

Memorandum 99-20

Administrative Rulemaking: Draft Tentative Recommendation

A revised draft tentative recommendation relating to rulemaking procedures is attached to this memorandum for the Commission's approval. The draft contains a number of minor changes that have not yet been considered by the Commission. These changes are indicated by staff notes in the draft tentative recommendation at pages 21, 32, 36, 40, 45, 56, 61, and 63. The staff does not anticipate discussing these points at the meeting unless concerns are specifically raised regarding them. The draft also contains changes that the Commission directed the staff to draft and present for further review. Those changes are discussed below.

The Commission also decided to prepare a list of statutory exemptions to the rulemaking requirements and publish that list in the California Regulatory Notice Register with a solicitation for public comments. The staff is working with a student at McGeorge Law School's Institute for Legislative Practice to develop the list.

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

RULEMAKING EXCEPTIONS

Individual Advice Exception

The Commission decided that there should be an express exception to the rulemaking requirements for agency advice issued to an individual who has requested advice. Recognizing that such an exception might create a loophole for agencies that wish to circumvent the rulemaking procedure, the Commission directed the staff to draft the exception narrowly. Specifically, individual advice issued under the exception should not be binding on the recipient and should not be entitled to any judicial deference. Another suggested limitation would prohibit an agency employee or officer from initiating a request for advice. This prevents an agency from disseminating "underground regulations" to its staff by

directing its employees to ask for advice on a particular point. The draft tentative recommendation contains the following language:

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

...

(e) An agency statement made to a specifically named person or group of specifically named persons, other than an employee or officer of the agency, to provide advice in response to a request for advice from that person or group of persons. Advice issued under this subdivision does not bind the person requesting the advice and is entitled to no judicial deference.

Comment. ...

...

Subdivision (e) establishes an exception for advice issued to a specifically named person who has requested the advice. Such advice is not binding on the recipient. However, the issuing agency may be bound by its advice under principles of equitable estoppel. See *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 496-97, 91 Cal. Rptr. 23 (1970) ("The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.").

While advice issued under this subdivision is not entitled to any deference by a court in interpreting a provision of law that is the subject of the advice, this does not preclude a court from independently reaching the same interpretive conclusion. Nor is the agency that issued the advice precluded from advancing the same interpretation on its own merits.

If an agency receives multiple requests for the same advice, it should adopt a clarifying regulation. However, the failure to do so does not bar the issuance of further individual advice on the same subject under this subdivision.

Section 11343(a)(3), which the California Supreme Court has cited as providing an exception to the rulemaking requirements for advice issued to an individual is repealed in the draft tentative recommendation. That subdivision contains a drafting defect and would be superfluous if the proposed individual advice exception were added.

Internal Management Exception

Under existing law, an agency rule that relates only to the internal management of the agency is excluded from the definition of “regulation.” This makes sense. An agency should be able to order its own internal operations without first soliciting public comment and publishing its policy in the Code of Regulations. However, some agency rules that govern the operation of the agency may also have a significant effect on the public. For example, an agency might adopt an internal rule instructing its employees to only approve a license application if the applicant meets specified substantive standards, despite the absence of those standards in a statute or duly-adopted regulation. Such a rule goes beyond the management of internal operations and should be adopted as a regulation.

The courts have addressed the problem of internal management rules that actually regulate the public by construing the internal management exception very narrowly — holding that a rule is not eligible for the exception if it has any effect on a person outside the agency or if it involves an important public interest. This excludes too much. Most internal rules will have at least some effect on persons outside the agency, and the public can be said to have an important interest in the fairness and efficiency of state agency operations generally. This means that the exception only applies to the most trivial internal management rules.

The Commission instructed the staff to redraft the internal management exception to broaden its application without opening the door to regulation of the public by means of internal management rules. The suggested approach was to limit the internal management exception to rules that do not affect the legal rights or obligations of members of the public. In addition, the internal management exception should not apply to rules that affect the legal rights or obligations of state employees and persons in the custody of the Department of Corrections. Such rules do more than simply govern the agency’s internal operations and should be adopted as regulations.

The draft tentative recommendation contains the following language:

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

...

(d) An agency rule concerning only the internal management of the agency that does not directly and significantly affect the legal rights or obligations of any person.

Comment. ...

...

Subdivision (d) continues the “internal management” exception to the definition of “regulation” in former Section 11342(g), with two changes:

(1) Under prior law, the internal management exception did not apply to a rule that had any effect on persons regulated by the agency. See, e.g., *Grier v. Kizer*, 219 Cal. App. 3d 422, 435-438 (1990) (“The internal management exception to the APA is narrow and is inapplicable where a rule is to ... affect persons subject to regulation by the agency”). Under subdivision (d) the internal management exception applies to a rule that affects the public, so long as it does not directly and significantly affect the legal rights or obligations of the public.

(2) Under prior law, the internal management exception applied to a rule that affected only the employees or officers of the agency unless the internal rule involved “a matter of serious consequence involving an important public interest.” See *Poschman v. Dumke*, 31 Cal. App. 3d 932, 943 (1973). Subdivision (d) does not differentiate between persons regulated by the agency and the officers and employees of the agency. A direct and significant effect on the legal rights of any person bars application of the exception.

Rules that Should Not Be Disclosed Publicly

Under existing law, there is no exception to the rulemaking requirements for agency audit criteria, settlement guidelines, or other rules that should properly be kept secret. This means that an agency must provide public notice of the substance of such a rule before it can be used by the agency. For example, an agency would need to formally adopt a regulation in order to establish an internal policy governing how it will perform audits. This would reveal the agency’s strategy in detecting fraud and would allow wrongdoers to escape detection by tailoring their methods to those of the state. This problem should be largely addressed by the changes to the internal management exception proposed above. However, the exception proposed here would cover some matters that would not fall within the scope of the internal management exception. The draft tentative recommendation includes the following language:

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

...

(f) A rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would do any of the following:

- (1) Enable law violators to avoid detection.
- (2) Facilitate disregard of requirements imposed by law.
- (3) Give a clearly improper advantage to persons who are in an adverse position to the state.

This language is drawn from the Model State Administrative Procedure Act. See 1981 Model State APA § 3-116(2).

The proposed exception is consistent with a California case holding that disclosure of agency records is not required under the Public Records Act where such disclosure would facilitate evasion of the law. See *Eskaton Monterey Hospital v. Meyers*, 134 Cal. App. 3d 788, 793, 184 Cal. Rptr. 840 (1982) (“It is an unassailable proposition that disclosure of law enforcement materials which when revealed assist in thwarting and circumventing the law is not in the public interest.”). The holding in *Eskaton* depended on the public interest catch-all exception to the Public Records Act. See Section 6255 (agency may withhold record where public interest served by nondisclosure outweighs public interest served by disclosure). At the February 1999 meeting, it was suggested that we might propose the addition of an express exception to the Public Record Act that would parallel the proposed rulemaking exception discussed above. Considering that the Commission intends to examine exemptions to the Public Records Act as part of a separate study, the staff feels it would be wiser to address this suggestion later, as part of that study.

Policy Manual Restating or Summarizing Prior Advice and Decisions

The Commission decided not to codify the rulemaking exception described in the *Tidewater* case for:

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 Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 571 (1996). However, the Commission also decided against adding language that would expressly

supersede *Tidewater* on this point. The Office of Administrative Law (OAL) has informed the staff that they would like the Commission to reconsider the latter decision.

NEGOTIATED RULEMAKING

The Commission tentatively decided that the proposed law should include provisions authorizing and encouraging negotiated rulemaking. Negotiated rulemaking has been a part of the federal APA since 1990. See 5 U.S.C. § 561 *et seq.* Under the federal procedure, an agency that is considering adopting a regulation may convene a negotiating committee comprised of representatives of groups that would be significantly affected by the new rule. This committee attempts to reach consensus on the text of the proposed rule. If it is successful, the agency introduces the consensus text as the text of a proposed rule in the regular notice and comment rulemaking procedure. This nonadversarial approach is intended to speed the rulemaking process, foster creativity as to the substance of the rule, and minimize resistance to the rule in the rulemaking process and in the courts.

The draft tentative recommendation includes a new article (Article 12 (commencing with Section 11368.010)) that establishes provisions authorizing, encouraging, and formalizing negotiated rulemaking. These provisions are drawn from the federal negotiated rulemaking provisions with some changes necessary to adapt them to the California rulemaking regime. The principal elements of the proposed negotiated rulemaking scheme are discussed below.

Determining Appropriateness of Negotiated Rulemaking

As a practical matter, an agency should only use negotiated rulemaking in situations where it is likely to be effective, i.e., where there are a relatively small number of identifiable interests affected by a proposed rule and those interests are likely to be able to reach some kind of accord. To ensure that agencies consider the appropriateness of negotiated rulemaking before engaging in it, the proposed law requires the agency to determine that negotiated rulemaking is feasible before beginning the process. See proposed Section 11368.030. In making this determination, the agency is required to consider the following factors:

11368.030. ...

(a) The number of identifiable interests that would be significantly affected by the regulation.

(b) The likelihood that a negotiated rulemaking committee can be convened with a balanced representation of the interests identified under subdivision (a).

(c) The likelihood that representatives of the affected interests will be willing to negotiate in good faith and will reach a consensus on the proposed regulation within a fixed period of time.

(d) The resources available to support the negotiated rulemaking process.

(e) The agency's willingness to use the consensus of the committee as the basis for the proposed regulation.

Public Notice and Comment

Once an agency has determined that use of negotiated rulemaking to develop a particular rule is feasible, the agency must provide public notice of its intent to engage in negotiated rulemaking. The notice provides general information about the nature and scope of the rule to be developed, the interests likely to be significantly affected, a list of the persons being considered by the agency to represent significantly affected interests, and the proposed schedule for the negotiated rulemaking.

The agency must accept public comment in response to the notice, for at least 30 days. This public comment can help the agency refine its understanding of the interests affected by the proposed rule, which is critical to creating a balanced and representative negotiated rulemaking committee. Public comment may also cause the agency to reevaluate its determination that negotiated rulemaking is feasible.

The notice also invites the public to apply for, or nominate others for membership on the negotiated rulemaking committee. While the proposed law does not require that all applicants and nominees be accepted, or that all committee members be drawn from the pool of applicants and nominees, the application and nomination process will provide the agency with a list of potential committee members that the agency might not have found otherwise.

Negotiated Rulemaking Committee

If, after the close of public comment, the agency decides to proceed with negotiated rulemaking, it will convene a negotiated rulemaking committee. The members of the committee are chosen to achieve balanced representation on the committee of all interests that would be significantly affected by the proposed

regulation. The proposed law establishes the following guidelines for the composition of the negotiated rulemaking committee:

(1) There must be at least one agency representative on the committee. That person will represent the agency in the negotiations with the same rights and responsibilities as any other committee member.

(2) There should be no more than 25 committee members. This limit, which is drawn directly from the federal APA, is intended to keep the committee to a workable size. This number can be exceeded if the agency finds that a larger group is required to ensure balanced and complete representation of affected interests.

(3) The committee will be chaired by a neutral facilitator. The facilitator will impartially assist the committee members in reaching agreement on the terms of the proposed rule.

Once the members of the committee have been chosen, the agency must again distribute public notice, detailing the composition of the committee and informing the public how to receive committee agendas, minutes, and other materials.

Public Character of Committee Proceedings

The proposed law expressly provides that a negotiated rulemaking committee is subject to the Bagley-Keene Open Meeting Act as an advisory committee. See proposed Section 11368.070(c). It also provides that committee records, other than the personal notes or materials of the facilitator or of any member of the committee, are public records subject to disclosure under the Public Records Act. See proposed Section 11368.070(d).

Effect of Committee Recommendation

Agency likely to accept committee recommendation. In most cases, an agency that engages in negotiated rulemaking will choose to use the consensus of the negotiated rulemaking committee as the basis for the regulation that it then proposes through the regular notice and comment procedure. Because it has a representative on the committee, the agency will presumably have given its consent to any rule agreed to by consensus of the committee. What's more, the expectation that the consensus of the committee will shape the final regulation is what motivates participants to negotiate in earnest. If an agency repeatedly rejects the recommendations of negotiated rulemaking committees, the reputation of the agency for bargaining in good faith may be undermined.

Possible conflict with Political Reform Act. Under the proposed law, an agency is encouraged but not required to use the results of the negotiated rulemaking process when adopting the proposed regulation. See proposed Section 11368.080(d):

The report [of the negotiated rulemaking committee] is advisory only. The agency is encouraged but not required to accept the recommendations of the negotiated rulemaking committee.

This provision is intended to avoid a possible conflict with the Political Reform Act of 1974 (PRA), which prohibits a public official from participating in a governmental decision in which the official has a financial interest. See Gov't Code § 87100. Given the purpose of negotiated rulemaking, it is to be expected that many participants will have a financial interest in the outcome of the negotiations. In order for their participation to be lawful, the proposed law must be drafted so that they are not considered to be public officials, or there must be an exception to Section 87100 that would cover a member of a negotiated rulemaking committee. These alternative approaches are discussed below.

Committee members as public officials. The definition of “public official” includes a “member” of a state agency. See 1 C.C.R. § 18701(a). “Member” is then defined as follows:

“Member” shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decisionmaking authority. A board or commission possess decisionmaking authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

By providing that the agency is not required to accept the recommendation of the negotiated rulemaking committee, the proposed law avoids giving committee members the power to make a final government decision or compel or prevent a government decision. Thus, under the proposed law, a negotiated rulemaking committee member would not be a public official under paragraphs (A) or (B).

See 2 FPPC Ops. 146 at 150 (1976) (because recommendations of redevelopment agency committee were not binding on agency, the committee did not make, compel or prevent government decisions and its members were not “public officials”).

Paragraph (C) presents a more difficult problem because it turns on a question of fact. Under that paragraph, a body has decisionmaking authority if, in practice, an agency routinely accepts its recommendations. As discussed above, it is probable that agencies will routinely accept the recommendations of negotiated rulemaking committees. In fact, they are encouraged to do so. However, because each negotiated rulemaking committee is separately convened to consider a single proposed regulation, there can be no history of agency rubber-stamping of recommendations *with respect to that committee*. This suggests that an individual negotiated rulemaking committee would not have decisionmaking authority — a suggestion that is supported by the following passage from an FPPC advice letter (see FPPC advice to Karen Tustin, No. A-87-173):

The citizens advisory committee appears to be an ad hoc group appointed for a limited period of time, for a single recommendation. Consequently, there will be no “track record” by which to judge whether or not its recommendations are followed by the decision-making bodies. ... Because of its very limited term of existence and its limited purpose, we conclude that the citizens advisory committee is not a government agency.

The staff spoke with an advice attorney at the Fair Political Practices Commission (FPPC) and was told that there is no FPPC opinion or advice letter addressing whether an agency practice of routinely accepting the recommendations of successive ad hoc committees would mean that a member of one of those committees has decisionmaking authority and is a public official.

Existing exception. Section 87101 provides an exception to Section 87100’s prohibition against a person with a financial interest in a decision participating in that decision:

87101. Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official’s vote is needed to

break a tie does not make his participation legally required for purposes of this section.

The meaning of “legally required” is elaborated in an FPPC regulation (2 C.C.R. § 18708):

18708. (a) A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

...

(c) This regulation shall be construed narrowly...

