

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Administrative Rulemaking Refinements

November 2001

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 9, 2002.**

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 has previously proposed a number of improvements to the law governing rulemaking by state administrative agencies. This tentative recommendation proposes additional refinements, which include the following:

- Clarification of the requirement that an agency consider reasonable alternatives to a proposed rulemaking action.
- Clarification of the requirement that an agency designate a representative to answer substantive inquiries regarding a proposed rulemaking action.
- Revision of the existing Internet publication requirement, to require posting of the text of a proposed emergency rulemaking action and to specify when and for how long documents must be posted.

This recommendation was prepared pursuant to Resolution Chapter 78 of the Statutes of 2001.

ADMINISTRATIVE RULEMAKING REFINEMENTS

1 The California Law Revision Commission has recommended a number of
2 reforms of the law governing rulemaking by state administrative agencies.¹ Most
3 of these recommendations have been enacted into law.² This tentative recommen-
4 dation proposes additional rulemaking reforms to address issues not previously
5 considered by the Commission.

6 **Description of Alternatives**

7 Existing law requires that an agency describe reasonable alternatives to a rule-
8 making action it is proposing, as well as separately describing reasonable alterna-
9 tives that would lessen any adverse impact on small business.³ However, an
10 agency is not required “to artificially construct alternatives or to justify why it has
11 not identified alternatives.”⁴ Although this limitation on the duty to describe alter-
12 natives appears to apply to both types of “reasonable alternatives,” there is some
13 ambiguity on this point. The Commission recommends that the limitation provi-
14 sion be redrafted to make its application clear. The Commission also recommends
15 that the provision requiring a description of alternatives that would lessen any
16 adverse impact on small business be revised so that it more closely parallels the
17 provision requiring a description of reasonable alternatives generally.

18 **Designation of Agency Representative**

19 Existing law requires that the notice of proposed rulemaking action designate an
20 agency representative and backup representative to whom inquiries regarding the
21 proposed rulemaking action may be directed, and, “where appropriate,” designate
22 a person to respond to substantive questions regarding the proposed rulemaking
23 action.⁵ The phrase “where appropriate” is ambiguous in this context. The Com-
24 mission recommends that the ambiguous provision be replaced with language
25 making clear that an agency representative shall either respond to substantive
26 questions or direct them to another person in the agency for a prompt response.

1. See *Administrative Rulemaking: Consent Regulations and other Noncontroversial Regulations*, 28 Cal. L. Revision Comm’n Reports 625 (1998); *Administrative Rulemaking: Advisory Interpretations*, 28 Cal. L. Revision Comm’n Reports 657 (1998); *Administrative Rulemaking*, 29 Cal. L. Revision Comm’n Reports 469 (1999); *Improving Access to Rulemaking Information*, 30 Cal. L. Revision Comm’n Reports 517 (2001); *Administrative Rulemaking Cleanup*, 30 Cal. L. Revision Comm’n Reports 533 (2001); *Rulemaking Under Penal Code Section 5058*, 30 Cal. L. Revision Comm’n Reports 545 (2001).

2. See 2000 Cal. Stat. ch. 1060; 2001 Cal. Stat. ch. 59; 2001 Cal. Stat. ch. 141.

3. Gov’t Code § 11346.2(b)(3).

4. *Id.*

5. Gov’t Code § 11346.5(a)(14).

1 **Internet Publication**

2 Existing law requires that an agency that maintains an Internet Web site publish
3 certain rulemaking documents.⁶ The Commission recommends that this require-
4 ment be expanded to include publication of: (1) the text of a proposed emergency
5 rulemaking action, and (2) the date the proposed action is submitted to the Office
6 of Administrative Law. Existing law provides a very abbreviated opportunity for
7 public comment regarding an emergency rulemaking action.⁷ Internet posting of
8 information regarding a proposed emergency rulemaking action would enhance
9 the opportunity for public review and comment, without significantly delaying the
10 emergency rulemaking process.

11 Existing law does not specify when or for how long rulemaking documents must
12 be posted on the Internet. The Commission recommends requiring that rulemaking
13 documents be posted during the rulemaking process to which they relate, and for
14 an additional period of at least 15 days.

15 **Technical Revisions**

16 The tentative recommendation also includes a small number of nonsubstantive
17 technical revisions.⁸

6. Gov't Code § 11340.85(c).

7. See Section 11349.6 (review of emergency regulation), 1 Cal. Code Regs. § 55 (public comments regarding emergency regulation).

