

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Improving Access to Rulemaking Information Under the Administrative Procedure Act

October 1999

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 **January 21, 2000.**

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 California Law Revision Commission recommends a number of minor changes to the rulemaking provisions of the Administrative Procedure Act that would significantly improve public access to information regarding a proposed rulemaking action:

(1) The notice of proposed rulemaking action should include an explanation of how to obtain a copy of an agency's final statement of reasons for the proposed rulemaking action.

(2) If an agency decides not to proceed with a proposed rulemaking action, notice of that decision should be published in the California Regulatory Notice Register.

(3) If an agency maintains an Internet website, its initial statement of reasons, final statement of reasons, and notice of any decision not to proceed should be published on the website.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

IMPROVING ACCESS TO RULEMAKING INFORMATION UNDER THE ADMINISTRATIVE PROCEDURE ACT

1 The Administrative Procedure Act (APA) governs the adoption of regulations by
2 state agencies.¹ The rulemaking process is publicly open — interested members of
3 the public are entitled to advance notice of agency rulemaking,² and all of the doc-
4 uments prepared by an agency in the course of rulemaking are part of the public
5 record.³ The California Law Revision Commission recommends a number of
6 minor changes to the rulemaking provisions of the APA that would improve public
7 access to information regarding agency rulemaking. The proposed changes are
8 discussed below.

9 **Access to Final Statement of Reasons**

10 Existing law requires that a notice of proposed rulemaking action refer to the
11 availability of the agency's initial statement of reasons for the proposed action.⁴
12 However, the notice is not required to refer to the availability of the agency's final
13 statement of reasons. An agency's final statement of reasons contains important
14 information regarding a proposed rulemaking action, including reasons why pro-
15 posed alternatives were rejected and agency responses to public comments⁵ —
16 matters of keen interest to a person who is following a proposed rulemaking
17 action. The notice of proposed rulemaking action should include instructions on
18 how to obtain a copy of the final statement of reasons.⁶

19 **Notice of Decision Not To Proceed**

20 Under existing law, an agency is required to provide public notice when it com-
21 mences rulemaking,⁷ but is not required to provide any notice if it decides not to
22 proceed with a proposed rulemaking action. A person who is interested in a pro-
23 posed rulemaking action will not realize that the proposal has been abandoned
24 until the one-year time limit on the rulemaking process⁸ has run without the rule-
25 making action being completed. Obviously, a person who is interested in a pro-
26 posed rulemaking action would find it useful to know that the agency has decided
27 not to proceed. An agency should be required to submit written notice of a deci-

1. Gov't Code §§ 11340-11359.

2. Gov't Code § 11346.4. The notice includes detailed information regarding the proposed regulation.
See Gov't Code § 11346.5

3. Gov't Code § 11347.1.

4. Gov't Code § 11346.5(a)(15).

5. See Gov't Code § 11346.9(a).

6. See proposed amendment of Gov't Code § 11346.5(a)(18).

7. Gov't Code § 11346.4.

8. See Gov't Code § 11346.4(b).

1 sion not to proceed with a proposed rulemaking action to the Office of Administra-
2 tive Law, for publication in the California Regulatory Notice Register.⁹

3 **Internet Publication**

4 In a previous recommendation, the California Law Revision Commission pro-
5 posed that an agency that maintains an Internet website should publish its rulemak-
6 ing notices on its website. In order to further enhance public access to rulemaking
7 information, an agency's initial and final statements of reasons, and any notice of a
8 decision not to proceed with a proposed rulemaking action, should also be pub-
9 lished on the Internet.¹⁰

9. See proposed Gov't Code § 11347.

10. See proposed Gov't Code § 11340.8(c).

PROPOSED LEGISLATION

1 **Gov't Code § 11340.8 (added). Electronic communication**

2 SECTION 1. Section 11340.8 is added to the Government Code, to read:

3 11340.8. (a) As used in this section, “electronic communication” includes
4 electronic transmission of written or graphical material by electronic mail,
5 facsimile, or other means, but does not include voice communication.

6 (b) Notwithstanding any other provision of this chapter that refers to mailing or
7 to oral or written communication:

8 (1) An agency may permit and encourage use of electronic communication, but
9 may not require use of electronic communication.

10 (2) An agency may make available in electronic form a document required by
11 this chapter, but shall not make that the exclusive means by which the document or
12 a copy of a document is made available.

13 (3) A communication required or authorized by this chapter, including a notice,
14 public comment, request, or petition, may be made electronically with the consent
15 of the recipient.

16 (c) An agency that maintains an Internet website or other similar forum for the
17 electronic publication or distribution of written material shall publish the
18 following materials on that website or other forum:

19 (1) Any public notice required by this chapter. For the purpose of this paragraph,
20 “public notice” means a notice that is required to be given by an agency to persons
21 who have requested notice of the agency’s rulemaking actions.

22 (2) The initial statement of reasons prepared pursuant to subdivision (b) of
23 Section 11346.2.

24 (3) The final statement of reasons prepared pursuant to subdivision (a) of Section
25 11346.9.

26 (4) Notice of a decision not to proceed prepared pursuant to Section 11347.

27 (d) Publication under subdivision (c) is in addition to any other required form of
28 publication. Subdivision (c) does not require an agency to establish or maintain a
29 website or other forum for the electronic publication or distribution of written
30 material.

31 (e) Nothing in this section precludes the office from requiring that the text of a
32 proposed regulation be submitted in electronic form.

