

Memorandum 2000-90

Administrative Rulemaking Cleanup (Draft Tentative Recommendation)

Assembly Bill 1822 (Wayne) (2000) implemented a number of Commission-recommended reforms of the rulemaking provisions of the Administrative Procedure Act. Assembly Bill 505 (Wright) (2000) also affected the rulemaking provisions. The Commission directed the staff to prepare draft language to correct two technical problems resulting from these bills. The problems and their proposed solutions are discussed below. A staff draft tentative recommendation implementing the solutions recommended by the staff is attached for the Commission's review.

All statutory references in this memorandum are to the Government Code.

ELECTRONIC COMMUNICATION REQUIREMENTS

AB 505 and AB 1822 each added sections relating to use of electronic communications in the rulemaking process, Sections 11340.8 and 11340.85 respectively. These sections are set out below for reference, and their differences are then discussed:

Gov't Code § 11340.8. Electronic communication

11340.8. In order to make the regulatory process more user friendly and to improve communication between affected businesses and the regulatory agencies, each state agency that proposes regulations pursuant to this chapter shall do all of the following:

(a) Accept comments from interested parties by facsimile and electronic mail.

(b) Post on its Internet website, if the agency has an Internet website, information regarding the proposed regulation or proposed regulatory repeal or amendment that includes, but is not limited to, all of the following:

(1) Notice of the proposed action.

(2) Initial statement of reasons for the regulation or proposed repeal or amendment.

(3) Text of the proposed regulation or proposed amendment to the regulation or instructions on how to obtain the text.

(4) Final statement of reasons.

(5) If applicable, a dated notice of the intent of the agency to discontinue the proposed action.

(6) The office's decisions on the regulation, proposed regulation, or proposed amendment or repeal of a regulation.

(7) The date the regulation was filed with the Secretary of State.

(8) The effective date of the regulation.

(9) A statement to the effect that a business or person submitting a comment to a proposed regulation or proposed amendment or repeal of a regulation has the right to request a copy of the final statement of reasons.

(c) Publication under subdivision (b) supplements any other required form of publication or distribution. The failure to comply with this section is not grounds for disapproval of a proposed regulation. Subdivision (b) does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written material.

Gov't Code § 11340.85. Electronic communication

11340.85. (a) As used in this section, "electronic communication" includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

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

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.

(3) A notice required or authorized by this chapter or by a regulation implementing this chapter may be delivered to a person by means of electronic communication if the person has expressly indicated a willingness to receive the notice by means of electronic communication.

(4) A comment or petition regarding a regulation may be delivered to an agency by means of electronic communication if the agency has expressly indicated a willingness to receive a comment or petition by means of electronic communication.

(c) An agency that maintains an Internet website or other similar forum for the electronic publication or distribution of written material shall publish the following materials on that website or other forum:

(1) Any public notice required by this chapter or by a regulation implementing this chapter. For the purposes of this paragraph, “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.

(2) The initial statement of reasons prepared pursuant to subdivision (b) of Section 11346.2.

(3) The final statement of reasons prepared pursuant to subdivision (a) of Section 11346.9.

(4) Notice of a decision not to proceed prepared pursuant to Section 11347.

(5) The text of a proposed regulation or instructions on how to obtain a copy of the text.

(d) Publication under subdivision (c) supplements any other required form of publication or distribution. Failure to comply with subdivision (c) is not grounds for disapproval of a proposed regulation. Subdivision (c) does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written material.

(e) Nothing in this section precludes the office from requiring that the material submitted to the office for publication in the California Code of Regulations or the California Regulatory Notice Register be submitted in electronic form.

As can be seen, the two sections are very similar but not identical. As a consequence, agencies must read both sections together in order to determine the scope of electronic communication requirements.

The principal differences between Section 11340.8 and Section 11340.85 are as follows:

- (1) The introductory paragraph of Section 11340.8 provides legislative intent language that is absent in Section 11340.85.
- (2) Section 11340.85(b)(1)-(3) provides general authority for an agency to use electronic communication as a nonexclusive alternative means of communication in any situation where communication is required by the APA rulemaking procedure. Section 11340.8 does not have analogous language.
- (3) Section 11340.8(a) *requires* an agency to accept public comments by fax and email, while Section 11340.85(b)(4) *authorizes* fax and email comments *and petitions* at the agency’s option.
- (4) Sections 11340.8(b) and 11340.85(c) both require website publication of certain rulemaking documents, but there are differences in the scope of these requirements.

