

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations

April 1998

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 15, 1998.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

The current rulemaking procedure does not differentiate between a proposed regulatory action that elicits adverse public comments and one that does not. This is inefficient because some procedures that make sense when adopting a controversial regulation make little or no sense when a regulation is noncontroversial. The Commission proposes two reforms that would improve efficiency by simplifying the rulemaking procedures applicable to noncontroversial regulatory actions.

This recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

1 CONSENT REGULATIONS AND OTHER 2 NONCONTROVERSIAL REGULATIONS

3 The current rulemaking procedure does not differentiate between a proposed
4 regulatory action that elicits adverse public comments and one that does not. This
5 is inefficient because some procedures that make sense when adopting a
6 controversial regulation make little or no sense when a regulation is
7 noncontroversial. The Commission proposes two reforms that would improve
8 efficiency:

9 (1) The circumvention of redundant reporting requirements where an
10 agency receives no adverse comments in response to a proposed
11 regulatory action.

12 (2) The creation of a simplified notice and comment procedure that an
13 agency may use when proposing a regulatory action that it expects will
14 be noncontroversial (“consent regulation procedure”). If any adverse
15 public comment is received in response to a proposed regulatory action,
16 the consent regulation procedure may not be used.

17 REDUNDANT REPORTING REQUIREMENTS

18 The California Administrative Procedure Act (APA)¹ specifies the procedure a
19 state agency must follow in order to take a regulatory action.² In greatly simplified
20 form, the procedure is as follows:

21 (1) Perform various preliminary analyses.

22 (2) Distribute public notice.

23 (3) Receive written public comments and, in some cases, hold a public
24 hearing.

25 (4) Update the preliminary analyses, in light of public input.

26 (5) Submit the proposed regulatory action and the record of the
27 rulemaking process to the Office of Administrative Law (OAL) for
28 review and approval.³

1. See Gov’t Code §§ 11340-11359. Note that certain agencies are partially or entirely exempt from the rulemaking requirements of the APA, either by the terms of the APA or by an exemption in the agency’s authorizing statutes. See, e.g., Gov’t Code §§ 11342(g) (legal rulings of Franchise Tax Board are not regulations subject to APA procedures), 19817.1 (partial exemption of Department of Personnel Administration from APA rulemaking provisions). The proposed law would not affect these exemptions.

2. The proposed law uses the term “regulatory action” to mean the adoption, amendment, or repeal of a regulation. See proposed Gov’t Code § 11342(g)(2) (“regulatory action” defined).

3. See Gov’t Code §§ 11346-11347.3 (notice and comment procedure). See also Gov’t Code §§ 11349-11349.6 (OAL review procedure).

Redundant Requirements

Of the procedures discussed above, number (4) is unnecessary when there is no adverse comment in response to a proposed regulatory action. Government Code Section 11346.9 requires that an agency update documents prepared before the public comment period, to take public commentary into account. If there is no adverse public comment, then there is no reason to update these preliminary documents. In many cases, the agency will simply take the preliminary document, make minor labeling changes, and resubmit it as the updated document.

Exemption

Under the proposed law, if an agency does not receive any adverse comments in response to a proposed regulatory action, the proposed regulatory action would not be subject to Government Code Section 11346.9.⁴ Instead the agency would forward the proposed regulatory action, along with certification that no adverse comments were received, to OAL for review and approval.⁵ This eliminates the need to issue boilerplate restatements of documents prepared earlier in the process. While the savings to the state from eliminating these unnecessary steps might be minor in any particular rulemaking, the cumulative effect of eliminating them from all noncontroversial rulemaking proceedings should be significant.

CONSENT REGULATION PROCEDURE

In some cases an agency may be relatively certain, before beginning the rulemaking process, that a proposed regulatory action will be noncontroversial — for example, where a regulatory action has a very minor or generally beneficial effect, or where the agency has obtained consensus among all interested parties before formally proposing a regulatory action. In such cases, a simplified notice and comment procedure will be adequate to provide public notice of the pending rule, confirm the agency’s belief that the regulatory action is noncontroversial, and provide other useful feedback to the agency.⁶ The proposed law creates such a procedure.⁷

⁴. An adverse comment is a comment suggesting that the regulation should not be adopted or should be changed, or asserting that the agency has not satisfied the requirements of the rulemaking procedure. See proposed Gov’t Code § 11347(c).

⁵. See proposed Gov’t Code § 11347.

⁶. Under existing law regulations that lack substantive effect may be adopted under a streamlined procedure as “regulations without regulatory effect.” See 1 Cal. Code Regs. § 100 (Westlaw 1997). However, many noncontroversial regulations have some substantive effect and are therefore not eligible for adoption as a regulation without regulatory effect.

