Study N-307 October 31, 2001

Memorandum 2001-95

Administrative Rulemaking: Deferred Issues

In 2000, two bills affecting the rulemaking provisions of the Administrative Procedure Act were enacted: Assembly Bill 1822 (Wayne), which implemented a number of Commission-recommended reforms, and Assembly Bill 505 (Wright), which related to the effect of administrative rulemaking on small businesses. A few problems resulting from these bills were brought to the Commission's attention shortly thereafter. The Commission recommended cleanup legislation to correct those problems that were technical and noncontroversial. Its recommendation was implemented in Senate Bill 561 (Morrow), which was successfully enacted this year. Issues that were too substantive for inclusion in a cleanup bill were deferred for later consideration.

This memorandum discusses two issues raised by the Department of Industrial Relations and the Occupational Safety and Health Standards Board ("DIR/OSHSB") that were too substantive for inclusion in the cleanup bill. The letter from DIR/OSHSB to the Commission, which was originally attached to Memorandum 2001-16, is attached to this memorandum for reference. Three issues raised by the Office of Administrative Law ("OAL") and an additional technical issue identified by the staff are also discussed.

Prior to distributing this memorandum, the staff consulted informally with DIR/OSHSB, OAL, and a member of Assembly Member Wright's staff regarding the proposals discussed in this memorandum. All were generally supportive of the proposed approaches. A few minor concerns were raised and are discussed below. If the Commission decides to recommend changes along the lines discussed in this memorandum, the staff will prepare a draft tentative recommendation for the Commission's review.

All statutory references in this memorandum are to the Government Code.

CONSIDERATION OF ALTERNATIVES

AB 505 amended Government Code Section 11346.2(b)(3) as follows:

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

…

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

…

(3) (A) A description of ~~the~~ reasonable alternatives to the regulation ~~considered by the agency~~ and the agency's reasons for rejecting those alternatives. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.

(B) A description of any reasonable alternatives the agency has identified or that have otherwise been identified and brought to the attention of the agency that would lessen any adverse impact on small business. It is not the intent of this paragraph to require the agency to artificially construct alternatives or to justify why it has not identified alternatives.

DIR/OSHSB comment that the requirements of revised paragraph (b)(3)(A) are unclear. Is an agency now required to devise alternatives to its proposed action that it would not otherwise have considered? If so, is this consistent with the final sentence of subparagraph (3)(B) ("It is not the intent of this paragraph to require the agency to artificially construct alternatives or to justify why it has not identified alternatives.")? See Exhibit p. 1.

The staff could find no authority construing revised Section 11346.2(b)(3). Legislative analyses of AB 505 do not address the changes to subdivision (b)(3) specifically. Nor is there any case-law construing the revised language or the former law. However, it seems likely that subdivision (b)(3)(A) was amended to close a perceived loophole — if an agency need only describe alternatives that it *considers*, an agency that fails to consider alternatives would arguably not be required to describe (or consider) any alternatives. The revised provision eliminates that possibility by requiring that an agency describe "reasonable alternatives to the regulation." However, where an agency determines that there aren't any reasonable alternatives to its proposed rulemaking action, it should not be required to invent alternatives, in order to satisfy the letter of the law. This is consistent with the existing rule providing that an agency need not "artificially construct alternatives."

DIR/OSHSB propose that subdivision (b)(3) be revised to make clear that the last sentence in (B) also applies to (A). Thus:

> (3) (A) A description of reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative.
>
> (B) A description of any reasonable alternatives the agency has identified or that have otherwise been identified and brought to the attention of the agency that would lessen any adverse impact on small business.
>
> (C) It is not the intent of ~~this paragraph~~ subparagraph (A) or (B) to require the agency to artificially construct alternatives or to justify why it has not identified alternatives.

The sentence in subdivision (b)(3)(B) should already apply to (b)(3)(A), as both (A) and (B) are technically subordinate parts of paragraph (3). However, the proposed revision is clearer. **The staff has no objection to the proposed change.** If the Commission decides to include the proposed revision in a tentative recommendation, the following Comment should be added:

> **Comment.** Subdivision (b)(3) of Section 11346.2 is amended to make clear that the former second sentence of subdivision (b)(3)(B) applies to subdivision (b)(3)(A) and (B).