The simplest approach to resolving these differences would be to repeal Section 11340.8 and amend Section 11340.85 to preserve the additional requirements imposed by Section 11340.8. **The staff recommends** that Section 11340.8 be repealed and Section 11340.85 be amended as follows:

Gov't Code § 11340.85 (amended). Electronic communication

11340.85. (a) As used in this section, “electronic communication” includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

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

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.

(3) A notice required or authorized by this chapter or by a regulation implementing this chapter may be delivered to a person by means of electronic communication if the person has expressly indicated a willingness to receive the notice by means of electronic communication.

(4) A comment or petition regarding a regulation may be delivered to an agency by means of electronic communication ~~if the agency has expressly indicated a willingness to receive a comment or petition by means of electronic communication.~~

(c) An agency that maintains an Internet website or other similar forum for the electronic publication or distribution of written material shall publish the following materials on that website or other forum:

(1) Any public notice required by this chapter or by a regulation implementing this chapter. For the purposes of this paragraph, “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.

(2) The initial statement of reasons prepared pursuant to subdivision (b) of Section 11346.2.

(3) The final statement of reasons prepared pursuant to subdivision (a) of Section 11346.9.

(4) Notice of a decision not to proceed prepared pursuant to Section 11347.

(5) The text of a proposed regulation or instructions on how to obtain a copy of the text.

(6) A statement of any decision made by the office regarding a proposed action.

(7) The date a rulemaking action is filed with the Secretary of State.

(8) The effective date of a rulemaking action.

(9) A statement to the effect that a business or person submitting a comment regarding a proposed action has the right to request a copy of the final statement of reasons.

(d) Publication under subdivision (c) supplements any other required form of publication or distribution. Failure to comply with ~~subdivision (e) this section~~ is not grounds for disapproval of a proposed regulation. Subdivision (c) does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written material.

(e) Nothing in this section precludes the office from requiring that the material submitted to the office for publication in the California Code of Regulations or the California Regulatory Notice Register be submitted in electronic form.

(f) This section is intended to make the regulatory process more user-friendly and to improve communication between interested parties and the regulatory agencies.

Comment. Section 11340.85 is amended to harmonize its requirements with those of former Section 11340.8.

Subdivision (b)(4) is amended to provide that agencies are required to accept fax and email comments and petitions. The mandatory aspect of this rule is drawn from former Section 11340.8(a).

Subdivision (c)(6)-(9) continues former Section 11340.8(b)(6)-(9) without substantive change.

Subdivision (f) continues the introductory statement of intent in former Section 11340.8 without substantive change.

DEFINITION OF “PROPOSED ACTION”

AB 505 added Government Code Section 11342.595, providing:

“Proposed action” means the regulatory action submitted to the office for publication in the California Regulatory Notice Register.

Technically, a regulatory action is not submitted to the Office of Administrative Law for publication. A *notice* of proposed action is published in the California Regulatory Notice Register, but not the proposed action itself. See

Section 11344.1(a) (contents of California Regulatory Notice Register). This technical problem could be corrected by amending the section as follows:

11342.595. “Proposed action” means the regulatory action, notice of which is submitted to the office for publication in the California Regulatory Notice Register.

Comment. Section 11342.595 is amended to correct a technical defect. It is the notice of proposed action, not the proposed action itself, that is published in the California Regulatory Notice Register. See Section 11344.1(a) (contents of California Regulatory Notice Register).

CONCLUSION

If the Commission approves the staff draft tentative recommendation it will be circulated for public comment on an expedited basis. Copies will also be provided to Assembly Members Wayne and Wright for their review.