⁷. The consent regulation procedure is similar to the direct final rulemaking procedure increasingly used in federal administrative rulemaking. See discussion in Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1 (1995). “The purpose of the direct final rulemaking technique is to streamline the rulemaking process in situations in which a rule is considered so noncontroversial that the most minimal procedures should be adequate.” *Id.* at 2. Expanded use of the direct final rulemaking procedure by federal

Consent Regulation Procedure

Under the proposed law, an agency may choose to take a regulatory action that it believes will be noncontroversial (a “consent regulation”) by means of a simplified alternative procedure:

(1) Prepare and distribute public notice of the regulatory action, making clear that it is being taken under the consent regulation procedure.

(2) Accept written public comment for at least 45 days.

(3) If no adverse comments are received, submit the text of the regulatory action and certification that no adverse comments were received to OAL for filing with the Secretary of State.

If any adverse comment is received, the regulatory action could not be taken under the consent regulation procedure.⁸ If the agency still wishes to take the regulatory action it may do so under the regular rulemaking procedure.⁹

In other words, any person can block an agency’s use of the consent regulation procedure by submitting a written comment opposing the regulatory action, recommending a change in the regulatory action, asserting that the agency has not followed required procedures, or asserting that the consent regulation procedure should not be used to take the regulatory action.¹⁰ This ensures that the consent regulation procedure will only be used to take a regulatory action that is truly noncontroversial. Furthermore, the fact that the resources expended in proposing a consent regulation will be wasted if the consent regulation elicits any adverse comment creates a significant incentive for agencies to restrict their use of the procedure to those cases where the agency is confident that the proposed regulatory action will be noncontroversial.

Review of a Consent Regulation

Although OAL review is not an automatic feature of the consent regulation procedure, any interested person may request that OAL review a regulatory action taken under the consent regulation procedure.¹¹ If OAL determines that the requirements of the consent regulation procedure were not satisfied, or that the regulatory action does not satisfy the standards by which all regulations are evaluated,¹² OAL may order the effect of the regulatory action reversed. The

agencies has been recommended by the Administrative Conference of the United States. See ACUS Recommendation 93-4, 59 Fed. Reg. 4670 (1994).

⁸. See proposed Gov’t Code § 11365.030.

⁹. See Gov’t Code §§ 11346-11347.3.

¹⁰. See proposed Gov’t Code § 11365.030(b).

¹¹. See proposed Gov’t Code § 11365.080.

¹². Gov’t Code § 11349 (regulatory standards defined).

- 1 validity of a consent regulation is also subject to judicial review, in the same
- 2 manner as any other regulation.¹³

¹³. See, e.g., Gov't Code § 11350 and the proposed amendment to Gov't Code § 11350.3.

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PROPOSED LEGISLATION

Gov't Code § 11347 (added). Noncontroversial regulatory action

SEC. _____. Section 11347 is added to the Government Code, to read:

11347. (a) If no adverse comment is received in relation to a proposed regulatory action, the proposed regulatory action is not subject to Section 11346.9.

(b) The final text of a regulatory action that is not subject to Section 11346.9 pursuant to subdivision (a) shall be submitted to the office for review, along with certification that no adverse comment was received.

(c) For the purposes of this section:

(1) "Adverse comment" means a written comment, received during the public comment period provided under Sections 11346.4 and 11346.8, that makes either of the following assertions:

(A) The proposed regulatory action should not be taken or should be changed.

(B) The agency did not satisfy the requirements of this article in proposing the regulatory action.

(2) "Adverse comment" does not include a comment suggesting that a proposed regulatory action be applied to other matters, unless support for the regulatory action is expressly conditioned on its application to other matters.

Comment. Section 11347 is comparable to Article 11 (commencing with Section 11365.010) in that both govern the procedures applicable where a regulation is noncontroversial. An agency's assertion that no adverse comment was received is subject to review by the Office of

Administrative Law (OAL). See Section 11349.1(a) (OAL reviews proposed regulations for compliance with this chapter).

See also Sections 11342(b) (“office” means Office of Administrative Law), 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

Gov’t Code §§ 11365.010-11365.080 (added). Consent regulation procedure

SEC. _____. Article 11 (commencing with Section 11365.010) is added to Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

Article 11. Consent Regulation Procedure

§ 11365.010. Purpose and application of article

11365.010. (a) The purpose of this article is to provide an efficient procedure an agency may use when taking a regulatory action that the agency believes is noncontroversial.

(b) Nothing in this article requires an agency to proceed under this article when taking a regulatory action.

(c) Except as otherwise provided by statute, any regulatory action that is subject to Article 5 (commencing with Section 11346) may instead be taken pursuant to this article.

Comment. Section 11365.010 states the purpose and application of this article. A regulatory action may not be taken under this article if the agency receives an adverse comment in response to the proposed regulatory action. See Section 11365.030 (adverse comment).

A regulatory action affecting a building standard may not be taken under this article. See Section 11356 (building standards).

See also Section 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

§ 11365.020. Consent regulation procedure

11365.020. To take a regulatory action under this article, an agency shall do all of the following:

(a) Prepare a preliminary text of the proposed regulatory action.

(b) Determine the potential financial impact of the proposed regulatory action on California businesses, individuals, housing costs, state agencies, local agencies, and school districts.

(c) Give public notice of the proposed regulatory action.