Assembly Member Wright's staff expressed some concern regarding the language: "or to justify why it has not identified alternatives." If an agency does not describe any alternatives, it might be appropriate to require that it explain the omission. On the other hand, any explanation would probably be rather perfunctory (e.g., "No reasonable alternatives to the proposed regulation are described because the agency did not identify any reasonable alternatives."). It isn't clear that much would be gained by requiring the agency to recite such boilerplate. For the purposes of a tentative recommendation, **the staff is inclined to use the language set out above**. It matches the existing language in subdivision (b)(3)(B), which probably already applies to subdivision (b)(3)(A).

DIR/OSHSB have also suggested that it might be helpful to combine subdivisions (b)(3)(A) and (b)(3)(B), in order to eliminate the inconsistencies between the two provisions. The staff is wary of attempting to combine the two provisions. Small businesses have an interest in preserving provisions that require particular attention to the effect of regulations on small businesses.

Perhaps subdivision (b)(3)(B) could simply be amended to make it parallel subdivision (b)(3)(A), thus:

> (B) A description of ~~any~~ reasonable alternatives ~~the agency has identified or that have otherwise been identified and brought to the attention of the agency~~ to the regulation that would lessen any adverse impact on small business and the agency's reasons for rejecting those alternatives.
>
> **Comment**. … Subdivision (b)(3)(B) is amended for parallelism with subdivision (b)(3)(A).

Note that this would slightly expand agency duties, by requiring that agencies explain why they rejected described alternatives. **The staff recommends** that the amendment set out above be included in any tentative recommendation. The changes would be beneficial and any additional burden on agencies should be slight.

DESIGNATION OF CONTACT PERSON "WHERE APPROPRIATE"

AB 505 added Section 11346.5(a)(14), requiring that a notice of proposed adoption, amendment, or repeal of a regulation include the following:

> (14) The name and telephone number of the following:
> (A) The agency representative and designated backup contact person to whom inquiries concerning the proposed administrative action may be directed.
> (B) An agency person or persons designated to respond to questions on the substance of the proposed regulations, where appropriate.

DIR/OSHSB are concerned that the phrase "where appropriate" is ambiguous. Specifically, it isn't clear who determines when it is appropriate to name a person to respond to substantive questions. At Exhibit p. 2, they write:

> We submit that "where appropriate" is open to many different interpretations and standards. While the Legislature likely intended to grant agencies discretion on this issue, the language used is so vague that it is difficult for agencies desiring to comply with the legislative intent to know what to do. For example, while it might be considered "appropriate" by some to designate such a person for a complex or technical rulemaking, it might be considered equally "inappropriate" by the agency because the agency might need to screen calls to ensure that the contact person for substantive issues is not overwhelmed. We propose that language such as "where

deemed appropriate by the agency," be substituted for the phrase "where appropriate."

The staff understands why an agency might be reluctant to provide direct telephone access to a person who can answer substantive questions. In many cases, it would be much more efficient to route inquiries to a central "gatekeeper" position. That person can then answer procedural questions, screen out harassing calls, and direct valid substantive inquiries to the person best able to respond. On the other hand, one purpose of AB 505 was to make the rulemaking process more "user-friendly," especially for small businesses. The requirement that an agency list a name and telephone number for a person who can answer substantive questions might have been intended as a "gate-crashing" provision, ensuring that less sophisticated members of the public will have access to policy makers and not be screened out.

Regardless of the intention behind the amendment, the staff agrees that the phrase "where appropriate" is ambiguous. This ambiguity could be resolved in favor of agency discretion as proposed by DIR/OSHSB. Or the ambiguity could be resolved in favor of direct public access, by striking "where appropriate" entirely. A compromise solution might be to amend Section 11346.5 as follows:

> 11346.5. (a) The notice of proposed adoption, amendment, or repeal of a regulation shall include the following:
>
> …
>
> (14) The name and telephone number of the ~~following~~:
>
> ~~(A) The~~ agency representative and designated backup contact person to whom inquiries concerning the proposed administrative action may be directed.
>
> ~~(B) An agency person or persons designated to respond to questions on the substance of the proposed regulations, where appropriate.~~
>
> …
>
> (b) The agency representative designated in paragraph (14) of subdivision (a) shall make available to the public upon request the express terms of the proposed action. The representative 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. <u>If the representative receives an inquiry regarding the substance of the proposed action that the representative cannot answer, the representative shall refer the inquiry to another person in the agency for a prompt response.</u>

Comment. Subdivisions (a)(14) and (b) of Section 11346.5 are amended to require that substantive inquiries received by an

> agency representative be answered promptly, either by the agency representative or other appropriate person.

This would combine the efficiency of centralized "gate keeping" with a directive that persons with substantive questions not be ignored. The staff recognizes that "prompt response" is somewhat ambiguous. If this flexibility is problematic, a specific deadline could be substituted.

