

## First Supplement to Memorandum 2002-4

### **Administrative Rulemaking: Deferred Issues (Further Comments)**

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We have received a letter from the Board of Equalization regarding the tentative recommendation on *Administrative Rulemaking Refinements*. The letter is attached. The Board offers one suggestion, which is discussed below.

Existing law requires that certain documents be posted to a rulemaking agency's web site (if it has a web site), but does not specify when or for how long those documents must be posted. The proposed revision of Government Code Section 11340.85(d) would add the following rule:

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 Board correctly notes that the term "rulemaking process" is not defined. Thus, there could be some confusion over when the rulemaking process has ended (for the purpose of determining when the "additional period" begins). The Board suggests that the additional period should be tied to a date certain, e.g., the date that a regulation is approved by the Office of Administrative Law. The staff agrees that such a change would make the proposed law clearer. However, it might be better to refer to the date that a regulation is filed with the Secretary of State, as that date is reproduced in the California Regulatory Notice Register and may be more easily verified by the public.

An additional wrinkle is that there are two ways in which the "rulemaking process" may come to an end: (1) the proposed rulemaking action can be completed, which is signaled by filing with the Secretary of State, as discussed above, or (2) a proposed rulemaking action can be abandoned by the rulemaking agency, in which case the agency would publish a notice of its decision not to proceed in the California Regulatory Notice Register. See Gov't Code Section 11347. If the Commission decides to tie the web-publication period to a date certain, publication of a notice not to proceed should be included as an alternative triggering date.

The change discussed above could be implemented by revising the time period language as follows:

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 after the rulemaking action is filed with the Secretary of State or after publication of notice of a decision not to proceed pursuant to Section 11347.

The Board also suggests that the additional period should be 60 days, rather than 15. In general, a longer posting period would provide better information to the public, at the expense of adding to the data that must be stored on an agency's web server. If storage space on a server is tight, a longer posting period could create problems for an agency. In deciding whether 15 or 60 days (or some period in between) is preferable, the Commission should keep in mind that 15 days is the period that was circulated for public comment. To increase the period without an opportunity for additional public review might lead to objections in the legislative process.

Respectfully submitted,

Brian Hebert  
Staff Counsel



STATE OF CALIFORNIA

**STATE BOARD OF EQUALIZATION**

450 N STREET, SACRAMENTO, CALIFORNIA  
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-00XX  
TELEPHONE (916) 324-3828  
FAX (916) 323-3387  
www.boe.ca.gov

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Fourth District, Los Angeles

KATHLEEN CONNELL  
State Controller, Sacramento

JAMES E. SPEED  
Executive Director

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, California 94303-4739

RE: Administrative Rulemaking Refinements  
Tentative Recommendation (November 2001)

Dear Sir or Madam:

In reviewing the November Tentative Recommendation regarding the proposed clarification of the existing Internet publication requirement to specify when and for how long documents must be posted, it appears there is still an ambiguity. The Recommendation is correct that recently enacted Government Code Section 11340.85, Electronic Communications, does not specify for how long rulemaking documents must be posed on the promulgating agency's web site. Proposed subdivision (d) is designed to rectify that situation by providing that the documents must remain on the agency's web site for the duration of the "rulemaking process to which the document relates and for an additional period of no fewer than 15 days."

The phrase "rulemaking process" is not, however, defined. The proposed amendment leaves the agency to guess at the time period. As a practical matter, most agencies are likely to leave at least the Final Statement of Reasons and proposed regulatory language posted until they are available to the public in print or other form. It is, though, better to give the agency a date certain for document management purposes. The agency may have limited space on its web server and need to keep posted documents to a minimum.

Therefore, we recommend that a minimum time period keyed to the OAL approval date be specified. We recommend the approval date plus 60 days to take into account the 30-day time

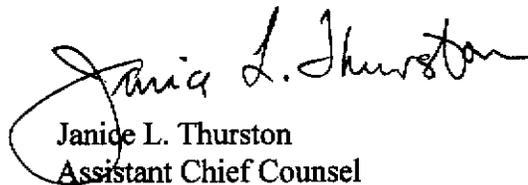
lag for finality after filing with the Secretary of State (Govt. Code § 11343.4) plus thirty extra days. Subdivision (d) should thus read as follows:

“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 60 days after the date the office approves the regulation.”

Any ambiguity is thus removed. This time period should give ample time for interested persons to download the approved version or for it to be otherwise disseminated before it is taken down from the agency’s web site.

If you have any questions, please contact Senior Tax Counsel John L. Waid at (916) 324-3828 (CALNET 8-454-3828) or e-mail at [John.Waid@boe.ca.gov](mailto:John.Waid@boe.ca.gov).

Sincerely,



Janice L. Thurston  
Assistant Chief Counsel

JLT:bb

cc: Mr. John Waid