

Memorandum 99-69

Administrative Rulemaking: Draft Recommendation

Attached is a draft recommendation relating to *Administrative Rulemaking*. This draft incorporates decisions made by the Commission at its August 13, 1999, meeting. The Commission should review this draft and decide whether to make it the final recommendation. The most significant changes from the tentative recommendation are listed below. The staff does not intend to discuss these changes unless issues are raised at the meeting.

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

Tidewater Exceptions Neither Ratified Nor Abrogated

The proposed language relating to the “individual advice” and “policy manual” exceptions, discussed in *Tidewater Marine Western, Inc. v. Bradshaw* (14 Cal. 4th 557, 571 (1996)) is deleted. The Comments to Sections 11340.5 and 11340.9(i) state that the proposed law is not intended to ratify or abrogate the opinion in *Tidewater*.

Existing “Internal Management” Exception Preserved

The proposed modifications to the “internal management” exception are deleted, preserving the substance of existing law. See Section 11340.9(d).

Addition of “Examination” to Audit Protocol Exception

Section 11349.9(e) provides an exception for rules that relate to audits, investigations, inspections, settlement of commercial disputes, negotiation of commercial arrangements, or the defense, prosecution, or settlement of cases, where disclosure of the rule would enable law violators to avoid detection, facilitate disregard of the law, or give a clearly improper advantage to a person in an adverse position to the state. As suggested by the Department of Corporations, “examination” has been added to the list of activities that are subject to this exception. The letter requesting this change focused on examinations that are, in effect, inspections. See, e.g., Fin. Code § 17405

(Department of Corporations may examine the business, accounts, and records of an escrow agent”). However, “examination” can also mean a test administered to evaluate a person’s knowledge or ability. In fact, the Department administers such examinations, as do other agencies. See, e.g., Corp. Code § 25217 (passage of examination administered by Department of Corporations may be required for licensing of securities agent). An agency should not be required to disclose rules or standards relating to a licensing examination if doing so would give the examinee an improper advantage. This policy is recognized in the Public Records Act, which exempts from disclosure “examination data used to administer a licensing examination, examination for employment, or academic examination.” See Section 6254(g). Both types of “examination” should be included in the proposed exception. The Comment to the section notes both meanings of the term.

Input Sought on Whether to Extend Effective Period of Rulemaking Notice

The staff draft recommendation includes a provision that would permit an extension for good cause of the effective period of a rulemaking notice. See proposed amendment to Section 11346.4(b). The Commission would like to receive input on the usefulness of such a provision. A request for input is also included in the preliminary part of the staff draft recommendation (it will be deleted in the final recommendation). See staff draft recommendation at p. 3.

Provision Limiting Scope of Necessity Review Deleted

The language providing that an agency need only demonstrate the necessity of “major provisions” and “challenged provisions” of a proposed regulation has been deleted. See Section 11349(a).

Stylistic Changes to Regulatory Review Standards Deleted

Stylistic changes to the regulatory review standards have been deleted. See Section 11349(b)-(f).

Provision Limiting Record in Declaratory Review Proceeding Refined

The provision limiting the record of review in a proceeding under Section 11350 has been refined in three ways:

(1) It is phrased in terms of a limitation on what a court may consider, rather than in terms of a definition of the record of review.

(2) The provision allowing consideration of evidence of a procedural violation has been replaced with a provision allowing consideration of items that should have been placed in the rulemaking file, but were not, for the sole purpose of proving their omission.

(3) A provision was added allowing consideration of affidavits to prove whether a regulation used by an agency should have been adopted under the rulemaking chapter (i.e., whether it is an “underground regulation”). The Commission would like to receive input on the usefulness of this provision. A request for input is also included in the preliminary part of the staff draft recommendation (it will be deleted in the final recommendation). See staff draft recommendation at p. 10.

Respectfully submitted,

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#N-300

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Administrative Rulemaking

August 1999

California Law Revision Commission
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SUMMARY OF STAFF DRAFT RECOMMENDATION

The California Law Revision Commission recommends a number of changes to the rulemaking provisions of the Administrative Procedure Act 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) Minor improvements to the rulemaking procedure.
- (3) Refinements to the exceptions to the rulemaking requirements.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

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

RULEMAKING PROCEDURE

The APA requires that regulations be adopted under a detailed public notice and comment procedure.⁴ The proposed law contains the following revisions and clarifications of that process:

Pre-Adoption Public Input

Under existing law, an agency may confer informally with interested persons in the process of developing a proposed regulation. The Commission has learned

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. Gov't Code §§ 11346-11347.3.

1 that some agencies do not understand that this is permitted. The proposed law
2 expressly authorizes the practice.⁵

3 **Effective Period of Notice of Proposed Action**

4 Existing law provides that a notice of proposed action is effective for one year.⁶
5 If the proposed action has not been completed in that time, the adopting agency
6 must issue a new notice. In some cases a proposed action may take more than a
7 year to complete (e.g., where voluminous comments have been received and must
8 be summarized and responded to). The proposed law would allow the Director of
9 the Office of Administrative Law to extend the effective period of a notice of
10 proposed action for good cause.⁷

11 **Some commentators have suggested that this provision is unnecessary and**
12 **would result in needless delays. The Commission would like to receive**
13 **additional input on this issue.**

14 **Preliminary Agency Determinations**

15 Existing law requires an agency's notice of proposed action and the
16 accompanying initial statement of reasons to include preliminary agency determi-
17 nations on a number of matters that can only be determined definitively after
18 public comment and hearing have occurred.⁸ The statute should be revised to
19 make clear that these preliminary determinations may be made on the basis of the
20 agency's belief.⁹

21 **Regulation that Imposes Report Requirement on Business**

22 To adopt a regulation that will impose a report requirement on a business, an
23 agency must make a finding that this is necessary for the health, safety, or welfare
24 of the people of the state.¹⁰ However, the statute does not indicate where the
25 finding is to be reported.

26 The proposed law makes clear that the finding is to be included in the
27 rulemaking notice.¹¹ This will put the public on notice that the proposed
28 regulation will require businesses to file a report and will allow an interested
29 person to comment on the required finding.

5. See proposed amendment to Gov't Code § 11346.

6. Gov't Code § 11346.4(b).

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

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

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

10. Gov't Code § 11346.3(c).

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

Plain English Requirement

Existing law requires that a regulation that will affect small business must be drafted in plain English or a plain English summary of the regulation must be provided,¹² and the informative digest prepared by the agency concerning the regulation must include a plain English policy statement overview explaining its objectives.¹³ These are beneficial provisions that should be extended to all regulations, not just those affecting small business. Other provisions applying to regulations that affect small business would also be extended to apply to all regulations.¹⁴

The statutory definition of “plain English” is difficult to apply.¹⁵ The proposed law would define plain English as language that satisfies the “clarity” standard, i.e., that is easily understood by persons who would be directly affected by it.¹⁶ Existing law provides an enforcement mechanism for such a requirement by means of review by the Office of Administrative Law.¹⁷

Public Hearing

Existing law provides for a public hearing on a proposed regulation.¹⁸ 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.¹⁹ If a hearing is held, the agency must permit public comment that is “either oral or in writing, or both.”²⁰ A literal reading of this language suggests that an agency may preclude oral comment, and in fact this has occurred.²¹

The proposed law revises the statute to make clear that oral testimony must be allowed at a public hearing, subject to reasonable agency limitations.²² 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.

12. Gov’t Code § 11346.2(a)(1).

13. Gov’t Code § 11346.5(a)(3)(B).

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

15. 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.”).

16. See Gov’t Code § 11349(c) (clarity standard for review of regulations).

17. Gov’t Code §§ 11349-11349.6.

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

19. Gov’t Code § 11346.8(a).

20. *Id.*

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

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

1 **Response to Comments**

2 An agency is required to respond to “each objection” made concerning a pro-
3 posed regulation.²³ A response is only required, however, if the comment is
4 directed at the proposed action or the procedures followed by the agency.²⁴
5 Agency practice under these rules has been to aggregate and respond to repeti-
6 tive comments as a group and to summarily dispose of comments that are irrele-
7 vant. The proposed law specifically recognizes this method of dealing with repeti-
8 tive or irrelevant comments.²⁵

9 **Rulemaking File**

10 *Public inspection of file.* The statutes governing the rulemaking file imply that
11 the file is not available to the public until the rulemaking proceeding, and the
12 record of that proceeding, are complete.²⁶ It is appropriate that the public be able
13 to view the contents of the rulemaking file from the time a regulation is proposed.
14 A major purpose of the rulemaking statute is to promote meaningful public partic-
15 ipation in agency rulemaking — for this purpose it is helpful to have the
16 rulemaking file available throughout the rulemaking process. The proposed law
17 makes clear that the rulemaking file is available for public inspection at all times
18 during the rulemaking proceedings.²⁷

19 *Documents added to file.* Existing law provides for addition of documents to
20 the rulemaking file after the close of the public hearing or comment period,²⁸
21 subject to the agency making “adequate provision” for further public com-
22 ment.²⁹ The proposed law supplements these provisions with specific procedural
23 rules,³⁰ based on existing practice.³¹ The proposed law also authorizes the addi-
24 tion of material to the rulemaking file during administrative review of a proposed
25 regulation, so long as doing so does not violate other limitations on the addition
26 of material to the file.³² This allows an agency to correct inadvertent omissions to
27 the rulemaking file, without requiring disapproval of the rule by the Office of
28 Administrative Law and resubmission of the corrected file.

29 *Final statement of reasons.* Despite the general statutory limitations on adding
30 documents to the rulemaking file after the close of public comment, the law

23. Gov’t Code § 11346.9(a)(3)

24. *Id.*

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

26. See Gov’t Code § 11347.3.

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

28. Gov’t Code § 11346.9(a)(1).

29. Gov’t Code § 11346.8(d).

30. See proposed Gov’t Code § 11347.1.

31. 1 Cal. Code Reg. § 45.

