial evidence).

60. See 1 C.C.R. § 10(b).

the regulation and any specific provisions of the regulation that have been challenged by public comment.”⁶¹ This provides focused and efficient review of the need for a regulation in general and of the need for specific controversial provisions. It avoids the inefficient “shotgun” approach of existing law, which requires the justification of every separate provision.

Evidence supporting determination. The proposed law authorizes an agency to provide its rationale for the necessity of a regulation in lieu of facts or expert opinion showing the need for the regulation. To do so, the agency must explain why, as a practical matter, factual evidence or expert opinion cannot be provided.⁶² This rule recognizes that some policy decisions depend on the expert judgment of the agency and cannot be justified by factual evidence. For example, where an agency is anticipating a problem that has not yet occurred, it may be difficult or impossible to find data relating to that problem. In such a case, the agency must act on its informed assessment of the situation.

Review Periods

The time period for administrative review of a proposal to make an emergency regulation permanent is 30 days.⁶³ This is inconsistent with the 30 working day period for review of a proposed regulation generally.⁶⁴ This inconsistency does not make sense — in each case the Office of Administrative Law is reviewing a proposed permanent regulation that has been adopted under the full rulemaking procedure. The proposed law eliminates the inconsistency by increasing the period for review of a proposal to make an emergency regulation permanent to 30 working days.⁶⁵

In some cases, 30 working days may not be sufficient time to review a proposed regulation. The proposed law authorizes a 15 working day extension to the review period where the Director of the Office of Administrative Law certifies that more time is required because of the length or complexity of the proposed regulation.⁶⁶

JUDICIAL REVIEW OF REGULATIONS

In a judicial proceeding to review the validity of a regulation, the record of review is limited to the contents of the rulemaking file prepared pursuant to

61. See proposed amendment to Gov’t Code § 11349(a). A provision is “challenged” if a public comment opposes the provision or asserts that it is unnecessary, and provides a specific reason for the opposition or assertion. *Id.*

62. See proposed amendment to Gov’t Code § 11349(a)(1).

63. See Gov’t Code § 11349.6(d).

64. See Gov’t Code § 11349.3.

65. See proposed amendment to Gov’t Code § 11349.6(d).

66. See proposed amendment to Gov’t Code §§ 11349.3, 11349.6.

Government Code Section 11347.3.⁶⁷ This is too restrictive. It precludes review of essential materials, such as the statement required when adopting an emergency regulation.⁶⁸ It can also preclude review of evidence that the agency did not comply with the rulemaking procedures in adopting the regulation. For example, proof that an agency failed to include written public comments in a rulemaking file requires review of the excluded comments. Also, where it is asserted that an agency statement is an invalid “underground regulation” (i.e. it should have been adopted under the APA but was not), the court will need to consider the text of the purported underground regulation in order to determine whether it is, in fact, a regulation subject to the APA.

MISCELLANEOUS TECHNICAL IMPROVEMENTS

The proposed law would make the following minor technical improvements to existing law:

(1) Some provisions that are awkwardly drafted or contain technical errors are revised.⁶⁹

(2) The definition of “agency” is revised to provide that “agency” has the same meaning as “state agency.” This is not clear under existing law.⁷⁰

(3) The name of the “California Regulatory Code Supplement” is changed to the “California Code of Regulations Supplement.”⁷¹ This is consistent with the name of the “California Code of Regulations,” which it supplements.

(4) The inordinately long definition section⁷² has been would be an article, divided into individual sections setting out the definitions in alphabetical order.⁷³

(5) Elements of definitions that are actually substantive provisions have been recast as such.⁷⁴

67. See Gov’t Code § 11350(b)(2).

68. This statement is not part of the rulemaking file. See Gov’t Code § 11346.1(a) (emergency regulations are not subject to Section 11347.3).

69. See proposed amendment to Gov’t Code §§ 11343.4(a) (erroneous reference), 11344.2(a)(4) (ambiguity), 11347.3(b)(9) (awkward), 11349(b)-(f) (awkward), 11350(a) (ambiguity).

70. See proposed Gov’t Code § 11342.520.

71. See proposed amendment to Gov’t Code § 11344.

72. Gov’t Code § 11342.

73. See proposed Gov’t Code §§ 11342.510-11342.600.

74. See proposed amendments to Gov’t Code §§ 11342(a) (agencies not subject to chapter), (g) (exceptions for forms, internal management decisions, and legal rulings of counsel of the Franchise Tax Board and the State Board of Equalization), 11346.3(b)(2) (agencies not subject to economic impact analysis requirement), 11346.54(b) (agencies not subject to economic impact analysis requirement).

(6) Minor changes have been made to codify existing salutary practices.⁷⁵

75. See proposed amendments to Gov't Code §§ 11344.2 (codifying OAL control over form of regulatory publications), 11353 (requiring changes to State Water Resources Control Board policies, plans, and guidelines to be set out in strike-through and underscore.)

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PROPOSED LEGISLATION

CHAPTER 3.5. ADMINISTRATIVE REGULATIONS AND RULEMAKING

Article 1. General

Gov't Code § 11340 (unchanged). Legislative finding and declaration

11340. The Legislature finds and declares as follows:

(a) There has been an unprecedented growth in the number of administrative regulations in recent years.

(b) The language of many regulations is frequently unclear and unnecessarily complex, even when the complicated and technical nature of the subject matter is taken into account. The language is often confusing to the persons who must comply with the regulations.

(c) Substantial time and public funds have been spent in adopting regulations, the necessity for which has not been established.

(d) The imposition of prescriptive standards upon private persons and entities through regulations where the establishment of performance standards could reasonably be expected to produce the same result has placed an unnecessary burden on California citizens and discouraged innovation, research, and development of improved means of achieving desirable social goals.

(e) There exists no central office in state government with the power and duty to review regulations to ensure that they are written in a comprehensible manner, are authorized by statute, and are consistent with other law.

(f) Correcting the problems that have been caused by the unprecedented growth of regulations in California requires the direct involvement of the Legislature as well as that of the executive branch of state government.

(g) The complexity and lack of clarity in many regulations put small businesses, which do not have the resources to hire experts to assist them, at a distinct disadvantage.

Gov't Code § 11340.1 (unchanged). Legislative intent

11340.1. (a) The Legislature therefore declares that it is in the public interest to establish an Office of Administrative Law which shall be charged with the orderly review of adopted regulations. It is the intent of the Legislature that the purpose of such review shall be to reduce the number of administrative regulations and to improve the quality of those regulations which are adopted. It is the intent of the Legislature that agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process. It is the intent

1 of the Legislature that neither the Office of Administrative Law nor the court
2 should substitute its judgment for that of the rulemaking agency as expressed in
3 the substantive content of adopted regulations. It is the intent of the Legislature
4 that while the Office of Administrative Law will be part of the executive branch
5 of state government, that the office work closely with, and upon request report
6 directly to, the Legislature in order to accomplish regulatory reform in California.

7 (b) It is the intent of the Legislature that the California Code of Regulations
8 made available on the Internet by the office pursuant to Section 11344 include
9 complete authority and reference citations and history notes.

10 **Gov't Code § 11340.2 (unchanged). Office of Administrative Law**

11 11340.2. (a) The Office of Administrative Law is hereby established in state
12 government. The office shall be under the direction and control of an executive
13 officer who shall be known as the director. There shall also be a deputy director.
14 The director's term and the deputy director's term of office shall be coterminous
15 with that of the appointing power, except that they shall be subject to
16 reappointment.

17 (b) The director and deputy director shall have the same qualifications as a
18 hearing officer and shall be appointed by the Governor subject to the
19 confirmation of the Senate.

20 **Gov't Code § 11340.3 (unchanged). Personnel**

21 11340.3. The director may employ and fix the compensation, in accordance
22 with law, of such professional assistants and clerical and other employees as is
23 deemed necessary for the effective conduct of the work of the office.

24 **Gov't Code § 11340.4 (unchanged). Authority of Office of Administrative Law**

25 11340.4. (a) The office is authorized and directed to do the following:

26 (1) Study the subject of administrative rulemaking in all its aspects.

27 (2) In the interest of fairness, uniformity, and the expedition of business, submit
28 its suggestions to the various agencies.

29 (3) Report its recommendations to the Governor and Legislature at the
30 commencement of each general session.

31 (b) All agencies of the state shall give the office ready access to their records
32 and full information and reasonable assistance in any matter of research requiring
33 recourse to them or to data within their knowledge or control. Nothing in this
34 subdivision authorizes an agency to provide access to records required by statute
35 to be kept confidential.

36 **Gov't Code § 11340.5 (amended). Use of regulations**

37 SEC. _____. Section 11340.5 of the Government Code is amended to read:

38 11340.5. (a) No state agency shall issue, utilize, enforce, or attempt to enforce
39 any guideline, criterion, bulletin, manual, instruction, order, standard of general

1 application, or other rule, which is a regulation as defined in ~~subdivision (g) of~~
2 ~~Section 11342~~ Section 11342.590, unless the guideline, criterion, bulletin, manual,
3 instruction, order, standard of general application, or other rule has been adopted
4 as a regulation and filed with the Secretary of State pursuant to this chapter.

5 (b) If the office is notified of, or on its own, learns of the issuance, enforcement
6 of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order,
7 standard of general application, or other rule that has not been adopted as a
8 regulation and filed with the Secretary of State pursuant to this chapter, the office
9 may issue a determination as to whether the guideline, criterion, bulletin, manual,
10 instruction, order, standard of general application, or other rule, is a regulation as
11 defined in ~~subdivision (g) of Section 11342~~ Section 11342.590.

12 (c) The office shall do all of the following:

13 (1) File its determination upon issuance with the Secretary of State.

14 (2) Make its determination known to the agency, the Governor, and the
15 Legislature.

16 (3) Publish its determination in the California Regulatory Notice Register within
17 15 days of the date of issuance.

18 (4) Make its determination available to the public and the courts.

19 (d) Any interested person may obtain judicial review of a given determination
20 by filing a written petition requesting that the determination of the office be
21 modified or set aside. A petition shall be filed with the court within 30 days of the
22 date the determination is published.

23 (e) A determination issued by the office pursuant to this section shall not be
24 considered by a court, or by an administrative agency in an adjudicatory
25 proceeding if all of the following occurs:

26 (1) The court or administrative agency proceeding involves the party that
27 sought the determination from the office.

28 (2) The proceeding began prior to the party's request for the office's
29 determination.

30 (3) At issue in the proceeding is the question of whether the guideline, criterion,
31 bulletin, manual, instruction, order, standard of general application, or other rule
32 that is the legal basis for the adjudicatory action is a regulation as defined in
33 ~~subdivision (g) of Section 11342~~ Section 11342.590.

34 **Comment.** Section 11340.5 is amended to correct references to former Section 11342(g)
35 which is continued in Section 11342.590.

36 **Gov't Code § 11340.6 (unchanged). Petition for adoption of regulation**

37 11340.6. Except where the right to petition for adoption of a regulation is
38 restricted by statute to a designated group or where the form of procedure for
39 such a petition is otherwise prescribed by statute, any interested person may
40 petition a state agency requesting the adoption, amendment, or repeal of a
41 regulation as provided in Article 5 (commencing with Section 11346). This
42 petition shall state the following clearly and concisely:

- (a) The substance or nature of the regulation, amendment, or repeal requested.
- (b) The reason for the request.
- (c) Reference to the authority of the state agency to take the action requested.

Gov't Code § 11340.7 (unchanged). Response to petition

11340.7. (a) Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), a state agency shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing or schedule the matter for public hearing in accordance with the notice and hearing requirements of that article.

(b) A state agency may grant or deny the petition in part, and may grant any other relief or take any other action as it may determine to be warranted by the petition and shall notify the petitioner in writing of this action.

(c) Any interested person may request a reconsideration of any part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an agency should reconsider its previous decision no later than 60 days after the date of the decision involved. The agency's reconsideration of any matter relating to a petition shall be subject to subdivision (a).

(d) Any decision of a state agency denying in whole or in part or granting in whole or in part a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346) shall be in writing and shall be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register at the earliest practicable date. The decision shall identify the agency, the party submitting the petition, the provisions of the California Code of Regulations requested to be affected, reference to authority to take the action requested, the reasons supporting the agency determination, an agency contact person, and the right of interested persons to obtain a copy of the petition from the agency.

Gov't Code § 11340.8 (added). Electronic communication

SEC. _____. Section 11340.8 is added to the Government Code, 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.

Comment. Section 11340.8 is new. Subdivision (b) authorizes the use of electronic communications in adopting a regulation under this chapter. Subdivision (c) requires electronic publication of rulemaking notices by agencies that maintain websites or equivalent electronic communication forums.

☞ **Staff Note.** The addition of subdivision (c) was recommended in the First Supplement to Memorandum 98-71.

Gov't Code § 11340.9 (added). Exceptions

SEC. _____. Section 11340.9 is added to the Government Code, to read:

11340.9. The requirements of this chapter do not apply to any of the following:

(a) An agency in the judicial or legislative branch of the state government.

(b) A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization.

(c) A 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 chapter when one is needed to implement the law under which the form is issued.

(d) An agency rule that relates only to the internal management of the agency.

(e) An agency statement made to a person or group of persons to provide advice in response to a request for advice from that person or group of persons.

(f) An agency interpretation of law arising in the course of a case-specific adjudication.

Comment. Section 11340.9 is new. It collects various exemptions from the requirements of this chapter without substantive change.

Subdivision (a) continues former Section 11342(a).

Subdivisions (b)-(c) continues provisions of former Section 11342(g).

Subdivision (d) continues the “internal management” exception to the definition of “regulation” in former Section 11342(g).

Subdivision (e) codifies the rule noted in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996) (individual advice letter is not subject to rulemaking provisions).

Subdivision (f) provides that an interpretation arising in the course of a specific adjudication is not subject to rulemaking requirements. This codifies the rule noted in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996). Note, however, that an agency may not rely on an adjudicative decision as a precedent unless it has been designated a precedent decision. See Section 11425.60.

Subdivision (g) is new. It provides that an agency is not subject to rulemaking requirements where stating the only legally tenable interpretation of a provision of law. This codifies the practice of the Office of Administrative Law. See, e.g., OAL Determination Number 1 of 1993 at 36 (“We agree that the challenged rule would not constitute a ‘regulation’ if it were merely a restatement of law or the only tenable interpretation of the law.”)

Heading of Article 2 (commencing with Section 11342) (repealed)

SEC. _____. The heading of Article 2 (commencing with Section 11342) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code is repealed.

~~Article 2. Rules and Regulations~~

Gov’t Code § 11342 (repealed). Definitions

SEC. _____. Section 11342 of the Government Code is repealed.

~~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)(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.

Gov’t Code § 11342.1 (unchanged). Scope of authority

11342.1. Except as provided in Section 11342.4, nothing in this chapter confers authority upon or augments the authority of any state agency to adopt, administer, or enforce any regulation. Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

Gov’t Code § 11342.2 (unchanged). Validity of regulations

11342.2. Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid

1 or effective unless consistent and not in conflict with the statute and reasonably
2 necessary to effectuate the purpose of the statute.

3 **Gov't Code § 11342.4 (unchanged). Regulations to carry out provisions of chapter**

4 11342.4. The office shall adopt, amend, or repeal regulations for the purpose of
5 carrying out the provisions of this chapter.

6 **Heading of Article 2 (added). Definitions**

7 SEC. _____. Article 2 (commencing with Section 11342.510) of Chapter 3.5 of
8 Part 1 of Division 3 of Title 2 of the Government Code is added, to read:

9 Article 2. Definitions

10 **Gov't Code § 11342.510 (added). Application of definitions**

11 11342.510. Unless the provision or context otherwise requires, the definitions in
12 this article govern the construction of this chapter.