(d) Accept written public comments for at least 45 days after giving public notice.

(e) Certify in writing that all written public comments received in the public comment period were read and considered by the agency and that no adverse comments were received.

(f) Prepare the final text of the proposed regulatory action.

(g) Transmit the final text of the proposed regulatory action, the certification required by subdivision (e), and the rulemaking file to the office.

1 **Comment.** Section 11365.020 provides a procedure an agency may use when proposing a
2 regulatory action that it expects to be noncontroversial. See Section 11365.010 (purpose and
3 application of article). This procedure may not be used if the agency receives any adverse
4 comment. See Section 11365.030 (adverse comment).

5 The requirements of subdivision (b) are comparable to the requirements of Section
6 11346.5(a)(5) (determination of local agency mandate), (a)(6) (estimate of cost or savings to state
7 agency), (a)(9) (statement of potential cost to private person or business), (a)(10) (assessment of
8 adverse economic impact), (a)(11) (statement of effect on housing costs).

9 See also Sections 11342(b) (“office” means the Office of Administrative Law), 11342(g)(2)
10 (“regulatory action” means adoption, amendment, or repeal of regulation).

11 **§ 11365.030. Adverse comment**

12 11365.030 (a) If an agency receives an adverse comment in response to a
13 proposed regulatory action, the regulatory action may not be taken under this
14 article.

15 (b) For the purposes of this article:

16 (1) “Adverse comment” means a written comment, received during the public
17 comment period provided under Sections 11365.020 and 11365.050, that makes
18 any of the following assertions:

19 (A) The proposed regulatory action should not be taken or should be changed.

20 (B) The agency did not satisfy the requirements of this article in proposing the
21 regulatory action.

22 (C) The proposed regulatory action should not be taken under this article.

23 (2) “Adverse comment” does not include a comment suggesting that a proposed
24 regulatory action be applied to other matters, unless support for the regulatory
25 action is expressly conditioned on its application to other matters.

26 **Comment.** Section 11365.030 is comparable to Section 11347(c) (noncontroversial regulatory
27 action). See also Section 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal
28 of regulation).

29 **§ 11365.040. Notice of proposed consent regulation**

30 11365.040. (a) The agency shall mail notice of a regulatory action proposed
31 under this article to the office and to any person that has requested notice of
32 agency regulatory actions. If the agency is within a state department, the agency
33 shall also mail or deliver notice to the director of the department.

34 (b) Notice of a proposed regulatory action shall include each of the following:

35 (1) Instructions on how to obtain a copy of the preliminary text of the proposed
36 regulatory action and how to submit a written comment relating to the proposed
37 regulatory action. The instructions shall specify the deadline for submission of
38 written comment.

39 (2) The following statement in substance:

40 “This regulatory action is being taken under the consent regulation procedure.
41 Unless withdrawn by the proposing agency, the proposed regulatory action will
42 automatically become final if the agency does not receive any adverse comments

1 relating to the proposed regulatory action during the public comment period. See
2 Government Code Sections 11365.010-11365.080.”

3 (3) A clear overview explaining the purpose and effect of the proposed
4 regulatory action.

5 (4) Reference to the authority under which the regulatory action is proposed and
6 a reference to a code section or other provision of law that is implemented,
7 interpreted, or made specific by the regulatory action.

8 (5) A determination of the financial impact of the regulatory action on California
9 businesses, individuals, and housing costs, a determination of any costs that the
10 regulatory action will impose on state agencies, or on local agencies or school
11 districts entitled to reimbursement under Part 7 (commencing with Section 17500)
12 of Division 4, and a statement of the basis for these determinations.

13 **Comment.** Section 11365.040 is comparable to Sections 11346.4-11346.5 (notice of regulatory
14 action taken under Article 5 (commencing with Section 11346)).

15 See also Sections 11342(b) (“office” means Office of Administrative Law), 11342(g)(2)
16 (“regulatory action” means adoption, amendment, or repeal of regulation), 11365.020(a)
17 (preparation of preliminary text).

18 **§ 11365.050. Limitation on final text**

19 11365.050. (a) The final text of a regulatory action proposed under this article
20 shall not be changed from the preliminary text, except in the following
21 circumstances:

22 (1) The change is solely grammatical in nature or is otherwise nonsubstantial.

23 (2) The change is substantial, but is sufficiently related to the preliminary text so
24 that the public was adequately placed on notice that the change could result from
25 the originally proposed regulatory action.

26 (b) If a change is made pursuant to paragraph (2) of subdivision (a), the final
27 text of the proposed regulatory action shall be made available to the public for at
28 least 15 additional days of written public comment before the agency submits the
29 final text to the office.

30 **Comment.** Section 11365.050 is comparable to Section 11346.8(c). See also Section
31 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

32 **§ 11365.060. Publication and filing**

33 11365.060. (a) On receiving notice of a regulatory action proposed under this
34 article, the office shall publish the contents of the notice in the California
35 Regulatory Notice Register.