Respectfully submitted,

Brian Hebert
Staff Counsel

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT TENTATIVE RECOMMENDATION

Administrative Rulemaking Cleanup

December 2000

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **January 31, 2001.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

Chapter 1060 of the Statutes of 2000 implemented two Law Revision Commission recommendations regarding rulemaking procedure under the Administrative Procedure Act. Chapter 1059 of the Statutes of 2000 also made changes to the rulemaking procedure. This recommendation would correct two technical problems resulting from these bills:

- (1) The bills each added a section governing use of electronic communications in the rulemaking process. The requirements of these sections are mostly duplicative, with only a few minor differences. The Commission recommends that the requirements of these sections be harmonized and combined in a single section.
- (2) Chapter 1059 added a definition of “proposed action” that is technically defective. The Commission recommends that the defect be corrected.

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

ADMINISTRATIVE RULEMAKING CLEANUP

1 Chapter 1060 of the Statutes of 2000¹ implemented two Law Revision
2 Commission recommendations regarding rulemaking procedure under the
3 Administrative Procedure Act.² Chapter 1059 of the Statutes of 2000³ also made
4 changes to the rulemaking procedure. This recommendation would correct two
5 technical problems resulting from these bills:

6 **Duplicative Electronic Communication Requirements**

7 Chapters 1059 and 1060 each added a section governing use of electronic
8 communication in the rulemaking process (Government Code Sections 11340.8
9 and 11340.85 respectively). The requirements of these sections are duplicative,
10 with only a few minor differences. The Commission recommends that the
11 requirements of these sections be harmonized and combined in a single section.

12 **Definition of “Proposed Action”**

13 Chapter 1059 added Government Code Section 11342.595, defining “proposed
14 action” as “the regulatory action submitted to the office for publication in the
15 California Regulatory Notice Register.”

16 Technically, a regulatory action is not submitted to the Office of Administrative
17 Law for publication. A notice of proposed action is published in the California
18 Regulatory Notice Register, but not the proposed action itself.⁴ The Commission
19 recommends that the definition be amended to correct this defect.

1. AB 1822 (Wayne).

2. AB 505 (Wright).

3. *Administrative Rulemaking*, 29 Cal. L. Revision Comm’n Reports 459 (1999); *Improving Access to Rulemaking Information*, 30 Cal. L. Revision Comm’n Reports ___ (2000).

4. See Gov’t Code § 11344.1(a) (contents of California Regulatory Notice Register).

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PROPOSED LEGISLATION

2 **Gov't Code § 11340.8 (repealed). Electronic communication**

3 SECTION 1. Section 11340.8 of the Government Code is repealed.

4 ~~11340.8. In order to make the regulatory process more user friendly and to~~
5 ~~improve communication between affected businesses and the regulatory agencies,~~
6 ~~each state agency that proposes regulations pursuant to this chapter shall do all of~~
7 ~~the following:~~

8 ~~(a) Accept comments from interested parties by facsimile and electronic mail.~~

9 ~~(b) Post on its Internet website, if the agency has an Internet website,~~
10 ~~information regarding the proposed regulation or proposed regulatory repeal or~~
11 ~~amendment that includes, but is not limited to, all of the following:~~

12 ~~(1) Notice of the proposed action.~~

13 ~~(2) Initial statement of reasons for the regulation or proposed repeal or~~
14 ~~amendment.~~

15 ~~(3) Text of the proposed regulation or proposed amendment to the regulation or~~
16 ~~instructions on how to obtain the text.~~

17 ~~(4) Final statement of reasons.~~

18 ~~(5) If applicable, a dated notice of the intent of the agency to discontinue the~~
19 ~~proposed action.~~

20 ~~(6) The office's decisions on the regulation, proposed regulation, or proposed~~
21 ~~amendment or repeal of a regulation.~~

22 ~~(7) The date the regulation was filed with the Secretary of State.~~

23 ~~(8) The effective date of the regulation.~~

24 ~~(9) A statement to the effect that a business or person submitting a comment to a~~
25 ~~proposed regulation or proposed amendment or repeal of a regulation has the right~~
26 ~~to request a copy of the final statement of reasons.~~

27 ~~(c) Publication under subdivision (b) supplements any other required form of~~
28 ~~publication or distribution. The failure to comply with this section is not grounds~~
29 ~~for disapproval of a proposed regulation. Subdivision (b) does not require an~~
30 ~~agency to establish or maintain a website or other forum for the electronic~~
31 ~~publication or distribution of written material.~~

32 **Comment.** Section 11340.8 is repealed. Its substance is continued in Section 11340.85.