One can argue that the purpose of negotiated rulemaking is such that it *requires* the participation of persons with a financial interest and there is no alternative source of decision consistent with the purposes and terms of the proposed law. This may be correct. However, the staff is unaware of any case in which the legally required participation exception has been applied in this way. In the past it has been applied to cases where disqualification of decision-makers would make it impossible to achieve a quorum or the number of votes required to act.

New exception. Another alternative would be to add a new statutory exception to the PRA for negotiated rulemaking committee members. However, the PRA was enacted by initiative and can only be amended to further its purposes — on a two-thirds vote of the legislature. See Section 81012(a). It is questionable whether an amendment establishing an exemption for negotiated rulemaking would further the purposes of the PRA.

Conclusion. It seems probable that the ad hoc nature of a negotiated rulemaking committee, combined with a clear statutory direction that the committee’s recommendation is advisory only, would mean that the committee members are not public officials. Thus, the approach taken in the draft tentative recommendation should not conflict with the PRA.

If the Commission decides that an agency should be required to use the consensus of a negotiated rulemaking committee as the basis for a proposed rule, the committee members probably would be considered public officials. In order for their participation to be lawful, we would either need to create a new exception (which may be legally and politically infeasible) or rely on the existing Section 87101 exception (which is probably, but not definitely, applicable). In

order to rely on Section 87101, a committee member would need to do each of the following (see 2 C.C.R. § 18708):

- (b) ...
 - (1) Disclose as a matter of official public record the existence of the financial interest;
 - (2) Describe with particularity the nature of the financial interest before he or she makes or participates in making the decision;
 - (3) State the reason there is no alternative source of decision-making authority;
- ...

These disclosure requirements should be pointed out in an appropriate Comment if the Commission decides to rely on Section 87101 to justify the participation of interested committee members.

Review of Public Comments

In addition to developing the initial text of a proposed regulation, the proposed law also authorizes a negotiated rulemaking committee to provide an agency with its reaction to public comments that the agency receives in the course of adopting the proposed regulation. See proposed Section 11368.080(e). This allows the committee to explain the basis for its recommendation in response to criticism of the recommended rule.

Administrative Support

The proposed law authorizes an agency to provide administrative and technical support to a negotiated rulemaking committee. It also provides that committee members serve without salary or compensation for committee-related expenses. However, there is an exception that allows an agency to provide a committee member with a \$100 per diem and to compensate reasonable and necessary expenses where that person could not participate without the agency's financial support and the participation of that person is "necessary to ensure adequate representation of the member's interest." See proposed Section 11368.090.

Judicial Review and Review by the Office of Administrative Law

The benefits of negotiated rulemaking depend on all interested groups being represented in the negotiations. Groups that are excluded from negotiations will be very suspicious of a negotiated regulation and perhaps more likely to resist its

adoption and enforcement than if the negotiated rulemaking process had not been used at all. Thus, an agency has a built-in incentive to abide by the requirements of the proposed law in convening a negotiated rulemaking committee. Because of the self-enforcing nature of the process, it isn't clear that any external enforcement mechanism is required. Accordingly, the proposed law provides that an agency action relating to the *establishment* of a negotiated rulemaking committee is not subject to judicial review or to review by OAL. See proposed Section 11368.100. This is similar to the federal procedure, which provides that "Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter shall not be subject to judicial review." See 5 U.S.C. § 570.

On the other hand, some form of review may be useful to ensure that agencies do not use the negotiated rulemaking procedure to negotiate with the major affected interests, while excluding smaller interests. Of course, there is nothing preventing an agency from doing the same thing informally under existing law.

Respectfully submitted,

Brian Hebert
Staff Counsel

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Administrative Rulemaking

April 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 July 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
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

The California Law Revision Commission recommends a number of changes to the APA rulemaking provisions to improve the efficiency of the rulemaking process while preserving the important benefits it provides. The proposed law includes:

- (1) A provision authorizing, and in some cases requiring, the use of electronic communications in the rulemaking process.
- (2) Provisions authorizing and encouraging negotiation with interested parties in developing a proposed regulation.
- (3) Refinements to the exceptions to the rulemaking requirements.
- (4) Minor improvements to the rulemaking procedures.

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

CONTENTS

ADMINISTRATIVE RULEMAKING	2
ELECTRONIC COMMUNICATIONS	2
NEGOTIATED RULEMAKING	2
EXCEPTIONS TO RULEMAKING REQUIREMENTS	3
Individual Advice	3
Internal Management Rules	4
Agency Rules That Should Not Be Disclosed Publicly	5
Only Tenable Interpretation	5
Financial Code Exceptions	6
Building Standards	6
RULEMAKING PROCEDURE	6
Effective Period of Notice of Proposed Action	6
Preliminary Agency Determinations	6
Initial Statement of Reasons	7
Regulation that Imposes Report Requirement on Business	7
Plain English Requirement	7
Public Hearing	8
Response to Comments	8
Rulemaking File	8
Application of Requirements to Repeals	9
Emergency Rulemaking	10
ADMINISTRATIVE REVIEW OF REGULATIONS	10
Necessity Standard	10
Review Periods	11
JUDICIAL REVIEW OF REGULATIONS	12
MISCELLANEOUS TECHNICAL IMPROVEMENTS	12
PROPOSED LEGISLATION	16
CONFORMING REVISIONS	73

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 before the rules become effective, reduce needless regulation, and improve the quality of regulations that are adopted.

However, the rulemaking procedures are complex and impose substantial 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 changes to the APA rulemaking provisions to improve the efficiency of the regulatory process without compromising the important benefits it provides.²

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 public rulemaking notices on their websites.³ Website publication supplements other required forms of publication.

NEGOTIATED RULEMAKING

Under the federal APA, an agency that is considering adopting a regulation may convene a negotiating committee comprised of representatives of groups that would be significantly affected by the new rule.⁴ This committee attempts to reach consensus on the terms of the proposed rule. If it is successful, the agency may use the committee's recommendation as the basis for a proposed rule to be adopted through the regular notice and comment procedure. This nonadversarial approach is intended to speed the rulemaking process, improve the quality of the proposed rule, and minimize resistance to the rule.

1. Gov't Code §§ 11340-11359.

2. As an aid to understanding the proposed changes, the entire rulemaking chapter is set out in the proposed legislation section of this report. Sections that would not be added, amended, or repealed under the proposed law are indicated as "unchanged."

3. See proposed Gov't Code § 11340.8.

4. See 5 U.S.C. § 561 *et seq.* (Negotiated Rulemaking).

The proposed law contains provisions authorizing and encouraging negotiated rulemaking in California.⁵ These provisions also impose procedural requirements to ensure that the process is open to the public.⁶

EXCEPTIONS TO RULEMAKING REQUIREMENTS

The APA rulemaking requirements are subject to a number of exceptions.⁷ It is important that these exceptions be carefully crafted to strike the proper balance between agency efficiency and public involvement. To that end, the proposed law makes a number of changes relating to exceptions.

Individual Advice

In *Tidewater Marine Western, Inc. v. Bradshaw* the California Supreme Court noted an exception to the rulemaking procedures for agency advice issued to an individual.⁸ In general, this makes sense. If a member of the public asks an agency for advice on how the agency interprets or applies the law, the agency should be able to provide advice to that person, without the substantial delay that would be involved in adopting a regulation.⁹ However, the exception described in *Tidewater* is too broad. It would allow an agency to circumvent the APA rulemaking requirements by declining to adopt regulations, relying instead on the issuance of individual advice. Such advice would be entitled to judicial deference as a valid expression of the agency's official position.¹⁰

The proposed law would address these problems by adding an express exception to the rulemaking requirements for agency advice issued to a person

5. See proposed Article 12 (commencing with Section 11368.010) (Negotiated Rulemaking)

6. See proposed Sections 11368.040 (notice of intent to engage in negotiated rulemaking), 111368.050(e) (notice of formation of negotiated rulemaking committee), 11368.070(c) (negotiated rulemaking committee subject to Bagley-Keene Open Meeting Act), 11368.070(d) (records of negotiated rulemaking committee subject to public records act).

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

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

9. There are, of course, other means by which an agency can lawfully convey advice to the public. An adjudicative decision that conveys useful information can be designated as a precedent decision and made available to the public. See Gov't Code § 11425.60. An interested member of the public can request a declaratory decision from the agency to explain how the law would apply to particular facts. See Gov't Code § 11465.20. Assuming enactment of the advisory interpretation procedure recommended by the Commission, an agency could use a streamlined notice and comment procedure to publish a nonbinding interpretation of a law that it enforces or administers. See *Administrative Rulemaking: Advisory Interpretations*, 28 Cal. L. Revision Comm'n Reports 657 (1998). However, these alternatives are relatively formal and time-consuming and would not allow an agency to provide prompt informal advice to a member of the public requesting such advice.

10. See *Yamaha Corp. of Am. v. State Bd. Of Equalization*, 19 Cal. 4th 1, 78 Cal. Rptr. 2d 1 (1998) (discussing standard of review of agency interpretations of law).

who has requested advice.¹¹ In order to avoid abuse of the exception, the effect and availability of such advice would be carefully limited, as follows:

- Advice can only be given to a person who has requested the advice. Unsolicited or generally distributed advice would not fall within the exception.
- A request for advice may not be made by an employee or officer of the agency issuing the advice.¹²
- Advice issued under the exception does not bind the person requesting the advice and is entitled to no deference from a reviewing court.

Internal Management Rules

An agency rule that relates only to the internal management of the agency is excluded from the definition of “regulation.”¹³ This is appropriate. An agency should be able to order its own internal operations without first soliciting public comment and publishing its policy in the California Code of Regulations. However, the internal management exception has been construed narrowly by the courts — a rule is not eligible for the exception if it has any effect on a person outside the agency¹⁴ or involves “a matter of serious consequence involving an important public interest.”¹⁵ This interpretation is problematic. Most agency policies will have at least some effect on persons outside the agency, and the public can be said to have an important interest in the fairness and efficiency of state agency operations generally.¹⁶ This means that the exception will only apply to the most trivial agency policies.

The proposed law changes the scope of the internal management exception slightly. Instead of limiting the exception to internal rules that have no effect on the public, it limits the exception to rules that do not directly and significantly

11. See proposed Gov’t Code § 11340.9(e) and the proposed amendment to Section 11343 (deleting subdivision (a)(3) as superfluous).

12. This is to avoid the promulgation of internal policies by means of “advice” to subordinates.

13. See Gov’t Code § 11342(g).

14. See, e.g., *Grier v. Kizer*, 219 Cal. App. 3d 422, 435-438 (1990) (The internal management exception to the APA is narrow and is inapplicable where a rule is to ... affect persons subject to regulation by the agency”).

15. See *Poschman v. Dumke*, 31 Cal. App. 3d 932, 943 (1973) (public university tenure policy is a matter of serious consequence involving an important public interest and is therefore not a matter of internal management).

16. Such a broad reading of what constitutes an “important public interest” may be warranted. The Office of Administrative Law recently determined that an agency policy requiring employees to verify an illness in order to use sick leave in some circumstances was not a matter of internal management because it implicated two important public interests: “(1) having fair and appropriate standards governing the suspension, demotion, and dismissal of public employees and (2) protecting the privacy of individuals’ medical history and records.” See 1998 OAL Determination No. 36 at 15. The important public interests identified in that determination are nearly as broad as the public’s general interest in the fair and efficient operation of government.

affect the legal rights or obligations of any person.¹⁷ This means that an internal rule with only an indirect or insignificant effect on a person's rights or obligations would not be required to be adopted as a regulation. This also means that a rule directly and significantly affecting the rights or obligations of a state employee or a person within the custody of the agency would not fall within the internal management exception and would need to be adopted as a regulation.

Agency Rules That Should Not Be Disclosed Publicly

Under existing law, there is no exception to the rulemaking requirements for agency audit criteria, settlement guidelines, or other rules that should not be disclosed to the public. This means that an agency must provide public notice of the substance of such a rule before it can be used by the agency. This problem is addressed by the proposed law, which adds an exception for the following:¹⁸

A rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would do any of the following:

- (1) Enable law violators to avoid detection.
- (2) Facilitate disregard of requirements imposed by law.
- (3) Give a clearly improper advantage to persons who are in an adverse position to the state.

This exception is consistent with case law holding that disclosure of agency audit materials, where that disclosure would facilitate evasion of the law, is contrary to the public interest and not required under the Public Records Act.¹⁹

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.²⁰ The proposed law adds an exception to the rulemaking requirements for an agency statement that is the only legally tenable interpretation of a law.²¹

17. See proposed Gov't Code § 11340.9(d). This language is drawn from 1981 Model State APA § 3-116(1).

18. See proposed Gov't Code § 11340.9(f). This exception is drawn from 1981 Model State APA § 3-116(2).

19. "It is an unassailable proposition that disclosure of law enforcement materials which when revealed assist in thwarting and circumventing the law is not in the public interest." *Eskaton Monterey Hospital v. Meyers*, 134 Cal. App. 3d 788, 793, 184 Cal. Rptr. 840 (1982).

20. See, e.g., 1993 OAL Determination No. 1 at 36 ("We agree that the challenged rule would not constitute a 'regulation' if it were ... the only tenable interpretation of the law.")

21. See proposed Gov't Code § 11340.9(g).

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.

Effective Period of Notice of Proposed Action

Existing law provides that a notice of proposed action is effective for one year.²⁵ If a proposed rulemaking action has not been completed in that time, the adopting agency must issue a new notice. In some cases a regulatory proposal may take more than a year to complete (e.g., where voluminous comments have been received and must be summarized and responded to). The proposed law would allow the Director of the Office of Administrative Law to extend the effective period of a notice of proposed action for good cause.²⁶

Preliminary Agency Determinations

Existing law requires an agency's notice of proposed rulemaking, or the accompanying initial statement of reasons, to include preliminary agency determinations on a number of matters that can only be determined after public comment and hearing has occurred.²⁷ 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.²⁸

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).

24. Gov't Code §§ 11346-11347.3.

25. Gov't Code § 11346.4(b).

26. See proposed amendment to Gov't Code § 11346.4(b).

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

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

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.²⁹ The statutory specification of the contents of the initial statement of reasons includes duplicative requirements that should be unified.³⁰

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.³¹ 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.³² 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 a regulation that will affect small business³³ must be drafted in plain English or a plain English summary of the regulation must be provided,³⁴ and the informative digest prepared by the agency concerning the regulation must include a plain English policy statement overview explaining its objectives.³⁵ 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.³⁶

However, the statutory definition of “plain English” is difficult to apply.³⁷ A more effective provision would define plain English as language that is easily understood by those persons directly affected by it.³⁸ Existing law provides an

29. Gov’t Code § 11346.2.

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

31. Gov’t Code § 11346.3(c).

32. See proposed Gov’t Code § 11346.5(a)(11).

33. The definition of “small business” depends on income figures that have not been adjusted since 1979. See proposed Section 11342.620. The Commission would like to receive input on whether these amounts should be increased and if so, by how much.