36 (b) On receiving the final text of a regulatory action proposed under this article
37 and certification that all timely public comment was read and considered and that
38 no adverse comment was received, the office shall file the final text of the
39 proposed regulatory action with the Secretary of State.

40 **Comment.** Section 11365.060 is comparable to the publication and filing requirements
41 applicable to regulatory actions taken under Article 5 (commencing with Section 11346). See
42 Sections 11346.4(a)(5) (notice publication), 11349.3 (filing with Secretary of State). See also

Sections 11342(b) (“office” means Office of Administrative Law), 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

§ 11365.070. Rulemaking file

11365.070. (a) Except as provided in subdivision (b), an agency taking a regulatory action under this article is subject to Section 11347.3.

(b) The requirements of paragraphs (3), (4), (5), and (8) of subdivision (b) of Section 11347.3 do not apply to a rulemaking file prepared pursuant to this section.

Comment. Section 11365.070 incorporates Section 11347.3 (rulemaking file for regulatory action taken under Article 5 (commencing with Section 11346)), except as specified in subdivision (b). See also Section 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

§ 11365.080. Review by Office of Administrative Law

11365.080. (a) Any interested person may request, in writing, that the office review a regulatory action taken under this article to determine whether it satisfies the requirements of this article and the substantive standards set forth in Section 11349.1. Within 30 days of receiving the request, the office shall review the regulatory action pursuant to the procedure provided in subdivisions (a) to (e), inclusive, of Section 11349.7.

(b) The following provisions govern the application of Section 11349.7 pursuant to this section:

(1) Before beginning the review, the office shall notify interested persons of the request for review and publish notice of the request in the California Regulatory Notice Register.

(2) A failure to satisfy the requirements of this article is equivalent to a failure to meet the standards set forth in Section 11349.1.

(3) “Regulation” means a regulatory action taken under this article.

(4) “Repeal” means to reverse the effect of a regulatory action.

(c) A regulatory action that has been reviewed under this section is not subject to further review under this section.

Comment. Section 11365.080 incorporates portions of Section 11349.7 (review of existing regulation on request of legislative committee). The introductory paragraphs of Section 11349.7, relating to OAL review on the request of a legislative committee, are not incorporated.

Subdivision (b) provides rules that are necessary to adapt the incorporated procedure for use in reviewing a regulatory action taken under this article. Under subdivision (b)(2) a failure to satisfy the requirements of this article has the same effect as a failure to satisfy the substantive standards prescribed in Section 11349.1(a). Thus, if OAL finds that a regulatory action taken under this article does not satisfy the requirements of this article it shall order the “adopting agency to show cause why the regulation should not be repealed.” See Section 11347(a).

Under subdivision (b)(3) it is a regulatory action, and not necessarily a regulation itself, that is reviewed under this section. For example, an agency may adopt a regulation that is unobjectionable, then amend the regulation under this article in a manner that does not satisfy the requirements of this article. In such a case, a person may request review of the amendment under this section. On a related point, under subdivision (b)(4) the remedy for finding a defect in a regulatory action is reversal of the action and not necessarily repeal of the regulation. In the

preceding example the problematic amendment would be reversed, restoring the original regulation. This is substantially different from repeal of the regulation.

Subdivision (c) provides that regulatory action may only be reviewed under this section once. However, review under this section does not preclude review under other applicable provisions of law. See, e.g., Sections 11349.7 (legislatively initiated review), 11349.8 (review of inoperative regulation), 11350 (judicial review of invalidity of regulation), 11350.3 (judicial review of OAL disapproval of a regulation).

See also Sections 11342(b) (“office” means Office of Administrative Law), 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

CONFORMING REVISIONS

Gov’t Code § 11342 (amended). Definitions

SEC. _____. Section 11342 of the Government Code is amended to read:

11342. In this chapter, unless otherwise specifically indicated, the following definitions apply:

(a) “Agency” and “state agency” do not include an agency in the judicial or legislative departments of the state government.

(b) “Office” means the Office of Administrative Law.

(c) “Order of repeal” means any resolution, order or other official act of a state agency that expressly repeals a regulation in whole or in part.

(d) “Performance standard” means a regulation that describes an objective with the criteria stated for achieving the objective.

(e) “Plain English” means language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English.

(f) “Prescriptive standard” means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means.

(g)(1) “Regulation” means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency. “Regulation” does not mean or include legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

(2) “Regulatory action” means the adoption, amendment, or repeal of a regulation.

(h)(1) “Small business” means a business activity in agriculture, general construction, special trade construction, retail trade, wholesale trade, services, transportation and warehousing, manufacturing, generation and transmission of

1 electric power, or a health care facility, unless excluded in paragraph (2), that is
2 both of the following:

3 (A) Independently owned and operated.

4 (B) Not dominant in its field of operation.

5 (2) “Small business” does not include the following professional and business
6 activities:

7 (A) A financial institution including a bank, a trust, a savings and loan
8 association, a thrift institution, a consumer finance company, a commercial
9 finance company, an industrial finance company, a credit union, a mortgage and
10 investment banker, a securities broker-dealer, or an investment adviser.