32. See proposed Gov’t Code § 11349.2.

1 requires an agency to add a final statement of reasons and updated informative
2 digest.³³ The proposed law resolves this inconsistency by making clear that the
3 addition of these materials is an exception to the limitation on adding material to
4 the rulemaking file after public comment.³⁴

5 **Application of Requirements to Repeals**

6 Some APA provisions appear to treat the repeal of regulations differently than
7 the adoption or amendment of regulations.³⁵ Such a distinction is undesirable.
8 While it is true that a repeal cannot be used to create new legal requirements, a
9 repeal may nonetheless have a substantive effect. For example, a repeal might be
10 used to broaden the scope of an existing requirement, by eliminating an
11 exemption. Or a repeal might eliminate a restriction on one group that is intended
12 to protect another group. The rulemaking procedures should apply to these
13 changes just as they would to the addition or amendment of a regulation. The
14 proposed law revises a number of rulemaking requirements so that they apply to a
15 proposed repeal as well as a proposed adoption or amendment.³⁶

16 **Emergency Rulemaking**

17 The APA provides a procedure for the expedited adoption of temporary
18 “emergency regulations” where such regulations are immediately required to
19 preserve the public peace, health and safety, or general welfare.³⁷ Emergency
20 regulations are valid for 120 days. This provides time for the agency to adopt a
21 permanent regulation to replace the emergency regulation. The 120-day limit was
22 added in 1957, when rulemaking procedures were less complex than they are
23 today.³⁸ Under existing law, 120 days may be insufficient time to adopt a
24 permanent regulation. The proposed law increases the effective period of an
25 emergency regulation to 180 days.³⁹

26 The proposed law also makes minor technical changes in the emergency regu-
27 lation provisions.⁴⁰

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

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

35. 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.

36. See proposed amendments to Gov’t Code §§ 11346.3 (assessment of economic impact), 11346.5(a)(7)-(8) (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).

37. Gov’t Code § 11346.1(b).

38. 1957 Cal. Stat. ch. 1919, § 1.

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

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

EXCEPTIONS TO RULEMAKING REQUIREMENTS

The APA rulemaking requirements are subject to a number of exceptions.⁴¹ The proposed law would create two new exceptions for material that should not be subject to rulemaking procedures:

Agency Rules That Should Not Be Disclosed Publicly

Under existing law, there is no exception to the rulemaking requirements for an agency audit criteria, settlement guideline, or similar rule that properly 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. The proposed law would create an exception for such a rule, where its disclosure would enable a law violator to avoid detection, facilitate disregard of the law, or give a clearly improper advantage to a person in an adverse position to the state.⁴² This is consistent with case law holding that disclosure of an agency audit protocol is contrary to the public interest and not required under the Public Records Act where the disclosure would facilitate evasion of the law.⁴³ It is also consistent with a provision exempting “examination data used to administer a licensing examination, examination for employment, or academic examination” from disclosure under the Public Records Act.⁴⁴ If such matters are exempt from disclosure under the Public Records Act they should also be exempt from disclosure under the rulemaking procedure.

Agency Rule That Is Only Tenable Interpretation of Provision of Law

An agency should not be required to adopt a regulation in order to state a rule that reflects the only legally tenable interpretation of a provision of law. This principle has been acknowledged by the courts⁴⁵ and reflects the current practice of the Office of Administrative Law.⁴⁶ The proposed law adds an exception to the

41. To improve their accessibility, the proposed law collects a number of these exceptions in a single section. See proposed Gov’t Code § 11340.9.

42. See proposed Gov’t Code § 11340.9(e). This exception is drawn from 1981 Model State APA § 3-116(2).

43. “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 Hosp. v. Meyers*, 134 Cal. App. 3d 788, 793, 184 Cal. Rptr. 840 (1982).

44. See Gov’t Code § 6254(g).

45. See, e.g., *Engelmann v. State Board of Education*, 2 Cal. App. 4th 47, 62, 3 Cal. Rptr. 2d 264, 274-75 (1991) (statement of policy or procedure that simply reiterates statutory law, without departing from or embellishing that law, need not be adopted as regulation). *Cf.* *Grier v. Kizer*, 219 Cal. App. 3d 422, 438-39, 268 Cal. Rptr. 244, 255 (1990) (agency policy was not “only legally tenable interpretation” of law and should have been adopted as a regulation).

46. See, e.g., 1988 OAL Determination No. 10, Cal. Regulatory Notice Reg. 88, No. 28-Z, July 8, 1988, p. 2313 (agency rule reflecting only legally tenable interpretation of statute was not a regulation). *Cf.* 1989 OAL Determination No. 15, Cal. Regulatory Notice Reg. 89, No. 44-Z, Nov. 3 1989, p. 3122 (law interpreted by agency regulation was subject to more than one legally tenable interpretation).

1 rulemaking requirements for an agency rule that is the only legally tenable
2 interpretation of a provision of law.⁴⁷

3 NECESSITY STANDARD FOR REVIEW OF REGULATIONS

4 Proposed regulations must be reviewed and approved by the Office of
5 Administrative Law before they become effective.⁴⁸ This review ensures that the
6 regulation satisfies specified standards⁴⁹ and was adopted in compliance with
7 procedural requirements. The proposed law would make two changes to the
8 “necessity” standard.⁵⁰

9 **Clarification of Meaning**

10 In order to satisfy the necessity standard, substantial evidence in the rulemaking
11 file must demonstrate the “need for” the regulation. This is somewhat circular.
12 The proposed law would clarify the meaning of the standard by placing it in the
13 context of the purpose of the regulation — i.e., the record must demonstrate the
14 need for a proposed regulation “to effectuate the purpose of the statute, court
15 decision, or other provision of law that the regulation implements, interprets, or
16 makes specific....”⁵¹ This change is consistent with other provisions of the APA
17 that relate to the necessity of a regulation.⁵²

18 **Evidence Supporting Determination**

19 Under existing law, if an agency relies on policies, conclusions, speculation, or
20 conjecture to explain the necessity of a regulation, the rulemaking file must also
21 include supporting facts, studies, expert opinion, or other information.⁵³ This can
22 be a problem where, as a practical matter, factual support for the agency’s
23 explanation of necessity cannot be provided. For example, where an agency
24 anticipates a problem that has not yet occurred, it may be difficult or impossible to
25 find data relating to that problem. In such a case, the agency must act on its
26 informed assessment of the situation. The proposed law would address this
27 problem by authorizing an agency to provide its rationale for the necessity of a
28 regulation in lieu of facts or expert opinion showing the need for the regulation.

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

48. Gov’t Code §§ 11349-11349.6.

49. The standards for review of a proposed regulation are: necessity, authority, clarity, consistency, reference, and nonduplication. Gov’t Code § 11349.1(a).

50. Gov’t Code § 11349(a).

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

52. 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).

53. 1 Cal. Code Regs. § 10(b)(2).

1 To do so, the agency must explain why, as a practical matter, factual evidence or
2 expert opinion cannot be provided to support its explanation.⁵⁴ The agency's
3 assertion that factual evidence could not be provided would be subject to review
4 by the Office of Administrative Law.⁵⁵

5 PERIOD FOR REVIEW OF EMERGENCY REGULATION

6 The period for review of a proposal to make an emergency regulation perma-
7 nent is 30 “days.”⁵⁶ This is inconsistent with the 30 “working day” period for
8 review of a regulation generally.⁵⁷ There is no apparent reason for this
9 inconsistency — in each case the Office of Administrative Law is reviewing a
10 proposed permanent regulation that has been adopted under the full rulemaking
11 procedure. The proposed law would eliminate the inconsistency by increasing the
12 period for review of an emergency regulation to 30 working days.⁵⁸

13 JUDICIAL REVIEW OF REGULATIONS

14 In a proceeding for a judicial declaration as to the validity of a regulation, the
15 record of review is limited to the contents of the rulemaking file.⁵⁹ This limitation
16 is too restrictive. It precludes review of essential materials that are not included in
17 the rulemaking file, such as the statement of emergency required when adopting
18 an emergency regulation.⁶⁰ It can also preclude review of evidence showing that
19 the agency did not comply with the rulemaking procedures in adopting the
20 regulation. For example, proof that an agency failed to include written public
21 comments in a rulemaking file requires review of the excluded comments. The
22 proposed law addresses this problem by expanding the scope of the record on
23 review to include materials necessary to that review.⁶¹

24 The declaratory review procedure may be used to challenge the validity of a
25 regulation used by the agency that should have been adopted under the APA,
26 but was not.⁶² In such a case, a party should be able to introduce evidence to
27 prove whether the regulation was used by the agency and whether it should

54. See proposed Gov't Code § 11349(a).

55. The Office of Administrative Law may disapprove a proposed regulation for failure to comply with rulemaking requirements. See Section 11349.3.

56. Gov't Code § 11349.6(d).

57. Gov't Code § 11349.3.

58. See proposed amendment to Gov't Code § 11349.6(d).

59. Gov't Code § 11350(b)(2).

60. See Gov't Code § 11346.1(a) (emergency regulations are not subject to Section 11347.3).

61. See proposed Gov't Code § 11350(d).

62. Section 11350 provides for review of “any regulation.” The definition of “regulation” is not limited to regulations that have been formally adopted as required. See also Gov't Code § 11340.5(a) (prohibiting use of regulations that have not been formally adopted).