34. Gov’t Code § 11346.2(a)(1).

35. Gov’t Code § 11345.5(a)(3)(B).

36. See proposed amendments to Gov’t Code §§ 11346.2(b)(4)(B), 11346.9(a)(5).

37. Gov’t Code § 11342(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.”).

38. This is consistent with the APA definition of “clarity.” See Gov’t Code § 11349(c).

enforcement mechanism for such a requirement by means of review by the Office of Administrative Law.³⁹

Public Hearing

Existing law provides for a public hearing on a proposed regulation.⁴⁰ An agency may elect not to hold a public hearing and instead receive written comments, but on timely demand by an interested person the agency must schedule a public hearing.⁴¹ If a hearing is held, the agency must permit public comment that is “either oral or in writing, or both”.⁴² A literal reading of this language is susceptible to the interpretation that the agency may preclude oral comment, and in fact this has occurred.⁴³

The proposed law revises the statute to make clear that oral testimony must be allowed at a public hearing, subject to reasonable agency limitations.⁴⁴ 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.⁴⁵ A response is only required, however, if the comment is directed at the proposed action or the procedures followed by the agency.⁴⁶ 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.⁴⁷

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.⁴⁸ 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

39. Gov’t Code §§ 11349-11349.6.

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

41. Gov’t Code § 11346.8(a).

42. *Id.*

43. 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).

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

45. Gov’t Code § 11346.9(a)(3)

46. *Id.*

47. See proposed amendment to Gov’t Code § 11346.9(a)(3).

48. See Gov’t Code § 11347.3.

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.⁴⁹

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,⁵⁰ subject to the agency making “adequate provision” for further public comment.⁵¹ The proposed law supplements these provisions with specific procedural rules,⁵² based on existing practice.⁵³ 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.⁵⁴ 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.⁵⁵ The proposed law resolves this inconsistency by making clear that the addition of these materials is an exception to the limitation on adding material to the rulemaking file after public comment.⁵⁶

Application of Requirements to Repeals

Some APA provisions appear to treat the repeal of regulations differently than the adoption or amendment of regulations.⁵⁷ Such a distinction does not make sense. While it is true that a repeal cannot be used to create new legal requirements, a repeal may nonetheless 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. The protections of the rulemaking procedures should apply to these changes just as they would to the addition or amendment of a regulation. The proposed law revises a number of rulemaking

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

50. Gov’t Code § 11346.9(a)(1).

51. Gov’t Code § 11346.8(d).

52. See proposed Gov’t Code § 11347.1.

53. 1 Cal. Code Reg. § 45.

54. See proposed Gov’t Code § 11349.2.

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

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

57. 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.

requirements so that they apply to a proposed repeal as well as a proposed adoption or amendment.⁵⁸

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.⁵⁹ 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 less complex than they are today.⁶⁰ Under existing law, 120 days may be insufficient time to adopt a permanent regulation. The proposed law increases the effective period of an emergency regulation to 180 days.⁶¹

The proposed law also makes minor technical changes to the emergency regulation provisions.⁶²

ADMINISTRATIVE REVIEW OF REGULATIONS

Proposed regulations must be reviewed and approved by the Office of Administrative Law before they become effective.⁶³ This review ensures that the regulation satisfies specified standards⁶⁴ 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 necessary “to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific....”⁶⁵

58. 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).

59. Gov’t Code § 11346.1(b).

60. 1957 Cal. Stat. ch. 1919, § 1.

61. See proposed amendment to Gov’t Code § 11346.1(e).

62. See proposed amendments to Gov’t Code §§ 11346.1(e) (underinclusive references corrected), (h) (unclear provision redrafted without substantive change), 11349.6(a)(1) (underinclusive reference corrected).

63. Gov’t Code §§ 11349-11349.6.

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

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

This change is consistent with other provisions of the APA that relate to the necessity of a regulation.⁶⁶

Scope of standard's application. Under existing law, an agency must demonstrate the necessity of “each provision” of a proposed regulation.⁶⁷ The proposed law refines the scope of necessity review, providing that an agency proposing a regulation must demonstrate the necessity of “major provisions of the regulation and any specific provisions of the regulation that have been challenged by public comment.”⁶⁸ 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.⁶⁹ This rule recognizes that some policy decisions depend on the expert judgment of the agency and cannot be justified with factual evidence. For example, where an agency anticipates 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 proposed regulation is 30 working days. In some cases, this 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.⁷⁰

The period for review of a proposal to make an emergency regulation permanent is 30 days.⁷¹ This is inconsistent with the 30 working day period for

66. 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).

67. See 1 C.C.R. § 10(b).

68. 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.*

69. See proposed amendment to Gov't Code § 11349(a)(1).

70. See proposed amendment to Gov't Code §§ 11349.3, 11349.6.

71. Gov't Code § 11349.6(d).

review of a regulation generally.⁷² 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.⁷³

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 Government Code Section 11347.3.⁷⁴ This is too restrictive. It precludes review of essential materials, such as the statement required when adopting an emergency regulation.⁷⁵ It can also preclude review of evidence showing 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. The proposed law addresses this problem by expanding the scope of the record of review to include materials necessary to that review.⁷⁶

MISCELLANEOUS TECHNICAL IMPROVEMENTS

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

(1) Some provisions that are awkwardly drafted or contain technical errors are revised.⁷⁷

(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.⁷⁸

72. Gov’t Code § 11349.3.

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

74. Gov’t Code § 11350(b)(2).

75. 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).

76. See proposed Gov’t Code § 11350(d).

77. See proposed amendment to Gov’t Code §§ 11343.4(a) (erroneous reference), 11344.1(a)(4) (ambiguity), 11347.3(b)(9) (awkward), 11349(b)-(f) (awkward), 11350(a) (ambiguity).

78. See proposed Gov’t Code § 11342.520.

(3) The name of the “California Regulatory Code Supplement” is changed to the “California Code of Regulations Supplement.”⁷⁹ This is consistent with the name of the “California Code of Regulations,” which it supplements.

(4) The very long definition section⁸⁰ has been replaced with an article, divided into individual sections setting out the definitions in alphabetical order.⁸¹

(5) Elements of definitions that are actually substantive provisions have been recast as such.⁸²

(6) Minor changes have been made to codify existing salutary practices.⁸³

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

80. Gov’t Code § 11342.

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

82. 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).

83. 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.)

ADMINISTRATIVE RULEMAKING

CONTENTS

CHAPTER 3.5. ADMINISTRATIVE REGULATIONS AND RULEMAKING	17
Article 1. General	17
Gov't Code § 11340 (unchanged). Legislative finding and declaration	17
Gov't Code § 11340.1 (unchanged). Legislative intent	17
Gov't Code § 11340.2 (unchanged). Office of Administrative Law	18
Gov't Code § 11340.3 (unchanged). Personnel	18
Gov't Code § 11340.4 (unchanged). Authority of Office of Administrative Law	18
Gov't Code § 11340.5 (amended). Use of regulations	18
Gov't Code § 11340.6 (unchanged). Petition for adoption of regulation	19
Gov't Code § 11340.7 (unchanged). Response to petition	20
Gov't Code § 11340.8 (added). Electronic communication	20
Gov't Code § 11340.9 (added). Exceptions	21
Gov't Code § 11342 (repealed). Definitions	23
Gov't Code § 11342.1 (unchanged). Scope of authority	25
Gov't Code § 11342.2 (unchanged). Validity of regulations	25
Gov't Code § 11342.4 (unchanged). Regulations to carry out provisions of chapter	25
Article 2. Definitions	25
Gov't Code § 11342.510 (added). Application of definitions	25
Gov't Code § 11342.520 (added). Agency	26
Gov't Code § 11342.530 (added). Building standard	26
Gov't Code § 11342.540 (added). Office	26
Gov't Code § 11342.550 (added). Order of repeal	26
Gov't Code § 11342.560 (added). Performance standard	26
Gov't Code § 11342.570 (added). Plain English	26
Gov't Code § 11342.580 (added). Prescriptive standard	26
Gov't Code § 11342.590 (added). Regulation	26
Gov't Code § 11342.600 (added). Small business	27
Article 3. Filing and Publication	28
Gov't Code § 11343 (amended). Transmittal of certified copies of regulations	28
Gov't Code § 11343.1 (unchanged). Style	29
Gov't Code § 11343.2 (unchanged). Filing procedures	29
Gov't Code § 11343.4 (amended). Effective date of regulation	29
Gov't Code § 11343.5 (unchanged). Filing of regulatory code or supplement	30
Gov't Code § 11343.6 (unchanged). Effect of filing certified copy	30
Gov't Code § 11343.8 (unchanged). Filing and publication other than required by article	30
Article 4. The California Code of Regulations, the California Code of Regulations Supplement, and the California Regulatory Notice Register	31
Gov't Code § 11344 (amended). Code of Regulations	31
Gov't Code § 11344.1 (amended). California Regulatory Notice Register	31
Gov't Code § 11344.2 (amended). Supplying sets to county clerks or delegated persons	32
Gov't Code § 11344.3 (unchanged). Publication in Notice Register	32
Gov't Code § 11344.4 (unchanged). Sale of publications	33
Gov't Code § 11344.6 (unchanged). Presumption from publication in Code or Supplement	33
Gov't Code § 11344.7 (unchanged). Purchase of publications	33
Gov't Code § 11344.9 (unchanged). Obsolete references	33
Article 5. Public Participation: Procedure for Adoption of Regulations	34
Gov't Code § 11346 (unchanged). Purpose and application	34
Gov't Code § 11346.1 (amended). Emergency regulations	34

Gov't Code § 11346.2 (amended). Notification of Office of Administrative Law	36
Gov't Code § 11346.3 (amended). Potential economic effect	38
Gov't Code § 11346.4 (amended). Notice of proposed action	39
Gov't Code § 11346.5 (amended). Notice contents	40
Gov't Code § 11346.54 (amended). Assessment of effect of regulations upon jobs and business	43
Gov't Code § 11346.8 (amended). Public hearing	44
Gov't Code § 11346.9 (amended). Final statement of reasons and updated informative digest	45
Gov't Code § 11347.1 (added). Documents added to rulemaking file	46
Gov't Code § 11347.3 (amended). File of rulemaking proceeding	47
Article 6. Review of Proposed Regulations	49
Gov't Code § 11349 (amended). Standards	49
Gov't Code § 11349.1 (amended). Review of regulations	50
Gov't Code § 11349.2 (added). Adding to rulemaking file during review	52
Gov't Code § 11349.3 (amended). Approval or disapproval	52
Gov't Code § 11349.4 (unchanged). Returned regulations	53
Gov't Code § 11349.5 (unchanged). Review by Governor of decision by Office of Administrative Law	54
Gov't Code § 11349.6 (amended). Emergency regulations	55
Article 7. Review of Existing Regulations	56
Gov't Code § 11349.7 (unchanged). Review of regulations on request of Legislature	56
Gov't Code § 11349.8 (unchanged). Repeal for lack of statutory authority	57
Gov't Code § 11349.9 (unchanged). Review of repeal pursuant to Section 11349.8	59
Article 8. Judicial Review	59
Gov't Code § 11350 (amended). Judicial review of validity of regulation	59
Gov't Code § 11350.3 (amended). Review of regulation disapproved by Office of Administrative Law	61
Article 9. Special Procedures	61
Gov't Code § 11351 (unchanged). Public Utilities Commission and Worker's Compensation Appeals Board	61
Gov't Code § 11352 (unchanged). Water quality certification and waste discharge requirements	61
Gov't Code § 11353 (amended). State water quality control policies, plans, and guidelines	62
Gov't Code § 11354 (unchanged). Application of Sections 11352 and 11353	63
Gov't Code § 11354.1 (unchanged). San Francisco Bay Conservation and Development Commission	64
Gov't Code § 11356 (amended). Building standards or regulations	65
Gov't Code § 11357 (unchanged). Department of Finance instructions	65
Gov't Code § 11359 (unchanged). Fire and panic safety regulations	66
Article 12. Negotiated Rulemaking	67
Gov't Code § 11368.010 (added). Legislative findings and purpose	67
Gov't Code § 11368.020 (added). Definitions	67
Gov't Code § 11368.030 (added). Negotiated rulemaking authorized	68
Gov't Code § 11368.040 (added). Notice and comment	68
Gov't Code § 11368.050 (added). Committee membership	69
Gov't Code § 11368.060 (added). Facilitator	70
Gov't Code § 11368.070 (added). Committee procedures	70
Gov't Code § 11368.080 (added). Report	71
Gov't Code § 11368.090 (added). Administrative and financial support	71
Gov't Code § 11368.100 (added). Judicial review	72
CONFORMING REVISIONS	73
Fin. Code § 3373 (amended). Changes to Regulation O	73
Gov't Code § 27491.41 (amended). Sudden infant death syndrome	73

Health & Safety Code § 33427 (amended). Small business incubator.	75
Health & Safety Code § 57004 (amended). External scientific peer review of proposed rules	75
Penal Code § 5058 (amended). Rulemaking	77
Pub. Res. Code § 25620.2 (amended). Administration of program	79
Welf. & Inst. Code § 11462.4 (amended). Community care facility deemed small business	81

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 the definition of
35 "regulation" in former Section 11342(g), 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 an Internet website or other similar forum for the electronic publication or distribution of written material shall publish any public notice required by this chapter on that website or other forum. For the purposes of this subdivision, “public notice” means a notice that is required to be given by an agency to persons who have requested notice of the agency’s regulatory actions. 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 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 an agency that maintains a website or similar electronic communication forum. Provisions requiring a public notice subject to this subdivision include Sections 11346.4 (notice of proposed action), 11346.8(a) (notice of hearing), 11346.8(b) (notice of continuance or postponement of hearing), 11347.1 (notice of addition to rulemaking file), 11368.040 (notice of intent to conduct negotiated rulemaking), 11368.050(e) (notice of formation of negotiated rulemaking committee).

 **Staff Note.** The addition of subdivision (c) was recommended in the First Supplement to Memorandum 98-71. The scope of the publication requirement has been narrowed since then, to avoid requiring Internet publication of “notices” exchanged between a rulemaking agency, OAL, and the Governor’s office.

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 concerning only the internal management of the agency that does not directly and significantly affect the legal rights or obligations of any person.

(e) An agency statement made to a specifically named person or group of specifically named persons, other than an employee or officer of the agency, to provide advice in response to a request for advice from that person or group of persons. Advice issued under this subdivision does not bind the person requesting the advice and is entitled to no judicial deference.

(f) An agency rule that establishes criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections, settling commercial disputes, negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if disclosure of the criteria or guidelines would do any of the following:

(1) Enable law violators to avoid detection.

(2) Facilitate disregard of requirements imposed by law.

(3) Give a clearly improper advantage to persons who are in an adverse position to the state.

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

(h) A regulation that establishes or fixes rates, prices, or tariffs.

(i) A regulation that 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 regulation determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.

Comment. Section 11340.9 is new. It collects various exemptions from the requirements of this chapter.

Subdivision (a) continues former Section 11342(a) without substantive change.

Subdivisions (b)-(c) continue provisions of former Section 11342(g) without substantive change.

Subdivision (d) continues the “internal management” exception to the definition of “regulation” in former Section 11342(g), with two changes:

(1) Under prior law, the internal management exception did not apply to a rule that had any effect on persons regulated by the agency. See, e.g., *Grier v. Kizer*, 219 Cal. App. 3d 422, 435-438 (1990) (“The internal management exception to the APA is narrow and is inapplicable where a rule is to ... affect persons subject to regulation by the agency”). Under subdivision (d) the internal management exception applies to a rule that affects the public, so long as it does not directly and significantly affect the legal rights or obligations of the public.

(2) Under prior law, the internal management exception applied to a rule that affected only the employees or officers of the agency unless the internal rule involved “a matter of serious consequence involving an important public interest.” See *Poschman v. Dumke*, 31 Cal. App. 3d 932, 943 (1973). Subdivision (d) does not differentiate between persons regulated by the agency and the officers and employees of the agency. A direct and significant effect on the legal rights of any person bars application of the exception.