11 (B) An insurance company, either stock or mutual.

12 (C) A mineral, oil, or gas broker; a subdivider or developer.

13 (D) A landscape architect, an architect, or a building designer.

14 (E) An entity organized as a nonprofit institution.

15 (F) An entertainment activity or production, including a motion picture, a stage
16 performance, a television or radio station, or a production company.

17 (G) A utility, a water company, or a power transmission company generating
18 and transmitting more than 4.5 million kilowatt hours annually.

19 (H) A petroleum producer, a natural gas producer, a refiner, or a pipeline.

20 (I) A business activity exceeding the following annual gross receipts in the
21 categories of:

22 (i) Agriculture, one million dollars (\$1,000,000).

23 (ii) General construction, nine million five hundred thousand dollars
24 (\$9,500,000).

25 (iii) Special trade construction, five million dollars (\$5,000,000).

26 (iv) Retail trade, two million dollars (\$2,000,000).

27 (v) Wholesale trade, nine million five hundred thousand dollars (\$9,500,000).

28 (vi) Services, two million dollars (\$2,000,000).

29 (vii) Transportation and warehousing, one million five hundred thousand dollars
30 (\$1,500,000).

31 (J) A manufacturing enterprise exceeding 250 employees.

32 (K) A health care facility exceeding 150 beds or one million five hundred
33 thousand dollars (\$1,500,000) in annual gross receipts.

34 **Comment.** The definition of “regulatory action” is added to Section 11342 for drafting
35 convenience. The term is used extensively in Article 11 (commencing with Section 11365.010)
36 (consent regulation procedure).

37 **Gov’t Code § 11343 (amended). Transmittal and certification**

38 SEC. _____. Section 11343 of the Government Code is amended to read:

39 11343. Every state agency shall:

40 (a) Transmit to the office for filing with the Secretary of State a certified copy of
41 every regulation adopted or amended by it except one which:

42 (1) Establishes or fixes rates, prices, or tariffs.

(2) Relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the order determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.

(3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

(4) Is a building standard, as defined in Section 18909 of the Health and Safety Code.

(b) Transmit to the office for filing with the Secretary of State a certified copy of every order of repeal of a regulation required to be filed under subdivision (a).

(c) Deliver to the office, at the time of transmittal for filing a regulation or order of repeal six duplicate copies of the regulation or order of repeal, together with a citation of the authority pursuant to which it or any part thereof was adopted.

(d) Deliver to the office a copy of the notice of proposed action required by Section 11346.4 or 11365.020.

(e) Transmit to the State Building Standards Commission for approval a certified copy of every regulation, or order of repeal of a regulation, that is a building standard or administrative regulation that applies directly to the implementation or enforcement of building standards, together with a citation of authority pursuant to which it or any part thereof was adopted, a copy of the notice of proposed action required by Section 11346.4, and any other records prescribed by the State Building Standards Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code).

(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.

Comment. Section 11343 is amended to extend the application of the section to regulations adopted pursuant to Article 11 (consent regulation procedure).

Gov't Code § 11346.1 (amended). Application of article

SEC. _____. Section 11346.1 of the Government Code is amended to read:

11346.1. (a) (1) This article does not apply to any regulation that is not required to be filed with the Secretary of State under this chapter, or to a regulatory action taken under Article 11 (commencing with Section 11365.010). ~~and only~~

(2) Only this section and Sections 11343.4 and 11349.6 apply to an emergency regulation adopted pursuant to subdivision (b), ~~or to any a~~ regulation adopted under Section 8054 ~~or 3373~~ of the Financial Code.

(b) Except as provided in subdivision (c), if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.

1 Any finding of an emergency shall include a written statement which contains
2 the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of
3 Section 11346.5 and a description of the specific facts showing the need for
4 immediate action. The enactment of an urgency statute shall not, in and of itself,
5 constitute a need for immediate action.

6 The statement and the regulation or order of repeal shall be filed immediately
7 with the office.

8 (c) Notwithstanding any other provision of law, no emergency regulation that is
9 a building standard, as defined in Section 18909 of the Health and Safety Code,
10 shall be filed, nor shall the building standard be effective, unless the building
11 standards are submitted to the State Building Standards Commission, and are
12 approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety
13 Code.

14 (d) The emergency regulation or order of repeal shall become effective upon
15 filing or upon any later date specified by the state agency in a written instrument
16 filed with, or as a part of, the regulation or order of repeal.

17 (e) No regulation, amendment, or order of repeal adopted as an emergency
18 regulatory action shall remain in effect more than 120 days unless the adopting
19 agency has complied with Sections 11346.2 to 11346.9, inclusive, prior to the
20 adoption of the emergency regulatory action, or has, within the 120-day period,
21 completed the regulation adoption process by formally adopting the emergency
22 regulation, amendment, or order of repeal or any amendments thereto, pursuant to
23 this chapter. The adopting agency, prior to the expiration of the 120-day period,
24 shall transmit to the office for filing with the Secretary of State the adopted
25 regulation, amendment, or order of repeal, the rulemaking file, and a certification
26 that either Sections 11346.2 to 11346.9, inclusive, were complied with prior to the
27 emergency regulatory action, or that there was compliance with this section within
28 the 120-day period.