1 have been adopted. The proposed law would allow the use of affidavits to prove
2 these matters.⁶³ **The Commission would like to receive additional input on this**
3 **proposed change.**

4 MISCELLANEOUS TECHNICAL IMPROVEMENTS

5 The proposed law would make the following technical improvements to exist-
6 ing law:

- 7 (1) Some provisions that are awkwardly drafted or contain technical
8 errors are revised.⁶⁴
- 9 (2) The definition of “agency” is revised to provide that “agency” has
10 the same meaning as “state agency.” This is implied but not expressly
11 stated in existing law.⁶⁵
- 12 (3) The name of the “California Regulatory Code Supplement” is
13 changed to the “California Code of Regulations Supplement.”⁶⁶ This
14 is consistent with the name of the “California Code of Regulations,”
15 which it supplements.
- 16 (4) The long definition section⁶⁷ is replaced with an article, divided into
17 individual sections, setting out the definitions in alphabetical order.⁶⁸
- 18 (5) Some definitions that are actually substantive provisions are recast as
19 such.⁶⁹
- 20 (6) Minor changes are made to codify existing beneficial practices.⁷⁰
- 21 (7) An entirely redundant section is repealed.⁷¹
- 22 (8) Duplicative requirements relating to the contents of the initial
23 statement of reasons are consolidated.⁷²

63. See proposed Gov’t Code § 11350(d)(4).

64. 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).

65. See proposed Gov’t Code § 11342.520.

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

67. Gov’t Code § 11342.

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

69. 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).

70. 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.)

71. Gov’t Code § 11346.54. Cf. Gov’t Code §§ 11346.3(b) (economic impact assessment), 11346.5(a)(10) (publication of economic impact assessment in notice of proposed action).


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

- 1 (9) Technical defects relating to the adoption of regulations under
2 Sections 3373 and 8054 of the Financial Code are corrected.⁷³
3 (10) Technical defects in provisions relating to the adoption of building
4 standards are corrected.⁷⁴

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

74. See proposed Gov't Code § 11342.530 ("building standard" defined to simplify drafting). See proposed amendment to Gov't Code § 11356 (a) (redrafted for clarity).

PROPOSED LEGISLATION

 **Note.** As an aid to understanding the proposed changes, the entire rulemaking chapter is set out below. Sections that would not be added, amended, or repealed under the proposed law are indicated as “unchanged.”

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PROPOSED LEGISLATION

CHAPTER 3.5. ADMINISTRATIVE REGULATIONS AND RULEMAKING

Article 1. General

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

11340. The Legislature finds and declares as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34 **Comment.** Section 11340.5 is amended to correct references to the definition of
35 "regulation" in former Section 11342(g), which is continued in Section 11342.590.
36 Amendment of this section is not intended to ratify or abrogate the opinion in Tidewater
37 Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557 (1996).

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

39 11340.6. Except where the right to petition for adoption of a regulation is
40 restricted by statute to a designated group or where the form of procedure for
41 such a petition is otherwise prescribed by statute, any interested person may
42 petition a state agency requesting the adoption, amendment, or repeal of a

1 regulation as provided in Article 5 (commencing with Section 11346). This
2 petition shall state the following clearly and concisely:

3 (a) The substance or nature of the regulation, amendment, or repeal requested.

4 (b) The reason for the request.

5 (c) Reference to the authority of the state agency to take the action requested.

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

7 11340.7. (a) Upon receipt of a petition requesting the adoption, amendment, or
8 repeal of a regulation pursuant to Article 5 (commencing with Section 11346), a
9 state agency shall notify the petitioner in writing of the receipt and shall within
10 30 days deny the petition indicating why the agency has reached its decision on
11 the merits of the petition in writing or schedule the matter for public hearing in
12 accordance with the notice and hearing requirements of that article.

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

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

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

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

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

34 11340.8. (a) As used in this section, "electronic communication" includes
35 electronic transmission of written or graphical material by electronic mail,
36 facsimile, or other means, but does not include voice communication.

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

39 (1) An agency may permit and encourage use of electronic communication, but
40 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.

(d) Nothing in this section precludes the office from requiring that the text of a proposed regulation be submitted in electronic form.

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 a rulemaking notice 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).

Gov’t Code § 11340.9 (added). Exceptions

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

11340.9. This chapter does 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 on 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) A regulation that relates only to the internal management of the state agency.

(e) An agency rule that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial arrangement, or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:

(1) Enable a law violator to avoid detection.

(2) Facilitate disregard of requirements imposed by law.

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

(f) An agency rule that embodies the only legally tenable interpretation of a provision of law.

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

(h) 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.

(i) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

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)-(d) continue provisions of former Section 11342(g) without substantive change.

Subdivision (e) establishes a new exception for agency rules that should not be disclosed to the public. It is drawn from 1981 Model State APA § 3-116(2). Note that “examination” includes both an inspection and a test administered to determine a person’s knowledge or ability. See, e.g., Corp. Code § 25217 (passage of examination administered by Department of Corporations may be required for licensing of securities agent); Fin. Code § 17405 (Department of Corporations may examine the business, accounts, and records of an escrow agent”).

Subdivision (f) establishes a new exception for an agency rule embodying the only legally tenable interpretation of a provision of law. This principle has been recognized by the courts. See, e.g., *Engelmann v. State Board of Education*, 2 Cal. App. 4th 47, 62, 3 Cal. Rptr. 2d 264, 274-75 (1991) (statement of policy or procedure that simply reiterates statutory law, without departing from or embellishing that law, need not be adopted as regulation). Cf. *Grier v. Kizer*, 219 Cal. App. 3d 422, 438-39, 268 Cal. Rptr. 244, 255 (1990) (agency policy was not “only legally tenable interpretation” of law and should have been adopted as a regulation). The rule is also consistent with the current practice of the Office of Administrative Law. See, e.g., 1988 OAL Determination No. 10, Cal. Regulatory Notice Reg. 88, No. 28-Z, July 8, 1988, p. 2313 (agency rule reflecting only legally tenable interpretation of statute was not a regulation). Cf. 1989 OAL Determination No. 15, Cal. Regulatory Notice Reg. 89, No. 44-Z, Nov. 3 1989, p. 3122 (law interpreted by agency regulation was subject to more than one legally tenable interpretation). The addition of this exception is not meant to imply that an agency interpretation is necessarily a regulation if there is more than one legally tenable interpretation of the interpreted law.

Subdivisions (g)-(i) continue, without substantive change, former Section 11343(a)(1)-(3) and part of the former first sentence of Section 11346.1(a) (“This article does not apply to any regulation not required to be filed with the Secretary of State under this chapter...”). Enactment of subdivision (i) is not intended to ratify or abrogate the opinion in *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 59 Cal. Rptr. 2d 186 (1996).

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

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

Article 2. Rules and Regulations

Gov't Code § 11342 (repealed). Definitions

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

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

(a) "Agency" and "state agency" do not include an agency in the judicial or legislative departments of the state government.

(b) "Office" means the Office of Administrative Law.

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

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

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

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

(g) "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency. "Regulation" does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

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

(A) Independently owned and operated.

(B) Not dominant in its field of operation.

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

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

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

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

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

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

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

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

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

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

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

11 (ii) General construction, nine million five hundred thousand dollars
12 (\$9,500,000).

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

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

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

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

17 (vii) Transportation and warehousing, one million five hundred thousand dollars
18 (\$1,500,000).

19 (J) A manufacturing enterprise exceeding 250 employees.

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

22 **Comment.** Section 11342 is repealed for drafting convenience.

23 Former subdivision (a) is continued without substantive change in Section 11340.9(a)
24 (requirements of chapter do not apply to agency in the judicial or legislative branch of state
25 government). See also Sections 11000 (“state agency” defined), 11342.520 (“agency”
26 defined).

27 Former subdivision (b) is continued without change in Section 11342.540.

28 Former subdivision (c) is continued without change in Section 11342.550.

29 Former subdivision (d) is continued without change in Section 11342.560.

30 Former subdivision (e) is continued in Section 11342.570. The definition of “plain
31 English” has been changed so that it refers to the “clarity” standard provided in Section
32 11349(c) (a regulation must be written or displayed so that its meaning is easily understood
33 by persons directly affected by it).

34 Former subdivision (f) is continued without change in Section 11342.580.

35 Former subdivision (g) is continued without substantive change Sections 11340.9(b) (legal
36 ruling of counsel of the Franchise Tax Board or State Board of Equalization exempt from
37 requirements of chapter), 11340.9(c) (state form and instructions for use of form exempt
38 from requirements of chapter), 11340.9(d) (internal management rules exempt from
39 requirements of chapter), 11342.590 (“regulation” defined).

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

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

42 11342.1. Except as provided in Section 11342.4, nothing in this chapter confers
43 authority upon or augments the authority of any state agency to adopt,
44 administer, or enforce any regulation. Each regulation adopted, to be effective,

1 shall be within the scope of authority conferred and in accordance with standards
2 prescribed by other provisions of law.

3 **Gov't Code § 11342.2 (unchanged). Validity of regulations**

4 11342.2. Whenever by the express or implied terms of any statute a state
5 agency has authority to adopt regulations to implement, interpret, make specific
6 or otherwise carry out the provisions of the statute, no regulation adopted is valid
7 or effective unless consistent and not in conflict with the statute and reasonably
8 necessary to effectuate the purpose of the statute.

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

10 11342.4. The office shall adopt, amend, or repeal regulations for the purpose of
11 carrying out the provisions of this chapter.

12 **Gov't Code §§ 11342.510-11342.600 (added). Definitions**

13 SEC. _____. Article 2 (commencing with Section 11342.510) is added to Chapter
14 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

15 Article 2. Definitions

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

17 11342.510. Unless the provision or context otherwise requires, the definitions in
18 this article govern the construction of this chapter.

19 **Comment.** Section 11342.510 continues the introductory paragraph of former Section
20 11342 without substantive change.

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

22 11342.520. "Agency" means state agency.

23 **Comment.** Section 11342.520 is new. It clarifies part of the substance of former Section
24 11342(a). See also Section 11000 ("state agency" defined for purposes of this title).

