

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations

September 1998

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations*, 28 Cal. L. Revision Comm'n Reports 625 (1998). This report is part of publication #199 [1998 Recommendations].

STATE OF CALIFORNIA

PETE WILSON, Governor

CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335

ARTHUR K. MARSHALL, Chairperson
ASSEMBLY MEMBER HOWARD WAYNE, Vice Chairperson
ROBERT E. COOPER
BION M. GREGORY
PAMELA L. HEMMINGER
SENATOR QUENTIN L. KOPP
EDWIN K. MARZEC
RONALD S. ORR
SANFORD M. SKAGGS
COLIN W. WIED

September 25, 1998

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

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 is submitted pursuant to Resolution Chapter 91 of the Statutes of 1998.

Respectfully submitted,

Arthur K. Marshall
Chairperson

CONSENT REGULATIONS AND OTHER NONCONTROVERSIAL REGULATIONS

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:

(1) Exemption from redundant reporting requirements where an agency receives no adverse comments in response to a proposed regulatory action.

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

REDUNDANT REPORTING REQUIREMENTS

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

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 and State Board of Equalization 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.

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).

- (1) Perform various preliminary analyses.
- (2) Distribute public notice.
- (3) Receive written public comments and, in some cases, hold a public hearing.
- (4) Update the preliminary analyses, in light of public input.
- (5) Submit the proposed regulatory action and the record of the rulemaking process to the Office of Administrative Law (OAL) for review and approval.²

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 and the substance of the proposed regulatory action has not changed since it was circulated for comment, the proposed regulatory action would not be subject to Government Code Section 11346.9.³ Instead the agency would forward the proposed regulatory action, along with certification that no

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

3. An adverse comment is one that specifically objects to the substance of the proposed regulatory action or identifies a specific defect in the procedures used to adopt the proposed regulatory action. See proposed Gov't Code § 11347(c).

adverse comments were received, to OAL for review and approval.⁴ 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.⁵ The proposed law creates such a procedure.⁶

4. See proposed Gov't Code § 11347.

5. 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.

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

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 review.

If any adverse comment is received, the regulatory action may not be taken under the consent regulation procedure.⁷ If the agency still wishes to take the regulatory action it may do so under the regular rulemaking procedure.⁸ In other words, any person can block an agency’s use of the consent regulation procedure by submitting a written comment specifically objecting to the substance of the regulatory action, or identifying a specific defect in the procedures used to propose the regulatory action.⁹ 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.

7. See proposed Gov’t Code § 11365.030.

8. See Gov’t Code §§ 11346-11347.3.

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

Review of a Consent Regulation

A regulatory action taken under the consent regulation procedure is subject to review by OAL and the courts, in the same manner as any other regulatory action.¹⁰

10. See Gov't Code §§ 11349-11349.5 (OAL review of proposed regulation), 11350 (declaratory relief regarding validity of regulation), 11350.3 (judicial review of regulation disapproved by OAL).

Contents

PROPOSED LEGISLATION 635

Gov't Code § 11347 (added). Noncontroversial regulatory action 635

Gov't Code §§ 11365.010-11365.070 (added). Consent regulation
 procedure 636

§ 11365.010. Purpose and application of article 636

§ 11365.020. Consent regulation procedure 637

§ 11365.030. Adverse comment 638

§ 11365.040. Notice of proposed consent regulation 638

§ 11365.050. Limitation on final text 640

§ 11365.060. Publication of notice 640

§ 11365.070. Rulemaking file 640

CONFORMING REVISIONS 641

Gov't Code § 11342 (amended). Definitions 641

Gov't Code § 11343 (amended). Transmittal and certification 643

Gov't Code § 11346.1 (amended). Application of article 645

Gov't Code § 11346.9 (amended). Post-comment analysis 647

Gov't Code § 11349.1 (amended). Review of regulations 649

Gov't Code § 11349.3 (amended). Approval, disapproval, or return
 of regulation 652

Gov't Code § 11349.4 (amended). Returned regulations 653

Gov't Code § 11349.5 (amended). Review by Governor of decision
 by Office of Administrative Law 654

Gov't Code § 11356 (amended). Building standards 656

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 and the final text of the proposed regulatory action is not different in substance from the text that was originally made available to the public for comment pursuant to Section 11346.5, 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 Section 11346.4, that specifically objects to the substance of the proposed regulatory action or identifies a specific defect in the procedures used to adopt the proposed 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 similar 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 §§ 11365.010-11365.070 (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.