29 (f) In the event an emergency amendment or order of repeal is filed and the
30 adopting agency fails to comply with subdivision (e), the regulation as it existed
31 prior to the emergency amendment or order of repeal shall thereupon become
32 effective and after notice to the adopting agency by the office shall be reprinted in
33 the California Code of Regulations.

34 (g) In the event a regulation is originally adopted and filed as an emergency and
35 the adopting agency fails to comply with subdivision (e), this failure shall
36 constitute a repeal thereof and after notice to the adopting agency by the office,
37 shall be deleted.

38 (h) A regulation originally adopted as an emergency regulation, or an emergency
39 regulation substantially equivalent thereto that is readopted as an emergency
40 regulation, shall not be filed with the Secretary of State as an emergency
41 regulation except with the express prior approval of the director of the office.

Comment. Section 11346.1 is amended to exempt a regulation adopted as a consent regulation from the requirements of this article. See Article 11 (commencing with Section 11365.010) (consent regulation procedure).

Staff Note. The redrafting of subdivision (a) is intended to add a provision exempting a regulatory action taken under the consent regulation procedure from the requirements of Article 5 and also to clarify the meaning of the subdivision. Note that the statement regarding the application of this article to Financial Code Section 3373 is no longer accurate and has not been continued. Financial Code Section 3373 governs the application of Article 5 to Section 3373.

Gov't Code § 11346.5 (amended). Notice of proposed adoption

SEC. _____. Section 11346.5 of the Government Code is amended to read:

11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:

(1) A statement of the time, place, and nature of proceedings for adoption, amendment, or repeal of the regulation.

(2) Reference to the authority under which the regulation is proposed and a reference to the particular code sections or other provisions of law that are being implemented, interpreted, or made specific.

(3) An informative digest containing a concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and the effect of the proposed action. The informative digest shall be drafted in a format similar to the Legislative Counsel's digest on legislative bills.

(A) If the proposed action differs substantially from an existing comparable federal regulation or statute, the informative digest shall also include a brief description of the significant differences and the full citation of the federal regulations or statutes.

(B) If the proposed action affects small business, the informative digest shall also include a plain English policy statement overview explaining the broad objectives of the regulation and, if appropriate, the specific objectives.

(4) Any other matters as are prescribed by statute applicable to the specific state agency or to any specific regulation or class of regulations.

(5) A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency determines that the regulation imposes a mandate on local agencies or school districts, but finds that the mandate is not reimbursable, the agency shall state the reasons for that finding.

(6) An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state.

1 For purposes of this paragraph, “cost or savings” means additional costs or
2 savings, both direct and indirect, that a public agency necessarily incurs in
3 reasonable compliance with regulations.

4 (7) If a state agency, in proposing to adopt or amend any administrative
5 regulation, determines that the action may have a significant adverse economic
6 impact on business, including the ability of California businesses to compete with
7 businesses in other states, it shall include the following information in the notice
8 of proposed action:

9 (A) Identification of the types of businesses that would be affected.

10 (B) A description of the projected reporting, recordkeeping, and other
11 compliance requirements that would result from the proposed action.

12 (C) The following statement: “The (name of agency) finds that the
13 (adoption/amendment) of this regulation may have a significant adverse economic
14 impact on businesses, including the ability of California businesses to compete
15 with businesses in other states. The (name of agency) (has/has not) considered
16 proposed alternatives that would lessen any adverse economic impact on business
17 and invites you to submit proposals. Submissions may include the following
18 considerations:

19 (i) The establishment of differing compliance or reporting requirements or
20 timetables that take into account the resources available to businesses.

21 (ii) Consolidation or simplification of compliance and reporting requirements
22 for businesses.

23 (iii) The use of performance standards rather than prescriptive standards.

24 (iv) Exemption or partial exemption from the regulatory requirements for
25 businesses.”

26 (8) If a state agency, in adopting or amending any administrative regulation,
27 determines that the action will not have a significant adverse economic impact on
28 business, including the ability of California businesses to compete with businesses
29 in other states, it shall make a declaration to that effect in the notice of proposed
30 action. In making this determination, the agency shall provide in the record facts,
31 evidence, documents, testimony, or other evidence upon which the agency relies to
32 support that finding.

33 An agency’s determination and declaration that a proposed regulation may have
34 or will not have a significant, adverse impact on businesses, including the ability
35 of California businesses to compete with businesses in other states, shall not be
36 grounds for the office to refuse to publish the notice of proposed action.

37 (9) A statement of the potential cost impact of the proposed action on private
38 persons or businesses directly affected, as considered by the agency during the
39 regulatory development process.

40 For purposes of this paragraph, “cost impact” means the reasonable range of
41 costs, or a description of the type and extent of costs, direct or indirect, that a
42 representative private person or business necessarily incurs in reasonable
43 compliance with the proposed action.