8. See proposed amendments to Gov't Code §§ 11343(f), 11346.5(a)(7)(C), 11347.6, *infra*.

PROPOSED LEGISLATION

1 **Gov't Code § 11340.85 (amended). Electronic communications**

2 SECTION 1. Section 11340.85 of the Government Code is amended to read:

3 11340.85. (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 publish or distribute a document required by this chapter or
11 by a regulation implementing this chapter by means of electronic communication,
12 but shall not make that the exclusive means by which the document is published or
13 distributed.

14 (3) A notice required or authorized by this chapter or by a regulation
15 implementing this chapter may be delivered to a person by means of electronic
16 communication if the person has expressly indicated a willingness to receive the
17 notice by means of electronic communication.

18 (4) A comment regarding a regulation may be delivered to an agency by means
19 of electronic communication.

20 (5) A petition regarding a regulation may be delivered to an agency by means of
21 electronic communication if the agency has expressly indicated a willingness to
22 receive a petition by means of electronic communication.

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

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

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

31 (3) The final statement of reasons prepared pursuant to subdivision (a) of Section
32 11346.9.

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

34 (5) The text of a proposed action or instructions on how to obtain a copy of the
35 text.

36 (6) A statement of any decision made by the office regarding a proposed action.

37 (7) The date a rulemaking action is filed with the Secretary of State.

38 (8) The effective date of a rulemaking action.

1 (9) A statement to the effect that a business or person submitting a comment
2 regarding a proposed action has the right to request a copy of the final statement of
3 reasons.

4 (10) The text of a proposed emergency adoption, amendment, or repeal of a
5 regulation pursuant to Section 11346.1 and the date it was submitted to the office
6 for review and filing.

7 (d) A document that is required to be posted pursuant to subdivision (c) shall be
8 posted during the rulemaking process to which the document relates and for an
9 additional period of not fewer than 15 days. Publication under subdivision (c)
10 supplements any other required form of publication or distribution. Failure to
11 comply with this section is not grounds for disapproval of a proposed regulation.
12 Subdivision (c) does not require an agency to establish or maintain a Web site or
13 other forum for the electronic publication or distribution of written material.

14 (e) Nothing in this section precludes the office from requiring that the material
15 submitted to the office for publication in the California Code of Regulations or the
16 California Regulatory Notice Register be submitted in electronic form.

17 (f) This section is intended to make the regulatory process more user-friendly
18 and to improve communication between interested parties and the regulatory
19 agencies.

20 **Comment.** Subdivision (c) of Section 11340.85 is amended to extend the existing Internet
21 publication requirement to include the text of a proposed emergency rulemaking action. See
22 Section 11349.6 (review of emergency regulation), 1 Cal. Code Regs. § 55 (public comments
23 regarding emergency regulation).

24 Subdivision (d) is amended to specify when and for how long a document must be posted under
25 subdivision (c).

26 ☞ **Note.** This section reflects legislative changes made in SB 561 (Morrow). See 2001 Cal. Stat.
27 ch 59, § 2.

28 **Gov't Code § 11343 (amended). Transmission and filing**

29 SEC. 2. Section 11343 of the Government Code is amended to read:

30 11343. Every state agency shall:

31 (a) Transmit to the office for filing with the Secretary of State a certified copy of
32 every regulation adopted or amended by it except one that is a building standard.

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

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

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

40 (e) Transmit to the California Building Standards Commission for approval a
41 certified copy of every regulation, or order of repeal of a regulation, that is a
42 building standard, together with a citation of authority pursuant to which it or any
43 part thereof was adopted, a copy of the notice of proposed action required by

1 Section 11346.4, and any other records prescribed by the State Building Standards
2 Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and
3 Safety Code).

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

8 **Comment.** Subdivision (f) of Section 11343 is amended to reflect the fact that the head of an
9 agency may be its governing body, rather than an individual officer. This is a nonsubstantive
10 technical change.

11 **Gov't Code § 11346.2 (amended). Documents submitted to Office of Administrative Law**

12 SEC. 3. Section 11346.2 of the Government Code is amended to read:

13 11346.2. Every agency subject to this chapter shall prepare, submit to the office
14 with the notice of the proposed action as described in Section 11346.5, and make
15 available to the public upon request, all of the following:

16 (a) A copy of the express terms of the proposed regulation.

17 (1) The agency shall draft the regulation in plain, straightforward language,
18 avoiding technical terms as much as possible, and using a coherent and easily
19 readable style. The agency shall draft the regulation in plain English.

20 (2) The agency shall include a notation following the express terms of each
21 California Code of Regulations section, listing the specific statutes or other
22 provisions of law authorizing the adoption of the regulation and listing the specific
23 statutes or other provisions of law being implemented, interpreted, or made
24 specific by that section in the California Code of Regulations.