Comment. Section 11365.020 provides a procedure an agency may use when proposing a regulatory action that it expects to be

noncontroversial. See Section 11365.010 (purpose and application of article). This procedure may not be used if the agency receives any adverse comment. See Section 11365.030 (adverse comment).

Subdivision (b) requires an agency to determine the potential effects of a proposed regulatory action. A public comment asserting that the agency's determination is incorrect or that the basis for the determination is flawed is an adverse comment as defined in Section 11365.030(b).

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

§ 11365.030. Adverse comment

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

(b) For the purposes of this article:

(1) "Adverse comment" means a written comment, received during the public comment period provided under Section 11365.020, that specifically objects to the substance of the proposed regulatory action or identifies a specific defect in the procedures used to adopt the proposed 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 11365.030 is similar to Section 11347(c) (noncontroversial regulatory action). See also Section 11342(g)(2) ("regulatory action" means adoption, amendment, or repeal of regulation).

§ 11365.040. Notice of proposed consent regulation

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

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

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

(2) The following statement in substance:

“This regulatory action is being taken under the consent regulation procedure. See Government Code Sections 11365.010-11365.070.”

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

(4) A statement of the agency’s rationale for determining that the proposed regulatory action is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is implemented, interpreted, or made specific by the regulatory action.

(5) Reference to the authority under which the regulatory action is proposed and a reference to the statute, court decision, or other provision of law that is implemented, interpreted, or made specific by the regulatory action.

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

Comment. Section 11365.040 is similar to Sections 11346.4-11346.5 (notice of regulatory action taken under Article 5 (commencing with Section 11346)). See also Sections 11342(b) (“office” means Office of Administrative Law), 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation), 11365.020(a) (preparation of preliminary text).

§ 11365.050. Limitation on final text

11365.050. The final text of a regulatory action taken under this article shall not be changed from the preliminary text, except where the change is solely grammatical in nature or is otherwise nonsubstantial.

Comment. Section 11365.050 prevents an agency from making any substantive change to a regulatory action being proposed under this article. See also Section 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

§ 11365.060. Publication of notice

11365.060. (a) Except as provided in subdivision (b), on receiving notice of a regulatory action proposed under this article, the office shall publish the contents of the notice in the California Regulatory Notice Register.

(b) The office may refuse to publish a notice of a proposed regulatory action submitted to it pursuant to this article if the agency that submitted the notice has not satisfied the requirements of this article.

Comment. Section 11365.060 governs publication of notice of a regulatory action taken under this article. 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 (2), (3), (4), (5), (8), and (9) of subdivision (b) of Section 11347.3 do not apply to a rulemaking file prepared pursuant to this section.

(c) The rulemaking file prepared pursuant to this section shall include the published notice of the proposed regulatory action.

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).

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

(A) Independently owned and operated.

(B) Not dominant in its field of operation.

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

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

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

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

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

(E) An entity organized as a nonprofit institution.

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

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

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

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

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

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

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

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

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

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

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

(J) A manufacturing enterprise exceeding 250 employees.

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

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

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

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

11343. Every state agency shall:

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

(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, ~~and only~~ *or to a regulatory action taken under Article 11 (commencing with Section 11365.010).*

(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.

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

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

(c) Notwithstanding any other provision of law, no emergency regulation that is a building standard, as defined in Section 18909 of the Health and Safety Code, shall be filed,

nor shall the building standard be effective, unless the building standards are submitted to the State Building Standards Commission, and are approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety Code.

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

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

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

(g) In the event a regulation is originally adopted and filed as an emergency and the adopting agency fails to comply with subdivision (e), this failure shall constitute a repeal thereof

and after notice to the adopting agency by the office, shall be deleted.

(h) A regulation originally adopted as an emergency regulation, or an emergency regulation substantially equivalent thereto that is readopted as an emergency regulation, shall not be filed with the Secretary of State as an emergency 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). A former provision stating an exemption to provisions of this chapter for regulations adopted under Financial Code Section 3373 is inaccurate and has not been continued. See Fin. Code § 3373 (regulations adopting changes to Federal Reserve Board regulations).

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

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

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

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

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

(2) A determination as to whether the regulation imposes a mandate on local agencies or school districts. If the determination is that the regulation does contain a local

mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding.

