Study N-306 January 24, 2001

Memorandum 2001-16

Administrative Rulemaking Cleanup
(Comments on Tentative Recommendation)

In December, the Commission circulated a tentative recommendation proposing solutions to two technical problems relating to enactment of Chapters 1059 and 1060 of the Statutes of 2000 (AB 505 (Wright) and AB 1822 (Wayne), respectively), which both affected administrative rulemaking procedures. AB 1822 implemented Commission recommendations.

To date, we have received the following letters commenting on the tentative recommendation:

Exhibit p.
1. Deborah Baity, Department of Motor Vehicles (1/4/01) 1
2. Carol Belcher & Heidi Gottlieb, Department of Industrial Relations & Occupational Safety and Health Standards Board (1/12/01) 2

Although the comment period for the tentative recommendation is open until January 31, 2000, the staff feels that it would be helpful to present these comment letters before that date, so that the issues raised can receive fuller consideration. Any further comments received will be included in supplements to this memorandum.

DEPARTMENT OF MOTOR VEHICLES

The Department of Motor Vehicles indicates that it supports the changes to Government Code Sections 11340.8 and 11340.85 proposed in the tentative recommendation (relating to electronic communication in administrative rulemaking). See Exhibit p. 1.

DEPARTMENT OF INDUSTRIAL RELATIONS & OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

The Department of Industrial Relations and the Occupational Safety and Health Standards Board ("DIR & OSHSB") write jointly to propose three new clarifications of provisions affected by AB 505 and AB 1822. In considering these

suggestions, it is useful to recall that the Commission's decision to recommend cleanup legislation was limited — only the changes proposed in the tentative recommendation were considered noncontroversial and straightforward enough to warrant inclusion in *immediate* cleanup legislation. Consideration of other suggested improvements to the rulemaking provisions would be deferred for a year. This would allow time for practical experience under the new law to develop before further changes are made. This does not mean that the Commission should reject the suggestions of DIR & OSHSB out of hand. However, if the Commission concludes that a proposed change is potentially controversial it may wish to defer action on that suggestion, consistent with the general decision on how to proceed. The proposals are discussed below:

Consideration of Alternatives

AB 505 amended Government Code Section 11346.2(b)(3) as follows:

> 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:
>
> …
>
> (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:
>
> …
>
> (3) (A) A description of ~~the~~ reasonable alternatives to the regulation ~~considered by the agency~~ and the agency's reasons for rejecting those alternatives. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.
>
> (B) A description of any reasonable alternatives the agency has identified or that have otherwise been identified and brought to the attention of the agency that would lessen any adverse impact on small business. It is not the intent of this paragraph to require the agency to artificially construct alternatives or to justify why it has not identified alternatives.

DIR & OSHSB believe that the changes in paragraph (b)(3)(A) make the requirements of that paragraph uncertain. Under prior law, an agency need only describe alternatives it had actually considered. Under the new language it is arguable that "an agency must devise possible reasonable alternatives to a proposed action and describe them." See Exhibit p. 2. This may be inconsistent

with the language in subdivision (b)(3)(B) providing: "It is not the intent of this paragraph to require the agency to artificially construct alternatives or to justify why it has not identified alternatives." However, it isn't clear whether that intent language applies to all of paragraph (3) or simply to subparagraph (3)(B). DIR & OSHSB propose that the intent language identical to that in subparagraph (3)(B) be added to subparagraph (3)(A).

The staff believes that the Legislature intended to broaden the scope of the requirement that an agency describe alternatives to a proposed regulation. Why would the language limiting the duty to alternatives "considered by the agency" be stricken if the Legislature did not intend to require description of alternatives beyond those that the agency would ordinarily consider. It isn't clear how this reading should be reconciled with the intent language in (3)(B) (if it applies).

The question of whether an agency should be required to devise reasonable alternatives in developing a proposed regulation and the proper boundaries of that exercise are not mere technical matters. They involve practical and policy concerns. As such, the staff does not believe that the issue is appropriate for inclusion in a purely technical cleanup bill. **The staff recommends** that this issue be noted and considered again when the Commission next revisits substantive matters relating to administrative rulemaking.

Internet Publication of "Public Notices"

AB 1822 added a requirement that certain documents be published on a rulemaking agency's website (if the agency has a website). One class of documents required to be published is specified in Government Code Section 11340.85(c)(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.

