

Second Supplement to Memorandum 2000-35

AB 1822 — Administrative Rulemaking

Assembly Bill 1822 (Wayne) would implement the Commission's recommendations regarding the administrative rulemaking process. The bill was amended on June 7 to make a small number of minor changes. These amendments are described below. Because Assembly Member Wayne is both the author and the Commission's current chair, his concurrence in the amendments satisfied our practice of discussing proposed amendments with the chair or vice-chair before they are made, whenever possible. A draft report of revised Comments to the Commission's recommendations, with changes indicated in strikeout and underscore, is attached for the Commission's approval. Note that Comments revisions that were previously approved by the Commission have not been highlighted.

The bill was heard in the Senate Governmental Organization Committee on June 13 and passed on consent.

Unless issues are raised at the meeting, the staff does not intend to discuss the contents of this memorandum in any detail. All statutory references in this memorandum are to the Government Code.

Effective Period of Emergency Regulation

Under existing law, an emergency regulation lapses 120 days after taking effect, unless the agency adopts the emergency regulation as a permanent regulation, or readopts it as an emergency regulation. The Commission was informed by the Office of Administrative Law (OAL), that 120 days is typically insufficient time to adopt an emergency regulation as a permanent regulation. Consequently, readoption is routine. The Commission recommended that the 120-day effective period be changed to 180 days in order to avoid the inefficiency inherent in routine readoption of emergency regulations.

As discussed at the April Meeting, the California Nurses Association (CNA) indicated that it would oppose the bill unless the provisions lengthening the effective period were removed. The Commission proposed an alternative, whereby the initial effective period would be extended to 180 days, but

subsequent extensions would be limited to 60-day periods (as compared to 120-day readoptions under existing law). After considering this proposal, CNA indicated that it might accept a 180-day initial effective period if only a *single* 60-day extension were permitted (for a maximum effective period of 240 days).

It seems likely that an inflexible duration limit would create problems for agencies in some circumstances. The staff contacted OAL to discuss that possibility. OAL then indicated that it had reassessed its former assertion that 120 days is typically insufficient time to adopt an emergency regulation on a permanent basis. Based on new information, OAL now maintains that 120 days is typically sufficient.

Considering the known opposition from CNA, and the reversal in the information on which we were basing our policy justification for the change, the decision was made to amend the bill to restore existing law (i.e., the 120-day effective period). After the amendment was made, CNA expressly withdrew its opposition to the bill. The Comment to Section 11346.1 needs to be revised to reflect the amendment (see attached).

Additional Opportunity for Public Comment on New Material

Proposed Section 11347.1 provides a procedure for additional public comment on material that has been added to the rulemaking file after publication of the notice of proposed action. The section codifies existing practice.

OAL raised a technical concern regarding the section's phrasing. As originally proposed, the additional comment period must begin "at least 15 calendar days before the proposed action is submitted to the office for review and filing with the Secretary of State." If an agency makes a final decision to adopt a proposed regulation more than 15 days before it submits the regulation to OAL for filing, it is possible that the additional public comment period could come *after* the agency's final decision. In order to ensure that the comment precedes the agency's decision, OAL proposes that the language quoted above be replaced with: "at least 15 calendar days before the proposed action is adopted by the agency." The bill was amended to make this change. No change to the Comment to Section 11347.1 is necessary.

Reference to Repeal of Regulation

In general, the APA rulemaking provisions apply to adoption, amendment, or repeal of a regulation. However, some provisions refer only to adoption or

amendment. AB 1822 would amend these provisions to include a reference to repeal. One such change was overlooked. The bill has been amended to correct this oversight. In relevant part, Section 11346.5(a)(7)(C) has been revised to read:

The following statement: “The (name of agency) has made an initial determination that the (adoption/amendment/repeal) of this regulation may have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states.

No change to the Comment to Section 11346.5 is necessary.

Public Availability of Rulemaking File

AB 1822 would amend Section 11347.3(a) as follows:

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

In the analysis of AB 1822 submitted by the Franchise Tax Board to the Assembly Appropriations Committee, the Board expresses concern that:

It is unclear at what location the department must make the file available (i.e., the original rulemaking file is created and maintained in the headquarters office; however, a member of the public makes a request to inspect and copy the rulemaking file at a district office in another city). Clarification is needed on this issue.