13 **Comment.** Section 11342.510 continues the introductory paragraph of former Section
14 11342 without substantive change.

15 **Gov't Code § 11342.520 (added). Agency**

16 11342.520. "Agency" means state agency.

17 **Comment.** Section 11342.520 is new. See Section 11000 ("state agency" defined for
18 purposes of this title).

19 **Gov't Code § 11342.530 (added). Building standard**

20 11342.530. "Building standard" has the meaning given in Section 18909 of
21 the Health and Safety Code.

22 **Comment.** Section 11342.530 is new. It is added for drafting convenience.

23 **Gov't Code § 11342.540 (added). Office**

24 11342.540. "Office" means the Office of Administrative Law.

25 **Comment.** Section 11342.540 continues former Section 11342(b) without change.

26 **Gov't Code § 11342.550 (added). Order of repeal**

27 11342.550. "Order of repeal" means any resolution, order or other official act
28 of a state agency that expressly repeals a regulation in whole or in part.

29 **Comment.** Section 11342.550 continues former Section 11342(c) without change.

30 **Gov't Code § 11342.560 (added). Performance standard**

31 11342.560. "Performance standard" means a regulation that describes an
32 objective with the criteria stated for achieving the objective.

33 **Comment.** Section 11342.560 continues former Section 11342(d) without change. See also
34 Section 11342.590 ("regulation" defined).

Gov't Code § 11342.570 (added). Plain English

11342.570. "Plain English" means language that satisfies the standard of clarity provided in Section 11349.

Comment. Section 11342.570 is drawn from former Section 11342(e). The section differs from former Section 11342(e) in that it refers to the "clarity" standard provided in Section 11349(c) (regulations must be written or displayed so that their meaning will be "easily understood" by persons directly affected by them). Plain English requirements may be found in Sections 11346.2 and 11346.5.

Gov't Code § 11342.580 (added). Prescriptive standard

11342.580. "Prescriptive standard" means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means.

Comment. Section 11342.580 continues former Section 11342(f) without change. See also Section 11342.590 ("regulation" defined).

Gov't Code § 11342.590 (added). Regulation

11342.590. "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.

Comment. Section 11342.590 continues part of former Section 11342(g) without substantive change. Section 11340.9(b)-(d) continues the substance of the provisions of former Section 11342(g) that are not continued in this section.

Gov't Code § 11342.600 (added). Small business

11342.600. (a) "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 subdivision (b), that is both of the following:

(1) Independently owned and operated.

(2) Not dominant in its field of operation.

(b) "Small business" does not include the following professional and business activities:

(1) 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.

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

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

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

(5) An entity organized as a nonprofit institution.

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

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

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

(9) A manufacturing enterprise exceeding 250 employees.

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

(c) “Small business” does not include the following business activities:

(1) Agriculture, where the annual gross receipts exceed one million dollars (\$1,000,000).

(2) General construction, where the annual gross receipts exceed nine million five hundred thousand dollars (\$9,500,000).

(3) Special trade construction, where the annual gross receipts exceed five million dollars (\$5,000,000).


(4) Retail trade, where the annual gross receipts exceed two million dollars (\$2,000,000).

(5) Wholesale trade, where the annual gross receipts exceed nine million five hundred thousand dollars (\$9,500,000).

(6) Services, where the annual gross receipts exceed two million dollars (\$2,000,000).

(7) Transportation and warehousing, where the annual gross receipts exceed one million five hundred thousand dollars (\$1,500,000).

Comment. Section 11342.600 continues former Section 11342(h) without substantive change.

 **Note.** The dollar amounts in this section have not been adjusted since 1979. The Commission would like to receive input on whether these amounts should be increased and if so, by how much.

Article 3. Filing and Publication

Gov’t Code § 11343 (amended). Transmittal of certified copies of regulations

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.

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

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

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

8 (d) Deliver to the office a copy of the notice of proposed action required by
9 Section 11346.4.

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

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

21 **Comment.** Section 11343 is amended to use the defined term “building standard.” See
22 Section 11342.530 (“building standard” defined). The section is also amended to reflect the
23 change in the name of the California Building Standards Commission.

24 **Gov’t Code § 11343.1 (unchanged). Style**

25 11343.1. (a) All regulations transmitted to the Office of Administrative Law for
26 filing with the Secretary of State shall conform to the style prescribed by the
27 office.

28 (b) Regulations approved by the office shall bear an endorsement by the office
29 affixed to the certified copy which is filed with the Secretary of State.

30 **Gov’t Code § 11343.2 (unchanged). Filing procedures**

31 11343.2. The Secretary of State shall endorse on the certified copy of each
32 regulation or order of repeal filed with or delivered to him or her, the time and
33 date of filing and shall maintain a permanent file of the certified copies of
34 regulations and orders of repeal for public inspection.

35 No fee shall be charged by any state officer or public official for the
36 performance of any official act in connection with the certification or filing of
37 regulations pursuant to this article.

38 **Gov’t Code § 11343.4 (amended). Effective date of regulation**

39 SEC. _____. Section 11343.4 of the Government Code is amended to read:

1 11343.4. A regulation or an order of repeal required to be filed with the
2 Secretary of State shall become effective on the 30th day after the date of filing
3 unless:

4 (a) Otherwise specifically provided by the statute pursuant to which the
5 regulation or order of repeal was adopted, in which event it becomes effective on
6 the day prescribed by this the statute.

7 ~~(b) It is a regulation adopted under Section 8054 or 3373 of the Financial Code,~~
8 ~~in which event it shall become effective upon filing or upon any later date~~
9 ~~specified by the state agency in a written instrument filed with, or as part of, the~~
10 ~~regulation or order of repeal.~~

11 ~~(c)~~ (e) A later date is prescribed by the state agency in a written instrument filed
12 with, or as part of, the regulation or order of repeal.

13 ~~(d)~~ (c) The agency makes a written request to the office demonstrating good
14 cause for an earlier effective date, in which case the office may prescribe an earlier
15 date.

16 **Comment.** Section 11343.4 is amended to correct a drafting defect in subdivision (a).
17 Subdivision (b) is deleted as redundant. See Fin. Code §§ 3373 & 8054. See also Section
18 11346.1(d) (effective date of emergency regulation).

19 **Gov't Code § 11343.5 (unchanged). Filing of regulatory code or supplement**

20 SEC. _____. Section 11343.5 of the Government Code is amended to read:
21 11343.5. Within 10 days from the receipt of printed copies of the California
22 Code of Regulations or of the California Regulatory Code Supplement from the
23 State Printing Office, the office shall file one copy of the particular issue of the
24 code or supplement in the office of the county clerk of each county in this state,
25 or if the authority to accept filings on his or her behalf has been delegated by the
26 county clerk of any county pursuant to Section 26803.5, in the office of the
27 person to whom that authority has been delegated.

28 **Gov't Code § 11343.6 (unchanged). Effect of filing certified copy**

29 11343.6. The filing of a certified copy of a regulation or an order of repeal with
30 the Secretary of State raises the rebuttable presumptions that:

- 31 (a) It was duly adopted.
32 (b) It was duly filed and made available for public inspection at the day and
33 hour endorsed on it.
34 (c) All requirements of this chapter and the regulations of the office relative to
35 such regulation have been complied with.
36 (d) The text of the certified copy of a regulation or order of repeal is the text of
37 the regulation or order of repeal as adopted.
38 The courts shall take judicial notice of the contents of the certified copy of each
39 regulation and of each order of repeal duly filed.

Gov't Code § 11343.8 (unchanged). Filing and publication other than required by article

11343.8. Upon the request of a state agency, the office may file with the Secretary of State and the office may publish in such manner as it believes proper, any regulation or order of repeal of a regulation not required by this article to be filed with the Secretary of State.

Heading of Article 4 (commencing with Section 11344) (amended)

SEC. _____. The heading of Article 4 (commencing with Section 11344) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code is amended to read:

~~Article 4. The California Administrative Register And Code~~

Article 4. The California Code of Regulations, the California Code of Regulations Supplement, and the California Regulatory Notice Register

Gov't Code § 11344 (amended). Code of Regulations

SEC. _____. Section 11344 of the Government Code is amended to read:

11344. The office shall do all of the following:

(a) Provide for the official compilation, printing, and publication of adoption, amendment, or repeal of regulations, which shall be known as the California Code of Regulations. On and after July 1, 1998, the office shall make available on the Internet, free of charge, the full text of the California Code of Regulations, and may contract with another state agency or a private entity in order to provide this service.

(b) Provide for the compilation, printing, and publication of weekly updates of the California Code of Regulations. This publication shall be known as the California ~~Regulatory Code of Regulations~~ Supplement and shall contain amendments to the code.

(c) Provide for the publication dates and manner and form in which regulations shall be printed and distributed and ensure that regulations are available in printed form at the earliest practicable date after filing with the Secretary of State.

(d) Ensure that each regulation is printed together with a reference to the statutory authority pursuant to which it was enacted and the specific statute or other provision of law which the regulation is implementing, interpreting, or making specific.

Comment. This section is amended to change the name of the California Regulatory Code Supplement.

Gov't Code § 11344.1 (amended). California Regulatory Notice Register

SEC. _____. Section 11344.1 of the Government Code is amended to read:

11344.1. The office shall do all of the following:

1 (a) Provide for the publication of the California Regulatory Notice Register,
2 which shall be an official publication of the State of California and which shall
3 contain the following:

4 (1) Notices of proposed action prepared by regulatory agencies, subject to the
5 notice requirements of this chapter, and which have been approved by the office.

6 (2) A summary of all regulations filed with the Secretary of State in the previous
7 week.


8 (3) All regulation decisions issued in the previous week detailing the reasons for
9 disapproval of a regulation, the reasons for not filing an emergency regulation,
10 and the reasons for repealing an emergency regulation. The California Regulatory
11 Notice Register shall also include a quarterly index of regulation decisions.

12 ~~(4) The Governor's action in reviewing the disapprovals of the office, the~~
13 ~~decisions to repeal, the agency's request for review, the office's response thereto,~~
14 ~~and the decisions of the Governor's office, as required by Section 11349.7.~~
15 Material that is required to be published under Sections 11349.5, 11349.7, and
16 11349.9.

17 (5) Determinations issued pursuant to Section 11340.5.

18 (b) Establish the publication dates and manner and form in which the California
19 Regulatory Notice Register shall be prepared and published and ensure that it is
20 published and distributed in a timely manner to the presiding officer and rules
21 committee of each house of the Legislature and to all subscribers.

22 **Comment.** Section 11344.1 is amended to eliminate ambiguity in subdivision (a)(4). This
23 change is technical and is not intended to affect the meaning of the section.

24  **Staff Note.** As currently drafted, Section 11344.1(a)(4) is confusing. What's more,
25 there are already express provisions requiring the publication of the referenced material. It is
26 clearer to cross-refer to those requirements than to try to explain them.

27 **Gov't Code § 11344.2 (amended). Supplying sets to county clerks or delegated persons**

28 SEC. _____. Section 11344.2 of the Government Code is amended to read:

29 11344.2. The office shall supply a complete set of the California Code of
30 Regulations, and of the California Regulatory Code Supplement ~~in the form~~
31 ~~provided by the State Printer~~ to the county clerk of any county or to the
32 delegatee of the county clerk pursuant to Section 26803.5, provided the director
33 makes the following two determinations:

34 (a) The county clerk or the delegatee of the county clerk pursuant to Section
35 26803.5 is maintaining the code and supplement in complete and current
36 condition in a place and at times convenient to the public.

37 (b) The California Code of Regulations and California Regulatory Code
38 Supplement are not otherwise reasonably available to the public in the
39 community where the county clerk or the delegatee of the county clerk pursuant
40 to Section 26803.5 would normally maintain the code and supplements by
41 distribution to libraries pursuant to Article 6 (commencing with Section 14900) of
42 Chapter 7 of Part 5.5.

1 **Comment.** Section 11344.2 is amended to remove an obsolete provision.

2 ☞ **Note.** This change was requested by OAL, to reflect existing practice. The Commission
3 would like to receive input as to whether this change would create any problems.

4 **Gov't Code § 11344.3 (unchanged). Publication in Notice Register**

5 11344.3. Every document, other than a notice of proposed rulemaking action,
6 required to be published in the California Regulatory Notice Register by this
7 chapter, shall be published in the first edition of the California Regulatory Notice
8 Register following the date of the document.

9 **Gov't Code § 11344.4 (unchanged). Sale of publications**

10 11344.4. (a) The California Code of Regulations, the California Regulatory
11 Code Supplement, and the California Regulatory Notice Register shall be sold at
12 prices which will reimburse the state for all costs incurred for printing, publication,
13 and distribution.

14 (b) All money received by the state from the sale of the publications listed in
15 subdivision (a) shall be deposited in the treasury and credited to the General
16 Fund, except that, where applicable, an amount necessary to cover the printing,
17 publication, and distribution costs shall be credited to the fund from which the
18 costs have been paid.

19 **Gov't Code § 11344.6 (unchanged). Presumption from publication in Code or Supplement**

20 11344.6. The publication of a regulation in the California Code of Regulations
21 or California Regulatory Code Supplement raises a rebuttable presumption that
22 the text of the regulation as so published is the text of the regulation adopted.

23 The courts shall take judicial notice of the contents of each regulation which is
24 printed or which is incorporated by appropriate reference into the California
25 Code of Regulations as compiled by the office.

26 The courts shall also take judicial notice of the repeal of a regulation as
27 published in the California Regulatory Code Supplement compiled by the office.

28 **Gov't Code § 11344.7 (unchanged). Purchase of publications**

29 11344.7. Nothing in this chapter precludes any person or state agency from
30 purchasing copies of the California Code of Regulations, the California
31 Regulatory Code Supplement, or the California Regulatory Notice Register or of
32 any unit of either, nor from printing special editions of any such units and
33 distributing the same. However, where the purchase and printing is by a state
34 agency, the state agency shall do so at the cost or at less than the cost to the
35 agency if it is authorized to do so by other provisions of law.

Gov't Code § 11344.9 (unchanged). Obsolete references

11344.9. (a) Whenever the term “California Administrative Code” appears in law, official legal paper, or legal publication, it means the “California Code of Regulations.”

(b) Whenever the term “California Administrative Notice Register” appears in any law, official legal paper, or legal publication, it means the “California Regulatory Notice Register.”

(c) Whenever the term “California Administrative Code Supplement” appears in any law, official legal paper, or legal publication, it means the “California Regulatory Code Supplement.”

Article 5. Public Participation: Procedure for Adoption of Regulations

Gov't Code § 11346 (unchanged). Purpose and application

11346. It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by any statute. This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.

Gov't Code § 11346.1 (amended). Application of article and emergency regulations

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

11346.1. (a) This article does not apply to any regulation not required to be filed with the Secretary of State under this chapter, and only this section and Sections 11343.4 and 11349.6 apply to an emergency regulation adopted pursuant to subdivision (b), ~~or to any regulation adopted under Section 8054 or 3373 of the Financial Code.~~

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

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

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

1 For the purposes of this subdivision, an emergency exists if the adoption of a
2 regulation or an order of repeal is immediately necessary for either of the
3 following purposes:

4 (1) To preserve the public peace, health and safety, or general welfare.

5 (2) To address a substantial and sudden change in economic or financial
6 conditions.

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

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

16 If the adopting agency specifies an effective date in a written instrument filed
17 with, or as a part of, the regulation or order of repeal, the emergency regulation or
18 order of repeal becomes effective on that date. If an effective date is not specified,
19 the emergency regulation or order of repeal becomes effective 7 days after it is
20 filed with the Secretary of State.

