

1985

5th Anniversary Report

Office of Administrative Law

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OFFICE
OF



ADMINISTRATIVE
LAW

5TH ANNIVERSARY
REPORT

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1985





State of California
George Deukmejian
Governor

The Office of Administrative Law
Linda Stockdale Brewer
Director

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OFFICE OF ADMINISTRATIVE LAW

5th Anniversary Report

1985

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A PREFACE:

THE REGULATORY

The mandate for regulatory reform was established by statute in the Administrative Procedure Act (APA) which created the Office of Administrative Law in 1980 to carry out regulatory reform by ensuring that all state regulations are in compliance with the APA. The APA imposes standards and procedures that apply to all regulations promulgated by more than 130 state agencies.

In California state government, there are two kinds of laws. The laws enacted by the Legislature are statutes and the laws adopted by agencies of the executive branch are regulations. Regulations are adopted to implement, clarify or interpret the statutes.

SIX STANDARDS

All regulations adopted by California agencies must meet the following six standards:

- *Necessity—Why is it needed? Agency must explain*
- *Clarity—Can the regulation be understood by those directly affected by it?*
- *Authority—Which state statute gives the agency the authority to adopt the regulation?*
- *Nonduplication—Does it duplicate other regulations or statutes?*
- *Consistency—Is it consistent with other regulations, laws or statutes?*

PROCESS

- *Reference—What statute does the regulation implement, interpret or make specific?*

PROCEDURAL REQUIREMENTS

In addition, agencies must also meet specific procedural requirements in the process of adopting, amending or repealing regulations. The main purposes of the procedural requirements are to ensure:

- *maximum opportunity for public comment;*
- *maximum amount of pertinent information is made available to the public; and*
- *there is a broad public awareness of the proposed agency action.*

*The announcement of an agency's intent to adopt, amend or repeal regulations is made in the form of a public notice. Notices are printed in the **California Administrative Notice Register**, a weekly legal publication compiled by OAL. The agency issuing a Notice must mail a copy of it to everyone who has filed a request with them for notification.*

In addition, the agency is required to send Notices to representatives of small business enterprises that are affected by the regulation being proposed, and any

person or groups the agency believes may be interested in the proposed action.

The Notice must be specific and include a clear summary of existing law and how it may be changed by the proposed regulatory action. If the regulation might result in a significant financial impact on private individuals, businesses, local government, school districts or housing costs, this must be stated in the Notice.

45 DAY PUBLIC COMMENT PERIOD

Publication of the Notice marks the start of a 45-day period during which the agency must accept comments from the public. Later, when the official rule-making file is submitted to OAL, it must contain summaries of all points raised during the public comment period. The file must show how the agency modified the regulation to accommodate the comments or provide a compelling reason why any comment did not result in modification.

If the agency modifies the text of the regulation from that originally proposed, the new text with the modifications clearly indicated, must be made available for public comment on the changes for a minimum of 15 days before final adoption.

**ANNIVERSARY
RETROSPECTIVE:**

**THE BENEFITS
OF
REGULATORY
REFORM**

**By
LINDA STOCKDALE BREWER**

**DIRECTOR
OFFICE OF ADMINISTRATIVE LAW**



Governor Deukmejian has stated that “rebuilding the robust and confident business and working environment” that California once enjoyed is a primary goal of his administration. Part of this effort, he said, must be to bring about regulatory reform.

During each of the first three years of Governor Deukmejian’s administration, California has consistently led the nation in new business expansion and more than a million new jobs have been created.

Obviously, economic recovery has been achieved, and so, too, has regulatory reform. That regulatory reform has been accomplished is due in no small measure to the willingness of the regulated public to get involved in the regulatory process. This is especially true of those in the business community—the small business entrepreneurs who take part in the public comment process and help identify regulations that need to be repealed, amended, or adopted.

Statistics bear this out. A study done in the late 1970’s revealed that approximately 40,000 regulations were on the books in California. It is no small wonder that there was a growing public outcry against government red tape. New regulations were added to the Code at the rate of approximately 15% per year—that

meant approximately 6,000 new regulations for you, the public, to cope with every 12 months.

In contrast, the total number of regulations added to the Code in 1985 was minus 79. Regulations necessary for the protection of the public or otherwise beneficial to them were adopted in 1985, but even more were removed—and the ones taken off the books were those that had been creating unnecessary red tape.

In all, thanks to your efforts, in the last three years a grand total of 20,464 regulations have been amended, repealed or prevented from taking effect.

Each year, federal or state Legislative mandates trigger the adoption of approximately 1,260 new regulations. In addition, changes in technology or social systems, emergencies created by both natural and human actions, or other unforeseen happenings will always result in a need for new regulatory responses.

Because the Office of Administrative Law (OAL) is responsible for ensuring that regulations meet the concerns of the public, we undertook a concerted effort to inform the public about opportunities that exist to participate in the regulatory process.

Your response to our informational and educational efforts has been enormously productive, and millions of Californians have benefitted—reaping rewards of better jobs, more prosperity, and a renewed confidence in state government.

To ensure that California's regulations continue to be appropriate to your concerns, I urge you to keep on monitoring and participating in rulemaking. And we will continue to ensure that your right to do so is protected.

LEGISLATIVE CHANGES

In 1985, the Legislature made several changes and refinements to the APA. OAL worked closely with legislative committees to strengthen and clarify basic regulatory standards and procedures.

A requirement was added that state regulatory agencies make available for public comment all supplemental data, studies or other materials upon which they relied in developing regulatory changes that were not included in initial statements of reasons. (Government Code Section 11346.7)

As a result of this change, the public now has the right to inspect all such data. If a member of the public believes any of the agency's supporting material is flawed or otherwise incomplete or incorrect, he or she may present evidence to this effect during the public comment period. OAL closely examines the agency's response to these points in the review of the rule-making file.