Existing law already requires that the rulemaking file be made available to the public. See Section 11347.3(d). Our proposed amendment clarifies *when* the file must be available, but is silent as to *where* or *how* it must be available. Thus, it is not our intention to affect existing practice as to where an agency must make the file available. In discussions with the Franchise Tax Board, the staff proposed that this could be clarified by revising the Comment to Section 11347.3(a) along the following lines:

Comment. Subdivision (a) of Section 11347.3 is amended to make clear that the rulemaking file is available to the public throughout the rulemaking process. The amendment is not intended to affect agency practice regarding where the agency makes the record available to the public. If an agency properly

limits the locations at which the rulemaking file may be inspected,
it may continue to do so.

The Franchise Tax Board analyst indicated that the proposed Comment language would address the Board's concern. The staff recommends that the Comment be revised as proposed (see attached).

Respectfully submitted,

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Staff Counsel

June 13, 2000

DRAFT REPORT OF THE
CALIFORNIA LAW REVISION COMMISSION
ON ASSEMBLY BILL 1822

Assembly Bill 1822, authored by Assembly Member Howard Wayne, implements two California Law Revision Commission recommendations: *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999) and *Improving Access to Rulemaking Information*, 30 Cal. L. Revision Comm'n Reports ___ (2000). The revised Comments set out below supersede the comparable Comments in the recommendations and reflect amendments to the bill made during the legislative process.

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

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

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

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

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

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

Comment. Subdivision (a)(1) of Section 11346.2 is a specific application of Section 6215(a) (state agency "shall write each document which it produces in plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style"). The requirement that a regulation be written in plain English has been expanded to include all regulations and not just those that affect small business. Plain English means language that satisfies the clarity standard expressed in Section 11349. See Section 11342.580 ("plain English" defined). Note that the former provision requiring the preparation of a plain English summary of a proposed regulation affecting small businesses, where the regulation cannot be drafted in plain English, has been broadened to apply to all regulations and continued in Section 11346.5(a)(3)(B). See Sections 11342.580 ("plain English" defined), 11349(c) (clarity standard).

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

Former subdivision (b)(5) is revised to eliminate the implication that a final finding is required before the agency has received comment on a proposed action.

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

Comment. Subdivision (a)(3)(B) of Section 11346.5 is amended to broaden the plain English policy statement requirement to apply to all proposed actions, and not just those affecting small business. The informative digest is also expanded to include a plain English summary of the regulation. See Sections 11342.580 (“plain English” defined), 11349(c) (clarity standard).

Paragraphs (7)-(8) and former paragraph (11) of subdivision (a) are amended to make clear that final findings are not required before the agency has received comment on a proposed action. Paragraphs (7)-(8) are also amended to provide that those provisions apply to the repeal of a regulation, as well as the adoption, or amendment of a regulation.

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

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

Comment. Subdivision (a)(1) of Section 11346.9 is amended to refer to Section 11347.1, which codifies the existing procedure for providing an additional opportunity for public comment in response to material added to the rulemaking file. See 1 Cal. Code Regs. § 45. Subdivision (a) requires additional public comment on certain material that is added to the rulemaking file after publication of the notice of proposed action. This is a broader requirement than that provided in Section 11346.8(d), which only requires an opportunity for additional comment regarding material that is added to the rulemaking file after the close of the public hearing or comment period. The broader requirement is consistent with existing practice.

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. The Office of Administrative Law may disapprove a proposed regulation if an agency improperly aggregates dissimilar comments or summarily dismisses a relevant comment. See Section 11349.3 (office may disapprove regulation for failure to comply with this chapter).

Subdivision (d) is added to authorize incorporation of a prior statement by reference. This reflects the fact that no purpose is served by requiring an agency to reiterate a statement that was made earlier in the rulemaking process. For example, where an agency determines pursuant to Section 11346.5(a)(6) that a proposed rule would not impose a cost on a local agency or school district and, at the time of preparing the final statement of reasons, determines that its prior determination is correct and complete, the agency may incorporate the statement made pursuant to Section 11346.5(a)(6) in complying with Section 11346.9(a)(2).

Gov't Code § 11349 (amended). Standards

Comment. Subdivision (a) of Section 11349 is amended to clarify the meaning of “necessity,” 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.

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

Comment. Subdivision (a) of Section 11347.3 is amended to make clear that the rulemaking file is available to the public throughout the rulemaking process. The amendment is not intended to affect agency practice regarding where the agency makes the record available to the public. If an

agency properly limits the locations at which the rulemaking file may be inspected, it may continue to do so.

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

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

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 any relevant evidence for the purpose of determining whether a regulation used by an agency is required to be 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). Note that evidence offered to prove that an agency has used a regulation that is required to be adopted under the rulemaking procedure will typically be documentary evidence, but a court may consider oral testimony in appropriate circumstances (e.g., to judge the credibility of an affiant or declarant).