21 (e) No regulation, amendment, or order of repeal adopted as an emergency
22 regulatory action shall remain in effect more than ~~120~~ 180 days unless the
23 adopting agency has complied with Sections 11346.2 to 11346.9, inclusive, prior
24 to the adoption of the emergency regulatory action, or has, within the 120-day
25 period, completed the regulation adoption process by formally adopting the
26 emergency regulation, amendment, or order of repeal or any amendments thereto,
27 pursuant to this chapter 11347.3, inclusive, either before adopting the emergency
28 regulation or within the 180-day period. The adopting agency, prior to the
29 expiration of the ~~120-day~~ 180-day period, shall transmit to the office for filing
30 with the Secretary of State the adopted regulation, amendment, or order of repeal,
31 the rulemaking file, and a certification that either Sections 11346.2 to 11346.9,
32 inclusive, were complied with prior to the emergency regulatory action, or that
33 there was compliance with this section within the 120-day period 11347.3,
34 inclusive, were complied with either before the emergency regulation was
35 adopted or within the 180-day period.

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

41 (g) In the event a regulation is originally adopted and filed as an emergency and
42 the adopting agency fails to comply with subdivision (e), this failure shall

1 constitute a repeal thereof and after notice to the adopting agency by the office,
2 shall be deleted.

3 ~~(h) A regulation originally adopted as an emergency regulation, or an~~
4 ~~emergency regulation substantially equivalent thereto that is readopted as an~~
5 ~~emergency regulation, shall not be filed with the Secretary of State as an~~
6 ~~emergency regulation except with the express prior approval of the director of~~
7 ~~the office. Except with the express prior approval of the director of the office, an~~
8 ~~agency shall not adopt an emergency regulation that is substantially equivalent~~
9 ~~to an emergency regulation previously adopted by that agency. If the agency~~
10 ~~proposes the adoption of an emergency regulation that is substantially equivalent~~
11 ~~to a previously adopted emergency regulation and the director does not~~
12 ~~expressly approve adoption of the emergency regulation, the office shall not file~~
13 ~~the emergency regulation with the Secretary of State.~~

14 **Comment.** Section 11346.1(a) is amended to eliminate an inconsistency between this
15 section and Financial Code Section 3373 and a redundant reference to Financial Code
16 Section 8054.


17 Subdivision (b) is amended to provide that an emergency regulation may be adopted to
18 address an emergency arising from a change in economic or financial conditions.

19 Subdivision (c) is amended to use the defined term “building standard.” See Section
20 11342.530 (“building standard” defined).

21 Subdivision (d) is amended to change the default effective date from the date of filing to 7
22 days after filing. This is intended to provide advance notice to interested persons in cases
23 where immediate effect is not required.

24 Subdivision (e) amended to extend the effective period of an emergency regulation from
25 120 days to 180 days and to correct an underinclusive reference.

26 Subdivision (h) is amended to improve its clarity.

27  **Staff Note.** The reference in subdivision (e) to Sections 11346.2 to 11346.9 is
28 apparently intended to refer to the procedures for adoption of a non-emergency regulation.
29 If so, the reference is underinclusive and should be extended to include 11347.1 and
30 11347.3. That change has been implemented here.

31 **Gov’t Code § 11346.2 (amended). Notification of Office of Administrative Law**

32 SEC. _____. Section 11346.2 of the Government Code is amended to read:

33 11346.2. Every agency subject to this chapter shall prepare, submit to the office
34 with the notice of the proposed action as described in Section 11346.5, and make
35 available to the public upon request, all of the following:

36 (a) A copy of the express terms of the proposed regulation.

37 (1) The agency shall draft the regulation in plain, straightforward language,
38 avoiding technical terms as much as possible, and using a coherent and easily
39 readable style. ~~If the regulation affects small business, the~~ The agency shall draft
40 the regulation in plain English, ~~as defined in subdivision (e) of Section 11342.~~
41 ~~However, if it is not feasible to draft the regulation in plain English due to the~~
42 ~~technical nature of the regulation, the agency shall prepare a noncontrolling plain~~
43 ~~English summary of the regulation.~~

44 (2) The agency shall include a notation following the express terms of each
45 regulation listing the specific statutes or other provisions of law authorizing the

1 adoption of the regulation and listing the specific statutes or other provisions of
2 law being implemented, interpreted, or made specific by the regulation.

3 (3) The agency shall use underline or italics to indicate additions to, and
4 strikethrough to indicate deletions from, the California Code of Regulations.

5 (b) An initial statement of reasons for proposing the adoption, amendment, or
6 repeal of a regulation. This statement of reasons shall include, but not be limited
7 to, all of the following:

8 (1) ~~A description of the public problem, administrative requirement, or other~~
9 ~~condition or circumstance that each adoption, amendment, or repeal is intended to~~
10 ~~address.~~

11 (2) A statement of the specific purpose of each adoption, amendment, or repeal
12 and the rationale for the determination by the agency that each adoption,
13 amendment, or repeal is reasonably necessary to carry out the purpose for which
14 it is proposed. Where the adoption or amendment of a regulation would mandate
15 the use of specific technologies or equipment, a statement of the reasons why the
16 agency believes these mandates or prescriptive standards are required.

17 (3) (2) An identification of each technical, theoretical, and empirical study,
18 report, or similar document, if any, upon which the agency relies in proposing the
19 adoption, amendment, or repeal of a regulation.

20 (4) (3) (A) A description of the alternatives to the regulation considered by the
21 agency and the agency's reasons for rejecting those alternatives. In the case of a
22 regulation that would mandate the use of specific technologies or equipment or
23 prescribe specific actions or procedures, the imposition of performance standards
24 shall be considered as an alternative.

25 (B) A description of any alternatives the agency has identified that would
26 lessen any adverse impact on small business. It is not the intent of this paragraph
27 to require the agency to artificially construct alternatives or to justify why it has
28 not identified alternatives.

29 (5) (4) Facts, evidence, documents, testimony, or other evidence ~~upon which~~
30 ~~that the agency relies to~~ believes may support a finding that the action will not
31 have a significant adverse economic impact on business.

32 (6) (5) A department, board, or commission within the Environmental Protection
33 Agency, the Resources Agency, or the Office of the State Fire Marshal shall
34 describe its efforts, in connection with a proposed rulemaking action, to avoid
35 unnecessary duplication or conflicts with federal regulations contained in the
36 Code of Federal Regulations addressing the same issues. These agencies may
37 adopt regulations different from federal regulations contained in the Code of
38 Federal Regulations addressing the same issues upon a finding of one or more of
39 the following justifications:

40 (A) The differing state regulations are authorized by law.

41 (B) The cost of differing state regulations is justified by the benefit to human
42 health, public safety, public welfare, or the environment.

(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 subdivision (b) 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 that the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

Comment. Subdivision (a)(1) of Section 11346.2 is a specific application of Section 6215(a) (state agency “shall write each document which it produces in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style”). The requirement that a regulation be written in plain English has been expanded to include all regulations and not just those that affect small business. Plain English means language that satisfies the clarity standard expressed in Section 11349. See Section 11342.570 (“plain English” defined). Note that the former provision requiring the preparation of a plain English summary of a proposed regulation affecting small businesses, where the regulation cannot be drafted in plain English, has been broadened to apply to all regulations and continued in Section 11346.5(a)(3)(B). See Sections 11342.570 (“plain English” defined) and 11349(c) (clarity standard).

Former subdivision (b)(1) (description of problem addressed) is deleted as unnecessary; it is subsumed by former subdivision (b)(2) (statement of purpose for proposed action). Subdivision (b)(5) is revised to eliminate the implication that formal findings are required before the agency has received comment on a proposed action.

Subdivision (b)(3)(B) has been amended to require that an agency describe alternatives that would lessen adverse impacts on any business, not just on a small business.

Gov’t Code § 11346.3 (amended). Potential economic effect

SEC. _____. Section 11346.3 of the Government Code is amended to read:

11346.3. (a) State agencies proposing to adopt, ~~or amend, or repeal~~ any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements. For purposes of this subdivision assessing the potential for adverse economic impact shall require agencies, when adopting new regulations or reviewing, ~~or amending, or repealing~~ existing regulations, to adhere to the following requirements, to the extent that these requirements do not conflict with other state or federal laws:

(1) ~~The regulations proposed adoption, amendment, or repeal of a regulation~~ shall be based on adequate information concerning the need for, and consequences of, proposed governmental action.

(2) The state agency, prior to submitting ~~regulations~~ a proposal to adopt, amend, or repeal a regulation to the office, shall consider the proposal’s impact on business, ~~when initiating, processing, and adopting regulations~~ with consideration of industries affected including the ability of California businesses to compete

1 with businesses in other states. For purposes of evaluating the impact on the
2 ability of California businesses to compete with businesses in other states, an
3 agency shall consider, but not be limited to, information supplied by interested
4 parties.

5 It is not the intent of this section to impose additional criteria on agencies,
6 above that which exists in current law, in assessing adverse economic impact on
7 California business enterprises, but only to assure that the assessment is made
8 early in the process of initiation and development of ~~proposed regulations or~~
9 ~~amendments to regulations~~ a proposed adoption, amendment, or repeal of a
10 regulation.

11 (b)(1) All state agencies proposing to adopt, ~~or amend, or repeal~~ any
12 administrative regulations shall assess whether and to what extent it will affect
13 the following:

14 (A) The creation or elimination of jobs within the State of California.

15 (B) The creation of new businesses or the elimination of existing businesses
16 within the State of California.

17 (C) The expansion of businesses currently doing business within the State of
18 California.

19 (2) ~~For purposes of this subdivision, “state agency” shall include every state~~
20 ~~office, officer, department, division, bureau, board, and commission, whether~~
21 ~~created by the Constitution, statute, or initiative, but shall not include the courts,~~
22 ~~an agency in the judicial or legislative branch of state government, This~~
23 subdivision does not apply to the University of California, the Hastings College
24 of the Law, or the Fair Political Practices Commission.

25 (3) Information required from state agencies for the purpose of completing the
26 assessment may come from existing state publications.

27 (c) No administrative regulation adopted on or after January 1, 1993, that
28 requires a report shall apply to businesses, unless the state agency adopting the
29 regulation makes a finding that it is necessary for the health, safety, or welfare of
30 the people of the state that the regulation apply to businesses.

31 **Comment.** Section 11346.3(a) is amended to provide that it applies to the repeal of a
32 regulation as well as the adoption or amendment of a regulation.

33 Subdivision (b)(2) is amended to recast the definition provision as a substantive limitation.
34 This change is technical and does not affect the meaning of the section. See Section 11000
35 (“state agency” defined).

36 **Gov’t Code § 11346.4 (amended). Notice of proposed action**

37 SEC. _____. Section 11346.4 of the Government Code is amended to read:

38 11346.4. (a) At least 45 days prior to the hearing and close of the public
39 comment period on the adoption, amendment, or repeal of a regulation, notice of
40 the proposed action shall be:

41 (1) Mailed to every person who has filed a request for notice of regulatory
42 actions with the state agency.

(2) In cases in which the state agency is within a state department, mailed or delivered to the director of the department.

(3) Mailed to a representative number of small business enterprises or their representatives which have been identified as being affected by the proposed action.

(4) When appropriate in the judgment of the state agency, mailed to any person or group of persons whom the agency believes to be interested in the proposed action and published in the form and manner as the state agency shall prescribe.

(5) Published in the California Regulatory Notice Register as prepared by the office for each state agency's notice of regulatory action.

~~(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.

(c) Once the adoption, amendment, or repeal is completed and approved by the office, no further adoption, amendment, or repeal to the noticed regulation shall be made without subsequent notice being given.

(d) The office may refuse to publish a notice submitted to it if the agency has failed to comply with this article.

(e) The office shall make the California Regulatory Notice Register available to the public and state agencies at a nominal cost that is consistent with a policy of encouraging the widest possible notice distribution to interested persons.

(f) Where the form or manner of notice is prescribed by statute in any particular case, in addition to filing and mailing notice as required by this section, the notice shall be published, posted, mailed, filed, or otherwise publicized as prescribed by that statute. The failure to mail notice to any person as provided in this section shall not invalidate any action taken by a state agency pursuant to this article.

Comment. Section 11346.4(b) is amended to provide that the director of the Office of Administrative Law may extend the effective period of a notice for good cause (e.g., where the comments received by an agency are so voluminous that the agency cannot adopt the proposed regulation within one year).

☞ **Staff Note.** The change in subdivision (b) was presented in the First Supplement to Memorandum 98-71 as a means to provide flexibility where good cause exists to extend the effectiveness of a notice of proposed action. OAL is skeptical about the need for the change.

Gov't Code § 11346.5 (amended). Notice contents

SEC. _____. Section 11346.5 of the Government Code is amended to read:

11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest containing a concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and the effect of the proposed action. The informative digest shall be drafted in a format similar to the Legislative Counsel's digest on legislative bills.

(A) If the proposed action differs substantially from an existing comparable federal regulation or statute, the informative digest shall also include a brief description of the significant differences and the full citation of the federal regulations or statutes.

~~(B) If the proposed action affects small business, the~~ The informative digest shall also include a plain English summary of the proposed action and a plain English policy statement overview explaining the broad objectives of the regulation and, if appropriate, the specific objectives.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

For purposes of this paragraph, "cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations.

(7) If a state agency, in proposing to adopt, ~~or amend, or repeal~~ any administrative regulation, ~~determines~~ believes that the action may have a significant adverse economic impact on business, including the ability of California businesses to compete with businesses in other states, it shall include the following information in the notice of proposed action:

(A) Identification of the types of businesses that would be affected.

1 (B) A description of the projected reporting, recordkeeping, and other
2 compliance requirements that would result from the proposed action.

3 (C) The following statement: “The (name of agency) ~~finds~~ believes that the
4 (adoption/amendment) of this regulation may have a significant adverse economic
5 impact on businesses, including the ability of California businesses to compete
6 with businesses in other states. The (name of agency) (has/has not) considered
7 proposed alternatives that would lessen any adverse economic impact on
8 business and invites you to submit proposals. Submissions may include the
9 following considerations:

10 (i) The establishment of differing compliance or reporting requirements or
11 timetables that take into account the resources available to businesses.

12 (ii) Consolidation or simplification of compliance and reporting requirements for
13 businesses.

14 (iii) The use of performance standards rather than prescriptive standards.

15 (iv) Exemption or partial exemption from the regulatory requirements for
16 businesses.”

17 (8) If a state agency, in adopting, ~~or~~ amending, ~~or~~ repealing any administrative
18 regulation, ~~determines~~ believes that the action will not have a significant adverse
19 economic impact on business, including the ability of California businesses to
20 compete with businesses in other states, it shall make a declaration to that effect
21 in the notice of proposed action. In making this ~~determination~~ declaration, the
22 agency shall provide in the record facts, evidence, documents, testimony, or other
23 evidence upon which the agency relies to support that ~~finding~~ belief.

24 An agency’s ~~determination~~ belief and declaration that a proposed adoption,
25 amendment, or repeal of a regulation may have or will not have a significant,
26 adverse impact on businesses, including the ability of California businesses to
27 compete with businesses in other states, shall not be grounds for the office to
28 refuse to publish the notice of proposed action.

29 (9) A statement of the potential cost impact of the proposed action on private
30 persons or businesses directly affected, as considered by the agency during the
31 regulatory development process.

32 For purposes of this paragraph, “cost impact” means the reasonable range of
33 costs, or a description of the type and extent of costs, direct or indirect, that a
34 representative private person or business necessarily incurs in reasonable
35 compliance with the proposed action.

