

Second Supplement to Memorandum 2002-4

Administrative Rulemaking: Deferred Issues (Further Comments)

The First Supplement to Memorandum 2002-4 discusses the timing of Internet publication of rulemaking documents. In response to that supplement, we received an email from the Department of Motor Vehicles on the same general topic (attached). Their concern is discussed below.

The tentative recommendation would add the following language to Government Code Section 11340.85(d):

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 first supplement discusses the fact that “rulemaking process” is not defined, and proposes to add a reference to the date on which the rulemaking process ends (i.e., the date a rulemaking action is filed with the Secretary of State, or the date that an agency announces its decision not to proceed with a proposed rulemaking action). Prior to reading that discussion, the DMV had understood “the rulemaking process to which the document relates” to mean a specific procedural event, rather than the entire process. For example, an agency that revises a proposed regulation must provide notice of the revision and accept public comments regarding the revision for a 15-day period. See Gov’t Code § 11346.8(c). Under DMV’s reading of the proposed language, the notice would only be posted during the 15-day comment period (the “process” to which that notice relates), plus the additional 15-day period. The staff’s intention has always been that notices would be posted during the *entire* rulemaking process.

DMV questions the benefit of having rulemaking documents posted throughout the entire rulemaking process: “We do not see the benefit to the public for posting every document related to a rulemaking action for a length of time that can equal one year or longer.” However, the staff does see some advantage to posting throughout the rulemaking process.

Many of the rulemaking documents that must be posted under Section 11340.85 are not clearly related to a specific step in the rulemaking process. For example, the “initial statement of reasons” is an informational document that must be filed with the Office of Administrative Law at the beginning of the rulemaking process. It does not relate to any specific procedural step (other than its own filing). Another example is the notice of proposed action. That document provides notice of the 45-day public comment period (a discrete procedural event), but it *also* provides a wide range of general information: the “informative digest,” cost impact statements, agency contact information, etc. These documents are generally useful and their publication should not be restricted to some limited part of the rulemaking process.

Even documents that are clearly tied to a discrete procedural event may have utility that lasts beyond the event that triggered their publication. For example, the notice of revision of a proposed regulation (discussed above) alerts the public that the proposal has been revised, demonstrates that the rulemaking agency has followed the law in revising its proposal, and provides the text of the revision. Even after the opportunity for comment has passed the public may have interest in such a document — at a minimum it provides procedural history.

The staff sees little hardship to an agency resulting from a longer filing period. The work involved in posting a document is the same no matter how long the document remains posted. The only burden resulting from a longer publication time is that the documents take up finite storage space on a server for a longer time. However, the documents at issue are text files of relatively modest length, which should not occupy much storage space. It seems unlikely that requiring an agency to post such documents throughout the rulemaking process would cause much of an impact on its storage capacity.

For the reasons discussed above, **the staff favors** the currently proposed rule, requiring publication throughout the entire rulemaking process. However, DMV’s letter makes clear that there is an ambiguity in the timing provision that should be eliminated. One alternative, would be to delete the phrase that seems to be the source of confusion: “process to which the document relates,” thus:

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.

Another alternative would be to eliminate all reference to the rulemaking process and rely instead on the ending dates discussed in the first supplement, thus:

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~~ remain posted until at least 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.

Respectfully submitted,

Brian Hebert
Staff Counsel

Exhibit

E-MAIL FROM DEPARTMENT OF MOTOR VEHICLES

From: "Baity, Debbie J." <dbaity@DMV.CA.gov>
To: "Brian Hebert (E-mail)" <bhebert@uop.edu>
Subject: MemoVehicles2002 13:35:58 -0800

Hello, Mr. Hebert,

We have reviewed the first supplement to Memorandum 2002-4 dated January 28, 2002, and the comments submitted to the CLRC by the Board of Equalization. After reading the first supplement, we agree that the revision of Gov C Section 11340.85(d) as proposed in the tentative recommendation on Administrative Rulemaking Refinements presents some confusion. Our interpretation of the requirement that the document "shall be posted during the rulemaking process to which the document relates" means that, for example, if the document establishes a 15-day notice period, the document must be posted on the Internet during the 15-day period (e.g., the rulemaking process to which the document relates) and for 15 additional days. Until now, we would never have understood this provision to mean that the 15-day notice must remain posted on the Internet until the rulemaking file was approved by OAL and filed with Secretary of State. We post the Final Statement of Reasons on our website when a rulemaking file is approved, and leave it posted for 6 months thereafter, however, we do not see the benefit to the public for posting every document related to a rulemaking action for a length of time that can equal one year or longer. It appears that the time frame for posting rulemaking documents on the Internet merits further discussion and clarification.

Sincerely,
Deborah Baity (916/657-5690)
DMV Regulations Coordinator