Subdivision (e) establishes an exception for advice issued to a specifically named person who has requested the advice. Such advice is not binding on the recipient. However, the issuing agency may be bound by its advice under principles of equitable estoppel. See *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 496-97, 91 Cal. Rptr. 23 (1970) (“The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.”).

While advice issued under this subdivision is not entitled to any deference by a court in interpreting a provision of law that is the subject of the advice, this does not preclude a court

1 from independently reaching the same interpretive conclusion. Nor is the agency that issued
2 the advice precluded from advancing the same interpretation on its own merits.

3 If an agency receives multiple requests for the same advice, it should adopt a clarifying
4 regulation. However, the failure to do so does not bar the issuance of further individual advice
5 on the same subject under this subdivision.

6 Subdivision (f) establishes a new exception for agency rules that should not be disclosed to
7 the public. It is drawn from 1981 Model State APA § 3-116(2).

8 Subdivision (g) establishes a new exception for an agency statement that is the only legally
9 tenable interpretation of a provision of law. This codifies the practice of the Office of
10 Administrative Law. See, e.g., 1993 OAL Determination No. 1 at 36 (“We agree that the
11 challenged rule would not constitute a ‘regulation’ if it were ... the only tenable
12 interpretation of the law.”)

13 Subdivision (h) continues former Section 11343(a)(1) without substantive change.

14 Subdivision (i) continues former Section 11343(a)(2) without substantive change.

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

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

18 **Article 2. Rules and Regulations**

19 **Gov’t Code § 11342 (repealed). Definitions**

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

21 ~~11342. In this chapter, unless otherwise specifically indicated, the following~~
22 ~~definitions apply:~~

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

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

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

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

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

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

35 ~~(g) “Regulation” means every rule, regulation, order, or standard of general~~
36 ~~application or the amendment, supplement, or revision of any rule, regulation,~~
37 ~~order, or standard adopted by any state agency to implement, interpret, or make~~
38 ~~specific the law enforced or administered by it, or to govern its procedure, except~~
39 ~~one that relates only to the internal management of the state agency.~~
40 ~~“Regulation” does not mean or include legal rulings of counsel issued by the~~
41 ~~Franchise Tax Board or State Board of Equalization, or any form prescribed by a~~
42 ~~state agency or any instructions relating to the use of the form, but this provision~~

1 is not a limitation upon any requirement that a regulation be adopted pursuant to
2 this part when one is needed to implement the law under which the form is issued.

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

8 (A) Independently owned and operated.

9 (B) Not dominant in its field of operation.

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

12 (A) A financial institution including a bank, a trust, a savings and loan
13 association, a thrift institution, a consumer finance company, a commercial finance
14 company, an industrial finance company, a credit union, a mortgage and
15 investment banker, a securities broker-dealer, or an investment adviser.

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

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

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

19 (E) An entity organized as a nonprofit institution.

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

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

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

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

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

28 (ii) General construction, nine million five hundred thousand dollars
29 (\$9,500,000).

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

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

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

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

34 (vii) Transportation and warehousing, one million five hundred thousand dollars
35 (\$1,500,000).

36 (J) A manufacturing enterprise exceeding 250 employees.

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

39 **Comment.** Section 11342 is repealed.

40 Subdivision (a) is continued without substantive change in Section 11340.9(a)
41 (requirements of chapter do not apply to agency in the judicial or legislative branch of state
42 government). See also Sections 11000 (“state agency” defined), 11342.520 (“agency”
43 defined).

44 Subdivision (b) is continued without change in Section 11342.540.

Subdivision (c) is continued without change in Section 11342.550.

Subdivision (d) is continued without change in Section 11342.560.

Subdivision (e) is continued in Section 11342.570. The definition of “plain English” has been changed so 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).

Subdivision (f) is continued without change in Section 11342.580.

The substance of subdivision (g) is continued in Sections 11340.9(b) (legal ruling of counsel of the Franchise Tax Board or State Board of Equalization exempt from requirements of chapter), 11340.9(c) (state form and instructions for use of form exempt from requirements of chapter), 11340.9(d) (internal management rules exempt from requirements of chapter), 11342.590 (“regulation” defined).

Subdivision (h) is continued without substantive change in Section 11342.600.

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

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

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

Gov’t Code §§ 11342.510-11342.600 (added). Definitions

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

Article 2. Definitions

Gov’t Code § 11342.510 (added). Application of definitions

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

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

Gov't Code § 11342.520 (added). Agency

11342.520. "Agency" means state agency.

Comment. Section 11342.520 is new. It clarifies part of the substance of former Section 11342(a). See also Section 11000 ("state agency" defined for purposes of this title).

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

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

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

Gov't Code § 11342.540 (added). Office

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

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

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

11342.550. "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.

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

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

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

Comment. Section 11342.560 continues former Section 11342(d) without change.

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.

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,

1 or make specific the law enforced or administered by it, or to govern its
2 procedure.

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

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

7 11342.600. (a) "Small business" means a business activity in agriculture,
8 general construction, special trade construction, retail trade, wholesale trade,
9 services, transportation and warehousing, manufacturing, generation and
10 transmission of electric power, or a health care facility, unless excluded in
11 subdivision (b), that is both of the following:

12 (1) Independently owned and operated.

13 (2) Not dominant in its field of operation.

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

16 (1) A financial institution including a bank, a trust, a savings and loan
17 association, a thrift institution, a consumer finance company, a commercial finance
18 company, an industrial finance company, a credit union, a mortgage and
19 investment banker, a securities broker-dealer, or an investment adviser.

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

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

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

23 (5) An entity organized as a nonprofit institution.

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

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

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

29 (9) A manufacturing enterprise exceeding 250 employees.

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

32 (c) "Small business" does not include the following business activities:

33 (1) Agriculture, where the annual gross receipts exceed one million dollars
34 (\$1,000,000).

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

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


39 (4) Retail trade, where the annual gross receipts exceed two million dollars
40 (\$2,000,000).

41 (5) Wholesale trade, where the annual gross receipts exceed nine million five
42 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.~~

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

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

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

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

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

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

Comment. Section 11343 is amended to make technical improvements.

Former subdivision (a)(1)-(2) is continued without substantive change in Section 11340.9(h)-(i). The substance of former subdivision (a)(3) is continued, with some changes, in Section 11340.9(e). Section 11340.9 contains exemptions to the requirements of this chapter. See also Section 11342.530 (“building standard” defined).

Subdivision (e) is amended to reflect the change in the name of the California Building Standards Commission.

Gov’t Code § 11343.1 (unchanged). Style

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 SEC. _____. Section 11343.5 of the Government Code is amended to read:
6 11343.5. Within 10 days from the receipt of printed copies of the California
7 Code of Regulations or of the California Regulatory Code Supplement from the
8 State Printing Office, the office shall file one copy of the particular issue of the
9 code or supplement in the office of the county clerk of each county in this state,
10 or if the authority to accept filings on his or her behalf has been delegated by the
11 county clerk of any county pursuant to Section 26803.5, in the office of the
12 person to whom that authority has been delegated.

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

14 11343.6. The filing of a certified copy of a regulation or an order of repeal with
15 the Secretary of State raises the rebuttable presumptions that:

- 16 (a) It was duly adopted.
17 (b) It was duly filed and made available for public inspection at the day and
18 hour endorsed on it.
19 (c) All requirements of this chapter and the regulations of the office relative to
20 such regulation have been complied with.
21 (d) The text of the certified copy of a regulation or order of repeal is the text of
22 the regulation or order of repeal as adopted.
23 The courts shall take judicial notice of the contents of the certified copy of each
24 regulation and of each order of repeal duly filed.

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

26 11343.8. Upon the request of a state agency, the office may file with the
27 Secretary of State and the office may publish in such manner as it believes
28 proper, any regulation or order of repeal of a regulation not required by this
29 article to be filed with the Secretary of State.

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

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

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

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

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

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

6 11344. The office shall do all of the following:

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

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

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

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

24 **Comment.** Section 11344 is amended to change the name of the California Regulatory
25 Code Supplement.

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

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

28 11344.1. The office shall do all of the following:

29 (a) Provide for the publication of the California Regulatory Notice Register,
30 which shall be an official publication of the State of California and which shall
31 contain the following:

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

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


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

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

(5) Determinations issued pursuant to Section 11340.5.

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

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

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

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


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

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

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

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

Comment. Section 11344.2 is amended to reflect existing practice.

 **Note.** This change was requested by OAL. The Commission would like to receive input as to whether this change would create any problems.

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

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

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

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

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

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

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

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

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

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

11344.7. Nothing in this chapter precludes any person or state agency from purchasing copies of the California Code of Regulations, the California Regulatory Code Supplement, or the California Regulatory Notice Register or of any unit of either, nor from printing special editions of any such units and distributing the same. However, where the purchase and printing is by a state agency, the state agency shall do so at the cost or at less than the cost to the 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). 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.~~

The adoption, amendment, or repeal of an emergency regulation is not subject to any provision of this chapter except this section and Section 11349.6.

(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, 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.

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

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

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

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

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

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

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

Comment. Section 11346.1(a) is amended to make four technical changes:

(1) The provision establishing an exception to the requirements of this article for “any regulation not required to be filed with the Secretary of State under this chapter” is deleted. The substance of this exception is continued in Section 11340.9(h)-(i). This change also resolves an inconsistency between Section 11356(b), which expressly requires building standards to be adopted under this article, and the deleted language, which exempted building standards from the requirements of this article.

(2) An inconsistency between this section and Financial Code Section 3373 is eliminated.


(3) A redundant reference to Financial Code Section 8054 is eliminated.

(4) An inconsistency between subdivision (d) and Section 11343.4 is eliminated.

1 Subdivision (c) is amended to use the defined term “building standard” and to correct a
2 grammatical error. See Section 11342.530 (“building standard” defined).

3 Subdivision (e) is amended to extend the effective period of an emergency regulation from
4 120 days to 180 days and to correct an underinclusive reference.

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

6  **Staff Note.** The reference in subdivision (e) to Sections 11346.2 to 11346.9 is
7 apparently intended to refer to the procedures for adoption of a non-emergency regulation.
8 If so, the reference is underinclusive and should be extended to include 11347.1 and
9 11347.3. That change has been implemented here.

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

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

12 11346.2. Every agency subject to this chapter shall prepare, submit to the office
13 with the notice of the proposed action as described in Section 11346.5, and make
14 available to the public upon request, all of the following:

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

16 (1) The agency shall draft the regulation in plain, straightforward language,
17 avoiding technical terms as much as possible, and using a coherent and easily
18 readable style. ~~If the regulation affects small business, the~~ The agency shall draft
19 the regulation in plain English, ~~as defined in subdivision (e) of Section 11342.~~
20 ~~However, if it is not feasible to draft the regulation in plain English due to the~~
21 ~~technical nature of the regulation, the agency shall prepare a noncontrolling plain~~
22 ~~English summary of the regulation.~~

23 (2) The agency shall include a notation following the express terms of each
24 regulation listing the specific statutes or other provisions of law authorizing the
25 adoption of the regulation and listing the specific statutes or other provisions of
26 law being implemented, interpreted, or made specific by the regulation.

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

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

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

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

41 (3) (2) An identification of each technical, theoretical, and empirical study,
42 report, or similar document, if any, upon which the agency relies in proposing the
43 adoption, amendment, or repeal of a regulation.

1 (4) ~~(3)~~ (A) A description of the alternatives to the regulation considered by the
2 agency and the agency's reasons for rejecting those alternatives. In the case of a
3 regulation that would mandate the use of specific technologies or equipment or
4 prescribe specific actions or procedures, the imposition of performance standards
5 shall be considered as an alternative.

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

10 (5) ~~(4)~~ Facts, evidence, documents, testimony, or other evidence ~~upon which~~
11 ~~that~~ the agency ~~relies to~~ believes may support a finding that the action will not
12 have a significant adverse economic impact on business.

13 (6) ~~(5)~~ A department, board, or commission within the Environmental Protection
14 Agency, the Resources Agency, or the Office of the State Fire Marshal shall
15 describe its efforts, in connection with a proposed rulemaking action, to avoid
16 unnecessary duplication or conflicts with federal regulations contained in the
17 Code of Federal Regulations addressing the same issues. These agencies may
18 adopt regulations different from federal regulations contained in the Code of
19 Federal Regulations addressing the same issues upon a finding of one or more of
20 the following justifications:

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

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

24 (c) A state agency that adopts or amends a regulation mandated by federal law
25 or regulations, the provisions of which are identical to a previously adopted or
26 amended federal regulation, shall be deemed to have complied with subdivision
27 (b) if a statement to the effect that a federally mandated regulation or amendment
28 to a regulation is being proposed, together with a citation to where an
29 explanation of the provisions of the regulation can be found, is included in the
30 notice of proposed adoption or amendment prepared pursuant to Section
31 11346.5. However, the agency shall comply fully with this chapter with respect to
32 any provisions in the regulation that the agency proposes to adopt or amend that
33 are different from the corresponding provisions of the federal regulation.

34 **Comment.** Subdivision (a)(1) of Section 11346.2 is a specific application of Section
35 6215(a) (state agency "shall write each document which it produces in plain, straightforward
36 language, avoiding technical terms as much as possible, and using a coherent and easily
37 readable style"). The requirement that a regulation be written in plain English has been
38 expanded to include all regulations and not just those that affect small business. Plain English
39 means language that satisfies the clarity standard expressed in Section 11349. See Section
40 11342.570 ("plain English" defined). Note that the former provision requiring the
41 preparation of a plain English summary of a proposed regulation affecting small businesses,
42 where the regulation cannot be drafted in plain English, has been broadened to apply to all
43 regulations and continued in Section 11346.5(a)(3)(B). See Sections 11342.570 ("plain
44 English" defined) and 11349(c) (clarity standard).

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

5 Former subdivision (b)(4)(B) has been amended to require that an agency describe
6 alternatives that would lessen adverse impacts on any business, not just on a small business.

7 **Gov't Code § 11346.3 (amended). Potential economic effect**

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

9 11346.3. (a) State agencies proposing to adopt, ~~or amend, or repeal~~ any
10 administrative regulation shall assess the potential for adverse economic impact
11 on California business enterprises and individuals, avoiding the imposition of
12 unnecessary or unreasonable regulations or reporting, recordkeeping, or
13 compliance requirements. For purposes of this subdivision assessing the potential
14 for adverse economic impact shall require agencies, when ~~adopting new~~
15 ~~regulations or reviewing, or amending, existing regulations proposing to adopt,~~
16 amend, or repeal a regulation, to adhere to the following requirements, to the
17 extent that these requirements do not conflict with other state or federal laws:

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

21 (2) The state agency, prior to submitting ~~regulations~~ a proposal to adopt, amend,
22 or repeal a regulation to the office, shall consider the proposal's impact on
23 business, ~~when initiating, processing, and adopting regulations~~ with consideration
24 of industries affected including the ability of California businesses to compete
25 with businesses in other states. For purposes of evaluating the impact on the
26 ability of California businesses to compete with businesses in other states, an
27 agency shall consider, but not be limited to, information supplied by interested
28 parties.

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

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

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

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

41 (C) The expansion of businesses currently doing business within the State of
42 California.