36 (10) A statement of the results of the assessment required by subdivision (b) of
37 Section 11346.3.

38 (11) The finding prescribed by subdivision (c) of Section 11346.3, if required.

39 (12) A statement that the action would have a significant effect on housing
40 costs, if a state agency, in adopting, amending, or repealing any administrative
41 regulation, ~~determines that the action would have an effect~~ believes that the
42 action would have that effect. In addition, the agency officer designated in
43 paragraph (13), shall make available to the public, upon request, the agency’s

1 evaluation, if any, of the effect of the proposed regulatory action on housing
2 costs.

3 ~~(12)~~ (13) A statement that the adopting agency must determine that no
4 alternative considered by the agency would be more effective in carrying out the
5 purpose for which the action is proposed or would be as effective and less
6 burdensome to affected private persons than the proposed action.

7 ~~(13)~~ (14) The name and telephone number of the agency officer to whom
8 inquiries concerning the proposed administrative action may be directed.

9 ~~(14)~~ (15) The date by which comments submitted in writing must be received to
10 present statements, arguments, or contentions in writing relating to the proposed
11 action in order for them to be considered by the state agency before it adopts,
12 amends, or repeals a regulation.

13 ~~(15)~~ (16) Reference to the fact that the agency proposing the action has
14 prepared a statement of the reasons for the proposed action, has available all the
15 information upon which its proposal is based, and has available the express terms
16 of the proposed action, pursuant to subdivision (b).

17 ~~(16)~~ (17) A statement that if a public hearing is not scheduled, any interested
18 person or his or her duly authorized representative may request, no later than 15
19 days prior to the close of the written comment period, a public hearing pursuant
20 to Section 11346.8.

21 ~~(17)~~ (18) A statement indicating that the full text of a regulation changed
22 pursuant to Section 11346.8 will be available for at least 15 days prior to the date
23 on which the agency adopts, amends, or repeals the resulting regulation.

24 (b) The agency officer designated in paragraph ~~(13)~~ (14) of subdivision (a) shall
25 make available to the public upon request the express terms of the proposed
26 action. The officer shall also make available to the public upon request the
27 location of public records, including reports, documentation, and other materials,
28 related to the proposed action.

29 (c) This section shall not be construed in any manner that results in the
30 invalidation of a regulation because of the alleged inadequacy of the notice
31 content or the summary or cost estimates, or the alleged inadequacy or inaccuracy
32 of the housing cost estimates, if there has been substantial compliance with those
33 requirements.

34 **Comment.** Subdivision (a)(3)(B) of Section 11346.5 is amended to broaden the plain
35 English policy statement overview to apply to all proposed actions, and not just those
36 affecting small business. The informative digest is expanded to include a plain English
37 summary of the regulation, whether or not such a summary is required by Section
38 11346.2(a)(1). See Sections 11342.570 (“plain English” defined) and 11349(c) (clarity
39 standard).

40 Subdivision (a)(7)-(8) & (12) is amended to eliminate the implication that formal findings
41 are required before the agency has received comment on a proposed action. Subdivision
42 (a)(7)-(8) is also amended to make clear that those provisions apply to the repeal of a
43 regulation, as well as the adoption, or amendment of regulation.

1 A new subdivision (a)(11) is added to include the finding that it is necessary for the health,
2 safety, or welfare of the people of the state that a regulation requiring a report apply to
3 businesses. This implements Section 11346.3(c).

4 **Gov't Code § 11346.54 (amended). Assessment of effect of regulations upon jobs and**
5 **business**

6 SEC. _____. Section 11346.54 of the Government Code is amended to read:

7 11346.54. (a) All state agencies proposing to adopt, or amend, or repeal any
8 administrative regulation shall assess whether and to what extent it will affect the
9 following:

10 (1) The creation or elimination of jobs within the State of California.

11 (2) The creation of new businesses or the elimination of existing businesses
12 within the State of California.

13 (3) The expansion of businesses currently doing business within the State of
14 California.

15 (b) ~~For purposes of this section, "state agency" shall include every state office,~~
16 ~~officer, department, division, bureau, board, and commission, whether created by~~
17 ~~the Constitution, statute, or initiative, but shall not include the courts, an agency~~
18 ~~in the judicial or legislative branch of state government, This section does not~~
19 ~~apply to the University of California, the Hastings College of the Law, or the Fair~~
20 ~~Political Practices Commission.~~

21 (c) The state agency shall include a statement of the results of this assessment in
22 the notice of proposed action.

23 (d) Information required from state agencies for the purpose of completing this
24 assessment may come from existing state publications.

25 **Comment.** Section 11346.54(a) is amended to make clear that the section applies to the
26 repeal of a regulation, as well as the adoption, or amendment of a regulation.

27 Subdivision (b) is amended to recast the provision as a substantive limitation rather than a
28 definition. This change is technical and does not affect the meaning of the section. See
29 Section 11000 ("state agency" defined).

30 **Gov't Code § 11346.8 (amended). Hearing**

31 SEC. _____. Section 11346.8 of the Government Code is amended to read:

32 11346.8. (a) If a public hearing is held, both oral and written statements,
33 arguments, or contentions, ~~either oral or in writing, or both,~~ shall be permitted. The
34 agency may impose reasonable limitations on oral presentations. If a public
35 hearing is not scheduled, the state agency shall, consistent with Section 11346.4,
36 afford any interested person or his or her duly authorized representative, the
37 opportunity to present statements, arguments or contentions in writing. In
38 addition, a public hearing shall be held if, no later than 15 days prior to the close
39 of the written comment period, an interested person or his or her duly authorized
40 representative submits in writing to the state agency, a request to hold a public
41 hearing. The state agency shall, to the extent practicable, provide notice of the
42 time, date, and place of the hearing by mailing the notice to every person who has

1 filed a request for notice thereby with the state agency. The state agency shall
2 consider all relevant matter presented to it before adopting, amending, or
3 repealing any regulation.


4 (b) In any hearing under this section, the state agency or its duly authorized
5 representative shall have authority to administer oaths or affirmations. An agency
6 may continue or postpone a hearing from time to time to the time and at the place
7 as it determines. If a hearing is continued or postponed, the state agency shall
8 provide notice to the public as to when it will be resumed or rescheduled.

9 (c) No state agency may adopt, amend, or repeal a regulation which has been
10 changed from that which was originally made available to the public pursuant to
11 Section 11346.5, unless the change is (1) nonsubstantial or solely grammatical in
12 nature, or (2) sufficiently related to the original text that the public was
13 adequately placed on notice that the change could result from the originally
14 proposed regulatory action. If a sufficiently related change is made, the full text of
15 the resulting adoption, amendment, or repeal, with the change clearly indicated,
16 shall be made available to the public for at least 15 days before the agency
17 adopts, amends, or repeals the resulting regulation. Any written comments
18 received regarding the change must be responded to in the final statement of
19 reasons required by Section 11346.9.

20 (d) No state agency shall add any material to the record of the rulemaking
21 proceeding after the close of the public hearing or comment period, unless
22 adequate provision is made for public comment on that matter. This subdivision
23 does not apply to material prepared pursuant to Section 11346.9.

24 **Comment.** Subdivision (a) of Section 11346.8 is amended to make clear that oral
25 testimony must be allowed at a public hearing, subject to reasonable time, repetition, or other
26 limitations by the agency.

27 Subdivision (d) is amended to recognize that the final statement of reasons and updated
28 informative digest are added to the record of the rulemaking proceeding after the close of the
29 hearing or comment period. See Sections 11346.9 (final statement of reasons and updated
30 informative digest), 11347.3 (rulemaking file). If the final statement of reasons refers to
31 documents not previously included in the record of the rulemaking proceeding, the addition
32 of those documents to the rulemaking file is governed by Section 11347.1 (documents added
33 to rulemaking file).

34  **Staff Note.** The amendment to subdivision (d) was recommended in Memorandum 98-
35 71. The change is technical and presents no policy issues.

36 **Gov't Code § 11346.9 (amended). Final statement of reasons and updated informative**
37 **digest**

38 SEC. _____. Section 11346.9 of the Government Code is amended to read:

39 11346.9. Every agency subject to this chapter shall do the following:

40 (a) Prepare and submit to the office with the adopted regulation a final
41 statement of reasons that shall include all of the following:

42 (1) An update of the information contained in the initial statement of reasons. If
43 the update identifies any data or any technical, theoretical or empirical study,
44 report, or similar document on which the agency is relying in proposing the

1 adoption, ~~or amendment, or repeal~~ of a regulation that was not identified in the
2 initial statement of reasons, or which was otherwise not identified or made
3 available for public review prior to the close of the public comment period, the
4 agency shall comply with ~~subdivision (d) of Section 11346.8~~ Section 11347.1.

5 (2) A determination as to whether adoption, amendment, or repeal of the
6 regulation imposes a mandate on local agencies or school districts. If the
7 determination is that adoption, amendment, or repeal of the regulation does
8 ~~contain~~ would impose a local mandate, the agency shall state whether the
9 mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of
10 Division 4. If the agency finds that the mandate is not reimbursable, it shall state
11 the reasons for that finding.

12 (3) A summary of each objection or recommendation made regarding the
13 specific adoption, amendment, or repeal proposed, together with an explanation
14 of how the proposed action has been changed to accommodate each objection or
15 recommendation, or the reasons for making no change. This requirement applies
16 only to objections or recommendations specifically directed at the agency's
17 proposed action or to the procedures followed by the agency in proposing or
18 adopting the action. The agency may aggregate and summarize repetitive or
19 irrelevant comments as a group, and may respond to repetitive comments or
20 summarily dismiss irrelevant comments as a group.

21 (4) A determination with supporting information that no alternative considered
22 by the agency would be more effective in carrying out the purpose for which the
23 regulation is proposed or would be as effective and less burdensome to affected
24 private persons than the adopted regulation.

25 (5) An explanation setting forth the reasons for rejecting any proposed
26 alternatives that would lessen the adverse economic impact on small businesses.

27 (b) Prepare and submit to the office with the adopted regulation an updated
28 informative digest containing a clear and concise summary of the immediately
29 preceding laws and regulations, if any, relating directly to the adopted, amended,
30 or repealed regulation and the effect of the adopted, amended, or repealed
31 regulation. The informative digest shall be drafted in a format similar to the
32 Legislative Counsel's Digest on legislative bills.

33 (c) A state agency that adopts or amends a regulation mandated by federal law
34 or regulations, the provisions of which are identical to a previously adopted or
35 amended federal regulation, shall be deemed to have complied with this section if
36 a statement to the effect that a federally mandated regulation or amendment to a
37 regulation is being proposed, together with a citation to where an explanation of
38 the provisions of the regulation can be found, is included in the notice of
39 proposed adoption or amendment prepared pursuant to Section 11346.5.
40 However, the agency shall comply fully with this chapter with respect to any
41 provisions in the regulation which the agency proposes to adopt or amend that
42 are different from the corresponding provisions of the federal regulation.

1 **Comment.** Section 11346.9(a)(1) is amended to cross-refer to the newly-created procedure
2 governing addition of documents to the rulemaking file. See Section 11347.1. Subdivision
3 (a)(1)-(2) is also amended to make clear that these provisions apply to the repeal of a
4 regulation as well as the adoption, or amendment of a regulation.

5 Subdivision (a)(3) is amended to codify the existing practice of grouping repetitive
6 comments and summarily dismissing irrelevant comments for purposes of this section.

7 Subdivision (a)(5) is amended to require an explanation for rejecting alternatives that
8 would lessen the adverse economic impact on any business, not just a small business.

9 **Gov't Code § 11347.1 (added). Documents added to rulemaking file**

10 SEC. _____. Section 11347.1 is added to the Government Code, to read:

11 11347.1. (a) An agency that adds any technical, theoretical, or empirical study,
12 report, or similar document to the rulemaking file after publication of the notice of
13 proposed action and relies on the document in proposing the action shall make
14 the document available as required by this section.

15 (b) At least 15 calendar days before a regulation is adopted and submitted to
16 the office for review and filing with the Secretary of State, the agency shall mail
17 to all of the following persons a notice identifying the added document and
18 stating the place and business hours that the document is available for public
19 inspection:

20 (1) Persons who testified at the public hearing.

21 (2) Persons who submitted written comments at the public hearing.

22 (3) Persons whose comments were received by the agency during the public
23 comment period.

24 (4) Persons who requested notification from the agency of the availability of
25 changes to the text of the proposed regulation.

26 (c) Documents shall be available for public inspection at the location described
27 in the notice for at least 15 calendar days before the proposed regulation is
28 adopted and submitted to the office for review and filing with the Secretary of
29 State.

30 (d) Written comments on the documents or information received by the agency
31 during the availability period shall be summarized and responded to in the final
32 statement of reasons as provided in Section 11346.9.

33 (e) The rulemaking record shall contain a statement confirming that the agency
34 complied with the requirements of this section and stating the date on which the
35 notice was mailed.

36 (f) If there are no persons in categories listed in subdivision (b), then the
37 rulemaking record shall contain a confirming statement to that effect.

38 **Comment.** Section 11347.1 implements Section 11346.9(a)(1) by prescribing a more
39 detailed procedure than that provided in Section 11346.8(d). It is drawn from 1 C.C.R. § 45.

40 **Gov't Code § 11347.3 (amended). File of rulemaking proceeding**

41 SEC. _____. Section 11347.3 of the Government Code is amended to read:

1 11347.3. (a) Every agency shall maintain a file of each rulemaking that shall be
2 deemed to be the record for that rulemaking proceeding. Commencing no later
3 than the date that the notice of the proposed action is published in the California
4 Regulatory Notice Register, and during all subsequent periods of time that the file
5 is in the agency's possession, the agency shall make the file available to the
6 public for inspection and copying during regular business hours.

7 (b) The rulemaking file shall include:

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

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

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

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

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

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

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

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

30 (9) The date on which the agency made the full text of the proposed regulation
31 available for 15 days prior to the adoption, amendment, or repeal of the regulation
32 the full text as required adoption of the regulation, if required to do so by
33 subdivision (c) of Section 11346.8 if the agency made changes to the regulation
34 noticed to the public.

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

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

40 (12) An index or table of contents that identifies each item contained in the
41 rulemaking file. The index or table of contents shall include an affidavit or a
42 declaration under penalty of perjury in the form specified by Section 2015.5 of
43 the Code of Civil Procedure by the agency official who has compiled the

1 rulemaking file, specifying the date upon which the record was closed, and that
2 the file or the copy, if submitted, is complete.

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

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

7 (e) Upon filing a regulation with the Secretary of State pursuant to Section
8 11349.3, the office shall return the related rulemaking file to the agency, after
9 which no item contained in the file shall be removed, altered, or destroyed or
10 otherwise disposed of. The agency shall maintain the file unless it elects to
11 transmit the file to the State Archives pursuant to subdivision (f).

12 (f) The agency may transmit the rulemaking file to the State Archives. The file
13 shall include instructions that the Secretary of State shall not remove, alter, or
14 destroy or otherwise dispose of any item contained in the file. Pursuant to Section
15 12223.5, the Secretary of State may designate a time for the delivery of the
16 rulemaking file to the State Archives in consideration of document processing or
17 storage limitations.

18 **Comment.** Subdivision (a) of Section 11347.3 is amended to make clear that the
19 rulemaking file is available to the public throughout the rulemaking process.