DIR & OSHSB believe that this provision is ambiguous. They are concerned that the provision might require web publication of any rulemaking document, because all rulemaking documents are public records which must be provided to the public on request. They believe that the first sentence is sufficiently clear and that the ambiguity in the paragraph could be eliminated by striking the second sentence. See Exhibit p. 3.

The purpose of the second sentence is to limit the scope of required publication by defining "public notice" to include only those notices that an agency is required to provide to people who have specifically requested notice of rulemaking activity. This was not intended to include any document that can be requested under the Public Record Act. The official Comment to Section 11340.85(c)(1) states:

> Subdivision (c) requires electronic publication of certain rulemaking documents by an agency that maintains a website or similar electronic communication forum. Provisions requiring a "public notice" as defined in paragraph (1) include Sections 11346.4 (notice of proposed action), 11346.8(a) (notice of hearing), 11346.8(b) (notice of continuance or postponement of hearing), and Section 44 of Title 1 of the California Code of Regulations (notice of changes to proposed regulation).

Section 11340.85(c) is reasonably clear without the second sentence, especially as supplemented by the Comment. As the second sentence appears to be confusing, it may be appropriate to delete it. The Commission is already proposing to amend Section 11340.85, so it would be a simple matter to change the proposed legislation along the following lines:

> 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.~~
>
> **Comment.** Subdivision (c)(1) is amended to improve its clarity. This is a nonsubstantive change.

The staff believes that this change would probably be noncontroversial and may be appropriate for inclusion in the proposed cleanup legislation.

Designation of Contact Person "Where Appropriate"

AB 505 added Section 11346.5(a)(14), requiring that a notice of proposed adoption, amendment, or repeal of a regulation include the following:

> (14) The name and telephone number of the following:
> (A) The agency representative and designated backup contact person to whom inquiries concerning the proposed administrative action may be directed.
> (B) An agency person or persons designated to respond to questions on the substance of the proposed regulations, where appropriate.

DIR & OSHSB is concerned about the ambiguity of the phrase "where appropriate." They write (see Exhibit p. 3.):

> We submit that "where appropriate" is open to many different interpretations and standards. While the Legislature likely intended to grant agencies discretion on this issue, the language used is so vague that it is difficult for agencies desiring to comply with the legislative intent to know what to do. For example, while it might be considered "appropriate" by some to designate such a person for a complex or technical rulemaking, it might be considered equally "inappropriate" by the agency because the agency night need to screen calls to ensure that the contact person for substantive issues is not overwhelmed. We propose that language such as "where deemed appropriate by the agency," be submitted for the phrase "where appropriate."

Because Section 11346.5(a)(14)(B) was not based on a Commission recommendation, the staff does not know what degree of deference to an agency was intended. It is worth noting, however, that AB 505 was primarily a bill aimed at lightening regulatory burdens on small businesses. In general it adjusts rulemaking procedures to increase agency accountability in the rulemaking process. A change enhancing an agency's ability to avoid identifying a contact person as required in Section 11346.5(a)(14)(B) seems contrary to the spirit of AB 505. The staff suspects that the change proposed by DIR & OSHSB would be controversial. **The staff recommends** that this issue be noted and considered again when the Commission next revisits substantive matters relating to administrative rulemaking.

Respectfully submitted,

Brian Hebert
Staff Counsel

State of California
Business, Transportation and Housing Agency

Department of Motor Vehicles

Memorandum

Date : January 4, 2001

To : Brian Hebert
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From : Department of Motor Vehicles
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Subject: Administrative Rulemaking Cleanup (Tentative Recommendation) #N-306

This is in response to the Administrative Rulemaking Cleanup tentative recommendation, dated December 2000, which will correct two technical problems resulting from Chapter 1060 of the Statutes of 2000 (AB 1822, Wayne) and Chapter 1059 of the Statutes of 2000 (AB 505, Wright). All statutory references in this memorandum are to the Government Code.

The Department of Motor Vehicles supports the repeal of section 11340.8 and amendment of section 11340.85, and the amendment of section 11342.595, as proposed in the tentative recommendation. The addition of subdivision (b)(5) in section 11340.85 will make clear that an agency is not required to accept rulemaking petitions by facsimile or e-mail, as discussed in our previous comments.