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

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

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

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

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

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

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

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

(1) Mailed to every person who has filed a request for notice of regulatory 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 after 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

1 action proposed in a notice is not completed and transmitted to the office within
2 the effective period of the notice, a new notice shall be issued pursuant to this
3 article.


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

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

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

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

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

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

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

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

26 11346.5. (a) The notice of proposed adoption, amendment, or repeal of a
27 regulation shall include the following:

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

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

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

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

41 ~~(B) If the proposed action affects small business, the~~ The informative digest shall
42 also include a plain English summary of the proposed action and a plain English

1 policy statement overview explaining the broad objectives of the regulation and,
2 if appropriate, the specific objectives.

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

5 (5) A determination as to whether the regulation imposes a mandate on local
6 agencies or school districts and, if so, whether the mandate requires state
7 reimbursement pursuant to Part 7 (commencing with Section 17500) of Division
8 4.

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

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

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

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

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

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

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

35 (ii) Consolidation or simplification of compliance and reporting requirements for
36 businesses.

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

38 (iv) Exemption or partial exemption from the regulatory requirements for
39 businesses.”

40 (8) If a state agency, in adopting, ~~or amending, or repealing~~ any administrative
41 regulation, ~~determines~~ believes that the action will not have a significant adverse
42 economic impact on business, including the ability of California businesses to
43 compete with businesses in other states, it shall make a declaration to that effect

1 in the notice of proposed action. In making this ~~determination~~ declaration, the
2 agency shall provide in the record facts, evidence, documents, testimony, or other
3 evidence upon which the agency relies to support that ~~finding~~ belief.

4 An agency's ~~determination~~ belief and declaration that a proposed adoption,
5 amendment, or repeal of a regulation may have or will not have a significant,
6 adverse impact on businesses, including the ability of California businesses to
7 compete with businesses in other states, shall not be grounds for the office to
8 refuse to publish the notice of proposed action.

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

12 For purposes of this paragraph, "cost impact" means the reasonable range of
13 costs, or a description of the type and extent of costs, direct or indirect, that a
14 representative private person or business necessarily incurs in reasonable
15 compliance with the proposed action.

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

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

19 (12) A statement that the action would have a significant effect on housing
20 costs, if a state agency, in adopting, amending, or repealing any administrative
21 regulation, ~~determines that the action would have an effect~~ believes that the
22 action would have that effect. In addition, the agency officer designated in
23 paragraph (13), shall make available to the public, upon request, the agency's
24 evaluation, if any, of the effect of the proposed regulatory action on housing
25 costs.

26 (12) (13) A statement that the adopting agency must determine that no
27 alternative considered by the agency would be more effective in carrying out the
28 purpose for which the action is proposed or would be as effective and less
29 burdensome to affected private persons than the proposed action.

30 (13) (14) The name and telephone number of the agency officer to whom
31 inquiries concerning the proposed administrative action may be directed.

32 (14) (15) The date by which comments submitted in writing must be received to
33 present statements, arguments, or contentions in writing relating to the proposed
34 action in order for them to be considered by the state agency before it adopts,
35 amends, or repeals a regulation.

36 (15) (16) Reference to the fact that the agency proposing the action has
37 prepared a statement of the reasons for the proposed action, has available all the
38 information upon which its proposal is based, and has available the express terms
39 of the proposed action, pursuant to subdivision (b).

40 (16) (17) A statement that if a public hearing is not scheduled, any interested
41 person or his or her duly authorized representative may request, no later than 15
42 days prior to the close of the written comment period, a public hearing pursuant
43 to Section 11346.8.

1 (17) (18) A statement indicating that the full text of a regulation changed
2 pursuant to Section 11346.8 will be available for at least 15 days prior to the date
3 on which the agency adopts, amends, or repeals the resulting regulation.

4 (b) The agency officer designated in paragraph (13) (14) of subdivision (a) shall
5 make available to the public upon request the express terms of the proposed
6 action. The officer shall also make available to the public upon request the
7 location of public records, including reports, documentation, and other materials,
8 related to the proposed action.

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

14 **Comment.** Subdivision (a)(3)(B) of Section 11346.5 is amended to broaden the plain
15 English policy statement requirement to apply to all proposed actions, and not just those
16 affecting small business. The informative digest is expanded to include a plain English
17 summary of the regulation. See Sections 11342.570 (“plain English” defined), 11349(c)
18 (clarity standard).

19 Subdivision (a)(7)-(8) and former subdivision (a)(11) are amended to eliminate the
20 implication that formal findings are required before the agency has received comment on a
21 proposed action. Subdivision (a)(7)-(8) is also amended to make clear that those provisions
22 apply to the repeal of a regulation, as well as the adoption, or amendment of a regulation.

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

26 **Gov’t Code § 11346.54 (amended). Assessment of effect of regulations upon jobs and**
27 **business**

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

29 11346.54. (a) All state agencies proposing to adopt, ~~or amend,~~ or repeal any
30 administrative regulation shall assess whether and to what extent it will affect the
31 following:

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

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

35 (3) The expansion of businesses currently doing business within the State of
36 California.

37 (b) ~~For purposes of this section, “state agency” shall include every state office,~~
38 ~~officer, department, division, bureau, board, and commission, whether created by~~
39 ~~the Constitution, statute, or initiative, but shall not include the courts, an agency~~
40 ~~in the judicial or legislative branch of state government, This section does not~~
41 ~~apply to the University of California, the Hastings College of the Law, or the Fair~~
42 ~~Political Practices Commission.~~

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

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

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

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

Gov’t Code § 11346.8 (amended). Public hearing

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

11346.8. (a) If a public hearing is held, both oral and written statements, arguments, or contentions, ~~either oral or in writing, or both~~, shall be permitted. The agency may impose reasonable limitations on oral presentations. If a public hearing is not scheduled, the state agency shall, consistent with Section 11346.4, afford any interested person or his or her duly authorized representative, the opportunity to present statements, arguments or contentions in writing. In addition, a public hearing shall be held if, no later than 15 days prior to the close of the written comment period, an interested person or his or her duly authorized representative submits in writing to the state agency, a request to hold a public hearing. The state agency shall, to the extent practicable, provide notice of the time, date, and place of the hearing by mailing the notice to every person who has filed a request for notice thereby with the state agency. The state agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation.

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


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

(d) No state agency shall add any material to the record of the rulemaking proceeding after the close of the public hearing or comment period, unless adequate provision is made for public comment on that matter. This subdivision

1 does not apply to material prepared pursuant to Section 11346.9 or Section
2 11368.080(e).

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

6 Subdivision (d) is amended to recognize that the final statement of reasons, updated
7 informative digest, and the response of a negotiated rulemaking committee to public
8 comments are added to the record of the rulemaking proceeding after the close of the
9 hearing or comment period. See Sections 11346.9 (final statement of reasons and updated
10 informative digest), 11347.3 (rulemaking file), 11368.080(e) (response of negotiated
11 rulemaking committee). If the final statement of reasons refers to documents not previously
12 included in the record of the rulemaking proceeding, the addition of those documents to the
13 rulemaking file is governed by Section 11347.1 (documents added to rulemaking file).

14  **Staff Note.** The exclusion of material required under Section 11346.9 from the
15 requirements of subdivision (d) was recommended in Memorandum 98-71. The change is
16 technical and presents no policy issues.

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

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

20 11346.9. Every agency subject to this chapter shall do the following:

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

23 (1) An update of the information contained in the initial statement of reasons. If
24 the update identifies any data or any technical, theoretical or empirical study,
25 report, or similar document on which the agency is relying in proposing the
26 adoption, ~~or amendment, or repeal~~ of a regulation that was not identified in the
27 initial statement of reasons, or which was otherwise not identified or made
28 available for public review prior to the close of the public comment period, the
29 agency shall comply with ~~subdivision (d) of Section 11346.8~~ Section 11347.1.

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

37 (3) A summary of each objection or recommendation made regarding the
38 specific adoption, amendment, or repeal proposed, together with an explanation
39 of how the proposed action has been changed to accommodate each objection or
40 recommendation, or the reasons for making no change. This requirement applies
41 only to objections or recommendations specifically directed at the agency's
42 proposed action or to the procedures followed by the agency in proposing or
43 adopting the action. The agency may aggregate and summarize repetitive or

1 irrelevant comments as a group, and may respond to repetitive comments or
2 summarily dismiss irrelevant comments as a group.

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

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

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

15 (c) A state agency that adopts or amends a regulation mandated by federal law
16 or regulations, the provisions of which are identical to a previously adopted or
17 amended federal regulation, shall be deemed to have complied with this section if
18 a statement to the effect that a federally mandated regulation or amendment to a
19 regulation is being proposed, together with a citation to where an explanation of
20 the provisions of the regulation can be found, is included in the notice of
21 proposed adoption or amendment prepared pursuant to Section 11346.5.
22 However, the agency shall comply fully with this chapter with respect to any
23 provisions in the regulation which the agency proposes to adopt or amend that
24 are different from the corresponding provisions of the federal regulation.

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

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

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

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

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

35 11347.1. (a) An agency that adds any technical, theoretical, or empirical study,
36 report, or similar document to the rulemaking file after publication of the notice of
37 proposed action and relies on the document in proposing the action shall make
38 the document available as required by this section.

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

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

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

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

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

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

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

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

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

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

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

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

23 11347.3. (a) Every agency shall maintain a file of each rulemaking that shall be
24 deemed to be the record for that rulemaking proceeding. Commencing no later
25 than the date that the notice of the proposed action is published in the California
26 Regulatory Notice Register, and during all subsequent periods of time that the file
27 is in the agency's possession, the agency shall make the file available to the
28 public for inspection and copying during regular business hours.

29 (b) The rulemaking file shall include:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 (e) Upon filing a regulation with the Secretary of State pursuant to Section
31 11349.3, the office shall return the related rulemaking file to the agency, after
32 which no item contained in the file shall be removed, altered, or destroyed or
33 otherwise disposed of. The agency shall maintain the file unless it elects to
34 transmit the file to the State Archives pursuant to subdivision (f).

35 (f) The agency may transmit the rulemaking file to the State Archives. The file
36 shall include instructions that the Secretary of State shall not remove, alter, or
37 destroy or otherwise dispose of any item contained in the file. Pursuant to Section
38 12223.5, the Secretary of State may designate a time for the delivery of the
39 rulemaking file to the State Archives in consideration of document processing or
40 storage limitations.

41 **Comment.** Section 11347.3(a) is amended to make clear that the rulemaking file is
42 available to the public throughout the rulemaking process.

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

Article 6. Review of Proposed Regulations

Gov't Code § 11349 (amended). Standards

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

11349. The following definitions provisions govern the interpretation of this chapter review of a proposed regulation under Section 11349.1:

(a) "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion. A regulation satisfies the necessity standard if the major provisions of the regulation and any specific provisions of the regulation that have been challenged are shown by substantial evidence in the rulemaking file 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, taking into account the totality of the record. For the purposes of this subdivision, the following terms have the following meanings:

(1) "Evidence" includes rationales, facts, studies, and expert opinion. Where the need for a regulation is based on policy judgments and cannot, as a practical matter, be demonstrated by facts or expert opinion, a statement of the adopting agency's rationale for the necessity of the regulation shall be considered substantial evidence. An agency that relies on a statement of its rationale for the necessity of the regulation under this subdivision must explain why the necessity of the regulation cannot, as a practical matter, be demonstrated by facts or expert opinion.

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

(b) "Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation. A regulation satisfies the authority standard if the regulation is authorized or required by statute.

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

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

(e) "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation. A regulation satisfies the reference standard if the adopting agency has provided the office with a complete and accurate list of the provisions of law that the regulation implements, interprets, or makes specific.

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

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

Subdivision (a) is amended to make three changes:

(1) The meaning of “necessity” is placed in context. The subdivision now provides that the necessity standard is met if a regulation is necessary to achieve the purpose of the provision of law that it implements, interprets, or makes specific. This is consistent with other provisions that relate to the necessity of a regulation. 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).

(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 a challenge 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

1 Code Supplement and for transmittal to the Secretary of State and make
2 determinations using all of the following standards:

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

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

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

16 (c) The office shall adopt regulations governing the procedures it uses in
17 reviewing regulations submitted to it. The regulations shall provide for an orderly
18 review and shall specify the methods, standards, presumptions, and principles the
19 office uses, and the limitations it observes, in reviewing regulations to establish
20 compliance with the standards specified in subdivision (a). The regulations
21 adopted by the office shall ensure that it does not substitute its judgment for that
22 of the rulemaking agency as expressed in the substantive content of adopted
23 regulations.

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

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

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

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

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

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

41 (C) Attach a letter or other documentation from the Department of Finance
42 which states that the Department of Finance has approved a request by the
43 agency that funds be included in the Budget Bill for the next following fiscal

1 year to reimburse local agencies or school districts for the costs mandated by the
2 regulation.

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

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

13 (f) The office shall return a rulemaking file to the submitting agency if the file
14 does not comply with subdivisions (a) and (b) of Section 11347.3. Within three
15 state working days of the receipt of a rulemaking file, the office shall notify the
16 submitting agency of any deficiency identified. If no notice of deficiency is
17 mailed to the adopting agency within that time, a rulemaking file shall be deemed
18 submitted as of the date of its original receipt by the office. A rulemaking file shall
19 not be deemed submitted until each deficiency identified under this subdivision
20 has been corrected.

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

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

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

27 SEC. _____. Section 11340.5 is added to the Government Code, to read:
28 11349.2. An agency proposing a regulation may add material to a rulemaking
29 file that has been submitted to the office for review pursuant to this article where
30 addition of the material does not violate other requirements of this chapter.

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

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

36 SEC. _____. Section 11349.3 of the Government Code is amended to read:
37 11349.3. (a) The office shall either approve a regulation submitted to it for
38 review and transmit it to the Secretary of State for filing or disapprove it within
39 30 working days after the regulation has been submitted to the office for review.
40 If the office fails to act within 30 days, the regulation shall be deemed to have
41 been approved and the office shall transmit it to the Secretary of State for filing.

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

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

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

19 (e) The 30 working day period provided in subdivisions (a) and (b) may be
20 extended to 45 working days if the director certifies in writing that additional
21 time is required due to the size or complexity of a proposed regulation. A
22 certification under this subdivision shall explain why additional time is required
23 and shall be delivered to the agency proposing the regulation within the 30
24 working day period provided in subdivisions (a) and (b).

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

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

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

31 11349.4. (a) A regulation returned to an agency because of failure to meet the
32 standards of Section 11349.1, because of an agency's failure to comply with this
33 chapter may be rewritten and resubmitted within 120 days of the agency's
34 receipt of the written opinion required by subdivision (b) of Section 11349.3
35 without complying with the notice and public hearing requirements of Sections
36 11346.4, 11346.5, and 11346.8 unless the substantive provisions of the regulation
37 have been significantly changed. If the regulation has been significantly changed
38 or was not submitted within 120 days of receipt of the written opinion, the
39 agency shall comply with Article 5 (commencing with Section 11346) and
40 readopt the regulation. The director of the office may, upon a showing of good
41 cause, grant an extension to the 120-day time period specified in this subdivision.

42 (b) Upon resubmission of a disapproved regulation to the office pursuant to
43 subdivision (a), the office shall only review the resubmitted regulation for those

1 reasons expressly identified in the written opinion required by subdivision (b) of
2 Section 11349.3, or for those issues arising as a result of a substantial change to a
3 provision of the resubmitted regulation or as a result of intervening statutory
4 changes or intervening court orders or decisions.