20 Subdivision (b)(9) is amended to improve its clarity, without affecting its substance.

21 Article 6. Review of Proposed Regulations

22 Gov't Code § 11349 (amended). Standards

23 SEC. _____. Section 11349 of the Government Code is amended to read:

24 11349. The following definitions standards govern the ~~interpretation of this~~
25 ~~chapter operation of~~ Section 11349.1:

26 (a) ~~“Necessity” means the record of the rulemaking proceeding demonstrates~~
27 ~~by substantial evidence the need for a regulation taking into account the totality~~
28 ~~of the record. For purposes of this standard, evidence includes, but is not limited~~
29 ~~to, facts, studies, and expert opinion. A regulation satisfies the necessity standard~~
30 ~~if the major provisions of the regulation and any specific provisions of the~~
31 ~~regulation that have been challenged by public comment are shown by~~
32 ~~substantial evidence in the rulemaking file to be necessary to effectuate the~~
33 ~~purpose of the statute, court decision, or other provision of law that the~~
34 ~~regulation implements, interprets, or makes specific, taking into account the~~
35 ~~totality of the record. For the purposes of this subdivision, the following terms~~
36 ~~have the following meanings:~~

37 (1) ~~“Evidence” includes rationales, facts, studies, and expert opinion. Where~~
38 ~~the need for a regulation is based on policy judgments and cannot, as a practical~~
39 ~~matter, be demonstrated by facts or expert opinion, a statement of the adopting~~
40 ~~agency’s rationale for the necessity of the regulation shall be considered~~
41 ~~substantial evidence. An agency that relies on a statement of its rationale for the~~

1 necessity of the regulation under this subdivision must explain why the necessity
2 of the regulation cannot, as a practical matter, be demonstrated by facts or expert
3 opinion.

4 (2) A provision is “challenged” if a public comment opposes the provision or
5 asserts that it is unnecessary and states a specific reason for that opposition or
6 assertion.

7 (b) “Authority” means the provision of law which permits or obligates the
8 agency to adopt, amend, or repeal a regulation. A regulation satisfies the authority
9 standard if the adopting agency identifies a statute that authorizes or requires the
10 regulation.

11 (c) “Clarity” means written or displayed so that the meaning of regulations will
12 be easily understood by those persons directly affected by them. A regulation
13 satisfies the clarity standard if it is drafted so that it can be easily understood by
14 those who will be directly affected by it.

15 (d) “Consistency” means being A regulation satisfies the consistency standard
16 if it is in harmony with, and not in conflict with or contradictory to, existing
17 statutes, court decisions, or other provisions of law.

18 (e) “Reference” means the statute, court decision, or other provision of law
19 which the agency implements, interprets, or makes specific by adopting,
20 amending, or repealing a regulation. A regulation satisfies the reference standard
21 if the adopting agency identifies each provision of law that the regulation is
22 intended to implement, interpret, or make specific.

23 (f) “Nonduplication” means that a regulation A regulation satisfies the
24 nonduplication standard if the regulation does not serve the same purpose as a
25 state or federal statute or another regulation. This standard requires that an
26 agency proposing to amend or adopt a regulation must identify any state or
27 federal statute or regulation which is overlapped or duplicated by the proposed
28 regulation and justify any overlap or duplication. This standard is not intended to
29 prohibit state agencies from printing relevant portions of enabling legislation in
30 regulations when the duplication is necessary to satisfy the clarity standard in
31 paragraph (3) of subdivision (a) of Section 11349.1 provided in subdivision (c).
32 This standard is intended to prevent the indiscriminate incorporation of statutory
33 language in a regulation.

34 **Comment.** Section 11349 is amended to clarify operation of the standards for
35 administrative review of proposed regulations.

36 Subdivision (a) is amended to make three changes:

37 (1) The meaning of “necessity” is placed in context. The subdivision now provides that
38 the necessity standard is met if a regulation is necessary to achieve the purpose of the
39 provision of law that it implements, interprets, or makes specific. This is consistent with other
40 provisions that relate to the necessity of a regulation. See Gov’t Code §§ 11342.2 (regulation
41 not valid unless “reasonably necessary to effectuate the purpose of statute” authorizing the
42 regulation), 11350 (court may find regulation invalid if agency determination that the
43 regulation “is reasonably necessary to effectuate the purpose of the statute, court decision, or
44 other provision of law that is being implemented, interpreted, or made specific by the
45 regulation” is not supported by substantial evidence).

(2) The scope of the standard's application is clarified. The subdivision now provides that an adopting agency need only establish the necessity of a regulation as a whole and the necessity of provisions that are challenged in public comment. In order to challenge a provision, a commentator must provide a specific reason for an objection. An objection that does not state a reason, or that states a general or immaterial reason, is not challenged for the purposes of subdivision (a).

(3) The evidentiary standard for demonstrating necessity has been changed to recognize that the necessity of some policy decisions is not, as a practical matter, factually demonstrable. However, the reasonable necessity of such decisions must still be explained by the adopting agency, and the agency must explain why it is impracticable to demonstrate necessity by reference to facts or expert opinion.

Subdivisions (b)-(f) are amended to improve their clarity. The substance of these provisions is continued without change.

In applying these standards, the Office of Administrative Law may not substitute its judgment for that of the adopting agency with regard to the substance of the regulation. See Sections 11340.1 ("It is the intent of the Legislature that neither the Office of Administrative Law nor the court should substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations."), 11349.1(c) ("The regulations adopted by the office shall ensure that it does not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations.").

Gov't Code § 11349.1 (amended). Review of regulations

SEC. _____. Section 11349.1 of the Government Code is amended to read:

11349.1. (a) The office shall review all regulations adopted, amended, or repealed pursuant to the procedure specified in Article 5 (commencing with Section 11346) and submitted to it for publication in the California Regulatory Code Supplement and for transmittal to the Secretary of State and make determinations using all of the following standards:

- (1) Necessity.
- (2) Authority.
- (3) Clarity.
- (4) Consistency.
- (5) Reference.
- (6) Nonduplication.

In reviewing regulations pursuant to this section, the office shall restrict its review to the regulation and the record of the rulemaking proceeding. The office shall approve the regulation or order of repeal if it complies with the standards set forth in this section and with this chapter.

(b) In reviewing proposed regulations for the criteria in subdivision (a), the office may consider the clarity of the proposed regulation in the context of related regulations already in existence.

(c) The office shall adopt regulations governing the procedures it uses in reviewing regulations submitted to it. The regulations shall provide for an orderly review and shall specify the methods, standards, presumptions, and principles the office uses, and the limitations it observes, in reviewing regulations to establish compliance with the standards specified in subdivision (a). The regulations adopted by the office shall ensure that it does not substitute its judgment for that

1 of the rulemaking agency as expressed in the substantive content of adopted
2 regulations.

3 (d) The office shall return any regulation subject to this chapter to the adopting
4 agency if any of the following occur:

5 (1) The adopting agency has not prepared the estimate required by paragraph
6 (6) of subdivision (a) of Section 11346.5 and has not included the data used and
7 calculations made and the summary report of the estimate in the file of the
8 rulemaking.

9 (2) The agency has not complied with Section 11346.3.

10 (3) The adopting agency has prepared the estimate required by paragraph (6) of
11 subdivision (a) of Section 11346.5, the estimate indicates that the regulation will
12 result in a cost to local agencies or school districts that is required to be
13 reimbursed under Part 7 (commencing with Section 17500) of Division 4, and the
14 adopting agency fails to do any of the following:

15 (A) Cite an item in the Budget Act for the fiscal year in which the regulation
16 will go into effect as the source from which the Controller may pay the claims of
17 local agencies or school districts.

18 (B) Cite an accompanying bill appropriating funds as the source from which the
19 Controller may pay the claims of local agencies or school districts.

20 (C) Attach a letter or other documentation from the Department of Finance
21 which states that the Department of Finance has approved a request by the
22 agency that funds be included in the Budget Bill for the next following fiscal
23 year to reimburse local agencies or school districts for the costs mandated by the
24 regulation.

25 (D) Attach a letter or other documentation from the Department of Finance
26 which states that the Department of Finance has authorized the augmentation of
27 the amount available for expenditure under the agency's appropriation in the
28 Budget Act which is for reimbursement pursuant to Part 7 (commencing with
29 Section 17500) of Division 4 to local agencies or school districts from the
30 unencumbered balances of other appropriations in the Budget Act and that this
31 augmentation is sufficient to reimburse local agencies or school districts for their
32 costs mandated by the regulation.

33 (e) The office shall notify the Department of Finance of all regulations returned
34 pursuant to subdivision (d).

35 (f) The office shall return a rulemaking file to the submitting agency if the file
36 does not comply with subdivisions (a) and (b) of Section 11347.3. Within three
37 state working days of the receipt of a rulemaking file, the office shall notify the
38 submitting agency of any deficiency identified. If no notice of deficiency is
39 mailed to the adopting agency within that time, a rulemaking file shall be deemed
40 submitted as of the date of its original receipt by the office. A rulemaking file shall
41 not be deemed submitted until each deficiency identified under this subdivision
42 has been corrected.

1 This subdivision shall not limit the review of regulations under this article,
2 including, but not limited to, the conformity of rulemaking files to subdivisions (a)
3 and (b) of Section 11347.3.

4 **Comment.** Section 11349.1 is amended to make clear that the section requires review of the
5 repeal of a regulation, as well as the adoption, or amendment of a regulation.

6 **Gov't Code § 11349.2 (added). Adding to rulemaking file during review**

7 SEC. _____. Section 11340.5 is added to the Government Code, to read:

8 11349.2. An agency proposing a regulation may add material to a rulemaking
9 file that has been submitted to the office for review pursuant to this article where
10 addition of the material does not violate other requirements of this chapter.

11 **Comment.** Section 11349.2 allows an agency to add inadvertently omitted material to a
12 rulemaking file that has been submitted for review by the Office of Administrative Law. See
13 Sections 11346.8(d) (limitation on addition of material to rulemaking file after close of
14 public comment), 11346.9(a)(1) (limitation on use of new data in final statement of reasons).

15 **Gov't Code § 11349.3 (amended). Approval or disapproval**

16 SEC. _____. Section 11349.3 of the Government Code is amended to read:

17 11349.3. (a) The office shall either approve a regulation submitted to it for
18 review and transmit it to the Secretary of State for filing or disapprove it within
19 30 working days after the regulation has been submitted to the office for review.
20 If the office fails to act within 30 days, the regulation shall be deemed to have
21 been approved and the office shall transmit it to the Secretary of State for filing.

22 (b) If the office disapproves a regulation, it shall return it to the adopting
23 agency within the 30-day period specified in subdivision (a) accompanied by a
24 notice specifying the reasons for disapproval. Within seven calendar days of the
25 issuance of the notice, the office shall provide the adopting agency with a written
26 decision detailing the reasons for disapproval. No regulation shall be disapproved
27 except for failure to comply with the standards set forth in Section 11349.1 or for
28 failure to comply with this chapter.

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

38 (d) The office shall not initiate the return of a regulation pursuant to subdivision
39 (c) as an alternative to disapproval pursuant to subdivision (b).

40 (e) The 30 working day period provided in subdivisions (a) and (b) may be
41 extended to 45 working days if the director certifies in writing that additional
42 time is required due to the size or complexity of a proposed regulation. A

1 certification under this subdivision shall explain why additional time is required
2 and shall be delivered to the agency proposing the regulation within the 30
3 working day period provided in subdivisions (a) and (b).

4 **Comment.** Section 11349.3(c) is amended to reflect the fact that the effective period of a
5 notice of proposed regulation can exceed one year with the approval of the director of the
6 Office of Administrative Law. See Section 11346.4(b).

7 Subdivision (e) is added to authorize an extension of the time period for review of
8 unusually large or complex regulations.

9 **Gov't Code § 11349.4 (unchanged). Returned regulations**

10 11349.4. (a) A regulation returned to an agency because of failure to meet the
11 standards of Section 11349.1, because of an agency's failure to comply with this
12 chapter may be rewritten and resubmitted within 120 days of the agency's
13 receipt of the written opinion required by subdivision (b) of Section 11349.3
14 without complying with the notice and public hearing requirements of Sections
15 11346.4, 11346.5, and 11346.8 unless the substantive provisions of the regulation
16 have been significantly changed. If the regulation has been significantly changed
17 or was not submitted within 120 days of receipt of the written opinion, the
18 agency shall comply with Article 5 (commencing with Section 11346) and
19 readopt the regulation. The director of the office may, upon a showing of good
20 cause, grant an extension to the 120-day time period specified in this subdivision.

21 (b) Upon resubmission of a disapproved regulation to the office pursuant to
22 subdivision (a), the office shall only review the resubmitted regulation for those
23 reasons expressly identified in the written opinion required by subdivision (b) of
24 Section 11349.3, or for those issues arising as a result of a substantial change to a
25 provision of the resubmitted regulation or as a result of intervening statutory
26 changes or intervening court orders or decisions.

27 (c) When an agency resubmits a withdrawn or disapproved regulation to the
28 office it shall identify the prior withdrawn or disapproved regulation by date of
29 submission to the office, shall specify the portion of the prior rulemaking record
30 that should be included in the resubmission, and shall submit to the office a copy
31 of the prior rulemaking record if that record has been returned to the agency by
32 the office.

33 (d) The office shall expedite the review of a regulation submitted without
34 significant substantive change.

35 **Gov't Code § 11349.5 (unchanged). Review by Governor of decision by Office of**
36 **Administrative Law**

37 11349.5. (a) To initiate a review of a decision by the office, the agency shall file
38 a written Request for Review with the Governor's Legal Affairs Secretary within
39 10 days of receipt of the written opinion provided by the office pursuant to
40 subdivision (b) of Section 11349.3. The Request for Review shall include a
41 complete statement as to why the agency believes the decision is incorrect and

1 should be overruled. Along with the Request for Review, the agency shall submit
2 all of the following:

3 (1) The office's written decision detailing the reasons for disapproval required
4 by subdivision (b) of Section 11349.3.

5 (2) Copies of all regulations, notices, statements, and other documents which
6 were submitted to the office.

7 (b) A copy of the agency's Request for Review shall be delivered to the office
8 on the same day it is delivered to the Governor's office. The office shall file its
9 written response to the agency's request with the Governor's Legal Affairs
10 Secretary within 10 days and deliver a copy of its response to the agency on the
11 same day it is delivered to the Governor's office.

12 (c) The Governor's office shall provide the requesting agency and the office
13 with a written decision within 15 days of receipt of the response by the office to
14 the agency's Request for Review. Upon receipt of the decision, the office shall
15 publish in the California Regulatory Notice Register the agency's Request for
16 Review, the office's response thereto, and the decision of the Governor's office.

17 (d) The time requirements set by subdivisions (a) and (b) may be shortened by
18 the Governor's office for good cause.

19 (e) The Governor may overrule the decision of the office disapproving a
20 proposed regulation, an order repealing an emergency regulation adopted
21 pursuant to subdivision (b) of Section 11346.1, or a decision refusing to allow the
22 readoption of an emergency regulation pursuant to Section 11346.1. In that
23 event, the office shall immediately transmit the regulation to the Secretary of State
24 for filing.

25 (f) Upon overruling the decision of the office, the Governor shall immediately
26 transmit to the Committees on Rules of both houses of the Legislature a statement
27 of his or her reasons for overruling the decision of the office, along with copies of
28 the adopting agency's initial statement of reasons issued pursuant to Section
29 11346.2 and the office's statement regarding the disapproval of a regulation
30 issued pursuant to subdivision (b) of Section 11349.3. The Governor's action and
31 the reasons therefor shall be published in the California Regulatory Notice
32 Register.