33 **Gov't Code § 11340.85 (amended). Electronic communication**

34 SEC. 2. Section 11340.85 of the Government Code is amended to read:

35 11340.85. (a) As used in this section, "electronic communication" includes
36 electronic transmission of written or graphical material by electronic mail,
37 facsimile, or other means, but does not include voice communication.

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

3 (1) An agency may permit and encourage use of electronic communication, but
4 may not require use of electronic communication.

5 (2) An agency may publish or distribute a document required by this chapter or
6 by a regulation implementing this chapter by means of electronic communication,
7 but shall not make that the exclusive means by which the document is published or
8 distributed.

9 (3) A notice required or authorized by this chapter or by a regulation
10 implementing this chapter may be delivered to a person by means of electronic
11 communication if the person has expressly indicated a willingness to receive the
12 notice by means of electronic communication.

13 (4) A comment or petition regarding a regulation may be delivered to an agency
14 by means of electronic communication if ~~the agency has expressly indicated a~~
15 ~~willingness to receive a comment or petition by means of electronic~~
16 ~~communication.~~

17 (c) An agency that maintains an Internet website or other similar forum for the
18 electronic publication or distribution of written material shall publish the
19 following materials on that website or other forum:

20 (1) Any public notice required by this chapter or by a regulation implementing
21 this chapter. For the purposes of this paragraph, “public notice” means a notice
22 that is required to be given by an agency to persons who have requested notice of
23 the agency’s regulatory actions.

24 (2) The initial statement of reasons prepared pursuant to subdivision (b) of
25 Section 11346.2.

26 (3) The final statement of reasons prepared pursuant to subdivision (a) of Section
27 11346.9.

28 (4) Notice of a decision not to proceed prepared pursuant to Section 11347.

29 (5) The text of a proposed regulation or instructions on how to obtain a copy of
30 the text.

31 (6) A statement of any decision made by the office regarding a proposed action.

32 (7) The date a rulemaking action is filed with the Secretary of State.

33 (8) The effective date of a rulemaking action.

34 (9) A statement to the effect that a business or person submitting a comment
35 regarding a proposed action has the right to request a copy of the final statement of
36 reasons.

37 (d) Publication under subdivision (c) supplements any other required form of
38 publication or distribution. Failure to comply with ~~subdivision (e)~~ this section is
39 not grounds for disapproval of a proposed regulation. Subdivision (c) does not
40 require an agency to establish or maintain a website or other forum for the
41 electronic publication or distribution of written material.

1 (e) Nothing in this section precludes the office from requiring that the material
2 submitted to the office for publication in the California Code of Regulations or the
3 California Regulatory Notice Register be submitted in electronic form.

4 (f) This section is intended to make the regulatory process more user-friendly
5 and to improve communication between interested parties and the regulatory
6 agencies.

7 **Comment.** Section 11340.85 is amended to harmonize its requirements with those of former
8 Section 11340.8.

9 Subdivision (b)(4) is amended to provide that agencies are required to accept fax and email
10 comments and petitions. The mandatory aspect of this rule is drawn from former Section
11 11340.8(a).

12 Subdivision (c)(6)-(9) continues former Section 11340.8(b)(6)-(9) without substantive change.

13 Subdivision (f) continues the introductory statement of intent in former Section 11340.8
14 without substantive change.

15 **Gov't Code § 11342.595 (amended). "Proposed action"**

16 SEC. 3. Section 11342.595 of the Government Code is amended to read:

17 11342.595. "Proposed action" means the regulatory action, notice of which is
18 submitted to the office for publication in the California Regulatory Notice
19 Register.

20 **Comment.** Section 11342.595 is amended to correct a technical defect. It is the notice of
21 proposed action, not the proposed action itself, that is published in the California Regulatory
22 Notice Register. See Section 11344.1(a) (contents of California Regulatory Notice Register).