1 (10) A statement of the results of the assessment required by subdivision (b) of
2 Section 11346.3.

3 (11) A statement that the action would have a significant effect on housing costs,
4 if a state agency, in adopting, amending, or repealing any administrative
5 regulation, determines that the action would have an effect. In addition, the agency
6 officer designated in paragraph (13), shall make available to the public, upon
7 request, the agency's evaluation, if any, of the effect of the proposed regulatory
8 action on housing costs.

9 (12) A statement that the adopting agency must determine that no alternative
10 considered by the agency would be more effective in carrying out the purpose for
11 which the action is proposed or would be as effective and less burdensome to
12 affected private persons than the proposed action.

13 (13) The name and telephone number of the agency officer to whom inquiries
14 concerning the proposed administrative action may be directed.

15 (14) The date by which comments submitted in writing must be received to
16 present statements, arguments, or contentions in writing relating to the proposed
17 action in order for them to be considered by the state agency before it adopts,
18 amends, or repeals a regulation.

19 (15) Reference to the fact that the agency proposing the action has prepared a
20 statement of the reasons for the proposed action, has available all the information
21 upon which its proposal is based, and has available the express terms of the
22 proposed action, pursuant to subdivision (b).

23 (16) A statement that if a public hearing is not scheduled, any interested person
24 or his or her duly authorized representative may request, no later than 15 days
25 prior to the close of the written comment period, a public hearing pursuant to
26 Section 11346.8.

27 (17) A statement indicating that the full text of a regulation changed pursuant to
28 Section 11346.8 will be available for at least 15 days prior to the date on which the
29 agency adopts, amends, or repeals the resulting regulation.

30 (b) The agency officer designated in paragraph (13) of subdivision (a) shall
31 make available to the public upon request the express terms of the proposed
32 action. The officer shall also make available to the public upon request the
33 location of public records, including reports, documentation, and other materials,
34 related to the proposed action.

35 (c) This section shall not be construed in any manner that results in the
36 invalidation of a regulation because of the alleged inadequacy of the notice content
37 or the summary or cost estimates, or the alleged inadequacy or inaccuracy of the
38 housing cost estimates, if there has been substantial compliance with those
39 requirements.

40 **Comment.** Section 11346.5(a)(5) is amended to conform to Section 11346.9(a)(2).

41 **Gov't Code §11346.9 (amended). Post-comment analysis**

42 SEC. _____. Section 11346.9 of the Government Code is amended to read:

1 11346.9. ~~Every~~ Except as provided in Section 11347, every agency subject to
2 this chapter shall do the following:

3 (a) Prepare and submit to the office with the adopted regulation a final statement
4 of reasons that shall include all of the following:

5 (1) An update of the information contained in the initial statement of reasons. If
6 the update identifies any data or any technical, theoretical or empirical study,
7 report, or similar document on which the agency is relying in proposing the
8 adoption or amendment of a regulation that was not identified in the initial
9 statement of reasons, or which was otherwise not identified or made available for
10 public review prior to the close of the public comment period, the agency shall
11 comply with subdivision (d) of Section 11346.8.

12 (2) A determination as to whether the regulation imposes a mandate on local
13 agencies or school districts. If the determination is that the regulation does contain
14 a local mandate, the agency shall state whether the mandate is reimbursable
15 pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency
16 finds that the mandate is not reimbursable, it shall state the reasons for that
17 finding.

18 (3) A summary of each objection or recommendation made regarding the
19 specific adoption, amendment, or repeal proposed, together with an explanation of
20 how the proposed action has been changed to accommodate each objection or
21 recommendation, or the reasons for making no change. This requirement applies
22 only to objections or recommendations specifically directed at the agency's
23 proposed action or to the procedures followed by the agency in proposing or
24 adopting the action.

25 (4) A determination with supporting information that no alternative considered
26 by the agency would be more effective in carrying out the purpose for which the
27 regulation is proposed or would be as effective and less burdensome to affected
28 private persons than the adopted regulation.

29 (5) An explanation setting forth the reasons for rejecting any proposed
30 alternatives that would lessen the adverse economic impact on small businesses.

31 (b) Prepare and submit to the office with the adopted regulation an updated
32 informative digest containing a clear and concise summary of the immediately
33 preceding laws and regulations, if any, relating directly to the adopted, amended,
34 or repealed regulation and the effect of the adopted, amended, or repealed
35 regulation. The informative digest shall be drafted in a format similar to the
36 Legislative Counsel's Digest on legislative bills.

37 (c) A state agency that adopts or amends a regulation mandated by federal law
38 or regulations, the provisions of which are identical to a previously adopted or
39 amended federal regulation, shall be deemed to have complied with this section if
40 a statement to the effect that a federally mandated regulation or amendment to a
41 regulation is being proposed, together with a citation to where an explanation of
42 the provisions of the regulation can be found, is included in the notice of proposed
43 adoption or amendment prepared pursuant to Section 11346.5. However, the

agency shall comply fully with this chapter with respect to any provisions in the regulation which the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

Comment. Section 11346.9 is amended to make an exception for regulations that do not elicit any adverse comment. See Section 11347 (noncontroversial regulatory action).