33 **Gov't Code § 11349.6 (amended). Emergency regulations**

34 SEC. _____. Section 11349.6 of the Government Code is amended to read:

35 11349.6. (a) In the event the adopting agency has complied with Sections
36 11346.2 to ~~11346.9~~ 11347.3, inclusive, prior to the adoption of the regulation as
37 an emergency, the office shall approve or disapprove the regulation in
38 accordance with this article.

39 (b) Emergency regulations adopted pursuant to subdivision (b) of Section
40 11346.1 shall be reviewed by the office within 10 calendar days after their
41 submittal to the office. The office shall not file the emergency regulations with the
42 Secretary of State if it determines that the regulation is not necessary for the

1 ~~immediate preservation of the public peace, health and safety, or general welfare~~
2 ~~to address an emergency as provided in subdivision (b) of Section 11346.1, or if it~~
3 ~~determines that the regulation fails to meet the standards set forth in Section~~
4 ~~11349.1, or if it determines the agency failed to comply with subdivisions (b) and~~
5 ~~(c) of Section 11346.1.~~

6 (c) If the office considers any information not submitted to it by the rulemaking
7 agency when determining whether to file emergency regulations, the office shall
8 provide the rulemaking agency with an opportunity to rebut or comment upon
9 that information.

10 (d) Within 30 working days of the filing of a certificate of compliance, the office
11 shall review the regulation and hearing record and approve or order the repeal of
12 an emergency regulation if it determines that the regulation fails to meet the
13 standards set forth in Section 11349.1, or if it determines that the agency failed to
14 comply with this chapter. The period for review pursuant to this subdivision may
15 be extended to 45 working days if the director certifies in writing that additional
16 time is required due to the size or complexity of a proposed regulation. A
17 certification under this subdivision shall explain why additional time is required
18 and shall be delivered to the agency proposing the regulation within the regular
19 30 working day review period provided in this subdivision.

20 **Comment.** Section 11349.6(a) is amended to correct an underinclusive reference. The
21 reference to Sections 11346.2 to 11346.9 has been expanded to include Sections 11346.2 to
22 11347.3.

23 Subdivision (b) is amended to conform to a change in the scope of what constitutes an
24 emergency under Section 11346.1(b).

25 Subdivision (e) is amended to conform the period for review of an emergency regulation
26 under that subdivision to the period for review of nonemergency regulations under Section
27 11343.3. A provision has also been added to authorize an extension of the period for review
28 of unusually large or complex regulations.

29 ➡ **Staff Note.** The reference in subdivision (a) to Sections 11346.2 to 11346.9 is
30 apparently intended to refer to the procedures for adoption of a non-emergency regulation.
31 If so, the reference is underinclusive and should be extended to include 11347.1 and
32 11347.3. That change has been implemented here.

33 Article 7. Review of Existing Regulations

34 **Gov't Code § 11349.7 (unchanged). Review of regulations on request of Legislature**

35 11349.7. The office, at the request of any standing, select, or joint committee of
36 the Legislature, shall initiate a priority review of any regulation, group of
37 regulations, or series of regulations that the committee believes does not meet the
38 standards set forth in Section 11349.1.

39 The office shall notify interested persons and shall publish notice in the
40 California Regulatory Notice Register that a priority review has been requested,
41 shall consider the written comments submitted by interested persons, the
42 information contained in the rulemaking record, if any, and shall complete each
43 priority review made pursuant to this section within 90 calendar days of the

1 receipt of the committee's written request. During the period of any priority
2 review made pursuant to this section, all information available to the office
3 relating to the priority review shall be made available to the public. In the event
4 that the office determines that a regulation does not meet the standards set forth
5 in Section 11349.1, it shall order the adopting agency to show cause why the
6 regulation should not be repealed and shall proceed to seek repeal of the
7 regulation as provided by this section in accordance with the following:

8 (a) In the event it determines that any of the regulations subject to the review
9 do not meet the standards set forth in Section 11349.1, the office shall within 15
10 days of the determination order the adopting agency to show cause why the
11 regulation should not be repealed. In issuing the order, the office shall specify in
12 writing the reasons for its determination that the regulation does not meet the
13 standards set forth in Section 11349.1. The reasons for its determination shall be
14 made available to the public. The office shall also publish its order and the reasons
15 therefor in the California Regulatory Notice Register. In the case of a regulation
16 for which no, or inadequate, information relating to its necessity can be furnished
17 by the adopting agency, the order shall specify the information which the office
18 requires to make its determination.

19 (b) No later than 60 days following receipt of an order to show cause why a
20 regulation should not be repealed, the agency shall respond in writing to the
21 office. Upon written application by the agency, the office may extend the time for
22 an additional 30 days.

23 (c) The office shall review and consider all information submitted by the agency
24 in a timely response to the order to show cause why the regulation should not be
25 repealed, and determine whether the regulation meets the standards set forth in
26 Section 11349.1. The office shall make this determination within 60 days of
27 receipt of an agency's response to the order to show cause. If the office does not
28 make a determination within 60 days of receipt of an agency's response to the
29 order to show cause, the regulation shall be deemed to meet the standards set
30 forth in subdivision (a) of Section 11349.1. In making this determination, the
31 office shall also review any written comments submitted to it by the public within
32 30 days of the publication of the order to show cause in the California
33 Regulatory Notice Register. During the period of review and consideration, the
34 information available to the office relating to each regulation for which the office
35 has issued an order to show cause shall be made available to the public. The
36 office shall notify the adopting agency within two working days of the receipt of
37 information submitted by the public regarding a regulation for which an order to
38 show cause has been issued. If the office determines that a regulation fails to meet
39 the standards, it shall prepare a statement specifying the reasons for its
40 determination. The statement shall be delivered to the adopting agency, the
41 Legislature, and the Governor and shall be made available to the public and the
42 courts. Thirty days after delivery of the statement required by this subdivision the

1 office shall prepare an order of repeal of the regulation and shall transmit it to the
2 Secretary of State for filing.

3 (d) The Governor, within 30 days after the office has delivered the statement
4 specifying the reasons for its decision to repeal, as required by subdivision (c),
5 may overrule the decision of the office ordering the repeal of a regulation. The
6 regulation shall then remain in full force and effect. Notice of the Governor's
7 action and the reasons therefor shall be published in the California Regulatory
8 Notice Register.

9 The Governor shall transmit to the rules committee of each house of the
10 Legislature a statement of reasons for overruling the decision of the office, plus
11 any other information that may be requested by either of the rules committees.

12 (e) In the event that the office orders the repeal of a regulation, it shall publish
13 the order and the reasons therefor in the California Regulatory Notice Register.

14 **Gov't Code § 11349.8 (unchanged). Repeal for lack of statutory authority**

15 11349.8. (a) If the office is notified of, or on its own becomes aware of, an
16 existing regulation in the California Code of Regulations for which the statutory
17 authority has been repealed or becomes ineffective or inoperative by its own
18 terms, the office shall order the adopting agency to show cause why the
19 regulation should not be repealed for lack of statutory authority and shall notify
20 the Legislature in writing of this order. In issuing the order, the office shall specify
21 in writing the reasons for issuance of the order. "Agency," for purposes of this
22 section and Section 11349.9, refers to the agency that adopted the regulation
23 and, if applicable, the agency that is responsible for administering the regulation
24 in issue.

25 (b) The agency may, within 30 days after receipt of the written notification,
26 submit in writing to the office any citations, legal arguments, or other information
27 opposing the repeal, including public comments during this period. This section
28 shall not apply where the agency demonstrates in its response that any of the
29 following conditions exists:

30 (1) The statute or section thereof is simultaneously repealed and substantially
31 reenacted through a single piece of legislation, or where subsequent legislation
32 evinces a specific legislative intent to reenact the substance of the statute or
33 section. When a regulation cites more than one specific statute or section as
34 reference or authority for the adoption of a regulation, and one or more of the
35 statutes or sections are repealed or become ineffective or inoperative, then the
36 only provisions of the regulation which remain in effect shall be those for which
37 the remaining statutes or sections provide specific or general authority.

38 (2) The statute is temporarily repealed, or rendered ineffective or inoperative by
39 a provision of law which is effective only for a limited period, in which case any
40 regulation described in subdivision (a) is thereby also temporarily repealed,
41 rendered ineffective, or inoperative during that limited period. Any regulation so
42 affected shall have the same force and effect upon the expiration of the limited

1 period during which the provision of law was effective as if that temporary
2 provision had not been enacted.

3 (3) The statute or section of a statute being repealed, or becoming ineffective or
4 inoperative by its own terms, is to remain in full force and effect as regards events
5 occurring prior to the date of repeal or ineffectiveness, in which case any
6 regulation adopted to implement or interpret that statute shall likewise be deemed
7 to remain in full force and effect in regards to those same events.

8 (c) This section shall not be construed to deprive any person or public agency
9 of any substantial right which would have existed prior to, or hereafter exists
10 subsequent to, the effective date of this section.

11 (d) Thirty days after receipt of the agency's opposition material, or the close of
12 the 30-day agency and public response period if no response is submitted, the
13 office shall do one of the following:

14 (1) Inform the agency and the Legislature in writing that the office has
15 withdrawn its order to show cause.

16 (2) Issue a written notice to the agency specifying the reasons for the repeal
17 and its intent to file a Notice of Repeal of the invalid regulation with the
18 Secretary of State. Within seven calendar days of the filing of the Notice of
19 Repeal, the office shall provide the agency, the Governor, and the Legislature
20 with a written decision detailing the reasons for the repeal and a copy of the
21 Notice of Repeal, and publish the office's written decision in the California
22 Regulatory Notice Register.

23 (e) The office shall order the removal of the repealed regulation from the
24 California Code of Regulations within 30 days after filing the Notice of Repeal, if
25 the agency has not appealed the office's decision, or upon receipt of notification
26 of the Governor's decision upholding the office's decision, if an appeal has been
27 filed pursuant to Section 11349.9.

28 **Gov't Code § 11349.9 (unchanged). Review of repeal pursuant to Section 11349.8**

29 11349.9. (a) To initiate a review of the office's Notice of Repeal pursuant to
30 Section 11349.8, the agency shall appeal the office's decision by filing a written
31 Request for Review with the Governor's Legal Affairs Secretary within 10 days
32 of receipt of the Notice of Repeal and written decision provided for by paragraph
33 (2) of subdivision (d) of Section 11349.8. The Request for Review shall include a
34 complete statement as to why the agency believes the decision is incorrect and
35 should be overruled. Along with the Request for Review, the agency shall submit
36 all of the following:

37 (1) The office's written opinion detailing the reasons for repeal required by
38 paragraph (2) of subdivision (d) of Section 11349.8.

39 (2) Copies of all statements and other documents that were submitted to the
40 office.

41 (b) A copy of the agency's Request for Review shall be delivered to the office
42 on the same day it is delivered to the Governor's office. The office shall file its

1 written response to the agency's request with the Governor's Legal Affairs
2 Secretary within 10 days, and deliver a copy of its response to the agency on the
3 same day it is delivered to the Governor's office.

4 (c) The Governor's office shall provide the requesting agency and the office
5 with a written decision within 15 days of receipt of the response by the office to
6 the agency's Request for Review. Upon receipt of the decision, the office shall
7 publish in the California Regulatory Notice Register the agency's Request for
8 Review, the office's response thereto, and the decision of the Governor's office.

9 (d) The time requirements set by subdivisions (a) and (b) may be shortened by
10 the Governor's office for good cause.

11 (e) In the event the Governor overrules the decision of the office, the office
12 shall immediately transmit the regulation to the Secretary of State for filing.

13 (f) Upon overruling the decision of the office, the Governor shall transmit to the
14 rules committees of both houses of the Legislature a statement of the reasons for
15 overruling the decision of the office.

16 Article 8. Judicial Review

17 Gov't Code § 11350 (amended). Judicial review of validity of regulation

18 SEC. ____ Section 11350 of the Government Code is amended to read:

19 11350. (a) Any interested person may obtain a judicial declaration as to the
20 validity of any regulation or order of repeal by bringing an action for declaratory
21 relief in the superior court in accordance with the Code of Civil Procedure. The
22 right to judicial determination shall not be affected by the failure either to petition
23 or to seek reconsideration of a petition filed pursuant to Section 11340.7 before
24 the agency promulgating the ~~regulations~~ regulation or order of repeal. The
25 regulation or order of repeal may be declared to be invalid for a substantial failure
26 to comply with this chapter, or, in the case of an emergency regulation or order to
27 repeal, upon the ground that the facts recited in the statement prepared pursuant
28 to subdivision (b) of Section 11346.1 do not constitute an emergency within the
29 provisions of Section 11346.1.

30 (b) In addition to any other ground that may exist, a regulation or order of
31 repeal may be declared invalid if either of the following exists:

32 (1) The agency's determination that the regulation is reasonably necessary to
33 effectuate the purpose of the statute, court decision, or other provision of law that
34 is being implemented, interpreted, or made specific by the regulation is not
35 supported by substantial evidence.

36 (2) The agency declaration pursuant to paragraph (8) of subdivision (a) of
37 Section 11346.5 is in conflict with substantial evidence in the record.

38 ~~For purposes of this section, the record shall be deemed to consist of all material~~
39 ~~maintained in the file of the rulemaking proceeding as defined in Section 11347.3.~~

40 (c) The approval of a regulation or order of repeal by the office or the
41 Governor's overruling of a decision of the office disapproving a regulation or

1 order of repeal shall not be considered by a court in any action for declaratory
2 relief brought with respect to a regulation or order of repeal.

3 (d) The record of review in a proceeding under this section shall be limited to
4 the following material:

5 (1) The rulemaking file prepared under Section 11347.3.


6 (2) The written statement prepared under paragraph (b) of Section 11346.1.

7 (3) Evidence of a procedural defect in the adoption, amendment, or repeal of the
8 regulation.

9 **Comment.** Section 11350 is amended to provide for judicial review of an order of repeal,
10 as well as a regulation. This is consistent with the prior law, which provided for review of an
11 emergency order of repeal.

12 Subdivision (a) is amended to eliminate an ambiguity regarding the statement an agency
13 prepares on proposing an emergency regulation. This change is technical and is not intended
14 to affect the meaning of the section.

15 Subdivision (d) is added to clarify the record of review in a proceeding under this section.
16 Subdivision (d)(1) restates part of the substance of the former second paragraph of Section
17 11350(b)(2), limiting the record of review to the rulemaking file prepared under Section
18 11347.3. Subdivision (d)(2) permits consideration of an agency statement prepared under
19 Section 11346.1(b) (justifying emergency regulation). Such a statement is not part of a
20 rulemaking file prepared under Section 11347.3. See Section 11346.1(a) Subdivision (d)(3)
21 permits consideration of evidence of procedural noncompliance. This is necessary where
22 proof of procedural noncompliance depends on material that is not included in the
23 rulemaking file. E.g., proof that an agency failed to include written public comments in a
24 rulemaking file requires consideration of the excluded comments. Also, where it is asserted
25 that an agency statement is in invalid “underground regulation” (i.e. it should have been
26 adopted under this chapter but was not), the court will need to consider the text of the
27 purported underground regulation in order to determine whether it is, in fact, a regulation
28 subject to this chapter.

29  **Staff Note.** The change to subdivision (b) and the addition of subdivision (d) was
30 recommended in Memorandum 98-71 to correct deficiencies in the scope of the record of
31 review. The existing limitation on the record of review is too narrow in that it excludes
32 material necessary for the review of emergency regulations, underground regulations, and
33 procedural violations that cannot be demonstrated by reference to the rulemaking file. The
34 new provision permits consideration of such material.