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

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

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

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

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with this section if a statement to the effect that a federally mandated

regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found, is included in the notice of proposed 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 § 11349.1 (amended). Review of regulations

SEC. _____. Section 11349.1 of the Government Code is amended to read:

11349.1. (a) The office shall review all regulations adopted pursuant to the procedure specified in Article 5 (commencing with Section 11346) *or Article 11 (commencing with Section 11365.010)* and submitted to it for publication in the California Regulatory Code Supplement and for transmittal to the Secretary of State and make determinations using all of the following standards:

- (1) Necessity.
- (2) Authority.
- (3) Clarity.
- (4) Consistency.
- (5) Reference.
- (6) Nonduplication.

In reviewing regulations pursuant to this section, the office shall restrict its review to the regulation and the record of the rulemaking proceeding. The office shall approve the regulation or order of repeal if it complies with the standards set forth in this section and with this chapter.

(b) In reviewing proposed regulations for the criteria in subdivision (a), the office may consider the clarity of the proposed regulation in the context of related regulations already in existence.

(c) The office shall adopt regulations governing the procedures it uses in reviewing regulations submitted to it. The regulations shall provide for an orderly review and shall specify the methods, standards, presumptions, and principles the office uses, and the limitations it observes, in reviewing regulations to establish compliance with the standards specified in subdivision (a). The regulations adopted by the office shall ensure that it does not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations.

(d) The office shall return any regulation ~~subject to this chapter~~ *adopted under Article 5 (commencing with Section 11346)* to the adopting agency if any of the following occur:

(1) The adopting agency has not prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5 and has not included the data used and calculations made and the summary report of the estimate in the file of the rulemaking.

(2) The agency has not complied with Section 11346.3.

(3) The adopting agency has prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5, the estimate indicates that the regulation will result in a cost to local agencies or school districts that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, and the adopting agency fails to do any of the following:

(A) Cite an item in the Budget Act for the fiscal year in which the regulation will go into effect as the source from which the Controller may pay the claims of local agencies or school districts.

(B) Cite an accompanying bill appropriating funds as the source from which the Controller may pay the claims of local agencies or school districts.

(C) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has approved a request by the agency that funds be included in the Budget Bill for the next following fiscal year to reimburse local agencies or school districts for the costs mandated by the regulation.

(D) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has authorized the augmentation of the amount available for expenditure under the agency's appropriation in the Budget Act which is for reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4 to local agencies or school districts from the unencumbered balances of other appropriations in the Budget Act and that this augmentation is sufficient to reimburse local agencies or school districts for their costs mandated by the regulation.

(e) The office shall notify the Department of Finance of all regulations returned pursuant to subdivision (d).

(f) The office shall return a rulemaking file to the submitting agency if the file does not comply with *applicable requirements of* subdivisions (a) and (b) of Section 11347.3 and Section 11365.070. Within three state working days of the receipt of a rulemaking file, the office shall notify the submitting agency of any deficiency identified. If no notice of deficiency is mailed to the adopting agency within that time, a rulemaking file shall be deemed submitted as of the date of its original receipt by the office. A rulemaking file shall not be deemed submitted until each deficiency identified under this subdivision has been corrected.

This subdivision shall not limit the review of regulations under this article, including, but not limited to, the conformity

of rulemaking files to *the applicable requirements of subdivisions (a) and (b) of Section 11347.3 and Section 11365.070.*

Comment. Section 11349.1 is amended to provide for administrative review of a proposed consent regulation. See Article 11 (commencing with Section 11365.010) (consent regulation procedure).

Gov't Code § 11349.3 (amended). Approval, disapproval, or return of regulation

SEC. _____. Section 11349.3 of the Government Code is amended to read:

(a) The office shall either approve a regulation submitted to it for review and transmit it to the Secretary of State for filing or disapprove it within 30 working days after the regulation has been submitted to the office for review. If the office fails to act within 30 days, the regulation shall be deemed to have been approved and the office shall transmit it to the Secretary of State for filing.

(b) If the office disapproves a regulation, it shall return it to the adopting agency within the 30-day period specified in subdivision (a) accompanied by a notice specifying the reasons for disapproval. Within seven calendar days of the issuance of the notice, the office shall provide the adopting agency with a written decision detailing the reasons for disapproval. No regulation shall be disapproved except for failure to comply with the standards set forth in Section 11349.1 or for failure to comply with this chapter.

(c) If an agency determines, on its own initiative, that a regulation submitted pursuant to subdivision (a) should be returned by the office prior to completion of the office's review, it may request the return of the regulation. All requests for the return of a regulation shall be memorialized in writing by the submitting agency no later than one week following the request. Any regulation returned pursuant to this subdivision shall be resubmitted to the office for review

~~within the one-year period specified in subdivision (b) of Section 11346.4 one year of distribution of a notice pursuant to Section 11346.4 or Section 11365.040 or shall comply with Article 5 (commencing with Section 11346) or Article 11 (commencing with Section 11365.010) prior to resubmission.~~

(d) The office shall not initiate the return of a regulation pursuant to subdivision (c) as an alternative to disapproval pursuant to subdivision (b).