25 (3) The agency shall use underline or italics to indicate additions to, and
26 strikeout to indicate deletions from, the California Code of Regulations.

27 (b) An initial statement of reasons for proposing the adoption, amendment, or
28 repeal of a regulation. This statement of reasons shall include, but not be limited
29 to, all of the following:

30 (1) A statement of the specific purpose of each adoption, amendment, or repeal
31 and the rationale for the determination by the agency that each adoption,
32 amendment, or repeal is reasonably necessary to carry out the purpose for which it
33 is proposed. Where the adoption or amendment of a regulation would mandate the
34 use of specific technologies or equipment, a statement of the reasons why the
35 agency believes these mandates or prescriptive standards are required.

36 (2) An identification of each technical, theoretical, and empirical study, report,
37 or similar document, if any, upon which the agency relies in proposing the
38 adoption, amendment, or repeal of a regulation.

39 (3)(A) A description of reasonable alternatives to the regulation and the agency's
40 reasons for rejecting those alternatives. In the case of a regulation that would
41 mandate the use of specific technologies or equipment or prescribe specific actions

1 or procedures, the imposition of performance standards shall be considered as an
2 alternative.

3 (B) A description of any reasonable alternatives ~~the agency has identified or that~~
4 ~~have otherwise been identified and brought to the attention of the agency to the~~
5 regulation that would lessen any adverse impact on small business and the
6 agency's reasons for rejecting those alternatives.

7 (C) It is not the intent of ~~this paragraph~~ subparagraph (A) or (B) to require the
8 agency to artificially construct alternatives or to justify why it has not identified
9 alternatives.

10 (4) Facts, evidence, documents, testimony, or other evidence on which the
11 agency relies to support an initial determination that the action will not have a
12 significant adverse economic impact on business.

13 (5) A department, board, or commission within the Environmental Protection
14 Agency, the Resources Agency, or the Office of the State Fire Marshal shall
15 describe its efforts, in connection with a proposed rulemaking action, to avoid
16 unnecessary duplication or conflicts with federal regulations contained in the Code
17 of Federal Regulations addressing the same issues. These agencies may adopt
18 regulations different from federal regulations contained in the Code of Federal
19 Regulations addressing the same issues upon a finding of one or more of the
20 following justifications:

21 (A) The differing state regulations are authorized by law.

22 (B) The cost of differing state regulations is justified by the benefit to human
23 health, public safety, public welfare, or the environment.

24 (c) A state agency that adopts or amends a regulation mandated by federal law or
25 regulations, the provisions of which are identical to a previously adopted or
26 amended federal regulation, shall be deemed to have complied with subdivision
27 (b) if a statement to the effect that a federally mandated regulation or amendment
28 to a regulation is being proposed, together with a citation to where an explanation
29 of the provisions of the regulation can be found, is included in the notice of
30 proposed adoption or amendment prepared pursuant to Section 11346.5. However,
31 the agency shall comply fully with this chapter with respect to any provisions in
32 the regulation that the agency proposes to adopt or amend that are different from
33 the corresponding provisions of the federal regulation.

34 **Comment.** Subdivision (b)(3) of Section 11346.2 is amended to make clear that the former
35 second sentence of subdivision (b)(3)(B) applies to subdivision (b)(3)(A) and (B). This is a
36 nonsubstantive technical change. Subdivision (b)(3)(B) is amended to more closely conform to
37 subdivision (b)(3)(A). This is a nonsubstantive change except that an agency is now required to
38 give reasons for rejecting reasonable alternatives that would lessen any adverse impact on small
39 business.

40 **Gov't Code § 11346.5 (amended). Notice of proposed rulemaking action**

41 SEC. 4. Section 11346.5 of the Government Code is amended to read:

42 11346.5. (a) The notice of proposed adoption, amendment, or repeal of a
43 regulation shall include the following:

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

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

6 (3) An informative digest drafted in plain English in a format similar to the
7 Legislative Counsel's digest on legislative bills. The informative digest shall
8 include the following:

9 (A) A concise and clear summary of existing laws and regulations, if any, related
10 directly to the proposed action and of the effect of the proposed action.

11 (B) If the proposed action differs substantially from an existing comparable
12 federal regulation or statute, a brief description of the significant differences and
13 the full citation of the federal regulations or statutes.

14 (C) A policy statement overview explaining the broad objectives of the
15 regulation and, if appropriate, the specific objectives.