5 (c) When an agency resubmits a withdrawn or disapproved regulation to the
6 office it shall identify the prior withdrawn or disapproved regulation by date of
7 submission to the office, shall specify the portion of the prior rulemaking record
8 that should be included in the resubmission, and shall submit to the office a copy
9 of the prior rulemaking record if that record has been returned to the agency by
10 the office.

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

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

15 11349.5. (a) To initiate a review of a decision by the office, the agency shall file
16 a written Request for Review with the Governor's Legal Affairs Secretary within
17 10 days of receipt of the written opinion provided by the office pursuant to
18 subdivision (b) of Section 11349.3. The Request for Review shall include a
19 complete statement as to why the agency believes the decision is incorrect and
20 should be overruled. Along with the Request for Review, the agency shall submit
21 all of the following:

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

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

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

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

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

38 (e) The Governor may overrule the decision of the office disapproving a
39 proposed regulation, an order repealing an emergency regulation adopted
40 pursuant to subdivision (b) of Section 11346.1, or a decision refusing to allow the
41 readoption of an emergency regulation pursuant to Section 11346.1. In that

1 event, the office shall immediately transmit the regulation to the Secretary of State
2 for filing.

3 (f) Upon overruling the decision of the office, the Governor shall immediately
4 transmit to the Committees on Rules of both houses of the Legislature a statement
5 of his or her reasons for overruling the decision of the office, along with copies of
6 the adopting agency's initial statement of reasons issued pursuant to Section
7 11346.2 and the office's statement regarding the disapproval of a regulation
8 issued pursuant to subdivision (b) of Section 11349.3. The Governor's action and
9 the reasons therefor shall be published in the California Regulatory Notice
10 Register.

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

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

13 11349.6. (a) In the event the adopting agency has complied with Sections
14 11346.2 to ~~11346.9~~ 11347.3, inclusive, prior to the adoption of the regulation as
15 an emergency, the office shall approve or disapprove the regulation in
16 accordance with this article.

17 (b) Emergency regulations adopted pursuant to subdivision (b) of Section
18 11346.1 shall be reviewed by the office within 10 calendar days after their
19 submittal to the office. The office shall not file the emergency regulations with the
20 Secretary of State if it determines that the regulation is not necessary for the
21 immediate preservation of the public peace, health and safety, or general welfare,
22 or if it determines that the regulation fails to meet the standards set forth in
23 Section 11349.1, or if it determines the agency failed to comply with subdivisions
24 (b) and (c) of Section 11346.1.

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

29 (d) Within 30 working days of the filing of a certificate of compliance, the office
30 shall review the regulation and hearing record and approve or order the repeal of
31 an emergency regulation if it determines that the regulation fails to meet the
32 standards set forth in Section 11349.1, or if it determines that the agency failed to
33 comply with this chapter. The period for review pursuant to this subdivision may
34 be extended to 45 working days if the director certifies in writing that additional
35 time is required due to the size or complexity of a proposed regulation. A
36 certification under this subdivision shall explain why additional time is required
37 and shall be delivered to the agency proposing the regulation within the regular
38 30 working day review period provided in this subdivision.

39 **Comment.** Section 11349.6(a) is amended to correct an underinclusive reference. The
40 reference to Sections 11346.2 to 11346.9 has been expanded to include Sections 11346.2 to
41 11347.3.

42 Subdivision (e) is amended to conform the period for review of an emergency regulation
43 under that subdivision to the period for review of nonemergency regulations under Section

1 11343.3. A provision has also been added to authorize an extension of the period for review
2 of unusually large or complex regulations.

3 ☞ **Staff Note.** The reference in subdivision (a) to Sections 11346.2 to 11346.9 is
4 apparently intended to refer to the procedures for adoption of a non-emergency regulation.
5 If so, the reference is underinclusive and should be extended to include 11347.1 and
6 11347.3. That change has been implemented here.

7 Article 7. Review of Existing Regulations

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

9 11349.7. The office, at the request of any standing, select, or joint committee of
10 the Legislature, shall initiate a priority review of any regulation, group of
11 regulations, or series of regulations that the committee believes does not meet the
12 standards set forth in Section 11349.1.

13 The office shall notify interested persons and shall publish notice in the
14 California Regulatory Notice Register that a priority review has been requested,
15 shall consider the written comments submitted by interested persons, the
16 information contained in the rulemaking record, if any, and shall complete each
17 priority review made pursuant to this section within 90 calendar days of the
18 receipt of the committee's written request. During the period of any priority
19 review made pursuant to this section, all information available to the office
20 relating to the priority review shall be made available to the public. In the event
21 that the office determines that a regulation does not meet the standards set forth
22 in Section 11349.1, it shall order the adopting agency to show cause why the
23 regulation should not be repealed and shall proceed to seek repeal of the
24 regulation as provided by this section in accordance with the following:

25 (a) In the event it determines that any of the regulations subject to the review
26 do not meet the standards set forth in Section 11349.1, the office shall within 15
27 days of the determination order the adopting agency to show cause why the
28 regulation should not be repealed. In issuing the order, the office shall specify in
29 writing the reasons for its determination that the regulation does not meet the
30 standards set forth in Section 11349.1. The reasons for its determination shall be
31 made available to the public. The office shall also publish its order and the reasons
32 therefor in the California Regulatory Notice Register. In the case of a regulation
33 for which no, or inadequate, information relating to its necessity can be furnished
34 by the adopting agency, the order shall specify the information which the office
35 requires to make its determination.

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

40 (c) The office shall review and consider all information submitted by the agency
41 in a timely response to the order to show cause why the regulation should not be
42 repealed, and determine whether the regulation meets the standards set forth in

1 Section 11349.1. The office shall make this determination within 60 days of
2 receipt of an agency's response to the order to show cause. If the office does not
3 make a determination within 60 days of receipt of an agency's response to the
4 order to show cause, the regulation shall be deemed to meet the standards set
5 forth in subdivision (a) of Section 11349.1. In making this determination, the
6 office shall also review any written comments submitted to it by the public within
7 30 days of the publication of the order to show cause in the California
8 Regulatory Notice Register. During the period of review and consideration, the
9 information available to the office relating to each regulation for which the office
10 has issued an order to show cause shall be made available to the public. The
11 office shall notify the adopting agency within two working days of the receipt of
12 information submitted by the public regarding a regulation for which an order to
13 show cause has been issued. If the office determines that a regulation fails to meet
14 the standards, it shall prepare a statement specifying the reasons for its
15 determination. The statement shall be delivered to the adopting agency, the
16 Legislature, and the Governor and shall be made available to the public and the
17 courts. Thirty days after delivery of the statement required by this subdivision the
18 office shall prepare an order of repeal of the regulation and shall transmit it to the
19 Secretary of State for filing.

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

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

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

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

32 11349.8. (a) If the office is notified of, or on its own becomes aware of, an
33 existing regulation in the California Code of Regulations for which the statutory
34 authority has been repealed or becomes ineffective or inoperative by its own
35 terms, the office shall order the adopting agency to show cause why the
36 regulation should not be repealed for lack of statutory authority and shall notify
37 the Legislature in writing of this order. In issuing the order, the office shall specify
38 in writing the reasons for issuance of the order. "Agency," for purposes of this
39 section and Section 11349.9, refers to the agency that adopted the regulation
40 and, if applicable, the agency that is responsible for administering the regulation
41 in issue.

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

6 (1) The statute or section thereof is simultaneously repealed and substantially
7 reenacted through a single piece of legislation, or where subsequent legislation
8 evinces a specific legislative intent to reenact the substance of the statute or
9 section. When a regulation cites more than one specific statute or section as
10 reference or authority for the adoption of a regulation, and one or more of the
11 statutes or sections are repealed or become ineffective or inoperative, then the
12 only provisions of the regulation which remain in effect shall be those for which
13 the remaining statutes or sections provide specific or general authority.

14 (2) The statute is temporarily repealed, or rendered ineffective or inoperative by
15 a provision of law which is effective only for a limited period, in which case any
16 regulation described in subdivision (a) is thereby also temporarily repealed,
17 rendered ineffective, or inoperative during that limited period. Any regulation so
18 affected shall have the same force and effect upon the expiration of the limited
19 period during which the provision of law was effective as if that temporary
20 provision had not been enacted.

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

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

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

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

34 (2) Issue a written notice to the agency specifying the reasons for the repeal
35 and its intent to file a Notice of Repeal of the invalid regulation with the
36 Secretary of State. Within seven calendar days of the filing of the Notice of
37 Repeal, the office shall provide the agency, the Governor, and the Legislature
38 with a written decision detailing the reasons for the repeal and a copy of the
39 Notice of Repeal, and publish the office's written decision in the California
40 Regulatory Notice Register.

41 (e) The office shall order the removal of the repealed regulation from the
42 California Code of Regulations within 30 days after filing the Notice of Repeal, if
43 the agency has not appealed the office's decision, or upon receipt of notification

1 of the Governor's decision upholding the office's decision, if an appeal has been
2 filed pursuant to Section 11349.9.

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

4 11349.9. (a) To initiate a review of the office's Notice of Repeal pursuant to
5 Section 11349.8, the agency shall appeal the office's decision by filing a written
6 Request for Review with the Governor's Legal Affairs Secretary within 10 days
7 of receipt of the Notice of Repeal and written decision provided for by paragraph
8 (2) of subdivision (d) of Section 11349.8. The Request for Review shall include a
9 complete statement as to why the agency believes the decision is incorrect and
10 should be overruled. Along with the Request for Review, the agency shall submit
11 all of the following:

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

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

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

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

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

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

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

33 **Article 8. Judicial Review**

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

35 SEC. _____. Section 11350 of the Government Code is amended to read:

36 11350. (a) Any interested person may obtain a judicial declaration as to the
37 validity of any regulation or order of repeal by bringing an action for declaratory
38 relief in the superior court in accordance with the Code of Civil Procedure. The
39 right to judicial determination shall not be affected by the failure either to petition
40 or to seek reconsideration of a petition filed pursuant to Section 11340.7 before

1 the agency promulgating the ~~regulations~~ regulation or order of repeal. The
2 regulation or order of repeal may be declared to be invalid for a substantial failure
3 to comply with this chapter, or, in the case of an emergency regulation or order to
4 repeal, upon the ground that the facts recited in the statement prepared pursuant
5 to subdivision (b) of Section 11346.1 do not constitute an emergency within the
6 provisions of Section 11346.1.

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

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

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

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

17 (c) The approval of a regulation or order of repeal by the office or the
18 Governor's overruling of a decision of the office disapproving a regulation or
19 order of repeal shall not be considered by a court in any action for declaratory
20 relief brought with respect to a regulation or order of repeal.

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

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

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

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

27 **Comment.** Section 11350 is amended to provide for judicial review of an order of repeal,
28 as well as a regulation. This is consistent with the provision authorizing review of an
29 emergency order of repeal.

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

33 Subdivision (d) is added to clarify the record of review in a proceeding under this section.
34 Subdivision (d)(1) restates part of the substance of the former second paragraph of Section
35 11350(b)(2), limiting the record of review to the rulemaking file prepared under Section
36 11347.3. Subdivision (d)(2) permits consideration of an agency statement prepared under
37 Section 11346.1(b) (justifying emergency regulation). Such a statement is not part of a
38 rulemaking file prepared under Section 11347.3. See Section 11346.1(a). Subdivision (d)(3)
39 permits consideration of evidence of procedural noncompliance. This is necessary where
40 proof of procedural noncompliance depends on material that is not included in the
41 rulemaking file. E.g., proof that an agency failed to include written public comments in a
42 rulemaking file requires consideration of the excluded comments. Also, where it is asserted
43 that an agency statement is an invalid "underground regulation" (i.e., it should have been
44 adopted under this chapter but was not), the court will need to consider the text of the
45 purported underground regulation in order to determine whether it is, in fact, a regulation
46 subject to this chapter.

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

Comment. Section 11350.3 is amended to provide for judicial review of an order of repeal that is disapproved by the Office of Administrative Law, as well as a regulation that is disapproved.

Gov't Code § 11351 (unchanged). Public Utilities Commission and Worker's Compensation Appeals Board

11351. (a) Except as provided in subdivision (b), Article 5 (commencing with Section 11346), Article 6 (commencing with Section 11349), Article 7 (commencing with Section 11349.7), and Article 8 (commencing with Section 11350) shall not apply to the Public Utilities Commission or the Workers' Compensation Appeals Board, and Article 3 (commencing with Section 11343) and Article 4 (commencing with Section 11344) shall apply only to the rules of procedure of these state agencies.

(b) The Public Utilities Commission and the Workers' Compensation Appeals Board shall comply with paragraph (5) of subdivision (a) of Section 11346.4 with respect to regulations that are required to be filed with the Secretary of State pursuant to Section 11343.

(c) Article 8 (commencing with Section 11350) shall not apply to the Division of Workers' Compensation.

11352. The following actions are not subject to this chapter:

- 61 -

1 (b) The issuance, denial, or revocation of waste discharge requirements and
2 permits pursuant to Sections 13263 and 13377 of the Water Code and waivers
3 issued pursuant to Section 13269 of the Water Code.

4 **Gov't Code § 11353 (amended). State water quality control policies, plans, and guidelines**

5 SEC. _____. Section 11353 of the Government Code is amended to read:

6 11353. (a) Except as provided in subdivision (b), this chapter does not apply to
7 the adoption or revision of state policy for water quality control and the adoption
8 or revision of water quality control plans and guidelines pursuant to Division 7
9 (commencing with Section 13000) of the Water Code.

10 (b) (1) Any policy, plan, or guideline, or any revision thereof, that the State
11 Water Resources Control Board has adopted or that a court determines is subject
12 to this part, after June 1, 1992, shall be submitted to the office.

13 (2) The State Water Resources Control Board shall include in its submittal to
14 the office all of the following:

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

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

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

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

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

30 (4) The office shall review the regulatory provisions to determine compliance
31 with the standards of necessity, authority, clarity, consistency, reference, and
32 nonduplication set forth in subdivision (a) of Section 11349.1. The office shall
33 also review the responses to public comments prepared by the State Water
34 Resources Control Board or the appropriate regional water quality control board
35 to determine compliance with the public participation requirements of the Federal
36 Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.). The office shall restrict
37 its review to the regulatory provisions and the administrative record of the
38 proceeding. Sections 11349.3, 11349.4, 11349.5, and 11350.3 shall apply to the
39 review by the office to the extent that those sections are consistent with this
40 section.

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

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


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

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

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

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

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

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

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

38 11354. Sections 11352 and 11353 do not affect any court's determination,
39 relating to the applicability of this chapter to any provision of a policy, plan, or
40 guideline, in a civil action which was pending on June 1, 1992, and on that date
41 included a challenge to a provision of a policy, plan, or guideline on the grounds
42 that it has not been adopted in accordance with this chapter.

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

3 11354.1. (a) For purposes of this section, "commission" means the San
4 Francisco Bay Conservation and Development Commission.

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

9 (c) The issuance or denial by the commission of any permit pursuant to
10 subdivision (a) of Section 66632, and the issuance or denial by, or appeal to, the
11 commission of any permit pursuant to Chapter 6 (commencing with Section
12 29500) of Division 19 of the Public Resources Code, are not subject to this
13 chapter.