Gov't Code § 11347.3 (amended). Rulemaking file

SEC. _____. Section 11347.3 of the Government Code is amended to read:

11347.3. (a) Every agency shall maintain a file of each rulemaking that shall be deemed to be the record for that rulemaking proceeding.

(b) The rulemaking file shall include:

(1) Copies of any petitions received from interested persons proposing the adoption, amendment, or repeal of the regulation, and a copy of any decision provided for by subdivision (d) of Section 11340.7, which grants a petition in whole or in part.

(2) All published notices of proposed adoption, amendment, or repeal of the regulation, and an updated informative digest, the initial statement of reasons, and the final statement of reasons.

(3) The determination, together with the supporting data required by paragraph (5) of subdivision (a) of Section 11346.5.

(4) The determination, together with the supporting data required by paragraph (8) of subdivision (a) of Section 11346.5.

(5) The estimate, together with the supporting data and calculations, required by paragraph (6) of subdivision (a) of Section 11346.5.

(6) All data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation.

(7) All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation, including any cost impact estimates as required by Section 11346.3.

(8) A transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation.

~~(9) The date on which the agency made available to the public for 15 days prior to the adoption, amendment, or repeal of the regulation the full text as required by subdivision (c) of Section 11346.8 if the agency made changes to the regulation noticed to the public.~~

(9) The date on which a comment period pursuant to subdivision (c) of Section 11346.8 or subdivision (b) of Section 11365.050 began.

(10) The text of regulations as originally proposed and the modified text of regulations, if any, that were made available to the public prior to adoption.

(11) Any other information, statement, report, or data that the agency is required by law to consider or prepare in connection with the adoption, amendment, or repeal of a regulation.

(12) An index or table of contents that identifies each item contained in the rulemaking file. The index or table of contents shall include an affidavit or a declaration under penalty of perjury in the form specified by Section 2015.5 of the Code of Civil Procedure by the agency official who has compiled the rulemaking file, specifying the date upon which the record was closed, and that the file or the copy, if submitted, is complete.

(c) Every agency shall submit to the office with the adopted regulation, the rulemaking file or a complete copy of the rulemaking file.

(d) The rulemaking file shall be made available by the agency to the public, and to the courts in connection with the review of the regulation.

(e) Upon filing a regulation with the Secretary of State pursuant to Section 11349.3 or 11365.060, the office shall return the related rulemaking file to the agency, after which no item contained in the file shall be removed, altered, or destroyed or otherwise disposed of. The agency shall maintain the file unless it elects to transmit the file to the State Archives pursuant to subdivision (f).

(f) The agency may transmit the rulemaking file to the State Archives. The file shall include instructions that the Secretary of State shall not remove, alter, or destroy or otherwise dispose of any item contained in the file. Pursuant to Section 12223.5, the Secretary of State may designate a time for the delivery of the rulemaking file to the State Archives in consideration of document processing or storage limitations.

Comment. Section 11347.3 is amended to extend its application to rulemaking files created pursuant to Section 11365.070 (rulemaking file for action taken under Article 11 (commencing with Section 11365.010) (consent regulation procedure)).

Gov't Code § 11350.3 (amended). Declaratory review

SEC. _____. Section 11350.3 of the Government Code is amended to read:

11350.3. Any interested person may obtain a judicial declaration as to the validity of a regulation which the office has disapproved or ordered repealed pursuant to Section 11349.3, 11349.6, ~~or~~ 11349.7, or 11365.080 by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure. The court may declare the regulation valid if it determines that the regulation meets the standards set forth in Section 11349.1 and that the agency has complied with this chapter. If the court so determines, it may order the office to immediately file the regulation with the Secretary of State.

Comment. Section 11350.3 is amended to extend its application to review of regulatory actions taken under Article 11 (commencing with Section 11365.010) (consent regulation procedure).

Gov't Code § 11356 (amended). Building standards

SEC. _____. Section 11356 of the Government Code is amended to read:

1 11356. (a) Article 6 (commencing with Section 11349) is not applicable to any
2 building standards or administrative regulations that apply directly to the
3 implementation or enforcement of a building standard, subject to the approval of
4 the State Building Standards Commission.

5 (b) Article 5 (commencing with Section 11346) is applicable to those building
6 standards, except that the office shall not disapprove those building standards nor
7 refuse to publish any notice of proposed building standards if either has been
8 approved by, and submitted to, the office by the State Building Standards
9 Commission pursuant to Section 18935 of the Health and Safety Code.

10 (c) Article 11 (commencing with Section 11365.010) is not applicable to any
11 regulatory action that affects a building standard or applies directly to the
12 implementation or enforcement of a building standard.

13 **Comment.** Section 11356 is amended to preclude the taking of a regulatory action involving a
14 building standard under Article 11 (commencing with Section 11365.010) (consent regulation
15 procedure).