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

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

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

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

30 (7) If a state agency, in proposing to adopt, amend, or repeal any administrative
31 regulation, makes an initial determination that the action may have a significant,
32 statewide adverse economic impact directly affecting business, including the
33 ability of California businesses to compete with businesses in other states, it shall
34 include the following information in the notice of proposed action:

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

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

38 (C) The following statement: "The (name of agency) has made an initial
39 determination that the (adoption/amendment/repeal) of this regulation may have a
40 significant, statewide adverse economic impact on businesses directly affecting
41 business, including the ability of California businesses to compete with businesses
42 in other states. The (name of agency)(has/has not) considered proposed
43 alternatives that would lessen any adverse economic impact on business and

1 invites you to submit proposals. Submissions may include the following
2 considerations:

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

5 (ii) Consolidation or simplification of compliance and reporting requirements for
6 businesses.

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

8 (iv) Exemption or partial exemption from the regulatory requirements for
9 businesses.”

10 (8) If a state agency, in adopting, amending, or repealing any administrative
11 regulation, makes an initial determination that the action will not have a
12 significant, statewide adverse economic impact directly affecting business,
13 including the ability of California businesses to compete with businesses in other
14 states, it shall make a declaration to that effect in the notice of proposed action. In
15 making this declaration, the agency shall provide in the record facts, evidence,
16 documents, testimony, or other evidence upon which the agency relies to support
17 its initial determination.

18 An agency’s initial determination and declaration that a proposed adoption,
19 amendment, or repeal of a regulation may have or will not have a significant,
20 adverse impact on businesses, including the ability of California businesses to
21 compete with businesses in other states, shall not be grounds for the office to
22 refuse to publish the notice of proposed action.

23 (9) A description of all cost impacts, known to the agency at the time the notice
24 of proposed action is submitted to the office, that a representative private person or
25 business would necessarily incur in reasonable compliance with the proposed
26 action.

27 If no cost impacts are known to the agency, it shall state the following:

28 “The agency is not aware of any cost impacts that a representative private person
29 or business would necessarily incur in reasonable compliance with the proposed
30 action.”

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

33 (11) The finding prescribed by subdivision (c) of Section 11346.3, if required.

34 (12) A statement that the action would have a significant effect on housing costs,
35 if a state agency, in adopting, amending, or repealing any administrative
36 regulation, makes an initial determination that the action would have that effect. In
37 addition, the agency officer designated in paragraph (14), shall make available to
38 the public, upon request, the agency’s evaluation, if any, of the effect of the
39 proposed regulatory action on housing costs.

40 (13) A statement that the adopting agency must determine that no reasonable
41 alternative considered by the agency or that has otherwise been identified and
42 brought to the attention of the agency would be more effective in carrying out the

1 purpose for which the action is proposed or would be as effective and less
2 burdensome to affected private persons than the proposed action.

3 (14) The name and telephone number of the following:

4 (A) The agency representative and designated backup contact person to whom
5 inquiries concerning the proposed administrative action may be directed.

6 ~~(B) An agency person or persons designated to respond to questions on the~~
7 ~~substance of the proposed regulations, where appropriate.~~

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

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

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

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

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

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

28 (b) The agency representative designated in paragraph (14) of subdivision (a)
29 shall make available to the public upon request the express terms of the proposed
30 action. The representative shall also make available to the public upon request the
31 location of public records, including reports, documentation, and other materials,
32 related to the proposed action. If the representative receives an inquiry regarding
33 the substance of the proposed action that the representative cannot answer, the
34 representative shall refer the inquiry to another person in the agency for a prompt
35 response.

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

41 **Comment.** Subdivision (a)(7)(C) of Section 11346.5 is amended to conform to the language
42 used in the introductory paragraph of subdivision (a)(7). This is a nonsubstantive technical
43 change.

1 Subdivisions (a)(14) and (b) are amended to require that substantive inquiries received by an
2 agency representative be answered promptly, either by the agency representative or by another
3 person in the agency.

4 **Gov't Code § 11347.6 (amended). Comments of specified agencies**

5 SEC. 5. Section 11347.6 of the Government Code is amended to read:

6 11347.6. Each state agency that adopts regulations shall, in the final statement of
7 reasons, separately identify comments made by the Office of Small Business
8 Advocate and the Technology, Trade and Commerce Agency pursuant to
9 subdivision (e) of Section 15363.6 and respond to each and every comment made
10 by that office or agency directed at the proposed action or at the procedures
11 followed by the agency in proposing or adopting the action, including providing a
12 basis for why those comments were rejected, if applicable.

13 **Comment.** Section 11347.6 is amended to update the reference to the Technology, Trade and
14 Commerce Agency. See Gov't Code § 15310.1. This is a nonsubstantive technical change.