35 **Gov’t Code § 11350.3 (amended). Review of regulation disapproved by Office of**
36 **Administrative Law**

37 11350.3. Any interested person may obtain a judicial declaration as to the
38 validity of a regulation or order of repeal which the office has disapproved ~~or~~
39 ~~ordered repealed~~ pursuant to Section 11349.3, or 11349.6, or of a regulation that
40 has been ordered repealed pursuant to Section 11349.7 by bringing an action for
41 declaratory relief in the superior court in accordance with the Code of Civil
42 Procedure. The court may declare the regulation valid if it determines that the
43 regulation meets the standards set forth in Section 11349.1 and that the agency
44 has complied with this chapter. If the court so determines, it may order the office
45 to immediately file the regulation with the Secretary of State.

1 (A) A clear and concise summary of any regulatory provisions adopted or
2 approved as part of that action, for publication in the California Code of
3 Regulations.

4 (B) The administrative record for the proceeding. Proposed additions to a
5 policy, plan, or guideline shall be indicated by underlined text and proposed
6 deletions shall be indicated by strike-through text in documents submitted as part
7 of the administrative record for the proceeding.

8 (C) A summary of the necessity for the regulatory provision.

9 (D) A certification by the chief legal officer of the State Water Resources
10 Control Board that the action was taken in compliance with all applicable
11 procedural requirements of Division 7 (commencing with Section 13000) of the
12 Water Code.

13 (3) Paragraph (2) does not limit the authority of the office to review any
14 regulatory provision which is part of the policy, plan, or guideline submitted by
15 the State Water Resources Control Board.

16 (4) The office shall review the regulatory provisions to determine compliance
17 with the standards of necessity, authority, clarity, consistency, reference, and
18 nonduplication set forth in subdivision (a) of Section 11349.1. The office shall
19 also review the responses to public comments prepared by the State Water
20 Resources Control Board or the appropriate regional water quality control board
21 to determine compliance with the public participation requirements of the Federal
22 Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.). The office shall restrict
23 its review to the regulatory provisions and the administrative record of the
24 proceeding. Sections 11349.3, 11349.4, 11349.5, and 11350.3 shall apply to the
25 review by the office to the extent that those sections are consistent with this
26 section.

27 (5) The policy, plan, guideline, or revision shall not become effective unless and
28 until the regulatory provisions are approved by the office in accordance with
29 subdivision (a) of Section 11349.3.

30 (6) Upon approval of the regulatory provisions, the office shall transmit to the
31 Secretary of State for filing the clear and concise summary of the regulatory
32 provisions submitted by the State Water Resources Control Board.


33 (7) Any proceedings before the State Water Resources Control Board or a
34 California regional water quality control board to take any action subject to this
35 subdivision shall be conducted in accordance with the procedural requirements
36 of Division 7 (commencing with Section 13000) of the Water Code, together with
37 any applicable requirements of the Federal Water Pollution Control Act (33
38 U.S.C. Sec. 1251 et seq.), and the requirements of this chapter, other than the
39 requirement for review by the office in accordance with this subdivision, shall not
40 apply.

41 (8) This subdivision shall not provide a basis for review by the office under this
42 subdivision or Article 6 (commencing with Section 11349) of any such policy,
43 plan, or guideline adopted or revised prior to June 1, 1992.

(c) Subdivision (a) does not apply to a provision of any policy, plan, guideline, or revision, as applied to any person who, as of June 1, 1992, was a party to a civil action challenging that provision on the grounds that it has not been adopted as a regulation pursuant to this chapter.

(d) Copies of the policies, plans, and guidelines to which subdivision (a) applies shall be maintained at central locations for inspection by the public. The State Water Resources Control Board shall maintain, at its headquarters in Sacramento, a current copy of each policy, plan, or guideline in effect. Each regional water quality control board shall maintain at its headquarters a current copy of each policy, plan, or guideline in effect in its respective region. Any revision of a policy, plan, or guideline shall be made available for inspection by the public within 30 days of its effective date.

Comment. Section 11353 is amended to require that amendments and deletions be clearly indicated in material submitted to the Office of Administrative Law for review. For a similar provision, see Section 11354.1(d)(2)(B) (underscore and strike-through required to indicate changes in plans of San Francisco Bay Conservation and Development Commission).

 **Staff Note.** This change was recommended in Memorandum 98-71. It would suggested codify the existing practice. The staff sees no problems with the change but would be interested in hearing any other views on the matter.

Gov't Code § 11354 (unchanged). Application of Sections 11352 and 11353

11354. Sections 11352 and 11353 do not affect any court's determination, relating to the applicability of this chapter to any provision of a policy, plan, or guideline, in a civil action which was pending on June 1, 1992, and on that date included a challenge to a provision of a policy, plan, or guideline on the grounds that it has not been adopted in accordance with this chapter.

Gov't Code § 11354.1 (unchanged). San Francisco Bay Conservation and Development Commission

11354.1. (a) For purposes of this section, "commission" means the San Francisco Bay Conservation and Development Commission.

(b) Except as provided in subdivision (d), this chapter does not apply to any policy, plan, or guideline adopted by the commission prior to January 1, 1996, pursuant to Chapter 5 (commencing with Section 66650) of Title 7.2 of this code or Division 19 (commencing with Section 29000) of the Public Resources Code.

(c) The issuance or denial by the commission of any permit pursuant to subdivision (a) of Section 66632, and the issuance or denial by, or appeal to, the commission of any permit pursuant to Chapter 6 (commencing with Section 29500) of Division 19 of the Public Resources Code, are not subject to this chapter.

(d)(1) Any amendments or other changes to the San Francisco Bay Plan or to a special area plan pursuant to Chapter 5 (commencing with Section 66650) of Title 7.2, and amendments or other changes to the Suisun Marsh Protection Plan, as defined in Section 29113 of the Public Resources Code, or in the Suisun Marsh

1 local protection program, as defined in Section 29111 of the Public Resources
2 Code, adopted by the commission on and after January 1, 1996, shall be submitted
3 to the office.

4 (2) The commission shall include in its submittal to the office pursuant to
5 paragraph (1) both of the following documents:

6 (A) A clear and concise summary of any regulatory provision adopted or
7 approved by the commission as part of the proposed change for publication in
8 the California Code of Regulations.

9 (B) The administrative record for the proceeding, and a list of the documents
10 relied upon in making the change. Proposed additions to the plans shall be
11 indicated by underlined text, and proposed deletions shall be indicated by strike-
12 through text in documents submitted as part of the administrative record for the
13 proceeding.

14 (3) The office shall review the regulatory provisions to determine compliance
15 with the standards of necessity, authority, clarity, consistency, reference, and
16 nonduplication set forth in subdivision (a) of Section 11349.1. The office shall
17 also review the responses to public comments prepared by the commission to
18 determine compliance with the public participation requirements of Sections
19 11000 to 11007, inclusive, of Title 14 of the California Code of Regulations, and
20 to ensure that the commission considers all relevant matters presented to it before
21 adopting, amending, or repealing any regulatory provision, and that the
22 commission explains the reasons for not modifying a proposed plan change to
23 accommodate an objection or recommendation. The office shall restrict its review
24 to the regulatory provisions and the administrative record of the proceeding.
25 Sections 11349.3, 11349.4, 11349.5, and 11350.3 shall apply to the review by the
26 office to the extent that those sections are consistent with this section.

27 (4) In reviewing proposed changes to the commission's plans for the criteria
28 specified in subdivision (a) of Section 11349.1, the office shall consider the clarity
29 of the proposed plan change in the context of the commission's existing plans.

30 (5) The proposed plan or program change subject to this subdivision shall not
31 become effective unless and until the regulatory provisions are approved by the
32 office in accordance with subdivision (a) of Section 11349.3.

33 (6) Upon approval of the regulatory provisions, the office shall transmit to the
34 Secretary of State for filing the clear and concise summary of the regulatory
35 provisions submitted by the commission.

36 (e) Except as provided in subdivisions (b) and (c), the adoption of any
37 regulation by the commission shall be subject to this chapter in all respects.

38 **Gov't Code § 11356 (amended). Building standards or regulations**

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

40 11356. (a) Article 6 (commencing with Section 11349) is not applicable to any
41 building standards or ~~administrative regulations that apply directly to the~~

1 ~~implementation or enforcement of a building standard, subject to the approval of~~
2 ~~the State Building Standards Commission.~~

3 (b) Notwithstanding subdivision (a) of Section 11346.1, Article 5 (commencing
4 with Section 11346) is applicable to those building standards, except that the
5 office shall not disapprove those building standards nor refuse to publish any
6 notice of proposed building standards if either has been approved by, and
7 submitted to, the office by the State California Building Standards Commission
8 pursuant to Section 18935 of the Health and Safety Code.

9 **Comment.** Section 11343(a) is amended to eliminate the implication that the exemption of
10 building standards from review by the Office of Administrative Law is conditioned on
11 approval of the California Building Standards Commission. Note, however, that building
12 standards are subject to review by the California Building Standards Commission under
13 Health and Safety Code Section 18930. The subdivision is amended to use the defined term
14 “building standard.” See Section 11342.530 (“building standard” defined).

15 Subdivision (b) is amended to eliminate an inconsistency between that subdivision and
16 Section 11346.1 (which provides that building standards, as regulations that are not required
17 to be submitted to the Office of Administrative Law for filing with the Secretary of State, are
18 not subject to Article 5 (commencing with Section 11346)). The subdivision is also amended
19 to reflect the change in the name of the California Building Standards Commission.

20 **Gov’t Code § 11357 (unchanged). Department of Finance instructions**

21 11357. (a) The Department of Finance shall adopt and update, as necessary,
22 instructions for inclusion in the State Administrative Manual prescribing the
23 methods that any agency subject to this chapter shall use in making the
24 determination required by paragraph (5) and the estimate required by paragraph
25 (6) of subdivision (a) of Section 11346.5. The instructions shall include, but need
26 not be limited to, the following:

27 (1) Guidelines governing the types of data or assumptions, or both, that may be
28 used, and the methods that shall be used, to calculate the estimate of the cost or
29 savings to public agencies mandated by the regulation for which the estimate is
30 being prepared.

31 (2) The types of direct or indirect costs and savings that should be taken into
32 account in preparing the estimate.

33 (3) The criteria that shall be used in determining whether the cost of a
34 regulation must be funded by the state pursuant to Section 6 of Article XIII B of
35 the California Constitution and Part 7 (commencing with Section 17500) of
36 Division 4.

37 (4) The format the agency preparing the estimate shall follow in summarizing
38 and reporting its estimate of the cost or savings to state and local agencies, school
39 districts, and in federal funding of state programs that will result from the
40 regulation.

41 (b) Any action by the Department of Finance to adopt and update, as necessary,
42 instructions to any state or local agency for the preparation, development, or
43 administration of the state budget, including any instructions included in the
44 State Administrative Manual, shall be exempt from this chapter.

1 (c) The Department of Finance may review any estimate prepared pursuant to
2 this section for content including, but not limited to, the data and assumptions
3 used in its preparation.

4 **Gov't Code § 11359 (unchanged). Fire and panic safety regulations**

5 11359. (a) Except as provided in subdivision (b), on and after January 1, 1982,
6 no new regulation, or the amendment or repeal of any regulation, which
7 regulation is intended to promote fire and panic safety or provide fire protection
8 and prevention, including fire suppression systems, equipment, or alarm
9 regulation, is valid or effective unless it is submitted by, or approved in writing by,
10 the State Fire Marshal before transmittal to the Secretary of State or the Office of
11 Administrative Law.

12 (b) Approval of the State Fire Marshal is not required if the regulation is
13 expressly required to be at least as effective as federal standards published in the
14 Federal Register pursuant to Section 6 of the Occupational Safety and Health Act
15 of 1970 (P.L. 91-596) within the time period specified by federal law and as
16 provided in subdivision (b) of Section 142.4 of the Labor Code, and as approved
17 by the Occupational Safety and Health Administration of the United States
18 Department of Labor as meeting the requirements of subdivision (a) of Section
19 142.3 of the Labor Code, unless the regulation is determined by the State Fire
20 Marshal to be less effective in promoting fire and panic safety than regulations
21 adopted by the State Fire Marshal.

CONFORMING REVISIONS AND REPEALS

Fin. Code § 3373 (amended). Changes to Regulation O

SEC. _____. Section 3373 of the Financial Code is amended to read:

3373. (a) Notwithstanding any other provisions of this article, whenever Section 215.2, 215.3, 215.4, 215.5, 215.7, or 215.8 is changed by the Board of Governors of the Federal Reserve System, the commissioner may by regulation adopt that same change. Any regulation adopted under this section shall expire at 12 p.m. on December 31 of the year following the calendar year in which it becomes effective.

(b)(1) Section 11343.4 and Article 5 (commencing with Section 11346) and Article 6 (commencing with Section 11349) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code do not apply to any regulation adopted under subdivision (a).

(2) The commissioner shall file any regulation adopted pursuant to subdivision (a), together with a citation to subdivision (a) as authority for the adoption and a citation to the provisions of federal law made applicable by the regulation, with the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations.

(3) A regulation adopted under subdivision (a) shall become effective on the date when it is filed with the Secretary of State unless the commissioner prescribes a later date in the regulation or in a written instrument filed with the regulation.

(c) A regulation adopted pursuant to subdivision (a) does not expire as provided by subdivision (a) and is not subject to subdivision (b) if the commissioner complies with all of the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of the Government Code in adopting the regulation, including those listed in paragraph (1) of subdivision (b).

Comment. Section 3373 is amended to provide a rule governing the effective date of regulations adopted under subdivision (a). This rule is consistent with the rule in Government Code Section 11343.4(b) that applied before regulations adopted under this section were exempted from Government Code Section 11343.4. Compare Section 753(c)(3) (providing equivalent rule).

Gov't Code § 27491.41 (amended). Sudden infant death syndrome

SEC. _____. Section 27491.41 of the Government Code is amended to read:

27491.41. (a) For purposes of this section, "sudden infant death syndrome" means the sudden death of any infant that is unexpected by the history of the infant and where a thorough postmortem examination fails to demonstrate an adequate cause of death.

(b) The Legislature finds and declares that sudden infant death syndrome (SIDS) is the leading cause of death for children under age one, striking one out

1 of every 500 children. The Legislature finds and declares that sudden infant
2 death syndrome is a serious problem within the State of California, and that public
3 interest is served by research and study of sudden infant death syndrome, and its
4 potential causes and indications.

5 (c) To facilitate these purposes, the coroner shall, within 24 hours, or as soon
6 thereafter as feasible, perform an autopsy in any case where an infant has died
7 suddenly and unexpectedly.

8 (d) The autopsy shall be conducted pursuant to a standardized protocol
9 developed by the State Department of Health Services. The protocol is exempt
10 from the procedural requirements pertaining to the adoption of administrative
11 rules and regulations pursuant to ~~Article 2 (commencing with Section 11342)~~
12 Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3
13 of Title 2 of the Government Code. The protocol shall be developed and
14 approved by July 1, 1990.

15 (e) The protocol shall be followed by all coroners throughout the state when
16 conducting the autopsies required by this section. The coroner shall state on the
17 certificate of death that sudden infant death syndrome was the cause of death
18 when the coroner's findings are consistent with the definition of sudden infant
19 death syndrome specified in the standardized autopsy protocol. The protocol may
20 include requirements and standards for scene investigations, requirements for
21 specific data, criteria for ascertaining cause of death based on the autopsy, and
22 criteria for any specific tissue sampling, and any other requirements. The protocol
23 may also require that specific tissue samples must be provided to a central tissue
24 repository designated by the State Department of Health Services.

