

Study N-300

October 13, 1999

Second Supplement to Memorandum 99-69**Administrative Rulemaking (Comments on Draft Recommendation)**

We received a letter from the Department of Motor Vehicles commenting on the draft recommendation. It is attached. The staff will discuss the points raised in the letter in conjunction with the discussion of the draft recommendation.

Respectfully submitted,

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Staff Counsel

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October 13, 1999

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RE: Comments on the tentative recommendation relating to administrative rulemaking of the California Law Revision Commission (CLRC), dated September 17, 1999

Thank you for providing an opportunity to comment on the August 1999 recommendations of the CLRC relating to the Administrative Rulemaking statutes that govern the adoption, amendment and repeal of regulations. The Department of Motor Vehicles (department) is not convinced that the proposed amendment of section 11346.4¹ subdivision (b), which would permit an extension for good cause of the effective period of a rulemaking notice, is necessary, or even desirable. However, we would have no opposition to this proposal if there are other agencies that support it.

The department notes that the description of the proposed addition of subdivision (d)(4) to section 11350, discussed on page 9 of the staff draft recommendation, does not appear to be consistent with the actual language of the proposal on page 57. According to the draft recommendation on page 9, the provision would expand the scope of evidence of a procedural violation by allowing for inclusion in the record in a proceeding for a judicial declaration of material which should have been in the rulemaking file but was not included. Although such a proposal may benefit agencies by making it more difficult to undo a regulation based on a failure of the agency to adopt the regulation according to required procedures, we don't believe that the proposed statutory language will have this effect. The proposed subdivision would allow the use of an affidavit in a proceeding for a judicial declaration for the sole purpose of proving whether a regulation used by an agency should have been adopted pursuant to the Administrative Procedure Act. Therefore, the department is opposed to the amendment of section 11350 on page 57, because a person attempting to prove that an "underground" regulation has been used by an agency must be required to provide evidence for review by the court beyond a mere affidavit.

In addition, the department believes that the following concerns should be addressed before the provisions are included in any legislation recommended to the Legislature:

1. Existing section 11346.5 subdivision (a)(3) requires that an agency's notice of proposed regulatory action must include an informative digest which contains a clear and concise summary of existing laws and regulations related to the proposed action and the effect of the proposed action, drafted in a format similar to the Legislative Counsel's digest on legislative bills. The CLRC's proposed amendment of section 11346.5 subdivision (a)(3)(B) would amend the existing requirement that the informative digest contain a plain English policy statement overview if the proposal affects small businesses. This provision, which would become applicable to every notice of proposed regulatory action, would require that each informative digest include a plain English summary of the proposed action and a plain English policy statement overview that explains the broad objectives of the proposed regulation and the specific objectives, as appropriate.

A review of the weekly California Regulatory Notice Register reveals that many agencies

¹ All statutory references are to the Government Code unless otherwise specified.

(including the Department of Motor Vehicles) typically include a plain English policy statement overview in the informative digest under a combined heading as a matter of routine, whether or not the proposal affects small businesses. It is unclear what meaningful information is expected to be provided in addition to the current requirements, by requiring both a plain English summary and plain English policy statement overview in the informative digest.

2. The proposed amendment of section 11349 subdivision (a) (page 47) would expand the definition of and provisions relating to “necessity,” and add to the required information in the statement of reasons a statement that an agency relying on a statement of its rationale for the necessity of the regulation must explain why the necessity of the regulation cannot, as a practical matter, be demonstrated by facts or expert opinion. Again, it is unclear what meaningful information is expected to be supplied by an agency in the statement of reasons by explaining why such facts or opinions do not exist.

If you have questions related to the comments outlined above, please contact me by e-mail at mvdjm2@dmv.ca.gov or call me at (916) 657-5690.

Sincerely,

Deborah Baity
Assoc. Govt. Program Analyst