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

26 11342.530. "Building standard" has the meaning provided in Section 18909 of
27 the Health and Safety Code.

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

29 **Gov't Code § 11342.535 (added). Director**

30 11342.530. "Director" means the director of the office.

31 **Comment.** Section 11342.535 is new. It is added for drafting convenience.

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

33 11342.540. "Office" means the Office of Administrative Law.

34 **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, or make specific the law enforced or administered by it, or to govern its procedure.

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

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

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

- (1) Independently owned and operated.
- (2) Not dominant in its field of operation.

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

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

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

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

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

(5) An entity organized as a nonprofit institution.

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

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

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

(9) A manufacturing enterprise exceeding 250 employees.

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

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

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

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

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

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

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

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

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

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

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)-(3) is continued without substantive change in Section 11340.9(g)-(i).

Subdivision (e) is amended to reflect the change in the name of the California Building Standards Commission. See also Section 11342.530 ("building standard" defined).

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

1 date of filing and shall maintain a permanent file of the certified copies of
2 regulations and orders of repeal for public inspection.

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

6 **Gov't Code § 11343.4 (amended). Effective date of regulation**

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

8 11343.4. A regulation or an order of repeal required to be filed with the
9 Secretary of State shall become effective on the 30th day after the date of filing
10 unless:

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

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

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

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

23 **Comment.** Subdivision (a) of Section 11343.4 is amended to eliminate an ambiguity.
24 Former subdivision (b) is deleted as redundant. See Fin. Code §§ 3373(b)(3) (effective date
25 of regulation adopted pursuant to that section), 8054(c) (regulation adopted pursuant to that
26 section subject to Gov't Code § 11346.1); Gov't Code § 11346.1(d) (effective date of
27 regulation adopted pursuant to that section).

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

29 SEC. _____. Section 11343.5 of the Government Code is amended to read:

30 11343.5. Within 10 days from the receipt of printed copies of the California
31 Code of Regulations or of the ~~California Regulatory Code Supplement~~ California
32 Code of Regulations Supplement from the State Printing Office, the office shall
33 file one copy of the particular issue of the code or supplement in the office of the
34 county clerk of each county in this state, or if the authority to accept filings on
35 his or her behalf has been delegated by the county clerk of any county pursuant
36 to Section 26803.5, in the office of the person to whom that authority has been
37 delegated.

38 **Comment.** Section 11343.5 is amended to conform to the change in the name of the
39 former California Regulatory Code Supplement. See Section 11344.

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

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

(a) It was duly adopted.

(b) It was duly filed and made available for public inspection at the day and hour endorsed on it.

(c) All requirements of this chapter and the regulations of the office relative to such regulation have been complied with.

(d) The text of the certified copy of a regulation or order of repeal is the text of the regulation or order of repeal as adopted.

The courts shall take judicial notice of the contents of the certified copy of each regulation and of each order of repeal duly filed.

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

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

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

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

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

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

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

11344. The office shall do all of the following:

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

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

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

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

Comment. Section 11344 is amended to change the name of the California Regulatory Code Supplement to conform to the name of the California Code of Regulations, which it supplements.

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

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

11344.1. The office shall do all of the following:

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

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

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

(3) All regulation decisions issued in the previous week detailing the reasons for disapproval of a regulation, the reasons for not filing an emergency regulation, and the reasons for repealing an emergency regulation. The California Regulatory 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.

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~~ California Code of Regulations Supplement to the

1 county clerk of any county or to the delegatee of the county clerk pursuant to
2 Section 26803.5, provided the director makes the following two determinations:

3 (a) The county clerk or the delegatee of the county clerk pursuant to Section
4 26803.5 is maintaining the code and supplement in complete and current
5 condition in a place and at times convenient to the public.

6 (b) The California Code of Regulations and ~~California Regulatory Code~~
7 ~~Supplement~~ California Code of Regulations Supplement are not otherwise
8 reasonably available to the public in the community where the county clerk or
9 the delegatee of the county clerk pursuant to Section 26803.5 would normally
10 maintain the code and supplements by distribution to libraries pursuant to Article
11 6 (commencing with Section 14900) of Chapter 7 of Part 5.5.

12 **Comment.** Section 11344.2 is amended to reflect existing practice and to conform to the
13 change in the name of the former California Regulatory Code Supplement. See Section
14 11344.

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

16 11344.3. Every document, other than a notice of proposed rulemaking action,
17 required to be published in the California Regulatory Notice Register by this
18 chapter, shall be published in the first edition of the California Regulatory Notice
19 Register following the date of the document.

20 **Gov't Code § 11344.4 (amended). Sale of publications**

21 SEC. _____. Section 11344.4 of the Government Code is amended to read:

22 11344.4. (a) The California Code of Regulations, the ~~California Regulatory~~
23 ~~Code Supplement~~, California Code of Regulations Supplement, and the California
24 Regulatory Notice Register shall be sold at prices which will reimburse the state
25 for all costs incurred for printing, publication, and distribution.

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

31 **Comment.** Section 11344.4 is amended to conform to the change in the name of the
32 former California Regulatory Code Supplement. See Section 11344.

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

34 SEC. _____. Section 11344.6 of the Government Code is amended to read:

35 11344.6. The publication of a regulation in the California Code of Regulations
36 or ~~California Regulatory Code Supplement~~ California Code of Regulations
37 Supplement raises a rebuttable presumption that the text of the regulation as so
38 published is the text of the regulation adopted.

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

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

7 **Comment.** Section 11344.6 is amended to conform to the change in the name of the
8 former California Regulatory Code Supplement. See Section 11344.

9 **Gov't Code § 11344.7 (amended). Purchase of publications**

10 SEC. _____. Section 11344.7 of the Government Code is amended to read:

11 11344.7. Nothing in this chapter precludes any person or state agency from
12 purchasing copies of the California Code of Regulations, the California
13 ~~Regulatory Code Supplement~~, California Code of Regulations Supplement, or the
14 California Regulatory Notice Register or of any unit of either, nor from printing
15 special editions of any such units and distributing the same. However, where the
16 purchase and printing is by a state agency, the state agency shall do so at the cost
17 or at less than the cost to the agency if it is authorized to do so by other
18 provisions of law.

19 **Comment.** Section 11344.7 is amended to conform to the change in the name of the
20 former California Regulatory Code Supplement. See Section 11344.

21 **Gov't Code § 11344.9 (amended). Obsolete references**

22 11344.9. (a) Whenever the term "California Administrative Code" appears in
23 law, official legal paper, or legal publication, it means the "California Code of
24 Regulations."

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

28 (c) Whenever the term "California Administrative Code Supplement" or
29 "California Regulatory Code Supplement" appears in any law, official legal
30 paper, or legal publication, it means the ~~"California Regulatory Code Supplement~~
31 California Code of Regulations Supplement."

32 **Comment.** Section 11344.9 is amended to conform to the change in the name of the
33 former California Regulatory Code Supplement. See Section 11344.

34 **Article 5. Public Participation: Procedure for Adoption of Regulations**

35 **Gov't Code § 11346 (amended). Purpose and application**

36 SEC. _____. Section 11346 of the Government Code is amended to read:

37 11346. (a) It is the purpose of this chapter to establish basic minimum
38 procedural requirements for the adoption, amendment, or repeal of administrative
39 regulations. Except as provided in Section 11346.1, the provisions of this chapter

1 are applicable to the exercise of any quasi-legislative power conferred by any
2 statute heretofore or hereafter enacted, but nothing in this chapter repeals or
3 diminishes additional requirements imposed by any statute. This chapter shall not
4 be superseded or modified by any subsequent legislation except to the extent
5 that the legislation shall do so expressly.

6 (b) An agency that is considering adopting, amending, or repealing a regulation
7 may consult with interested persons before initiating regulatory action pursuant
8 to this article.

9 **Comment.** Subdivision (b) of Section 11346 is added to clarify the legality of an existing
10 agency practice — consultation with interested persons in developing a proposed regulation.
11 For example, an agency that is considering the adoption of a regulation may hold a workshop
12 in which interested persons can share their views on the proposal. Informal communication of
13 this type provides useful information to the agency and may reduce opposition to the
14 proposed regulation from persons who participated in its development.

15 **Gov't Code § 11346.1 (amended). Emergency regulations**

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

17 11346.1. (a) ~~This article does not apply to any regulation not required to be filed~~
18 ~~with the Secretary of State under this chapter, and only this section and Sections~~
19 ~~11343.4 and 11349.6 apply to an emergency regulation adopted pursuant to~~
20 ~~subdivision (b), or to any regulation adopted under Section 8054 or 3373 of the~~
21 ~~Financial Code. The adoption, amendment, or repeal of an emergency regulation~~
22 is not subject to any provision of this chapter except this section and Section
23 11349.6.

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

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

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

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

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

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

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

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

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

39 **Comment.** Subdivision (a) of Section 11346.1 is amended to make three technical changes:

40 (1) The provision establishing an exception to the requirements of this article for “any
41 regulation not required to be filed with the Secretary of State under this chapter” is deleted.
42 The substance of this exception is continued in Section 11340.9(g)-(i). This change also
43 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.

Subdivision (c) is amended to use the defined term “building standard,” to correct a grammatical error, and to reflect the change in the name of the California Building Standards Commission. See Section 11342.530 (“building standard” defined).

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

Subdivision (h) is amended to improve its clarity, without affecting its substance.

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

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

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

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

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

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

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

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

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

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

1 ~~(3)~~ (2) An identification of each technical, theoretical, and empirical study,
2 report, or similar document, if any, upon which the agency relies in proposing the
3 adoption, amendment, or repeal of a regulation.

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

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

13 ~~(5)~~ (4) Facts, evidence, documents, testimony, or other evidence ~~upon which~~
14 ~~that the agency relies to~~ believes may support a finding that the action will not
15 have a significant adverse economic impact on business.