ISSUES RAISED BY OAL

After the Commission made its recommendation for cleanup legislation, OAL raised three additional issues. These are discussed below.

Reporting Requirements

Section 11346.3(c) provides as follows:

> (c) No administrative regulation adopted on or after January 1, 1993, that requires a report shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses.

Section 11346.5(a)(11) requires that the finding referenced in Section 11346.3(c) be included in the notice of proposed action.

OAL notes that agencies sometimes inadvertently fail to include the finding in the notice. If OAL detects the omission, it can send the notice back for correction. If it does not detect the omission, the consequences could be severe — the regulation would not apply to businesses. OAL suggests that the requirement that the finding be included in the notice be deleted or amended to permit inclusion of the finding elsewhere in the rulemaking record.

Under existing law, if an agency makes the finding required by Section 11346.3(c), but does not include it in the notice of proposed action, it isn't clear that the sanction in Section 11346.3(c) — inapplicability of the regulation to businesses — would apply. Inapplicability of the rule to businesses is the sanction for failure to make the finding. There is no sanction specified for omitting required elements of the notice. To the contrary, Section 11346.5(c) provides:

> (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.

The staff recommends against deleting the requirement that the finding be included in the notice. That requirement reflects a clear policy choice to provide notice to businesses that a proposed regulation would impose new reporting requirements. On the other hand, the Legislature probably did not intend the sanction for failure to make the finding to apply where an agency merely fails to include the finding in the notice. It may make sense to require that the finding be located elsewhere in the record, as well. For example, the finding could be added to the required contents of the final statement of reasons. This would give the agency another reminder of the need to make the finding, and would also provide an opportunity for more thorough checking by OAL, which carefully reviews the final statement of reasons as part of its general review of proposed regulations. Also, an agency could change a proposed regulation to add a reporting requirement, *after* it issued the notice of proposed action. In such a case, it isn't clear where in the rulemaking record the finding should be located. The final statement of reasons, as one of the last agency documents in the rulemaking process, would make a good location for such a finding. This could be implemented by amending Section 11346.9 as follows:

> 11346.9. 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:
>
> …
>
> (6) The finding prescribed by subdivision (c) of Section 11346.3, if required.
>
> …
>
> **Comment**. Section 11346.9 is amended to require that the final statement of reasons include the finding required by Section 11346.3(c).

Economic Impact Determination

AB 505 amended Section 11346.5(a)(7) as follows:

> (7) If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, makes an initial determination that the action may have a significant, statewide adverse economic impact ~~on~~ directly affecting 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) has made an initial determination that the (adoption/amendment/repeal) 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:

…

OAL suggests that a parallel change be made in subparagraph (C), as follows:

(C) The following statement: "The (name of agency) has made an initial determination that the (adoption/amendment/repeal) of this regulation may have a significant, statewide adverse economic impact ~~on businesses~~ directly affecting business, 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:

…

The staff has no objection to this change, which appears to be technical and nonsubstantive.

Trade and Commerce Agency

AB 505 added Section 11347.6, which refers to the "Trade and Commerce Agency." That agency's name has been changed to the "Technology, Trade, and Commerce Agency." See Section 15310.1. **The outdated reference should be corrected.**

NEW TECHNICAL ISSUE

AB 1822 added Section 11347, which requires an agency to give notice if it decides not to proceed with a proposed rulemaking action. AB 505 proposed to add a similar requirement, in a different section. However, AB 505 was later

amended to delete its version of the requirement, and to add a version of Section 11347 that is identical to the version added by AB 1822. As both bills were enacted, there are now two different sections with the same text and number. This could create problems if the section is amended or repealed in the future. **One of the two sections should be repealed, as follows:**

> **Gov't Code § 11347 (repealed). Decision not to proceed.**
>
> SEC. ___. Section 11347 of the Government Code, as added by Section 17 of Chapter 1059 of the Statutes of 2000, is repealed.
>
> ~~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 that section, 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, as added by 2000 Cal. Stat. ch. 1059, § 17, is repealed as redundant. It duplicates Section 11347 as added by 2000 Cal. Stat. ch. 1060, § 28.

Another possible approach would be to repeal both of the Sections 11347 that were added in 2000, and add a new Section 11347, with identical text and Commission Comment. This would reduce the possibility of confusion on the part of publishers, who might mistakenly see the repeal of one of the two duplicate sections as an intended repeal of both.

