

First Supplement to Memorandum 2001-95

Administrative Rulemaking: Deferred Issues

This supplement presents two new issues that the Commission may wish to address as part of its study of rulemaking procedure. The issues are discussed below.

INTERNET POSTING OF EMERGENCY RULE

Government Code Section 11340.85(c), as amended by 2001 Cal. Stat. ch. 59, SB 561 (Morrow), provides:

(c) An agency that maintains an Internet Web site or other similar forum for the electronic publication or distribution of written material shall publish on that Web site or other forum information regarding a proposed regulation or regulatory repeal or amendment, that includes, but is not limited to, the following:

(1) Any public notice required by this chapter or by a regulation implementing this chapter.

(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 action 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.

The Office of Administrative Law (“OAL”) suggests that an agency should also be required to post the text of a proposed emergency regulation.

Under existing law, an agency can use the expedited “emergency rulemaking” procedure, rather than the regular rulemaking procedure, if it makes a finding that

“adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare.” Gov’t Code § 11346.1(b). A proposed emergency rulemaking action is reviewed by OAL for ten days before it is filed with the Secretary of State. Gov’t Code § 11349.6(b). In the course of its review, OAL is permitted to consider information other than that submitted by the agency. Gov’t Code § 11349.6(c). OAL accepts public comments regarding a proposed emergency rulemaking action for five days after receipt of the proposed action. 1 Cal. Code Regs. § 55(b)(2). It is OAL’s practice to post on its website notice of emergency rulemaking actions that are under active review. It does not post the text of the proposed regulations.

Requiring agencies to post notice and the text of proposed emergency rulemaking actions on their web sites would provide better public notice of a proposed emergency rulemaking action, and would facilitate participation in the very brief period for public comment provided under existing law. The burden to the agency should be slight. **The staff recommends** that Government Code Section 11340.85(c) be revised to add a paragraph (10), as follows:

(10) Notice of emergency rulemaking pursuant to Section 11346.1, including the text of the proposed adoption, amendment, or repeal of a regulation.

Comment. Subdivision (c) of Section 11340.85 is amended to require that notice and the text of a proposed emergency rulemaking action be posted. See Section 11349.6 (review of emergency regulation), 1 Cal. Code Regs. § 55 (public comments regarding emergency regulation).

It also occurs to the staff that Section 11340.85 does not specify how long a document must remain on an agency’s web site. The Commission should consider adding a provision along the following lines:

A document that is required to be posted pursuant to subdivision (c) shall be posted during the rulemaking process to which the document relates and for an additional period of not fewer than 15 days.

The “additional period” would serve two purposes: (1) It would provide for a longer period of posting of the text of emergency rulemaking, which would otherwise only be posted for ten days. (2) It would provide a meaningful period for posting of a notice not to proceed with rulemaking, which terminates the rulemaking process and therefore arguably could be removed as soon as it was posted.

RULEMAKING BY MULTI-MEMBER BODIES

Under Government Code Section 11343, every state agency that adopts, amends, or repeals a regulation must submit a certified copy of the regulation or order of repeal to OAL for filing with the Secretary of State. Subdivision (f) of that section provides:

(f) Whenever a certification is required by this section, it shall be made by the head of the state agency or his or her designee which is adopting, amending, or repealing the regulation and the certification and delegation shall be in writing.

Use of the phrase “his or her designee” suggests that the head of the state agency is a natural person. However, in an agency that is a multi-member board or commission, such as the Law Revision Commission, the agency head is probably the board or commission itself. The staff could not find any case-law or Attorney General opinions that discuss who is the “agency head” in a multi-member body. Government Code Section 11405.40, added on Commission recommendation, defines “agency head” for administrative adjudication purposes, as follows:

“Agency head” means a person or body in which the ultimate legal authority of an agency is vested, and includes a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide.

Although not applicable to rulemaking, this definition recognizes that an agency's ultimate legal authority may be vested in a body rather than an individual. As a technical matter, it might be useful to revise Section 11343(f) as follows:

(f) Whenever a certification is required by this section, it shall be made by the head of the state agency or ~~his or her~~ its designee which is adopting, amending, or repealing the regulation and the certification and delegation shall be in writing.

Comment. Subdivision (f) of Section 11343 is amended to reflect the fact that the head of an agency may be its governing body, rather than an individual officer.

Respectfully submitted,

Brian Hebert
Staff Counsel