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

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

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

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

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

1 where the regulation cannot be drafted in plain English, has been broadened to apply to all
2 regulations and continued in Section 11346.5(a)(3)(B). See Sections 11342.570 (“plain
3 English” defined), 11349(c) (clarity standard).

4 Former subdivision (b)(1) (description of problem addressed) is deleted as unnecessary; the
5 same information is required by former subdivision (b)(2) (statement of purpose for
6 proposed action).

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

9 Former subdivision (b)(5) is revised to eliminate the implication that formal findings are
10 required before the agency has received comment on a proposed action.

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

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

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

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

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

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

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

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

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

1 (C) The expansion of businesses currently doing business within the State of
2 California.

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

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

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

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

17 Subdivision (b)(2) is amended to recast the definition provision as a substantive limitation.
18 This change is technical and does not affect the meaning of the section. See Sections 11000
19 (“state agency” defined), 11340.9(a) (requirements of chapter do not apply to agency in
20 judicial or legislative branch).

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

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

23 11346.4. (a) At least 45 days prior to the hearing and close of the public
24 comment period on the adoption, amendment, or repeal of a regulation, notice of
25 the proposed action shall be:

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

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

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

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

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

38 (b) ~~The effective period of a notice issued pursuant to this section shall not~~
39 ~~exceed one year from the date thereof. If the adoption, amendment, or repeal of a~~
40 ~~regulation proposed in the notice is not completed and transmitted to the office~~
41 ~~within the period of one year, a notice of the proposed action shall again be~~
42 ~~issued pursuant to this article. Except where its effective period is extended~~
43 ~~pursuant to this subdivision, a notice of proposed action shall not be effective for~~

1 more than one year after the date it was published. For good cause, the director
2 may extend the effective period of a notice of proposed action by an additional
3 90 days. If the action proposed in a notice is not completed and transmitted to the
4 office within the effective period of the notice, a new notice shall be issued
5 pursuant to this article.

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

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

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

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

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

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

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

25 11346.5. (a) The notice of proposed adoption, amendment, or repeal of a
26 regulation shall include the following:

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

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

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

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

40 (B) ~~If the proposed action affects small business, the~~ The informative digest shall
41 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)~~ (14), 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 also expanded to include a plain English
17 summary of the regulation. See Sections 11342.570 (“plain English” defined), 11349(c)
18 (clarity standard).

19 Paragraphs (7)-(8) and former subdivision (a)(11) of subdivision (a) are amended to make
20 clear that formal findings are not required before the agency has received comment on a
21 proposed action. Paragraphs (7)-(8) are also amended to provide that those provisions apply
22 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 (repealed). Assessment of economic effect**

27 SEC. _____. Section 11346.54 of the Government Code is repealed.

28 ~~11346.54. (a) All state agencies proposing to adopt, or amend any~~
29 ~~administrative regulation shall assess whether and to what extent it will affect the~~
30 ~~following:~~

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

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

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

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

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

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

3 **Comment.** Section 11346.54 is repealed as redundant. See Sections 11346.3(b)
4 (assessment of economic effect), 11346.5(a)(10) (inclusion of assessment in notice of
5 proposed action).

6 **Gov't Code § 11346.8 (amended). Public hearing**

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

8 11346.8. (a) If a public hearing is held, both oral and written statements,
9 arguments, or contentions, ~~either oral or in writing, or both~~, shall be permitted. The
10 agency may impose reasonable limitations on oral presentations. If a public
11 hearing is not scheduled, the state agency shall, consistent with Section 11346.4,
12 afford any interested person or his or her duly authorized representative, the
13 opportunity to present statements, arguments or contentions in writing. In
14 addition, a public hearing shall be held if, no later than 15 days prior to the close
15 of the written comment period, an interested person or his or her duly authorized
16 representative submits in writing to the state agency, a request to hold a public
17 hearing. The state agency shall, to the extent practicable, provide notice of the
18 time, date, and place of the hearing by mailing the notice to every person who has
19 filed a request for notice thereby with the state agency. The state agency shall
20 consider all relevant matter presented to it before adopting, amending, or
21 repealing any regulation.

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

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

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

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

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

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

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

14 11346.9. Every agency subject to this chapter shall do the following:

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

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

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

31 (3) A summary of each objection or recommendation made regarding the
32 specific adoption, amendment, or repeal proposed, together with an explanation
33 of how the proposed action has been changed to accommodate each objection or
34 recommendation, or the reasons for making no change. This requirement applies
35 only to objections or recommendations specifically directed at the agency's
36 proposed action or to the procedures followed by the agency in proposing or
37 adopting the action. The agency may aggregate and summarize repetitive or
38 irrelevant comments as a group, and may respond to repetitive comments or
39 summarily dismiss irrelevant comments as a group.

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

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

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

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

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

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

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

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

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

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

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

(1) Persons who testified at the public hearing.

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

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

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

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

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

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

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

Comment. Section 11347.1 implements Section 11346.9(a)(1) by prescribing a more detailed procedure than that provided in Section 11346.8(d). It is drawn from 1 Cal. Code Regs. § 45.

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

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

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

(b) The rulemaking file shall include:

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

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

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

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

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

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

(7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption,

1 amendment, or repeal of a regulation, including any cost impact estimates as
2 required by Section 11346.3.

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

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

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

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

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

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

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

24 (e) Upon filing a regulation with the Secretary of State pursuant to Section
25 11349.3, the office shall return the related rulemaking file to the agency, after
26 which no item contained in the file shall be removed, altered, or destroyed or
27 otherwise disposed of. The agency shall maintain the file unless it elects to
28 transmit the file to the State Archives pursuant to subdivision (f).

29 (f) The agency may transmit the rulemaking file to the State Archives. The file
30 shall include instructions that the Secretary of State shall not remove, alter, or
31 destroy or otherwise dispose of any item contained in the file. Pursuant to Section
32 12223.5, the Secretary of State may designate a time for the delivery of the
33 rulemaking file to the State Archives in consideration of document processing or
34 storage limitations.

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

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

38 Article 6. Review of Proposed Regulations

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

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

41 11349. The following definitions govern the interpretation of this chapter:

(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 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, “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 shall explain why the necessity of the regulation cannot, as a practical matter, be demonstrated by facts or expert opinion.~~

(b) “Authority” means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.

(c) “Clarity” means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

(d) “Consistency” means being 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.

(f) “Nonduplication” means that a 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. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.

Comment. Subdivision (a) of Section 11349 is amended to make two changes:

(1) The meaning of “necessity” is clarified by placing it in the context of the purpose of the regulation. 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). This is a nonsubstantive change.

(2) The evidentiary standard for demonstrating necessity has been changed in recognition of the fact that, in some cases, necessity cannot be factually demonstrated. In such a case, the agency must explain the need for the regulation and must also explain why it cannot provide facts to support its explanation. The adequacy of these explanations is subject to review by

1 the Office of Administrative Law (OAL). See Section 11349.3 (OAL may disapprove
2 proposed regulation for failure to comply with requirements of chapter).

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

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

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

- 11 (1) Necessity.
- 12 (2) Authority.
- 13 (3) Clarity.
- 14 (4) Consistency.
- 15 (5) Reference.
- 16 (6) Nonduplication.

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

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

24 (c) The office shall adopt regulations governing the procedures it uses in
25 reviewing regulations submitted to it. The regulations shall provide for an orderly
26 review and shall specify the methods, standards, presumptions, and principles the
27 office uses, and the limitations it observes, in reviewing regulations to establish
28 compliance with the standards specified in subdivision (a). The regulations
29 adopted by the office shall ensure that it does not substitute its judgment for that
30 of the rulemaking agency as expressed in the substantive content of adopted
31 regulations.

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

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

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

39 (3) The adopting agency has prepared the estimate required by paragraph (6) of
40 subdivision (a) of Section 11346.5, the estimate indicates that the regulation will
41 result in a cost to local agencies or school districts that is required to be

1 reimbursed under Part 7 (commencing with Section 17500) of Division 4, and the
2 adopting agency fails to do any of the following:

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

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

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

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

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

23 (f) The office shall return a rulemaking file to the submitting agency if the file
24 does not comply with subdivisions (a) and (b) of Section 11347.3. Within three
25 state working days of the receipt of a rulemaking file, the office shall notify the
26 submitting agency of any deficiency identified. If no notice of deficiency is
27 mailed to the adopting agency within that time, a rulemaking file shall be deemed
28 submitted as of the date of its original receipt by the office. A rulemaking file shall
29 not be deemed submitted until each deficiency identified under this subdivision
30 has been corrected.

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

34 **Comment.** Section 11349.1 is amended to make clear that the section requires review of the
35 repeal of a regulation, as well as the adoption, or amendment of a regulation and to conform
36 to the change in the name of the former California Regulatory Code Supplement. See Section
37 11344.

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

39 SEC. _____. Section 11349.2 is added to the Government Code, to read:

40 11349.2. An agency may add material to a rulemaking file that has been
41 submitted to the office for review pursuant to this article if addition of the material
42 does not violate other requirements of this chapter.

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

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

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

7 11349.3. (a) The office shall either approve a regulation submitted to it for
8 review and transmit it to the Secretary of State for filing or disapprove it within
9 30 working days after the regulation has been submitted to the office for review.
10 If the office fails to act within 30 days, the regulation shall be deemed to have
11 been approved and the office shall transmit it to the Secretary of State for filing.

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

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

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

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

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

34 11349.4. (a) A regulation returned to an agency because of failure to meet the
35 standards of Section 11349.1, because of an agency's failure to comply with this
36 chapter may be rewritten and resubmitted within 120 days of the agency's
37 receipt of the written opinion required by subdivision (b) of Section 11349.3
38 without complying with the notice and public hearing requirements of Sections
39 11346.4, 11346.5, and 11346.8 unless the substantive provisions of the regulation
40 have been significantly changed. If the regulation has been significantly changed
41 or was not submitted within 120 days of receipt of the written opinion, the
42 agency shall comply with Article 5 (commencing with Section 11346) and

1 readopt the regulation. The director of the office may, upon a showing of good
2 cause, grant an extension to the 120-day time period specified in this subdivision.