Comment. Section 11349.3 is amended to provide for administrative review of a proposed consent regulation. See Article 11 (commencing with Section 11365.010) (consent regulation procedure).

Gov't Code § 11349.4 (amended). Returned regulations

SEC. _____. Section 11349.4 of the Government Code is amended to read:

(a) A regulation returned to an agency because of failure to meet the standards of Section 11349.1; *or* because of an agency's failure to comply with this chapter may be rewritten and resubmitted within 120 days of the agency's receipt of the written opinion required by subdivision (b) of Section 11349.3 without complying with the notice and public hearing requirements of Sections 11346.4, 11346.5, and 11346.8, 11365.020, and 11365.040, unless the substantive provisions of the regulation have been significantly changed. If the regulation has been significantly changed or was not submitted within 120 days of receipt of the written opinion, the agency shall comply with Article 5 (commencing with Section 11346) *or* Article 11 (commencing with Section 11365.010) and readopt the regulation. The director of the office may, upon a showing of good cause, grant an extension to the 120-day time period specified in this subdivision.

(b) Upon resubmission of a disapproved regulation to the office pursuant to subdivision (a), the office shall only review the resubmitted regulation for those reasons expressly identified in the written opinion required by subdivision (b) of

Section 11349.3, or for those issues arising as a result of a substantial change to a provision of the resubmitted regulation or as a result of intervening statutory changes or intervening court orders or decisions.

(c) When an agency resubmits a withdrawn or disapproved regulation to the office it shall identify the prior withdrawn or disapproved regulation by date of submission to the office, shall specify the portion of the prior rulemaking record that should be included in the resubmission, and shall submit to the office a copy of the prior rulemaking record if that record has been returned to the agency by the office.

(d) The office shall expedite the review of a regulation submitted without significant substantive change.

Comment. Section 11349.4 is amended to provide for administrative review of a proposed consent regulation. See Article 11 (commencing with Section 11365.010) (consent regulation procedure).

Gov't Code § 11349.5 (amended). Review by Governor of decision by Office of Administrative Law

SEC. _____. Section 11349.5 of the Government Code is amended to read:

(a) To initiate a review of a decision by the office, the agency shall file a written Request for Review with the Governor's Legal Affairs Secretary within 10 days of receipt of the written opinion provided by the office pursuant to subdivision (b) of Section 11349.3. The Request for Review shall include a complete statement as to why the agency believes the decision is incorrect and should be overruled. Along with the Request for Review, the agency shall submit all of the following:

(1) The office's written decision detailing the reasons for disapproval required by subdivision (b) of Section 11349.3.

(2) Copies of all regulations, notices, statements, and other documents which were submitted to the office.

(b) A copy of the agency's Request for Review shall be delivered to the office on the same day it is delivered to the Governor's office. The office shall file its written response to the agency's request with the Governor's Legal Affairs Secretary within 10 days and deliver a copy of its response to the agency on the same day it is delivered to the Governor's office.

(c) The Governor's office shall provide the requesting agency and the office with a written decision within 15 days of receipt of the response by the office to the agency's Request for Review. Upon receipt of the decision, the office shall publish in the California Regulatory Notice Register the agency's Request for Review, the office's response thereto, and the decision of the Governor's office.

(d) The time requirements set by subdivisions (a) and (b) may be shortened by the Governor's office for good cause.

(e) The Governor may overrule the decision of the office disapproving a proposed regulation, an order repealing an emergency regulation adopted pursuant to subdivision (b) of Section 11346.1, or a decision refusing to allow the readoption of an emergency regulation pursuant to Section 11346.1. In that event, the office shall immediately transmit the regulation to the Secretary of State for filing.

(f) Upon overruling the decision of the office, the Governor shall immediately transmit to the Committees on Rules of both houses of the Legislature a statement of his or her reasons for overruling the decision of the office, along with copies of the adopting agency's initial statement of reasons issued pursuant to Section 11346.2 *or copies of the notice issued pursuant to Section 11365.040*, and the office's statement regarding the disapproval of a regulation issued pursuant to subdivision (b) of Section 11349.3. The Governor's action and the reasons therefor shall be published in the California Regulatory Notice Register.

Comment. Section 11349.5 is amended to provide for administrative review of a proposed consent regulation. See 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:

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

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

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

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