33 **Comment.** Section 11340.8 is new. Subdivision (b) authorizes the use of electronic
34 communications in adopting a regulation under this chapter.

35 Subdivision (c) requires electronic publication of certain rulemaking documents by an agency
36 that maintains a website or similar electronic communication forum. Provisions requiring a
37 “public notice” as defined in paragraph (1) include Sections 11346.4 (notice of proposed action),
38 11346.8(a) (notice of hearing), 11346.8(b) (notice of continuance or postponement of hearing).
39 See also Section 11342(b) (“office” means Office of Administrative Law).

40 ☞ **Staff Note.** Proposed Section 11340.8 was previously recommended by the Commission in a
41 slightly different form. See Recommendation on *Administrative Rulemaking* (October 1999) (on

1 file with California Law Revision Commission). It has been extended to require electronic
2 publication of the initial statement of reasons, final statement of reasons, and notice of a decision
3 not to proceed with proposed rulemaking action.

4 **Gov't Code § 11346.5 (amended). Contents of notice of proposed action**

5 SEC. 2. Section 11346.5 of the Government Code is amended to read:

6 11346.5. (a) The notice of proposed adoption, amendment, or repeal of a
7 regulation shall include the following:

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

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

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

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

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

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

26 (5) A determination as to whether the regulation imposes a mandate on local
27 agencies or school districts and, if so, whether the mandate requires state
28 reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

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

35 For purposes of this paragraph, "cost or savings" means additional costs or
36 savings, both direct and indirect, that a public agency necessarily incurs in
37 reasonable compliance with regulations.

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

- 1 (A) Identification of the types of businesses that would be affected.
- 2 (B) A description of the projected reporting, recordkeeping, and other
3 compliance requirements that would result from the proposed action.
- 4 (C) The following statement: “The (name of agency) finds that the
5 (adoption/amendment) of this regulation may have a significant adverse economic
6 impact on businesses, including the ability of California businesses to compete
7 with businesses in other states. The (name of agency) (has/has not) considered
8 proposed alternatives that would lessen any adverse economic impact on business
9 and invites you to submit proposals. Submissions may include the following
10 considerations:
- 11 (i) The establishment of differing compliance or reporting requirements or
12 timetables that take into account the resources available to businesses.
- 13 (ii) Consolidation or simplification of compliance and reporting requirements for
14 businesses.
- 15 (iii) The use of performance standards rather than prescriptive standards.
- 16 (iv) Exemption or partial exemption from the regulatory requirements for
17 businesses.”
- 18 (8) If a state agency, in adopting or amending any administrative regulation,
19 determines that the action will not have a significant adverse economic impact on
20 business, including the ability of California businesses to compete with businesses
21 in other states, it shall make a declaration to that effect in the notice of proposed
22 action. In making this determination, the agency shall provide in the record facts,
23 evidence, documents, testimony, or other evidence upon which the agency relies to
24 support that finding.
- 25 An agency’s determination and declaration that a proposed regulation may have
26 or will not have a significant, adverse impact on businesses, including the ability
27 of California businesses to compete with businesses in other states, shall not be
28 grounds for the office to refuse to publish the notice of proposed action.
- 29 (9) A statement of the potential cost impact of the proposed action on private
30 persons or businesses directly affected, as considered by the agency during the
31 regulatory development process.
- 32 For purposes of this paragraph, “cost impact” means the reasonable range of
33 costs, or a description of the type and extent of costs, direct or indirect, that a
34 representative private person or business necessarily incurs in reasonable
35 compliance with the proposed action.
- 36 (10) A statement of the results of the assessment required by subdivision (b) of
37 Section 11346.3.
- 38 (11) A statement that the action would have a significant effect on housing costs,
39 if a state agency, in adopting, amending, or repealing any administrative
40 regulation, determines that the action would have an effect. In addition, the agency
41 officer designated in paragraph (13), shall make available to the public, upon
42 request, the agency’s evaluation, if any, of the effect of the proposed regulatory
43 action on housing costs.

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

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

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

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

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

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

22 (18) A statement explaining how to obtain a copy of the final statement of
23 reasons once it has been prepared pursuant to subdivision (a) of Section 11346.9.

24 (19) If the agency maintains an Internet website or other similar forum for the
25 electronic publication or distribution of written material, a statement explaining
26 how materials published or distributed through that forum can be accessed.

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

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

37 **Comment.** Section 11346.5 is amended to provide that the notice of proposed action must
38 include statements explaining how to obtain the final statement of reasons and any electronically
39 published documents. See Section 11349.8(c) (electronic publication of rulemaking materials).
40 See also Section 11342(b) (“office” means Office of Administrative Law).

41 ☞ **Staff Note.** The Commission’s previous rulemaking recommendation proposed a number of
42 technical changes to Section 11346.5. See Recommendation on *Administrative Rulemaking*
43 (October 1999) (on file with California Law Revision Commission). For the sake of clarity, those
44 changes are not reflected here.

1 **Gov't Code §11347 (added). Notice of decision not to proceed**

2 SEC. 3. Section 11347 is added to the Government Code, to read:

3 11347. If, after publication of a notice of proposed action pursuant to Section
4 11346.4, an agency decides not to proceed with a proposed rulemaking action, it
5 shall deliver notice of its decision to the office for publication in the California
6 Regulatory Notice Register.

7 **Comment.** Section 11347 is new. See also Section 11342(b) (“office” means Office of
8 Administrative Law).