3 (b) Upon resubmission of a disapproved regulation to the office pursuant to
4 subdivision (a), the office shall only review the resubmitted regulation for those
5 reasons expressly identified in the written opinion required by subdivision (b) of
6 Section 11349.3, or for those issues arising as a result of a substantial change to a
7 provision of the resubmitted regulation or as a result of intervening statutory
8 changes or intervening court orders or decisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) Within 30 working days of the filing of a certificate of compliance, the office shall review the regulation and hearing record and approve or order the repeal of an emergency regulation if it determines that the regulation fails to meet the standards set forth in Section 11349.1, or if it determines that the agency failed to comply with this chapter.

Comment. Subdivision (a) of Section 11349.6 is amended to correct an underinclusive reference.

Subdivision (d) is amended to conform the period for review of an emergency regulation under that subdivision to the period for review of nonemergency regulations under Section 11343.3.

Article 7. Review of Existing Regulations

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

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

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

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

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

(c) The office shall review and consider all information submitted by the agency in a timely response to the order to show cause why the regulation should not be repealed, and determine whether the regulation meets the standards set forth in Section 11349.1. The office shall make this determination within 60 days of receipt of an agency's response to the order to show cause. If the office does not make a determination within 60 days of receipt of an agency's response to the order to show cause, the regulation shall be deemed to meet the standards set forth in subdivision (a) of Section 11349.1. In making this determination, the office shall also review any written comments submitted to it by the public within

1 30 days of the publication of the order to show cause in the California
2 Regulatory Notice Register. During the period of review and consideration, the
3 information available to the office relating to each regulation for which the office
4 has issued an order to show cause shall be made available to the public. The
5 office shall notify the adopting agency within two working days of the receipt of
6 information submitted by the public regarding a regulation for which an order to
7 show cause has been issued. If the office determines that a regulation fails to meet
8 the standards, it shall prepare a statement specifying the reasons for its
9 determination. The statement shall be delivered to the adopting agency, the
10 Legislature, and the Governor and shall be made available to the public and the
11 courts. Thirty days after delivery of the statement required by this subdivision the
12 office shall prepare an order of repeal of the regulation and shall transmit it to the
13 Secretary of State for filing.

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

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

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

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

26 11349.8. (a) If the office is notified of, or on its own becomes aware of, an
27 existing regulation in the California Code of Regulations for which the statutory
28 authority has been repealed or becomes ineffective or inoperative by its own
29 terms, the office shall order the adopting agency to show cause why the
30 regulation should not be repealed for lack of statutory authority and shall notify
31 the Legislature in writing of this order. In issuing the order, the office shall specify
32 in writing the reasons for issuance of the order. "Agency," for purposes of this
33 section and Section 11349.9, refers to the agency that adopted the regulation
34 and, if applicable, the agency that is responsible for administering the regulation
35 in issue.

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

41 (1) The statute or section thereof is simultaneously repealed and substantially
42 reenacted through a single piece of legislation, or where subsequent legislation

1 evinces a specific legislative intent to reenact the substance of the statute or
2 section. When a regulation cites more than one specific statute or section as
3 reference or authority for the adoption of a regulation, and one or more of the
4 statutes or sections are repealed or become ineffective or inoperative, then the
5 only provisions of the regulation which remain in effect shall be those for which
6 the remaining statutes or sections provide specific or general authority.

7 (2) The statute is temporarily repealed, or rendered ineffective or inoperative by
8 a provision of law which is effective only for a limited period, in which case any
9 regulation described in subdivision (a) is thereby also temporarily repealed,
10 rendered ineffective, or inoperative during that limited period. Any regulation so
11 affected shall have the same force and effect upon the expiration of the limited
12 period during which the provision of law was effective as if that temporary
13 provision had not been enacted.

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

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

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

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

27 (2) Issue a written notice to the agency specifying the reasons for the repeal
28 and its intent to file a Notice of Repeal of the invalid regulation with the
29 Secretary of State. Within seven calendar days of the filing of the Notice of
30 Repeal, the office shall provide the agency, the Governor, and the Legislature
31 with a written decision detailing the reasons for the repeal and a copy of the
32 Notice of Repeal, and publish the office's written decision in the California
33 Regulatory Notice Register.

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

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

40 11349.9. (a) To initiate a review of the office's Notice of Repeal pursuant to
41 Section 11349.8, the agency shall appeal the office's decision by filing a written
42 Request for Review with the Governor's Legal Affairs Secretary within 10 days

1 of receipt of the Notice of Repeal and written decision provided for by paragraph
2 (2) of subdivision (d) of Section 11349.8. The Request for Review shall include a
3 complete statement as to why the agency believes the decision is incorrect and
4 should be overruled. Along with the Request for Review, the agency shall submit
5 all of the following:

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

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

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

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

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

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

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

27 Article 8. Judicial Review

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

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

30 11350. (a) Any interested person may obtain a judicial declaration as to the
31 validity of any regulation or order of repeal by bringing an action for declaratory
32 relief in the superior court in accordance with the Code of Civil Procedure. The
33 right to judicial determination shall not be affected by the failure either to petition
34 or to seek reconsideration of a petition filed pursuant to Section 11340.7 before
35 the agency promulgating the ~~regulations~~ regulation or order of repeal. The
36 regulation or order of repeal may be declared to be invalid for a substantial failure
37 to comply with this chapter, or, in the case of an emergency regulation or order to
38 repeal, upon the ground that the facts recited in the statement prepared pursuant
39 to subdivision (b) of Section 11346.1 do not constitute an emergency within the
40 provisions of Section 11346.1.

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

(1) The agency's 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 agency declaration pursuant to paragraph (8) of subdivision (a) of Section 11346.5 is in conflict with substantial evidence in the record.

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

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

(d) In a proceeding under this section, a court may only consider the following evidence:

(1) The rulemaking file prepared under Section 11347.3.

(2) The written statement prepared pursuant to paragraph (b) of Section 11346.1.

(3) An item that is required to be included in the rulemaking file but is not included in the rulemaking file, for the sole purpose of proving its omission.

(4) An affidavit, for the sole purpose of proving whether a regulation used by an agency should have been adopted under this chapter.

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

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

Subdivision (d) is added to correct inadequacies in the former provision limiting the record of review to the rulemaking file. Subdivision (d)(1) restates part of the substance of the former second paragraph of Section 11350(b)(2), limiting the record of review to the rulemaking file prepared under Section 11347.3. Subdivision (d)(2) permits consideration of an agency statement prepared under Section 11346.1(b) (justifying emergency regulation). Such a statement is not part of a rulemaking file prepared under Section 11347.3. See Section 11346.1(a). Subdivision (d)(3) permits consideration of a document that should have been included in the rulemaking file but was not, in order to prove its omission. Such evidence may be necessary to prove a substantial failure to follow required procedures. For example, an agency's failure to include a public comment in the rulemaking file may constitute a substantial failure to follow required procedures. See Section 11347.3(b)(6) (written public comments must be included in rulemaking file). Proof of such an omission requires consideration of the omitted item. Subdivision (d)(4) permits consideration of an affidavit for the purpose of determining whether a regulation used by an agency should have been adopted under this chapter — i.e., whether it is an invalid "underground regulation." See Section 11340.5 (issuance or use of regulation that has not been adopted is prohibited).

Gov't Code § 11350.3 (amended). Review of regulation disapproved by Office of Administrative Law

SEC. _____. Section 11350.3 of the Government Code is amended to read:

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.

Article 9. Special Procedures

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.

Gov't Code § 11352 (unchanged). Water quality certification and waste discharge requirements

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

(a) The issuance, denial, or waiver of any water quality certification as authorized under Section 13160 of the Water Code.

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

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

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

1 11353. (a) Except as provided in subdivision (b), this chapter does not apply to
2 the adoption or revision of state policy for water quality control and the adoption
3 or revision of water quality control plans and guidelines pursuant to Division 7
4 (commencing with Section 13000) of the Water Code.

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

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

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

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

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

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

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

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

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

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

42 (7) Any proceedings before the State Water Resources Control Board or a
43 California regional water quality control board to take any action subject to this

subdivision shall be conducted in accordance with the procedural requirements of Division 7 (commencing with Section 13000) of the Water Code, together with any applicable requirements of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.), and the requirements of this chapter, other than the requirement for review by the office in accordance with this subdivision, shall not apply.

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

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

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

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

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

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

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

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

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

(c) The issuance or denial by the commission of any permit pursuant to subdivision (a) of Section 66632, and the issuance or denial by, or appeal to, the

1 commission of any permit pursuant to Chapter 6 (commencing with Section
2 29500) of Division 19 of the Public Resources Code, are not subject to this
3 chapter.

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

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

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

16 (B) The administrative record for the proceeding, and a list of the documents
17 relied upon in making the change. Proposed additions to the plans shall be
18 indicated by underlined text, and proposed deletions shall be indicated by strike-
19 through text in documents submitted as part of the administrative record for the
20 proceeding.

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

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

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

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

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

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

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

5 11356. (a) Article 6 (commencing with Section 11349) is not applicable to any
6 ~~building standards or administrative regulations that apply directly to the~~
7 ~~implementation or enforcement of a building standard, subject to the approval of~~
8 ~~the State Building Standards Commission a building standard.~~

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

14 **Comment.** Section 11343(a) is amended to eliminate the implication that the exemption of
15 building standards from review by the Office of Administrative Law is conditioned on
16 approval of the California Building Standards Commission. Note, however, that building
17 standards are subject to review by the California Building Standards Commission under
18 Health and Safety Code Section 18930. The subdivision is also amended to use the defined
19 term "building standard." See Section 11342.530 ("building standard" defined).