CONCLUSION

Many of the issues discussed above result from changes made by AB 505 — not from changes recommended by the Commission. In light of this, the Commission may wish to refrain from making the proposed changes so soon after enactment of AB 505. On the other hand, this is an area of law with which the Commission and its staff are familiar, and it would not require much additional expenditure of resources to draft and circulate a tentative recommendation. On balance, **the staff recommends that a tentative recommendation be prepared and circulated.** If the proposals prove

controversial or difficult to resolve, the Commission can reevaluate what priority this project should be given relative to its other projects.

Respectfully submitted,

Brian Hebert
Staff Counsel

STATE OF CALIFORNIA - DEPARTMENT OF INDUSTRIAL RELATIONS

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January 12, 2001

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Re: Tentative Recommendation Regarding Administrative Rulemaking Clean-up Legislation

Dear Mr. Hebert:

The Department of Industrial Relations and the Occupational Safety and Health Standards Board are writing to comment on the Law Revision Commission's tentative recommendation on proposed clean-up legislation pertaining to Chaptered bills 1059 and 1060. In addition to the items identified by the Commission, our agencies would like to propose a few additional items for clarification.

First, we note that an agency's obligation to consider alternative actions is unclear. This problem results primarily from revisions made to Government Code section 11346.2(b)(3)(A). Subsection (A) pertains to the initial statement of reasons and previously required an agency to describe alternatives to the proposed regulatory action *considered by it*. The section now omits the italicized language and states that an agency must describe reasonable alternatives to the proposed regulatory action and its reasons for rejecting them. These revisions suggest that an agency must devise possible reasonable alternatives to a proposed action and describe them.

Although subsection (B) of that provision states that "it is not the intent of *this paragraph* to require the agency to artificially construct alternatives," a similar statement is not contained in subsection (A). The Legislature may have intended the sentence in subsection (B) to apply to subsection (A), but that is not clear. To further confuse the issue, sections 11346.5(a)(13) and 11346.9(a)(4), which pertain to the notice and final statement of reasons respectively, continue to talk in terms of alternatives *considered by the agency*. While these three sections are not parallel in all respects, it seems odd that the ISOR would require an agency to construct alternatives while the notice and final statement would not. However, if an agency is simply to report on reasonable alternatives considered by it in the ISOR, it is unclear why the revisions to section 11346.2(b)(3)(A) were made. Legislative clarification of this issue is needed. We propose that the second statement in subsection (B) be added to subsection (A), to clarify that an agency need not artificially construct alternatives.

Second, the requirement to post public notices in section 11340.85 is ambiguous. Under section 11340.85(c), agencies are required to publish on their websites all public notices "required by this chapter or by a regulation implementing this chapter." Public notice is also defined to mean a notice that is required to be given by an agency to persons who have requested notice of the agency's regulatory actions. There are two problems with this subsection, as we see it. First, the definition contained in the second sentence lacks clarity. Second, it is unclear how these two sentences are intended to interact.

Regarding our first concern, we note that although most rulemaking documents are not typically referred to as "notices", many could be considered a public notice under this definition. For example, the Standards Board produces a Calendar of Activities, which announces a variety of activities associated with its rulemaking activities. Although not commonly understood to be a "notice," the document could be considered such under this definition because it pertains to regulatory actions, and the Board would be required to provide it to the public upon request, given that it is a public document. Is the Board then obligated to post the Calendar of Activities on its website under section 11340.85(c)?

Regarding our second concern, it is unclear whether the second sentence's definition of public notice is intended to be read into and limit the first sentence's delineation of notices to be posted, read into the first sentence as an example of notices to be posted, or to independently expand upon the scope of notices to be posted.

As a solution to both these concerns, we submit that the first sentence of this section adequately defines notices to be posted. The second sentence unnecessarily complicates the requirement, and potentially expands the universe of documents intended to be posted far beyond what is manageable for an agency.

Finally, section 11346.5(a)(14) requires agencies to designate a contact person to respond to substantive issues, *where appropriate*. We submit that "where appropriate" is open to many different interpretations and standards. While the Legislature likely intended to grant agencies discretion on this issue, the language used is so vague that it is difficult for agencies desiring to comply with the legislative intent to know what to do. For example, while it might be considered "appropriate" by some to designate such a person for a complex or technical rulemaking, it might be considered equally "inappropriate" by the agency because the agency might need to screen calls to ensure that the contact person for substantive issues is not overwhelmed. We propose that language such as "if deemed appropriate by the agency," be substituted for the phrase "where appropriate."

Thank you for your consideration of our suggestions. If you have any questions or comments, please do not hesitate to contact the undersigned.

Sincerely,

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