14 (d)(1) Any amendments or other changes to the San Francisco Bay Plan or to a
15 special area plan pursuant to Chapter 5 (commencing with Section 66650) of
16 Title 7.2, and amendments or other changes to the Suisun Marsh Protection Plan,
17 as defined in Section 29113 of the Public Resources Code, or in the Suisun Marsh
18 local protection program, as defined in Section 29111 of the Public Resources
19 Code, adopted by the commission on and after January 1, 1996, shall be submitted
20 to the office.

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

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

26 (B) The administrative record for the proceeding, and a list of the documents
27 relied upon in making the change. Proposed additions to the plans shall be
28 indicated by underlined text, and proposed deletions shall be indicated by strike-
29 through text in documents submitted as part of the administrative record for the
30 proceeding.

31 (3) The office shall review the regulatory provisions to determine compliance
32 with the standards of necessity, authority, clarity, consistency, reference, and
33 nonduplication set forth in subdivision (a) of Section 11349.1. The office shall
34 also review the responses to public comments prepared by the commission to
35 determine compliance with the public participation requirements of Sections
36 11000 to 11007, inclusive, of Title 14 of the California Code of Regulations, and
37 to ensure that the commission considers all relevant matters presented to it before
38 adopting, amending, or repealing any regulatory provision, and that the
39 commission explains the reasons for not modifying a proposed plan change to
40 accommodate an objection or recommendation. The office shall restrict its review
41 to the regulatory provisions and the administrative record of the proceeding.
42 Sections 11349.3, 11349.4, 11349.5, and 11350.3 shall apply to the review by the
43 office to the extent that those sections are consistent with this section.

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

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

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

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

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

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

11356. (a) Article 6 (commencing with Section 11349) is not applicable to ~~any building standards or administrative regulations that apply directly to the implementation or enforcement of a building standard, subject to the approval of the State Building Standards Commission~~ a building standard.

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

Comment. Section 11343(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. The subdivision is amended to use the defined term "building standard." See Section 11342.530 ("building standard" defined).

Subdivision (b) is amended to reflect the change in the name of the California Building Standards Commission.

Gov't Code § 11357 (unchanged). Department of Finance instructions

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

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

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

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

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

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

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

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

19 11359. (a) Except as provided in subdivision (b), on and after January 1, 1982,
20 no new regulation, or the amendment or repeal of any regulation, which
21 regulation is intended to promote fire and panic safety or provide fire protection
22 and prevention, including fire suppression systems, equipment, or alarm
23 regulation, is valid or effective unless it is submitted by, or approved in writing by,
24 the State Fire Marshal before transmittal to the Secretary of State or the Office of
25 Administrative Law.

26 (b) Approval of the State Fire Marshal is not required if the regulation is
27 expressly required to be at least as effective as federal standards published in the
28 Federal Register pursuant to Section 6 of the Occupational Safety and Health Act
29 of 1970 (P.L. 91-596) within the time period specified by federal law and as
30 provided in subdivision (b) of Section 142.4 of the Labor Code, and as approved
31 by the Occupational Safety and Health Administration of the United States
32 Department of Labor as meeting the requirements of subdivision (a) of Section
33 142.3 of the Labor Code, unless the regulation is determined by the State Fire
34 Marshal to be less effective in promoting fire and panic safety than regulations
35 adopted by the State Fire Marshal.

36 **Gov't Code §§ 11368.010-11368.100 (added). Negotiated rulemaking**

37 SEC. _____. Article 12 (commencing with Section 11368.010) is added to
38 Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

Article 12. Negotiated Rulemaking

Gov't Code § 11368.010 (added). Legislative findings and purpose

11368.010. (a) The Legislature finds as follows:

(1) Traditional notice and comment rulemaking procedures may cause parties with different interests to assume conflicting and antagonistic positions and to engage in expensive and time-consuming litigation over agency regulations.

(2) Adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a regulation. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties.

(3) Negotiated rulemaking, in which the parties who will be significantly affected by a regulation participate in the development of the regulation, can provide significant advantages over adversarial rulemaking. Negotiated rulemaking can increase the acceptability and improve the substance of regulations, making it less likely that the affected parties will resist enforcement or challenge such regulations in court. It may also shorten the amount of time needed to issue final regulations.

(b) The purpose of this article is to establish a framework for the conduct of negotiated rulemaking and to encourage its use. Nothing in this article requires an agency to conduct negotiated rulemaking or limits an agency's authority to conduct informal discussions with an interested person regarding a proposed regulation.

(c) Negotiated rulemaking precedes the adoption of a regulation and is intended only as a method for developing the initial text of a proposed regulation. If an agency decides to adopt a regulation developed by means of negotiated rulemaking, it must do so under Article 5 (commencing with Section 11346).

Comment. Section 11368.010 is new. The findings in subdivision (a) are similar to those stated in Pub. L. No. 101-648 § 2. See also 5 U.S.C. § 561 *et seq* (federal negotiated rulemaking procedure).

Gov't Code § 11368.020 (added). Definitions

11368.020. As used in this article, the following terms have the following meanings:

(a) "Consensus" means unanimous concurrence among the interests represented on a negotiated rulemaking committee, unless the committee agrees to define the term to mean agreement of a specified majority.

(b) "Negotiated rulemaking committee" or "committee" means an advisory committee established by an agency to represent the interests that would be significantly affected by a proposed regulation in negotiations regarding the terms of the proposed regulation.

1 **Comment.** Section 11368.020 is new. It is added for drafting convenience. See also 5
2 U.S.C. § 562 (definitions applicable to federal negotiated rulemaking procedure).

3 **Gov't Code § 11368.030 (added). Negotiated rulemaking authorized**

4 11368.030. An agency may engage in negotiated rulemaking pursuant to this
5 article if the head of the agency determines that to do so is feasible. The factors
6 considered by the head of the agency in making this determination shall include
7 the following:

8 (a) The number of identifiable interests that would be significantly affected by
9 the regulation.

10 (b) The likelihood that a negotiated rulemaking committee can be convened
11 with a balanced representation of the interests identified under subdivision (a).

12 (c) The likelihood that representatives of the affected interests will be willing to
13 negotiate in good faith and will reach a consensus on the proposed regulation
14 within a fixed period of time.

15 (d) The resources available to support the negotiated rulemaking process.

16 (e) The agency's willingness to use the consensus of the committee as the basis
17 for the proposed regulation.

18 **Comment.** Section 11368.030 is new. It authorizes the use of negotiated rulemaking if its
19 use is determined to be feasible. See also Sections 11368.020(a) ("consensus" defined),
20 11368.020(b) ("negotiated rulemaking committee" defined); 5 U.S.C. § 563(a)
21 (determination of need for negotiated rulemaking under federal procedure).

22 **Gov't Code § 11368.040 (added). Notice and comment**

23 11368.040. An agency intending to engage in negotiated rulemaking shall
24 publish a notice of intent in the California Regulatory Notice Register and shall
25 mail a copy of the notice to any person who has requested notice of agency
26 regulatory actions. The notice shall include all of the following:

27 (a) A description of the subject and the scope of the regulation that the agency
28 proposes to develop through negotiated rulemaking.

29 (b) A list of the interests that are likely to be significantly affected by the
30 regulation.

31 (c) A list of the persons presently being considered by the agency for
32 membership on the negotiated rulemaking committee, indicating the interest that
33 each person would represent.

34 (d) A proposed agenda and schedule for completing the work of the committee,
35 including a target date for publication by the agency of a notice of proposed
36 action pursuant to Section 11346.4.

37 (e) A description of the administrative and technical support that the agency
38 intends to provide to the committee.

39 (f) A solicitation for comments on the proposal to engage in negotiated
40 rulemaking.

41 (g) An explanation of how a person may apply or nominate another person for
42 committee membership.

(h) The deadline for submission of comments and applications or nominations for committee membership. The deadline shall be at least 30 days after publication and mailing of the notice.

Comment. Section 11368.040 is new. It requires public notice of an agency's intention to engage in negotiated rulemaking. It also provides a mechanism for members of the public to comment on the agency's intention and to apply for or nominate others for membership on the negotiated rulemaking committee. See also Section 11368.020(b) ("negotiated rulemaking committee" defined); 5 U.S.C. § 564 (public notice and comment under federal negotiated rulemaking procedure).

Gov't Code § 11368.050 (added). Committee membership

11368.050. (a) If, after considering all public comments received pursuant to Section 11368.040, the agency decides to proceed with negotiated rulemaking to develop the proposed regulation, it shall convene a negotiated rulemaking committee.

(b) Unless the agency determines that a greater number of members is necessary for the functioning of the committee or to achieve balanced representation of the affected interests, the agency shall appoint no more than 25 members to the negotiated rulemaking committee.

(c) The committee shall include at least one person representing the agency. Other committee members shall be chosen by the agency in order to achieve balanced representation of all significantly affected interests. In choosing committee members, the agency is not limited to those persons who have applied or been nominated for committee membership pursuant to Section 11368.040.

(d) The person or persons representing the agency on the negotiated rulemaking committee shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee, and shall be authorized to fully represent the agency in the discussions and negotiations of the committee.

(e) Once the agency has chosen the committee members, it shall give notice of its action. The notice shall be published in the California Regulatory Notice Register and mailed to any person who has requested notice of agency regulatory actions. The notice shall include the following information:

(1) A list of the committee members chosen and the interests they represent.

(2) Information on how to receive committee agendas, minutes, and other materials.

Comment. Section 11368.050 is new. It governs the composition of the negotiated rulemaking committee. It also requires public notice when the members of a negotiated rulemaking committee have been chosen. See also Sections 11368.020(a) ("consensus" defined), 11368.020(b) ("negotiated rulemaking committee" defined); 5 U.S.C. §§ 565 (establishment and membership of negotiated rulemaking committee under federal procedure), 566(b) (representative of agency on negotiated rulemaking committee under federal procedure).

Gov't Code § 11368.060 (added). Facilitator

11368.060. (a) An agency may nominate any person to serve as facilitator of the negotiated rulemaking committee, subject to the approval of the committee by consensus. If the committee does not approve the nominee of the agency for facilitator, the agency shall submit a substitute nomination. If a committee does not approve any nominee of the agency for facilitator, the committee shall select by consensus a person to serve as facilitator. A person designated to represent the agency in substantive issues may not serve as facilitator or otherwise chair the committee.

(b) An agency shall determine whether a person under consideration to serve as facilitator of a committee has any financial or other interest that would preclude that person from serving in an impartial and independent manner.

(c) The facilitator shall do all of the following:

(1) Chair the meetings of the committee in an impartial manner.

(2) Impartially assist the members of the committee in conducting discussions and negotiations.

(3) Maintain committee minutes and records.

Comment. Section 11368.060 is new. It provides for the appointment of a neutral facilitator to assist the negotiated rulemaking committee. See also Sections 11368.020(a) ("consensus" defined), 11368.020(b) ("negotiated rulemaking committee" defined); 5 U.S.C. §§ 566(c) & (d) (selection and duties of facilitator under federal negotiated rulemaking procedure), 568(a) (contracting for services of facilitator under federal negotiated rulemaking procedure).

Gov't Code § 11368.070 (added). Committee procedures

11368.070. (a) The members of the negotiated rulemaking committee shall negotiate in good faith in an attempt to reach consensus on the terms of the regulation proposed by the agency.

(b) A committee may adopt procedures governing its operations. These procedures are not subject to the requirements of this chapter.

(c) The committee is an advisory committee for the purposes of Section 11121.8.

(d) All committee records are public records for the purposes of the California Public Records Act, except for the personal notes or materials of the facilitator or of any member of the committee. On termination of the committee, all public records of the committee shall be transmitted to the agency.

(e) A negotiated rulemaking committee terminates either when the agency decides not to proceed further with adoption of the proposed regulation or when the proposed regulation is filed with the Secretary of State.

Comment. Section 11368.070 is new. It governs the operations of the negotiated rulemaking committee. See also Sections 11368.020(a) ("consensus" defined), 11368.020(b) ("negotiated rulemaking committee" defined). See also 5 U.S.C. §§ 566(a) (duties of committee under federal negotiated rulemaking procedure), 566(e) (exemption of committee procedures from rulemaking procedure), 566(g) (status of committee records), 567 (termination of committee).

Gov't Code § 11368.080 (added). Report

11368.080. (a) On reaching consensus or on expiration of the time allotted by the agency for negotiation, the negotiated rulemaking committee shall submit its report to the agency.

(b) If the committee reaches consensus on the terms of the proposed regulation, the report shall contain the text of the proposed regulation agreed to by the committee. If the committee does not reach consensus on the proposed regulation as a whole, the report shall identify any issues on which the committee did reach consensus.

(c) The report shall include any information, recommendations, or materials that the committee considers appropriate. An individual committee member may also include any additional information, recommendations, or materials that the committee member considers important. Material added by an individual committee member shall be included as a separate addendum to the report.

(d) The report is advisory only. The agency is encouraged but not required to accept the recommendations of the negotiated rulemaking committee.

(e) On the request of the agency, the committee shall prepare and submit to the agency a supplemental report responding to public comments received by the agency in response to the proposed regulation.

Comment. Section 11368.080 is new. It specifies the means by which a negotiated rulemaking committee communicates its recommendations to the rulemaking agency. See also Sections 11368.020(a) ("consensus" defined), 11368.020(b) ("negotiated rulemaking committee" defined); 5 U.S.C. § 566(f) (committee report under federal negotiated rulemaking procedure).

Gov't Code § 11368.090 (added). Administrative and financial support

11368.090. (a) The agency shall provide appropriate administrative support to the negotiated rulemaking committee, including technical assistance.

(b) Except as provided in subdivision (c), members of the committee shall serve without compensation and shall not be reimbursed for expenses related to service on the committee.

(c) If a committee member certifies that the member lacks the financial resources necessary to participate on the committee and the agency determines that the member's participation on the committee is necessary to ensure adequate representation of the member's interest, the agency may do either or both of the following:

(1) Reimburse the committee member for reasonable expenses necessarily incurred in serving on the committee.

(2) Provide a per diem of one hundred dollars (\$100) for each day actually spent on committee business.

(d) An agency may employ or enter into contracts for the services of a private individual or organization to serve as a facilitator or to provide any other service that is reasonably necessary in conducting a negotiated rulemaking.

1 **Comment.** Section 11368.090 is new. It provides for the allocation of agency resources to
2 a negotiated rulemaking committee. See also Section 11368.020(b) (“negotiated rulemaking
3 committee” defined); 5 U.S.C. § 565(c) (administrative support for committee under federal
4 negotiated rulemaking procedure), 568(c) (compensation of committee members under
5 federal negotiated rulemaking procedure).

6 **Gov’t Code § 11368.100 (added). Judicial review**

7 11368.100. An agency action relating to the establishment of a negotiated
8 rulemaking committee is not subject to judicial review or to review under Article 6
9 (commencing with Section 11349).

10 **Comment.** Section 11368.100 is new. While this section provides that agency action
11 relating to the establishment of a negotiated rulemaking committee is not subject to judicial
12 review or review by the Office of Administrative Law, it does not preclude review of a
13 regulation that was developed through negotiated rulemaking, where the basis for review is
14 unrelated to the establishment of the negotiated rulemaking committee. See also Section
15 11368.020(b) (“negotiated rulemaking committee” defined); 5 U.S.C. § 570 (limitation on
16 judicial review under federal negotiated rulemaking procedure).

