

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Improving Access to Rulemaking Information Under the Administrative Procedure Act

February 2000

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 *Improving Access to Rulemaking Information Under the Administrative Procedure Act*, 30 Cal. L. Revision Comm'n Reports 517 (2000). This is part of publication #209 [2000-2001 Recommendations].

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CALIFORNIA LAW REVISION COMMISSION

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February 11, 2000

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

The 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 rulemaking action it has previously commenced, notice of that decision should be published in the California Regulatory Notice Register.
- (3) If an agency maintains an Internet website, the text of a proposed regulation, the initial statement of reasons, the final statement of reasons, and any notice of a decision not to proceed should be published on the website.
- (4) The existing practice of publishing detailed summaries of regulation decisions in the California Regulatory Notice Register should be ratified.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

Howard Wayne
Chairperson

IMPROVING ACCESS TO RULEMAKING INFORMATION UNDER THE ADMINISTRATIVE PROCEDURE ACT

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

Access to Final Statement of Reasons

Existing law requires that a notice of proposed rulemaking action refer to the availability of the agency's initial statement of reasons for the proposed action.⁴ However, the notice is not required to refer to the availability of the agency's final statement of reasons. An agency's final statement of reasons contains important information regarding a proposed rulemaking action, including reasons why proposed alternatives were rejected and agency responses to public comments⁵ — matters of interest to a person who is following a proposed rulemaking action. The notice of proposed rulemaking action

1. Gov't Code §§ 11340-11359. All further statutory references are to the Government Code.

2. Section 11346.4. The notice includes detailed information regarding the proposed regulation. See Section 11346.5

3. Section 11347.3.

4. Section 11346.5(a)(15).

5. See Section 11346.9(a).

should include instructions on how to obtain a copy of the final statement of reasons.⁶

Notice of Decision Not To Proceed

Under existing law, an agency is required to provide public notice when it commences rulemaking,⁷ but is not required to provide any notice if it decides not to proceed with a rulemaking action that it has already commenced. A person who is interested in a proposed rulemaking action will not realize that the proposal has been abandoned until the one-year time limit on the rulemaking process⁸ has run without the rulemaking action being completed. A person who is interested in a proposed rulemaking action would find it useful to know that the agency has decided not to proceed. An agency should be required to submit written notice of a decision not to proceed with a rulemaking action to the Office of Administrative Law, for publication in the California Regulatory Notice Register.⁹

Internet Publication

In a previous recommendation, the California Law Revision Commission proposed that an agency that maintains an Internet website should publish its rulemaking notices on its website.¹⁰ In order to further enhance public access to rulemaking information, the text of a proposed regulation, the initial and final statements of reasons, and any notice of a decision not to proceed with a proposed rulemaking action, should also be published on the Internet.¹¹

6. See proposed amendment of Section 11346.5(a)(18).

7. Section 11346.4.

8. See Section 11346.4(b).

9. See proposed Section 11347.

10. *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999).

11. See proposed Section 11340.8(c).

Publication of Regulation Decisions of the Office of Administrative Law

Existing law requires that regulation decisions of the Office of Administrative Law be published in the California Regulatory Notice Register.¹² In practice, the Office of Administrative Law publishes detailed summaries of these decisions in the California Regulatory Notice Register and makes the full decisions, which can be lengthy, available on request. This practice is efficient and should be ratified.

12. Section 11344.1.

PROPOSED LEGISLATION

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

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

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

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

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

(2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter, by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.

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

(4) A comment or petition regarding a regulation may be delivered to an agency by means of electronic communication if the agency has expressly indicated a willingness to receive a comment or petition by means of electronic communication.

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

(1) Any public notice required by this chapter or by a regulation implementing this chapter. For the purposes of this

paragraph, “public notice” means a notice that is required to be given by an agency to persons who have requested notice of the agency’s regulatory actions.

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

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

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

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

(d) Publication under subdivision (c) supplements any other required form of publication or distribution. Subdivision (c) does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written material. Failure to comply with subdivision (c) is not ground for disapproval of a proposed regulation.

