

First Supplement to Memorandum 2000-90

Administrative Rulemaking Cleanup (Comments of Deborah Baity)

We received a letter from Deborah Baity, Chief of the Regulations Branch of the Department of Motor Vehicles (DMV), commenting on the draft tentative recommendation relating to *Administrative Rulemaking Cleanup*. The letter is attached.

Ms. Baity objects to one aspect of the proposed reconciliation of Government Code Sections 11340.8 and 11340.85, which impose nearly identical requirements for use of electronic communications in administrative rulemaking. The problem is described below:

Section 11340.8(b), added by AB 505 (Wright), requires that an agency “[accept] comments from interested parties by facsimile and electronic mail.” Section 11340.85(a)(4), added by AB 1822 (Wayne) on the Commission’s recommendation, provides that “[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.” Section 11340.8(b) is mandatory, while Section 11340.85(a)(4) is permissive. Section 11340.8(b) applies to comments only, while Section 11340.85(a)(4) applies to comments *and petitions* — Government Code Section 11340.7 provides that an interested person can petition an agency for adoption, amendment, or repeal of a regulation.

The draft tentative recommendation reconciles these inconsistencies by repealing Section 11340.8 and amending Section 11340.85(a)(4) to read: “A comment or petition regarding a regulation may be delivered to an agency by means of electronic communication.” The proposed rule is mandatory and applies to both comments and petitions.

Ms. Baity points out, correctly, that a rule requiring electronic acceptance of petitions goes beyond mere reconciliation of the two inconsistent provisions. A purely technical reconciliation would result in a rule that is mandatory with respect to comments, but permissive with respect to petitions, thus:

A comment regarding a regulation may be delivered to an agency by means of electronic communication. A 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 petition by means of electronic communication.

Ms. Baity's concern with the change is based on her agency's experience with soliciting electronic comments. When the DMV has established an email address for receipt of comments on regulations and advertised that address only in the notice of proposed action (in the California Regulatory Notice Register), the comments received were relevant to the particular regulation at issue. When the DMV advertised an email address on its website, for comments on regulations generally, it received over 200 comments in two months, on a wide range of topics — none relevant to a proposed regulation. Ms. Baity believes that a rule requiring electronic acceptance of petitions would mean advertising an email address on their website, since the petitions would not be limited to any specific regulation. In Ms. Baity's experience, website advertisement of this sort generates a great deal of irrelevant comment. Therefore, the DMV would object to a rule making acceptance of electronic petitions mandatory.

In preparing the draft tentative recommendation, the staff felt that a rule requiring acceptance of electronic comments and petitions was consistent with the spirit of the two sections read together — the Legislature had approved a mandatory requirement and there was no clear reason why comments and petitions should be treated differently. Ms. Baity has now offered a good reason. **The staff recommends** that the draft tentative recommendation be revised to adopt language along the lines of the language indented above.

Respectfully submitted,

Brian Hebert
Staff Counsel

Memorandum

Date : November 15, 2000

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From : Department of Motor Vehicles
2415 First Avenue
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Subject: Administrative Rulemaking Cleanup (Draft Tentative Recommendation)

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This is in response to Memorandum 2000-90, dated November 9, 2000, which is intended to correct two technical problems identified by the Law Revision Commission resulting from the implementation of Chapter 1060 of the Statutes of 2000 (AB 1822) and Chapter 1059 of the Statutes of 2000 (AB 505). All statutory references in this memorandum are to the Government Code.

The Law Revision Commission staff recommends that section 11340.8 be repealed and section 11340.85(b)(4) be amended to mandate that a comment *or petition* regarding a regulation may be delivered to an agency by means of electronic communication (emphasis added). The Department of Motor Vehicles (department) does not support this specific amendment, nor do we believe that it is merely technical in nature.

The comments attached to the proposed revision of section 11340.85(b)(4) indicate that this amendment harmonizes the requirements of this subdivision with the provisions of section 11340.8(a). However, the scope of section 11340.8 appears to be limited by context to procedures for publication and distribution of a proposed regulatory action. Nowhere in section 11340.8 is there a reference to procedures for electronic transmission of petitions. Therefore, the argument that the mandatory aspect of this rule is drawn from section 11340.8(a) is not valid, as this amendment would exceed the original legislative intent.


Section 11340.85(b)(4), effective January 1, 2001, authorizes a comment (on a proposed regulation) or a petition to be delivered to an agency by means of electronic communication *if the agency has expressed a willingness to receive them in this fashion*. Electronic communication is defined in section 11340.85(a) as transmission of written or graphic material by e-mail, fax or other means, but does not include voice communication. Since an agency is required to accept electronic communication on proposed regulations by section 11340.8, a Notice of proposed

action must contain an e-mail address and/or fax number for the contact person identified in the Notice, or these avenues of communication must be identified in the agency's Internet website.

In order to provide the capability of acceptance of petitions by electronic communication, an agency would have to publicize a fax number or e-mail address (or both) for this purpose. The Department of Motor Vehicles is a high profile agency, and our experience in this regard has not been positive. We established an e-mail address strictly for the purpose of receiving comments on proposed regulations, which was clearly identified on our Internet website. In the two month period the address was available, the Regulations Branch received over 200 electronic communications concerning a myriad of issues related to driver licenses, vehicle registration and other transportation matters, but we did not receive a single comment on a proposed regulation by this method of communication.

Since May 2000, each notice of proposed regulatory action published and distributed by the department has identified an e-mail address to which comments on the proposal may be directed, and we have satisfactorily received comments on regulatory proposals and requests for a public hearing by electronic mail and facsimile, in addition to receiving written comments by U.S. Mail. We would object to a statutory change which would extend this requirement and make mandatory the acceptance of electronic communication concerning petitions.

If you have any questions concerning this matter, please contact me at (916) 657-5690 or via e-mail at dbaity@dmv.ca.gov.


DEBORAH BAITY, Chief
Regulations Branch