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

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

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

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

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

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

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

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

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

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

9 11359. (a) Except as provided in subdivision (b), on and after January 1, 1982,
10 no new regulation, or the amendment or repeal of any regulation, which
11 regulation is intended to promote fire and panic safety or provide fire protection
12 and prevention, including fire suppression systems, equipment, or alarm
13 regulation, is valid or effective unless it is submitted by, or approved in writing by,
14 the State Fire Marshal before transmittal to the Secretary of State or the Office of
15 Administrative Law.

16 (b) Approval of the State Fire Marshal is not required if the regulation is
17 expressly required to be at least as effective as federal standards published in the
18 Federal Register pursuant to Section 6 of the Occupational Safety and Health Act
19 of 1970 (P.L. 91-596) within the time period specified by federal law and as
20 provided in subdivision (b) of Section 142.4 of the Labor Code, and as approved
21 by the Occupational Safety and Health Administration of the United States
22 Department of Labor as meeting the requirements of subdivision (a) of Section
23 142.3 of the Labor Code, unless the regulation is determined by the State Fire
24 Marshal to be less effective in promoting fire and panic safety than regulations
25 adopted by the State Fire Marshal.

CONFORMING REVISIONS

Fin. Code § 3373 (amended). Changes to federal regulations

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 that applied before regulations adopted under this section were exempted from Government Code Section 11343.4.

Gov't Code § 8546 (amended). Legislative intent regarding Bureau of State Audits

SEC. _____. Section 8546 of the Government Code is amended to read:

8546. It is the intent of the Legislature that the Bureau of State Audits have the independence necessary to conduct all of its audits in conformity with "Government Auditing Standards" published by the Comptroller General of the United States and the standards published by the American Institute of Certified Public Accountants, free from influence of existing state control agencies that could be the subject of audits conducted by the bureau. Therefore, all of the following exclusions apply to the office:

1 (a) Notwithstanding Section 19790, the State Auditor shall establish an
2 affirmative action program that shall meet the criteria and objectives established
3 by the State Personnel Board and shall report annually to the State Personnel
4 Board and the commission.

5 (b) Notwithstanding Section 12470, the State Auditor shall be responsible for
6 maintaining its payroll system. In lieu of audits of the uniform payroll system
7 performed by the Controller or any other department, the office shall contract
8 pursuant to subdivision (e) of Section 8544.5 for an annual audit of its payroll
9 and financial operations by an independent public accountant.

10 (c) Notwithstanding Sections 11730 and 13292, the State Auditor is delegated
11 the authority to establish and administer the fiscal and administrative policies of
12 the bureau in conformity with the State Administrative Manual without oversight
13 by the Department of Finance, the Office of Information Technology, or any other
14 state agency.

15 (d) Notwithstanding Section 11032, the State Auditor may approve actual and
16 necessary traveling expenses for travel outside the state for officers and
17 employees of the bureau.

18 (e) Notwithstanding Section 11033, the State Auditor or officers and employees
19 of the bureau may be absent from the state on business of the state upon
20 approval of the State Auditor or Chief Deputy State Auditor.

21 (f) Sections 11040, 11042, and 11043 shall not apply to the Bureau of State
22 Audits. The State Auditor may employ legal counsel under those terms that he or
23 she deems necessary to conduct the legal business of, or render legal counsel to,
24 the State Auditor.

25 (g) The provisions and definitions of ~~Section 11342~~ Article 2 (commencing with
26 Section 11342.510) of Chapter 3.5 of Division 3 shall not be construed to include
27 the Bureau of State Audits. The State Auditor may adopt regulations necessary
28 for the operation of the bureau pursuant to the provisions of the Administrative
29 Procedure Act (Chapter 3.5 (commencing with Section 11340) of Division 3), but
30 these regulations shall not be subject to the review or approval of the Office of
31 Administrative Law.

32 (h) The State Auditor shall be exempt from all contract requirements of the
33 Public Contract Code that require oversight, review, or approval by the
34 Department of General Services or any other state agency. The State Auditor may
35 contract on behalf of the State of California for goods and services that he or she
36 deems necessary for the furtherance of the purposes of the bureau.

37 (i)(1) Subject to Article VII of the California Constitution, the State Auditor is
38 delegated the authority to establish and administer the personnel policies and
39 practices of the Bureau of State Audits in conformity with Part 2.6 (commencing
40 with Section 19815) of Division 5 of Title 2 without oversight or approval by the
41 Department of Personnel Administration.

42 (2) At the election of the State Auditor, officers and employees of the bureau
43 may participate in benefits programs administered by the Department of Personnel

1 Administration subject to the same conditions for participation that apply to civil
2 service employees in other state agencies. For the purposes of benefits programs
3 administration only, the State Auditor is subject to the determinations of the
4 department. The Bureau of State Audits shall reimburse the Department of
5 Personnel Administration for the normal administrative costs incurred by the
6 Department of Personnel Administration and for any extraordinary costs resulting
7 from the inclusion of the bureau employees in these state benefit programs.

8 **Comment.** Section 8546 is amended to correct the reference to former Section 11342,
9 which has been continued without substantive change in Article 2 (commencing with Section
10 11342) of Chapter 3.5 of Part 1 of Division 3 and in Section 11340.9(b)-(d).

11 **Gov't Code § 27491.41 (amended). Sudden infant death syndrome**

12 SEC. _____. Section 27491.41 of the Government Code is amended to read:

13 27491.41. (a) For purposes of this section, "sudden infant death syndrome"
14 means the sudden death of any infant that is unexpected by the history of the
15 infant and where a thorough postmortem examination fails to demonstrate an
16 adequate cause of death.

17 (b) The Legislature finds and declares that sudden infant death syndrome
18 (SIDS) is the leading cause of death for children under age one, striking one out
19 of every 500 children. The Legislature finds and declares that sudden infant
20 death syndrome is a serious problem within the State of California, and that public
21 interest is served by research and study of sudden infant death syndrome, and its
22 potential causes and indications.

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

26 (d) The autopsy shall be conducted pursuant to a standardized protocol
27 developed by the State Department of Health Services. The protocol is exempt
28 from the procedural requirements pertaining to the adoption of administrative
29 rules and regulations pursuant to ~~Article 2 (commencing with Section 11342)~~
30 Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3
31 of Title 2 of the Government Code. The protocol shall be developed and
32 approved by July 1, 1990.

33 (e) The protocol shall be followed by all coroners throughout the state when
34 conducting the autopsies required by this section. The coroner shall state on the
35 certificate of death that sudden infant death syndrome was the cause of death
36 when the coroner's findings are consistent with the definition of sudden infant
37 death syndrome specified in the standardized autopsy protocol. The protocol may
38 include requirements and standards for scene investigations, requirements for
39 specific data, criteria for ascertaining cause of death based on the autopsy, and
40 criteria for any specific tissue sampling, and any other requirements. The protocol
41 may also require that specific tissue samples must be provided to a central tissue
42 repository designated by the State Department of Health Services.

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

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

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

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

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

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

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

22 33427. (a) In addition to any other authority granted under this part, an agency
23 may, within a project area, for the purposes of redevelopment, assist public
24 agencies or private nonprofit corporations to establish and maintain a small
25 business incubator.

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

29 (c) For the purposes of this section, “small business” shall have the same
30 meaning as defined in Section ~~11342~~ 11342.600 of the Government Code.

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

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

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

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

3 SEC. _____. Section 57004 of the Health and Safety Code is amended to read:
4 57004. (a) For purposes of this section, the following terms have the following
5 meaning:

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

7 (A) A regulation, as defined in ~~subdivision (g) of Section 11342~~ Section
8 11342.590 of the Government Code.

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

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

17 (b) The agency, or a board, department, or office within the agency, shall enter
18 into an agreement with the National Academy of Sciences, the University of
19 California, the California State University, or any similar scientific institution of
20 higher learning, any combination of those entities, or with a scientist or group of
21 scientists of comparable stature and qualifications that is recommended by the
22 President of the University of California, to conduct an external scientific peer
23 review of the scientific basis for any rule proposed for adoption by any board,
24 department, or office within the agency. The scientific basis or scientific portion
25 of a rule adopted pursuant to Chapter 6.6 (commencing with Section 25249.5) of
26 Division 20 or Chapter 3.5 (commencing with Section 39650) of Division 26 shall
27 be deemed to have complied with this section if it complies with the peer review
28 processes established pursuant to these statutes.

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

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

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

39 (2) The external scientific peer review entity, within the timeframe agreed upon
40 by the board, department, or office and the external scientific peer review entity,
41 prepares a written report that contains an evaluation of the scientific basis of the
42 proposed rule. If the external scientific peer review entity finds that the board,
43 department, or office has failed to demonstrate that the scientific portion of the

1 proposed rule is based upon sound scientific knowledge, methods, and practices,
2 the report shall state that finding, and the reasons explaining the finding, within
3 the agreed-upon timeframe. The board, department, or office may accept the
4 finding of the external scientific peer review entity, in whole, or in part, and may
5 revise the scientific portions of the proposed rule accordingly. If the board,
6 department, or office disagrees with any aspect of the finding of the external
7 scientific peer review entity, it shall explain, and include as part of the rulemaking
8 record, its basis for arriving at such a determination in the adoption of the final
9 rule, including the reasons why it has determined that the scientific portions of
10 the proposed rule are based on sound scientific knowledge, methods, and
11 practices.

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

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

17 **Comment.** Section 57004 is amended to substitute reference to the Government Code
18 provision that continues the definition of “regulation” in former Government Code Section
19 11342(g).