25 (f) The State Department of Health Services shall establish procedures and
26 protocols for access by researchers to any tissues, or other materials or data
27 authorized by this section. Research may be conducted by any individual with a
28 valid scientific interest and prior approval from the State Committee for the
29 Protection of Human Subjects. The tissue samples, the materials, and all data shall
30 be subject to the confidentiality requirements of Section 103850 of the Health
31 and Safety Code.

32 (g) The coroner may take tissue samples for research purposes from infants who
33 have died suddenly and unexpectedly without consent of the responsible adult if
34 the tissue removal is not likely to result in any visible disfigurement.

35 (h) A coroner shall not be liable for damages in a civil action for any act or
36 omission done in compliance with this section.

37 (i) No consent of any person is required prior to undertaking the autopsy
38 required by this section. However, if the physician of record certifies the cause of
39 death is sudden infant death syndrome and the parents object to an autopsy on
40 religious or ethical grounds, no autopsy shall be required.

41 **Comment.** Section 27491.41 is amended to correct an erroneous reference to former
42 Article 2 (commencing with Section 11342) of Chapter 3.5 of Part 1 of Division 3 of Title 2
43 of the Government Code.

1 ☞ **Staff Note.** This section establishes an exemption from the “procedural requirements
2 pertaining to the adoption of administrative rules and regulations pursuant to Article 2
3 (commencing with Section 11342).” Article 2 does not express any procedural requirements.
4 The proposed amendment refers to Article 5, which contains the procedures for adoption of a
5 regulation.

6 **Health & Safety Code § 33427 (amended). Small business incubator**

7 SEC. _____. Section 33427 of the Health and Safety Code is amended to read:
8 33427. (a) In addition to any other authority granted under this part, an agency
9 may, within a project area, for the purposes of redevelopment, assist public
10 agencies or private nonprofit corporations to establish and maintain a small
11 business incubator.
12 (b) In addition to any other authority granted under this part, an agency may,
13 for the purposes of redevelopment, provide loan guarantees for small businesses
14 located within a project area.
15 (c) For the purposes of this section, “small business” shall have the same
16 meaning as defined in Section ~~11342~~ 11341.100 of the Government Code.
17 (d) This section shall apply only to a project area that is located within the City
18 of Healdsburg, the City of Long Beach, the City of Los Angeles, the City of
19 Oakland, or the City of Signal Hill. Any agency operating within one of those
20 cities which uses the authority granted by this section shall separately identify
21 those actions in the annual report to its legislative body prepared pursuant to
22 Section 33080.1.
23 (e) No agency may amend a redevelopment plan to increase the tax increment
24 revenue limit pursuant to Section 33333.2 or 33333.4 for the purpose of
25 implementing this section.

26 **Comment.** Section 33427 is amended to substitute reference to the Government Code
27 provision that replaced former Government Code Section 11342(h).

28 **Health & Safety Code § 57004 (amended). External scientific peer review of proposed**
29 **rules**

30 SEC. _____. Section 57004 of the Health and Safety Code is amended to read:
31 57004. (a) For purposes of this section, the following terms have the following
32 meaning:
33 (1) “Rule” means either of the following:
34 (A) A regulation, as defined in ~~subdivision (g) of Section 11342~~ Section
35 11342.590 of the Government Code.
36 (B) A policy adopted by the State Water Resources Control Board pursuant to
37 the Porter-Cologne Water Quality Control Act (Division 7 (commencing with
38 Section 13000) of the Water Code) that has the effect of a regulation and that is
39 adopted in order to implement or make effective a statute.
40 (2) “Scientific basis” and “scientific portions” means those foundations of a
41 rule that are premised upon, or derived from, empirical data or other scientific

1 findings, conclusions, or assumptions establishing a regulatory level, standard, or
2 other requirement for the protection of public health or the environment.

3 (b) The agency, or a board, department, or office within the agency, shall enter
4 into an agreement with the National Academy of Sciences, the University of
5 California, the California State University, or any similar scientific institution of
6 higher learning, any combination of those entities, or with a scientist or group of
7 scientists of comparable stature and qualifications that is recommended by the
8 President of the University of California, to conduct an external scientific peer
9 review of the scientific basis for any rule proposed for adoption by any board,
10 department, or office within the agency. The scientific basis or scientific portion
11 of a rule adopted pursuant to Chapter 6.6 (commencing with Section 25249.5) of
12 Division 20 or Chapter 3.5 (commencing with Section 39650) of Division 26 shall
13 be deemed to have complied with this section if it complies with the peer review
14 processes established pursuant to these statutes.

15 (c) No person may serve as an external scientific peer reviewer for the scientific
16 portion of a rule if that person participated in the development of the scientific
17 basis or scientific portion of the rule.

18 (d) No board, department, or office within the agency shall take any action to
19 adopt the final version of a rule unless all of the following conditions are met:

20 (1) The board, department, or office submits the scientific portions of the
21 proposed rule, along with a statement of the scientific findings, conclusions, and
22 assumptions on which the scientific portions of the proposed rule are based and
23 the supporting scientific data, studies, and other appropriate materials, to the
24 external scientific peer review entity for its evaluation.

25 (2) The external scientific peer review entity, within the timeframe agreed upon
26 by the board, department, or office and the external scientific peer review entity,
27 prepares a written report that contains an evaluation of the scientific basis of the
28 proposed rule. If the external scientific peer review entity finds that the board,
29 department, or office has failed to demonstrate that the scientific portion of the
30 proposed rule is based upon sound scientific knowledge, methods, and practices,
31 the report shall state that finding, and the reasons explaining the finding, within
32 the agreed-upon timeframe. The board, department, or office may accept the
33 finding of the external scientific peer review entity, in whole, or in part, and may
34 revise the scientific portions of the proposed rule accordingly. If the board,
35 department, or office disagrees with any aspect of the finding of the external
36 scientific peer review entity, it shall explain, and include as part of the rulemaking
37 record, its basis for arriving at such a determination in the adoption of the final
38 rule, including the reasons why it has determined that the scientific portions of
39 the proposed rule are based on sound scientific knowledge, methods, and
40 practices.

41 (e) The requirements of this section do not apply to any emergency regulation
42 adopted pursuant to subdivision (b) of Section 11346.1 of the Government Code.

(f) Nothing in this section shall be interpreted to, in any way, limit the authority of a board, department, or office within the agency to adopt a rule pursuant to the requirements of the statute that authorizes or requires the adoption of the rule.

Comment. Section 57004 is amended to substitute reference to the Government Code provision that replaced former Government Code Section 11342(g).

Penal Code § 5058 (amended). Rulemaking

SEC. _____. Section 5058 of the Penal Code is amended to read:

5058. (a) The director may prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons sentenced under Section 1170 except those persons who meet the criteria set forth in Section 2962. The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, except as otherwise provided in this section. All rules and regulations shall, to the extent practical, be stated in language that is easily understood by the general public.

For any rule or regulation filed as regular rulemaking as defined in paragraph (5) of subdivision (a) of Section 1 of Title 1 of the California Code of Regulations, copies of the rule or regulation shall be posted in conspicuous places throughout each institution and shall be mailed to all persons or organizations who request them no less than 20 days prior to its effective date.

(b) The director shall maintain, publish and make available to the general public, a compendium of the rules and regulations promulgated by the director or director's designee pursuant to this section.

(c) The following are deemed not to be "regulations" as defined in ~~subdivision (b) of Section 11342~~ Section 11342.590 of the Government Code:

(1) Rules issued by the director or by the director's designee applying solely to a particular prison or other correctional facility, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public.

(2) Short-term criteria for the placement of inmates in a new prison or other correctional facility, or subunit thereof, during its first six months of operation, or in a prison or other correctional facility, or subunit thereof, planned for closing during its last six months of operation, provided that the criteria are made available to the public and that an estimate of fiscal impact is completed pursuant to Section 6055, and following, of the State Administrative Manual dated July 1986.

1 (3) Rules issued by the director or director's designee that are excluded from
2 disclosure to the public pursuant to subdivision (f) of Section 6254 of the
3 Government Code.

4 (d) The following regulations are exempt from Chapter 3.5 (commencing with
5 Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under
6 the conditions specified:

7 (1) Regulations adopted by the director or the director's designee applying to
8 any legislatively mandated or authorized pilot program or a departmentally
9 authorized pilot program, provided that an estimate of fiscal impact is completed
10 pursuant to Section 6055, and following, of the State Administrative Manual
11 dated July 1986, and that the following conditions are met:

12 (A) A pilot program affecting male inmates only shall affect no more than 10
13 percent of the total state male inmate population; a pilot program affecting female
14 inmates only shall affect no more than 10 percent of the total state female inmate
15 population; and a pilot program affecting male and female inmates shall affect no
16 more than 10 percent of the total state inmate population.

17 (B) The director certifies in writing that the regulations apply to a pilot program
18 that qualifies for exemption under this subdivision.

19 (C) The certification and regulations are filed with the Office of Administrative
20 Law and the regulations are made available to the public by publication pursuant
21 to subparagraph (F) of paragraph (2) of subdivision (b) of Section 6 of Title 1 of
22 the California Code of Regulations.

23 The regulations shall become effective immediately upon filing with the
24 Secretary of State and shall lapse by operation of law two years after the date of
25 the director's certification unless formally adopted by the director pursuant to
26 Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of
27 the Government Code.

28 (2) Action or actions, or policies implementing them, taken by the department
29 and based upon a determination of imminent danger by the director or the
30 director's designee that there is a compelling need for immediate action, and that
31 unless that action is taken, serious injury, illness, or death is likely to result. The
32 action or actions, or policies implementing them, may be taken provided that the
33 following conditions shall subsequently be met:

34 (A) A written determination of imminent danger shall be issued describing the
35 compelling need and why the specific action or actions must be taken to address
36 the compelling need.

37 (B) The written determination of imminent danger shall be mailed within 10
38 working days to every person who has filed a request for notice of regulatory
39 actions with the department and to the Chief Clerk of the Assembly and the
40 Secretary of the Senate for referral to the appropriate policy committees.

41 Any policy in effect pursuant to a determination of imminent danger shall lapse
42 by operation of law 15 calendar days after the date of the written determination
43 of imminent danger unless an emergency regulation is filed with the Office of

1 Administrative Law pursuant to subdivision (e). This section shall in no way
2 exempt the department from compliance with other provisions of law related to
3 fiscal matters of the state.

4 (e) Emergency regulations shall be adopted pursuant to Chapter 3.5
5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the
6 Government Code, except that:

7 (1) Notwithstanding subdivision (e) of Section 11346.1 of the Government
8 Code, the initial effective period for emergency regulations shall be 160 days.

9 (2) No showing of emergency is necessary in order to adopt emergency
10 regulations other than a written statement by the director or the director's
11 designee, to be filed with the Office of Administrative Law, certifying that
12 operational needs of the department require adoption of the regulations on an
13 emergency basis.

14 (3) This subdivision shall apply only to the adoption and one readoption of any
15 emergency regulation.

16 It is the intent of the Legislature, in authorizing the deviations in this
17 subdivision from the requirements and procedures of Chapter 3.5 (commencing
18 with Section ~~113340~~ 11340) of Part 1 of Division 3 of Title 2 of the Government
19 Code, to authorize the department to expedite the exercise of its power to
20 implement regulations as its unique operational circumstances require.

21 **Comment.** Section 5058 is amended to substitute reference to the Government Code
22 provision that replaced former Government Code Section 11342 and to correct an erroneous
23 reference in subdivision (e)(3).

24 **Pub. Res. Code § 25620.2 (amended). Administration of program**

25 SEC. _____. Section 25620.2 of the Public Resources Code is amended to read:

26 25620.2. (a) The commission shall administer the program in a manner that is
27 consistent with the purposes of Chapter 854 of the Statutes of 1996, and shall
28 ensure that the program meets all of the following criteria:

29 (1) Demonstrates a balance of benefits to all sectors that contribute to the
30 funding under Section 381 of the Public Utilities Code.

31 (2) Addresses key technical and scientific barriers.

32 (3) Demonstrates a balance between short-term, mid-term, and long-term
33 potential.

34 (4) Ensures that research currently, previously, or about to be undertaken by
35 research organizations is not unnecessarily duplicated.

36 (b) To ensure the efficient implementation and administration of the program,
37 the commission shall do both of the following:

38 (1) Develop procedures for the solicitation of award applications for project or
39 program funding, and to ensure efficient program management.

40 (2) Evaluate and select programs and projects, based on merit, that will be
41 funded under the program.

(c) To ensure the success of electric industry restructuring in the transition to a new market structure and to implement the program, the commission shall adopt regulations, as defined in ~~subdivision (g) of Section 11342~~ Section 11342.590 of the Government Code, in accordance with the following procedures:

(1) Prepare a preliminary text of the proposed regulation and provide a copy of the preliminary text to any person requesting a copy.

(2) Provide public notice of the proposed regulation to any person who has requested notice of the regulations prepared by the commission. The notice shall contain all of the following:

(A) A clear overview explaining the proposed regulation.

(B) Instructions on how to obtain a copy of the proposed regulations.

(C) A statement that if a public hearing is not scheduled for the purpose of reviewing a proposed regulation, any person may request, not later than 15 days prior to the close of the written comment period, a public hearing conducted in accordance with the procedures set forth in Section 11346.8 of the Government Code.

(D) A deadline for the submission of written comments.

(3) Accept written public comments for 30 calendar days after providing the notice required in paragraph (2).

(4) Certify that all written comments were read and considered by the commission.

(5) Place all written comments in a record that includes copies of any written factual support used in developing the proposed regulation, including written reports and copies of any transcripts or minutes in connection with any public hearings on the adoption of the regulation. The record shall be open to public inspection and available to the courts.

(6) Provide public notice of any substantial revision of the proposed regulation at least 15 days prior to the expiration of the deadline for public comments and comment period using the procedures provided in paragraph (2).

(7) Conduct public hearings, if a hearing is requested by an interested party, that shall be conducted in accordance with the procedures set forth in Section 11346.8 of the Government Code.

(8) Adopt any proposed regulation at a regularly scheduled and noticed meeting of the commission. The regulation shall become effective immediately unless otherwise provided by the commission.

(9) Publish any adopted regulation in a manner that makes copies of the regulation easily available to the public. Any adopted regulation shall also be made available on the Internet. The commission shall transmit a copy of an adopted regulation to the Office of Administrative Law for publication, or, if the commission determines that printing the regulation is impractical, an appropriate reference as to where a copy of the regulation may be obtained.

(10) Notwithstanding any other provision of law, this subdivision provides an interim exception from the requirements of Chapter 3.5 (commencing with

1 Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code for
2 regulations required to implement Sections 25621 and 25622 that are adopted
3 under the procedures specified in this subdivision.

4 (11) This subdivision shall become inoperative on January 1, 2000, unless a later
5 enacted statute deletes or extends that date. However, after January 1, 2000, the
6 commission shall not be required to repeat any procedural step in adopting a
7 regulation that has been completed before January 1, 2000, using the procedures
8 specified in this subdivision.

9 **Comment.** Section 25620.2 is amended to substitute reference to the Government Code
10 provision that replaced former Government Code Section 11342(g).

11 **Welf. & Inst. Code § 11462.4 (amended). Community care facility deemed small business**

12 SEC. _____. Section 11462.4 of the Welfare and Institutions Code is amended to
13 read:

14 11462.4. Notwithstanding Section ~~11342~~ 11342.600 of the Government Code,
15 group homes and foster family agencies shall be deemed small businesses and the
16 department shall project the impact on group homes and foster family agencies of
17 any new regulations which will affect those community care facilities.

18 **Comment.** Section 11462.4 is amended to substitute reference to the Government Code
19 provision that replaced former Government Code Section 11342(h).
20