CONFORMING REVISIONS

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 former subdivision (b) of Government Code Section that applied before regulations adopted under this section were exempted from Government Code Section 11343.4.

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 of every 500 children. The Legislature finds and declares that sudden infant

1 death syndrome is a serious problem within the State of California, and that public
2 interest is served by research and study of sudden infant death syndrome, and its
3 potential causes and indications.

4 (c) To facilitate these purposes, the coroner shall, within 24 hours, or as soon
5 thereafter as feasible, perform an autopsy in any case where an infant has died
6 suddenly and unexpectedly.

7 (d) The autopsy shall be conducted pursuant to a standardized protocol
8 developed by the State Department of Health Services. The protocol is exempt
9 from the procedural requirements pertaining to the adoption of administrative
10 rules and regulations pursuant to ~~Article 2 (commencing with Section 11342)~~
11 Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3
12 of Title 2 of the Government Code. The protocol shall be developed and
13 approved by July 1, 1990.

14 (e) The protocol shall be followed by all coroners throughout the state when
15 conducting the autopsies required by this section. The coroner shall state on the
16 certificate of death that sudden infant death syndrome was the cause of death
17 when the coroner's findings are consistent with the definition of sudden infant
18 death syndrome specified in the standardized autopsy protocol. The protocol may
19 include requirements and standards for scene investigations, requirements for
20 specific data, criteria for ascertaining cause of death based on the autopsy, and
21 criteria for any specific tissue sampling, and any other requirements. The protocol
22 may also require that specific tissue samples must be provided to a central tissue
23 repository designated by the State Department of Health Services.

24 (f) The State Department of Health Services shall establish procedures and
25 protocols for access by researchers to any tissues, or other materials or data
26 authorized by this section. Research may be conducted by any individual with a
27 valid scientific interest and prior approval from the State Committee for the
28 Protection of Human Subjects. The tissue samples, the materials, and all data shall
29 be subject to the confidentiality requirements of Section 103850 of the Health
30 and Safety Code.

31 (g) The coroner may take tissue samples for research purposes from infants who
32 have died suddenly and unexpectedly without consent of the responsible adult if
33 the tissue removal is not likely to result in any visible disfigurement.

34 (h) A coroner shall not be liable for damages in a civil action for any act or
35 omission done in compliance with this section.

36 (i) No consent of any person is required prior to undertaking the autopsy
37 required by this section. However, if the physician of record certifies the cause of
38 death is sudden infant death syndrome and the parents object to an autopsy on
39 religious or ethical grounds, no autopsy shall be required.

40 **Comment.** Section 27491.41 is amended to correct an erroneous reference to former
41 Article 2 (commencing with Section 11342) of Chapter 3.5 of Part 1 of Division 3 of Title 2
42 of the Government Code.

Health & Safety Code § 33427 (amended). Small business incubator

SEC. _____. Section 33427 of the Health and Safety Code is amended to read:

33427. (a) In addition to any other authority granted under this part, an agency may, within a project area, for the purposes of redevelopment, assist public agencies or private nonprofit corporations to establish and maintain a small business incubator.

(b) In addition to any other authority granted under this part, an agency may, for the purposes of redevelopment, provide loan guarantees for small businesses located within a project area.

(c) For the purposes of this section, “small business” shall have the same meaning as defined in Section 11342.600 of the Government Code.

(d) This section shall apply only to a project area that is located within the City of Healdsburg, the City of Long Beach, the City of Los Angeles, the City of Oakland, or the City of Signal Hill. Any agency operating within one of those cities which uses the authority granted by this section shall separately identify those actions in the annual report to its legislative body prepared pursuant to Section 33080.1.

(e) No agency may amend a redevelopment plan to increase the tax increment revenue limit pursuant to Section 33333.2 or 33333.4 for the purpose of implementing this section.

Comment. Section 33427 is amended to substitute reference to the Government Code provision that replaced former Government Code Section 11342(h).

Health & Safety Code § 57004 (amended). External scientific peer review of proposed rules

SEC. _____. Section 57004 of the Health and Safety Code is amended to read:

57004. (a) For purposes of this section, the following terms have the following meaning:

(1) “Rule” means either of the following:

(A) A regulation, as defined in ~~subdivision (g) of Section 11342~~ Section 11342.590 of the Government Code.

(B) A policy adopted by the State Water Resources Control Board pursuant to the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code) that has the effect of a regulation and that is adopted in order to implement or make effective a statute.

(2) “Scientific basis” and “scientific portions” means those foundations of a rule that are premised upon, or derived from, empirical data or other scientific findings, conclusions, or assumptions establishing a regulatory level, standard, or other requirement for the protection of public health or the environment.

(b) The agency, or a board, department, or office within the agency, shall enter into an agreement with the National Academy of Sciences, the University of California, the California State University, or any similar scientific institution of higher learning, any combination of those entities, or with a scientist or group of

1 scientists of comparable stature and qualifications that is recommended by the
2 President of the University of California, to conduct an external scientific peer
3 review of the scientific basis for any rule proposed for adoption by any board,
4 department, or office within the agency. The scientific basis or scientific portion
5 of a rule adopted pursuant to Chapter 6.6 (commencing with Section 25249.5) of
6 Division 20 or Chapter 3.5 (commencing with Section 39650) of Division 26 shall
7 be deemed to have complied with this section if it complies with the peer review
8 processes established pursuant to these statutes.

9 (c) No person may serve as an external scientific peer reviewer for the scientific
10 portion of a rule if that person participated in the development of the scientific
11 basis or scientific portion of the rule.

12 (d) No board, department, or office within the agency shall take any action to
13 adopt the final version of a rule unless all of the following conditions are met:

14 (1) The board, department, or office submits the scientific portions of the
15 proposed rule, along with a statement of the scientific findings, conclusions, and
16 assumptions on which the scientific portions of the proposed rule are based and
17 the supporting scientific data, studies, and other appropriate materials, to the
18 external scientific peer review entity for its evaluation.

19 (2) The external scientific peer review entity, within the timeframe agreed upon
20 by the board, department, or office and the external scientific peer review entity,
21 prepares a written report that contains an evaluation of the scientific basis of the
22 proposed rule. If the external scientific peer review entity finds that the board,
23 department, or office has failed to demonstrate that the scientific portion of the
24 proposed rule is based upon sound scientific knowledge, methods, and practices,
25 the report shall state that finding, and the reasons explaining the finding, within
26 the agreed-upon timeframe. The board, department, or office may accept the
27 finding of the external scientific peer review entity, in whole, or in part, and may
28 revise the scientific portions of the proposed rule accordingly. If the board,
29 department, or office disagrees with any aspect of the finding of the external
30 scientific peer review entity, it shall explain, and include as part of the rulemaking
31 record, its basis for arriving at such a determination in the adoption of the final
32 rule, including the reasons why it has determined that the scientific portions of
33 the proposed rule are based on sound scientific knowledge, methods, and
34 practices.

35 (e) The requirements of this section do not apply to any emergency regulation
36 adopted pursuant to subdivision (b) of Section 11346.1 of the Government Code.

37 (f) Nothing in this section shall be interpreted to, in any way, limit the authority
38 of a board, department, or office within the agency to adopt a rule pursuant to the
39 requirements of the statute that authorizes or requires the adoption of the rule.

40 **Comment.** Section 57004 is amended to substitute reference to the Government Code
41 provision that continues the definition of “regulation” in former Government Code Section
42 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.

(3) Rules issued by the director or director's designee that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code.

(d) The following regulations are exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code under the conditions specified:

1 (1) Regulations adopted by the director or the director's designee applying to
2 any legislatively mandated or authorized pilot program or a departmentally
3 authorized pilot program, provided that an estimate of fiscal impact is completed
4 pursuant to Section 6055, and following, of the State Administrative Manual
5 dated July 1986, and that the following conditions are met:

6 (A) A pilot program affecting male inmates only shall affect no more than 10
7 percent of the total state male inmate population; a pilot program affecting female
8 inmates only shall affect no more than 10 percent of the total state female inmate
9 population; and a pilot program affecting male and female inmates shall affect no
10 more than 10 percent of the total state inmate population.

11 (B) The director certifies in writing that the regulations apply to a pilot program
12 that qualifies for exemption under this subdivision.

13 (C) The certification and regulations are filed with the Office of Administrative
14 Law and the regulations are made available to the public by publication pursuant
15 to subparagraph (F) of paragraph (2) of subdivision (b) of Section 6 of Title 1 of
16 the California Code of Regulations.

17 The regulations shall become effective immediately upon filing with the
18 Secretary of State and shall lapse by operation of law two years after the date of
19 the director's certification unless formally adopted by the director pursuant to
20 Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of
21 the Government Code.

22 (2) Action or actions, or policies implementing them, taken by the department
23 and based upon a determination of imminent danger by the director or the
24 director's designee that there is a compelling need for immediate action, and that
25 unless that action is taken, serious injury, illness, or death is likely to result. The
26 action or actions, or policies implementing them, may be taken provided that the
27 following conditions shall subsequently be met:

28 (A) A written determination of imminent danger shall be issued describing the
29 compelling need and why the specific action or actions must be taken to address
30 the compelling need.

31 (B) The written determination of imminent danger shall be mailed within 10
32 working days to every person who has filed a request for notice of regulatory
33 actions with the department and to the Chief Clerk of the Assembly and the
34 Secretary of the Senate for referral to the appropriate policy committees.

35 Any policy in effect pursuant to a determination of imminent danger shall lapse
36 by operation of law 15 calendar days after the date of the written determination
37 of imminent danger unless an emergency regulation is filed with the Office of
38 Administrative Law pursuant to subdivision (e). This section shall in no way
39 exempt the department from compliance with other provisions of law related to
40 fiscal matters of the state.

41 (e) Emergency regulations shall be adopted pursuant to Chapter 3.5
42 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the
43 Government Code, except that:

1 (1) Notwithstanding subdivision (e) of Section 11346.1 of the Government
2 Code, the initial effective period for emergency regulations shall be 160 days.

3 (2) No showing of emergency is necessary in order to adopt emergency
4 regulations other than a written statement by the director or the director's
5 designee, to be filed with the Office of Administrative Law, certifying that
6 operational needs of the department require adoption of the regulations on an
7 emergency basis.

8 (3) This subdivision shall apply only to the adoption and one readoption of any
9 emergency regulation.

10 It is the intent of the Legislature, in authorizing the deviations in this
11 subdivision from the requirements and procedures of Chapter 3.5 (commencing
12 with Section ~~113340~~ 11340) of Part 1 of Division 3 of Title 2 of the Government
13 Code, to authorize the department to expedite the exercise of its power to
14 implement regulations as its unique operational circumstances require.

15 **Comment.** Section 5058 is amended to substitute reference to the Government Code
16 provision that continues the definition of "regulation" in former Government Code Section
17 11342(g) and to correct an erroneous reference in subdivision (e)(3).

18 **Pub. Res. Code § 25620.2 (amended). Administration of program**

19 SEC. _____. Section 25620.2 of the Public Resources Code is amended to read:

20 25620.2. (a) The commission shall administer the program in a manner that is
21 consistent with the purposes of Chapter 854 of the Statutes of 1996, and shall
22 ensure that the program meets all of the following criteria:

23 (1) Demonstrates a balance of benefits to all sectors that contribute to the
24 funding under Section 381 of the Public Utilities Code.

25 (2) Addresses key technical and scientific barriers.

26 (3) Demonstrates a balance between short-term, mid-term, and long-term
27 potential.

28 (4) Ensures that research currently, previously, or about to be undertaken by
29 research organizations is not unnecessarily duplicated.

30 (b) To ensure the efficient implementation and administration of the program,
31 the commission shall do both of the following:

32 (1) Develop procedures for the solicitation of award applications for project or
33 program funding, and to ensure efficient program management.

34 (2) Evaluate and select programs and projects, based on merit, that will be
35 funded under the program.

36 (c) To ensure the success of electric industry restructuring in the transition to a
37 new market structure and to implement the program, the commission shall adopt
38 regulations, as defined in ~~subdivision (g) of Section 11342~~ Section 11342.590 of
39 the Government Code, in accordance with the following procedures:

40 (1) Prepare a preliminary text of the proposed regulation and provide a copy of
41 the preliminary text to any person requesting a copy.

1 (2) Provide public notice of the proposed regulation to any person who has
2 requested notice of the regulations prepared by the commission. The notice shall
3 contain all of the following:

4 (A) A clear overview explaining the proposed regulation.

5 (B) Instructions on how to obtain a copy of the proposed regulations.

6 (C) A statement that if a public hearing is not scheduled for the purpose of
7 reviewing a proposed regulation, any person may request, not later than 15 days
8 prior to the close of the written comment period, a public hearing conducted in
9 accordance with the procedures set forth in Section 11346.8 of the Government
10 Code.

11 (D) A deadline for the submission of written comments.

12 (3) Accept written public comments for 30 calendar days after providing the
13 notice required in paragraph (2).

14 (4) Certify that all written comments were read and considered by the
15 commission.

16 (5) Place all written comments in a record that includes copies of any written
17 factual support used in developing the proposed regulation, including written
18 reports and copies of any transcripts or minutes in connection with any public
19 hearings on the adoption of the regulation. The record shall be open to public
20 inspection and available to the courts.

21 (6) Provide public notice of any substantial revision of the proposed regulation
22 at least 15 days prior to the expiration of the deadline for public comments and
23 comment period using the procedures provided in paragraph (2).

24 (7) Conduct public hearings, if a hearing is requested by an interested party,
25 that shall be conducted in accordance with the procedures set forth in Section
26 11346.8 of the Government Code.

27 (8) Adopt any proposed regulation at a regularly scheduled and noticed
28 meeting of the commission. The regulation shall become effective immediately
29 unless otherwise provided by the commission.

30 (9) Publish any adopted regulation in a manner that makes copies of the
31 regulation easily available to the public. Any adopted regulation shall also be
32 made available on the Internet. The commission shall transmit a copy of an
33 adopted regulation to the Office of Administrative Law for publication, or, if the
34 commission determines that printing the regulation is impractical, an appropriate
35 reference as to where a copy of the regulation may be obtained.

36 (10) Notwithstanding any other provision of law, this subdivision provides an
37 interim exception from the requirements of Chapter 3.5 (commencing with
38 Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code for
39 regulations required to implement Sections 25621 and 25622 that are adopted
40 under the procedures specified in this subdivision.

41 (11) This subdivision shall become inoperative on January 1, 2000, unless a later
42 enacted statute deletes or extends that date. However, after January 1, 2000, the
43 commission shall not be required to repeat any procedural step in adopting a

1 regulation that has been completed before January 1, 2000, using the procedures
2 specified in this subdivision.

3 **Comment.** Section 25620.2 is amended to substitute reference to the Government Code
4 provision that continues the definition of “regulation” in former Government Code Section
5 11342(g).

6 **Welf. & Inst. Code § 11462.4 (amended). Community care facility deemed small business**

7 SEC. _____. Section 11462.4 of the Welfare and Institutions Code is amended to
8 read:

9 11462.4. Notwithstanding Section ~~11342~~ 11342.600 of the Government Code,
10 group homes and foster family agencies shall be deemed small businesses and the
11 department shall project the impact on group homes and foster family agencies of
12 any new regulations which will affect those community care facilities.

13 **Comment.** Section 11462.4 is amended to substitute reference to the Government Code
14 provision that continues the definition of “small business” in former Government Code
15 Section 11342(h).