20 **Penal Code § 5058 (amended). Rulemaking**

21 SEC. _____. Section 5058 of the Penal Code is amended to read:

22 5058. (a) The director may prescribe and amend rules and regulations for the
23 administration of the prisons and for the administration of the parole of persons
24 sentenced under Section 1170 except those persons who meet the criteria set
25 forth in Section 2962. The rules and regulations shall be promulgated and filed
26 pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3
27 of Title 2 of the Government Code, except as otherwise provided in this section.
28 All rules and regulations shall, to the extent practical, be stated in language that is
29 easily understood by the general public.

30 For any rule or regulation filed as regular rulemaking as defined in paragraph (5)
31 of subdivision (a) of Section 1 of Title 1 of the California Code of Regulations,
32 copies of the rule or regulation shall be posted in conspicuous places throughout
33 each institution and shall be mailed to all persons or organizations who request
34 them no less than 20 days prior to its effective date.

35 (b) The director shall maintain, publish and make available to the general public,
36 a compendium of the rules and regulations promulgated by the director or
37 director’s designee pursuant to this section.

38 (c) The following are deemed not to be “regulations” as defined in ~~subdivision~~
39 ~~(b) of Section 11342~~ Section 11342.590 of the Government Code:

40 (1) Rules issued by the director or by the director’s designee applying solely to
41 a particular prison or other correctional facility, provided that the following
42 conditions are met:

1 (A) All rules that apply to prisons or other correctional facilities throughout the
2 state are adopted by the director pursuant to Chapter 3.5 (commencing with
3 Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

4 (B) All rules except those that are excluded from disclosure to the public
5 pursuant to subdivision (f) of Section 6254 of the Government Code are made
6 available to all inmates confined in the particular prison or other correctional
7 facility to which the rules apply and to all members of the general public.

8 (2) Short-term criteria for the placement of inmates in a new prison or other
9 correctional facility, or subunit thereof, during its first six months of operation, or
10 in a prison or other correctional facility, or subunit thereof, planned for closing
11 during its last six months of operation, provided that the criteria are made
12 available to the public and that an estimate of fiscal impact is completed pursuant
13 to Section 6055, and following, of the State Administrative Manual dated July
14 1986.

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

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

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

26 (A) A pilot program affecting male inmates only shall affect no more than 10
27 percent of the total state male inmate population; a pilot program affecting female
28 inmates only shall affect no more than 10 percent of the total state female inmate
29 population; and a pilot program affecting male and female inmates shall affect no
30 more than 10 percent of the total state inmate population.

31 (B) The director certifies in writing that the regulations apply to a pilot program
32 that qualifies for exemption under this subdivision.

33 (C) The certification and regulations are filed with the Office of Administrative
34 Law and the regulations are made available to the public by publication pursuant
35 to subparagraph (F) of paragraph (2) of subdivision (b) of Section 6 of Title 1 of
36 the California Code of Regulations.

37 The regulations shall become effective immediately upon filing with the
38 Secretary of State and shall lapse by operation of law two years after the date of
39 the director's certification unless formally adopted by the director pursuant to
40 Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of
41 the Government Code.

42 (2) Action or actions, or policies implementing them, taken by the department
43 and based upon a determination of imminent danger by the director or the

1 director's designee that there is a compelling need for immediate action, and that
2 unless that action is taken, serious injury, illness, or death is likely to result. The
3 action or actions, or policies implementing them, may be taken provided that the
4 following conditions shall subsequently be met:

5 (A) A written determination of imminent danger shall be issued describing the
6 compelling need and why the specific action or actions must be taken to address
7 the compelling need.

8 (B) The written determination of imminent danger shall be mailed within 10
9 working days to every person who has filed a request for notice of regulatory
10 actions with the department and to the Chief Clerk of the Assembly and the
11 Secretary of the Senate for referral to the appropriate policy committees.

12 Any policy in effect pursuant to a determination of imminent danger shall lapse
13 by operation of law 15 calendar days after the date of the written determination
14 of imminent danger unless an emergency regulation is filed with the Office of
15 Administrative Law pursuant to subdivision (e). This section shall in no way
16 exempt the department from compliance with other provisions of law related to
17 fiscal matters of the state.

18 (e) Emergency regulations shall be adopted pursuant to Chapter 3.5
19 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the
20 Government Code, except that:

21 (1) Notwithstanding subdivision (e) of Section 11346.1 of the Government
22 Code, the initial effective period for emergency regulations shall be 160 days.

23 (2) No showing of emergency is necessary in order to adopt emergency
24 regulations other than a written statement by the director or the director's
25 designee, to be filed with the Office of Administrative Law, certifying that
26 operational needs of the department require adoption of the regulations on an
27 emergency basis.

28 (3) This subdivision shall apply only to the adoption and one readoption of any
29 emergency regulation.

30 It is the intent of the Legislature, in authorizing the deviations in this
31 subdivision from the requirements and procedures of Chapter 3.5 (commencing
32 with Section ~~113340~~ 11340) of Part 1 of Division 3 of Title 2 of the Government
33 Code, to authorize the department to expedite the exercise of its power to
34 implement regulations as its unique operational circumstances require.

35 **Comment.** Section 5058 is amended to substitute reference to the Government Code
36 provision that continues the definition of "regulation" in former Government Code Section
37 11342(g) and to correct an erroneous reference in subdivision (e)(3).

38 **Pub. Res. Code § 25620.2 (amended). Administration of program**

39 SEC. _____. Section 25620.2 of the Public Resources Code is amended to read:

40 25620.2. (a) The commission shall administer the program in a manner that is
41 consistent with the purposes of Chapter 854 of the Statutes of 1996, and shall
42 ensure that the program meets all of the following criteria:

1 (1) Demonstrates a balance of benefits to all sectors that contribute to the
2 funding under Section 381 of the Public Utilities Code.

3 (2) Addresses key technical and scientific barriers.

4 (3) Demonstrates a balance between short-term, mid-term, and long-term
5 potential.

6 (4) Ensures that research currently, previously, or about to be undertaken by
7 research organizations is not unnecessarily duplicated.

8 (b) To ensure the efficient implementation and administration of the program,
9 the commission shall do both of the following:

10 (1) Develop procedures for the solicitation of award applications for project or
11 program funding, and to ensure efficient program management.

12 (2) Evaluate and select programs and projects, based on merit, that will be
13 funded under the program.

14 (c) To ensure the success of electric industry restructuring in the transition to a
15 new market structure and to implement the program, the commission shall adopt
16 regulations, as defined in ~~subdivision (g) of Section 11342~~ Section 11342.590 of
17 the Government Code, in accordance with the following procedures:

18 (1) Prepare a preliminary text of the proposed regulation and provide a copy of
19 the preliminary text to any person requesting a copy.

20 (2) Provide public notice of the proposed regulation to any person who has
21 requested notice of the regulations prepared by the commission. The notice shall
22 contain all of the following:

23 (A) A clear overview explaining the proposed regulation.

24 (B) Instructions on how to obtain a copy of the proposed regulations.

25 (C) A statement that if a public hearing is not scheduled for the purpose of
26 reviewing a proposed regulation, any person may request, not later than 15 days
27 prior to the close of the written comment period, a public hearing conducted in
28 accordance with the procedures set forth in Section 11346.8 of the Government
29 Code.

30 (D) A deadline for the submission of written comments.

31 (3) Accept written public comments for 30 calendar days after providing the
32 notice required in paragraph (2).

33 (4) Certify that all written comments were read and considered by the
34 commission.

35 (5) Place all written comments in a record that includes copies of any written
36 factual support used in developing the proposed regulation, including written
37 reports and copies of any transcripts or minutes in connection with any public
38 hearings on the adoption of the regulation. The record shall be open to public
39 inspection and available to the courts.

40 (6) Provide public notice of any substantial revision of the proposed regulation
41 at least 15 days prior to the expiration of the deadline for public comments and
42 comment period using the procedures provided in paragraph (2).

1 (7) Conduct public hearings, if a hearing is requested by an interested party,
2 that shall be conducted in accordance with the procedures set forth in Section
3 11346.8 of the Government Code.

4 (8) Adopt any proposed regulation at a regularly scheduled and noticed
5 meeting of the commission. The regulation shall become effective immediately
6 unless otherwise provided by the commission.

7 (9) Publish any adopted regulation in a manner that makes copies of the
8 regulation easily available to the public. Any adopted regulation shall also be
9 made available on the Internet. The commission shall transmit a copy of an
10 adopted regulation to the Office of Administrative Law for publication, or, if the
11 commission determines that printing the regulation is impractical, an appropriate
12 reference as to where a copy of the regulation may be obtained.

13 (10) Notwithstanding any other provision of law, this subdivision provides an
14 interim exception from the requirements of Chapter 3.5 (commencing with
15 Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code for
16 regulations required to implement Sections 25621 and 25622 that are adopted
17 under the procedures specified in this subdivision.

18 (11) This subdivision shall become inoperative on January 1, 2000, unless a later
19 enacted statute deletes or extends that date. However, after January 1, 2000, the
20 commission shall not be required to repeat any procedural step in adopting a
21 regulation that has been completed before January 1, 2000, using the procedures
22 specified in this subdivision.

23 **Comment.** Section 25620.2 is amended to substitute reference to the Government Code
24 provision that continues the definition of “regulation” in former Government Code Section
25 11342(g).

26 **Welf. & Inst. Code § 11462.4 (amended). Community care facility deemed small business**

27 SEC. _____. Section 11462.4 of the Welfare and Institutions Code is amended to
28 read:

29 11462.4. Notwithstanding Section 11342 11342.600 of the Government Code,
30 group homes and foster family agencies shall be deemed small businesses and the
31 department shall project the impact on group homes and foster family agencies of
32 any new regulations which will affect those community care facilities.

33 **Comment.** Section 11462.4 is amended to substitute reference to the Government Code
34 provision that continues the definition of “small business” in former Government Code
35 Section 11342(h).