Also, the department supports the addition of subdivision (c)(6) in section 11342.85, which will allow an agency to publish a statement on its Internet website concerning any decision made by the Office of Administrative Law (OAL) regarding a proposed regulatory action. Because OAL decisions are provided to agencies on paper by U.S. Mail, it is impractical to require that the decisions be converted into an Internet compatible format in order to post them on a website.

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

DEBORAH BAITY, Chief
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January 12, 2001

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Re: Tentative Recommendation Regarding Administrative Rulemaking Clean-up Legislation

Dear Mr. Hebert:

The Department of Industrial Relations and the Occupational Safety and Health Standards Board are writing to comment on the Law Revision Commission's tentative recommendation on proposed clean-up legislation pertaining to Chaptered bills 1059 and 1060. In addition to the items identified by the Commission, our agencies would like to propose a few additional items for clarification.

First, we note that an agency's obligation to consider alternative actions is unclear. This problem results primarily from revisions made to Government Code section 11346.2(b)(3)(A). Subsection (A) pertains to the initial statement of reasons and previously required an agency to describe alternatives to the proposed regulatory action *considered by it*. The section now omits the italicized language and states that an agency must describe reasonable alternatives to the proposed regulatory action and its reasons for rejecting them. These revisions suggest that an agency must devise possible reasonable alternatives to a proposed action and describe them.

Although subsection (B) of that provision states that "it is not the intent of *this paragraph* to require the agency to artificially construct alternatives," a similar statement is not contained in subsection (A). The Legislature may have intended the sentence in subsection (B) to apply to subsection (A), but that is not clear. To further confuse the issue, sections 11346.5(a)(13) and 11346.9(a)(4), which pertain to the notice and final statement of reasons respectively, continue to talk in terms of alternatives *considered by the agency*. While these three sections are not parallel in all respects, it seems odd that the ISOR would require an agency to construct alternatives while the notice and final statement would not. However, if an agency is simply to report on reasonable alternatives considered by it in the ISOR, it is unclear why the revisions to section 11346.2(b)(3)(A) were made. Legislative clarification of this issue is needed. We propose that the second statement in subsection (B) be added to subsection (A), to clarify that an agency need not artificially construct alternatives.

Second, the requirement to post public notices in section 11340.85 is ambiguous. Under section 11340.85(c), agencies are required to publish on their websites all public notices "required by this chapter or by a regulation implementing this chapter." Public notice is also defined to mean a notice that is required to be given by an agency to persons who have requested notice of the agency's regulatory actions. There are two problems with this subsection, as we see it. First, the definition contained in the second sentence lacks clarity. Second, it is unclear how these two sentences are intended to interact.

Regarding our first concern, we note that although most rulemaking documents are not typically referred to as "notices", many could be considered a public notice under this definition. For example, the Standards Board produces a Calendar of Activities, which announces a variety of activities associated with its rulemaking activities. Although not commonly understood to be a "notice," the document could be considered such under this definition because it pertains to regulatory actions, and the Board would be required to provide it to the public upon request, given that it is a public document. Is the Board then obligated to post the Calendar of Activities on its website under section 11340.85(c)?

Regarding our second concern, it is unclear whether the second sentence's definition of public notice is intended to be read into and limit the first sentence's delineation of notices to be posted, read into the first sentence as an example of notices to be posted, or to independently expand upon the scope of notices to be posted.

As a solution to both these concerns, we submit that the first sentence of this section adequately defines notices to be posted. The second sentence unnecessarily complicates the requirement, and potentially expands the universe of documents intended to be posted far beyond what is manageable for an agency.

Finally, section 11346.5(a)(14) requires agencies to designate a contact person to respond to substantive issues, *where appropriate*. We submit that "where appropriate" is open to many different interpretations and standards. While the Legislature likely intended to grant agencies discretion on this issue, the language used is so vague that it is difficult for agencies desiring to comply with the legislative intent to know what to do. For example, while it might be considered "appropriate" by some to designate such a person for a complex or technical rulemaking, it might be considered equally "inappropriate" by the agency because the agency might need to screen calls to ensure that the contact person for substantive issues is not overwhelmed. We propose that language such as "if deemed appropriate by the agency," be substituted for the phrase "where appropriate."

Thank you for your consideration of our suggestions. If you have any questions or comments, please do not hesitate to contact the undersigned.

Sincerely,

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Occupational Safety and
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