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

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

Subdivision (c) requires electronic publication of certain rulemaking documents by an agency that maintains a website or similar electronic communication forum. Provisions requiring a “public notice” as defined in paragraph (1) include Sections 11346.4 (notice of proposed action), 11346.8(a) (notice of hearing), 11346.8(b) (notice of continuance or postponement of hearing), and Section 44 of Title 1 of the California Code of Regulations (notice of changes to proposed regulation).

Use of electronic communications pursuant to this section supplements other required forms of publication or distribution. See subdivisions (b)(2) & (d). See also Section 11342(b) (“office” means Office of Administrative Law).

☞ **Note.** Proposed Section 11340.8 was previously recommended by the Commission in a slightly different form. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm’n Reports 459 (1999).

Gov't Code § 11344.1 (amended). California Regulatory Notice Register

SEC. 2. Section 11344.1 of the Government Code is amended to read:

11344.1. The office shall do all of the following:

(a) Provide for the publication of the California Regulatory Notice Register, which shall be an official publication of the State of California and which shall contain the following:

(1) Notices of proposed action prepared by regulatory agencies, subject to the notice requirements of this chapter, and which have been approved by the office.

(2) A summary of all regulations filed with the Secretary of State in the previous week.

(3) *All Summaries of all* regulation decisions issued in the previous week detailing the reasons for disapproval of a regulation, the reasons for not filing an emergency regulation, and the reasons for repealing an emergency regulation. The California Regulatory Notice Register shall also include a quarterly index of regulation decisions.

(4) The Governor's action in reviewing the disapprovals of the office, the decisions to repeal, the agency's request for review, the office's response thereto, and the decisions of the Governor's office, as required by Section 11349.7.

(5) Determinations issued pursuant to Section 11340.5.

(b) Establish the publication dates and manner and form in which the California Regulatory Notice Register shall be prepared and published and ensure that it is published and distributed in a timely manner to the presiding officer and rules committee of each house of the Legislature and to all subscribers.

Comment. Subdivision (a)(3) of Section 11344.1 is amended to ratify the existing practice of publishing detailed summaries of regulation decisions, rather than the decisions themselves. The complete decisions are public documents and can be obtained from the Office of Administrative Law.

☞ **Note.** The Commission's previous rulemaking recommendation proposed technical changes to Section 11344.1. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm'n Reports 459 (1999). For the sake of clarity, those changes are not reflected here.

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

SEC. 3. Section 11346.5 of the Government Code is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

submit proposals. Submissions may include the following considerations:

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

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

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

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

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

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

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

For purposes of this paragraph, “cost impact” means the reasonable range of costs, or a description of the type and extent of costs, direct or indirect, that a representative private

person or business necessarily incurs in reasonable compliance with the proposed action.

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

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

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

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

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

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

(16) A statement that if a public hearing is not scheduled, any interested person or his or her duly authorized representative may request, no later than 15 days prior to the

close of the written comment period, a public hearing pursuant to Section 11346.8.

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

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

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

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

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

Comment. Section 11346.5 is amended to provide that the notice of proposed action must include statements explaining how to obtain the final statement of reasons and any electronically published documents. See also Sections 11340.8(c) (electronic publication of rulemaking materials), 11342(b) (“office” means Office of Administrative Law).

☞ **Note.** The Commission’s previous rulemaking recommendation proposed a number of technical changes to Section 11346.5. See *Administrative Rulemaking*, 29 Cal. L. Revision Comm’n Reports 459 (1999). For the sake of clarity, those changes are not reflected here.

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

SEC. 4. Section 11347 is added to the Government Code, to read:

11347. (a) If, after publication of a notice of proposed action pursuant to Section 11346.4, but before the notice of proposed action becomes ineffective pursuant to subdivision (b) of Section 11346.4, an agency decides not to proceed with the proposed action, it shall deliver notice of its decision to the office for publication in the California Regulatory Notice Register.

(b) Publication of a notice under this section terminates the effect of the notice of proposed action referred to in the notice. Nothing in this section precludes an agency from proposing a new regulatory action that is similar or identical to a regulatory action that was previously the subject of a notice published under this section.

Comment. Section 11347 is new. The purpose of this section is to require notice where an agency decides to completely abandon a proposed regulatory action. A decision not to proceed with part of a proposed regulatory action, while proceeding with the remainder, would not require notice under this section. See also Section 11342(b) ("office" means Office of Administrative Law).