A related change clarifies the requirement that agencies must summarize each objection or comment made during

the public comment period. This now applies only to specific objections or recommendations on the agency's proposed action or procedures. (Government Code Section 11346.7(b)(3))

The participating public benefits as this clarification directs the agency's focus to the most critical areas of the proposed regulation. Indeed, the more specific the comment, the more effective—which this amendment helps to emphasize.

Another amendment establishes a strict deadline by which the agency must resubmit disapproved regulations or regulations withdrawn voluntarily from OAL's review. As a result of this change, the enforcing agency must either submit a corrected filing within 120 days or schedule a new 45-day public comment period. (Government Code Section 11349.4)

The language of the necessity standard was amplified to state that substantial evidence includes facts, studies and expert opinion. (Government Code Section 11349(a))

NEW OAL REGULATIONS

Regulations that implement a new regulatory determination program and clarify existing rulemaking requirements were adopted by OAL in 1985.

OAL first held a series of preliminary public workshops to gain a clear understanding of the subject matter OAL's regulations should address.

During the public comment period, input was received from several hundred members of OAL's regulated public. In OAL's case, these were most often the officials of other state agencies. This firsthand experience afforded OAL great insight and appreciation of the work and preparation engaged in by the public and by officials of other state agencies.

This was a valuable and rewarding experience. It renewed OAL's appreciation of the complex and important decision making process that is inherent in rulemaking and also reinforced our belief in the necessity of public participation.

One set of regulations adopted by OAL “interprets, implements and makes specific” the statutes in Chapter 3.5, Articles 1 through 8 of the APA. (Government Code Sections 11340–11356)

These regulations spell out how OAL applies APA standards and procedures to rulemaking files submitted for review by other state agencies. The OAL regulations provide uniform guidelines to the more than 130 rulemaking agencies and departments whose submissions cover virtually the entire spectrum of state government. Thus, OAL’s rulemaking enables the other regulatory agencies to adopt regulations more efficiently.

Although other state agencies are the primary beneficiaries of these regulations, the public should find them helpful, too, as OAL’s regulations can serve as “guideposts” to points on which an agency can be most effectively challenged.

on
whether an agency is enforcing an edict or rule that has never been adopted by the rulemaking process. Such a rule has been referred to as an “underground” or “unofficial” regulation.

It may have evolved as an agency guideline, manual, instruction or rule that is regulatory in nature. Until now, such low profile originations afforded the public no opportunity to take issue with the rule, except by means of a court challenge, which might be costly and time consuming.

“UNDERGROUND REGULATIONS”

Government Code Section 11347.5 prohibits state agencies from enforcing any rule that has not been adopted

in compliance with the APA process. OAL’s new Regulatory Determinations Division protects the public from illegal enforcement of unauthorized regulations.

Regulations adopted by OAL in 1985 establish the procedures by which any member of the Legislature or the general public may request OAL to make determinations on specific rules. The regulations also set deadlines and describe procedures used by OAL in making regulatory determinations. (These regulations are on pages 25–38.)

COMING:

AN EASIER-TO-USE CALIFORNIA ADMINISTRATIVE CODE

Regulations enforced by all California state agencies can be found in the California Administrative Code—but not very easily.

The California Administrative Code (CAC) is an invaluable resource, but may prove a difficult one especially for those who are not familiar with its complexities and the structure of state government.

A formatting of the CAC is a logical and desirable adjunct to regulatory reform. A pro-

ject is underway to do just that in order to establish the CAC as a useful document for the general public.

At one time in California's history, no single repository existed for state regulations. One had to apply to each separate state agency to find out what regulations it enforced. In 1945, all state regulations were assembled in three volumes and published as the CAC.

Since then have come 40 years of unprecedented growth in population, business, industry and technology in California. The CAC grew, too. It is now divided into 25 titles, and comprises 30,000 pages in 58 loose-leaf volumes.

no effort was made to plan an organizational structure that would keep the growing Code uniform in style and easy to use. As a result, the CAC has become a frustrating and intimidating document for the user.

228. Vacua.

NOTE: Authority

HISTORY:

1. New section filed
2. Certificate of Competence (62, No. 18).
3. Amendment of subsection 76, No. 12.
4. Repealer filed 10-5-51; effect.

230. Issuance of Permits for O.
Bass and Striped Bass.

Permits may be issued by the department for prizes or other inducements totaling in the taking of trout, black bass and striped bass in accordance with the following conditions:

- (a) Application shall be made on a standard form and shall include the name, address and phone number of the organization or individual, the location and date of the prizes, and expected number of participants.

(1) The application shall be submitted to the department prior to the proposed event.

- **Index**
- **Cross Reference**
- **User's Manual**

A consulting contract for the formatting has been awarded to California State University, Chico. There, a team of experts in law, library and computer sciences is working to design a format appropriate to the CAC.

Underway is the development of an index that will cross reference all regulations and have a table of contents at the beginning of each division of the Code. Standardization of various components is being completed and a users' manual is being printed.

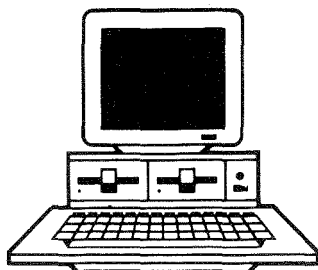
The formatting is another step taken by OAL to promote a better understanding and easier access to state regulations by those who live and do business in California.

PLANS IN PROGRESS

Office Automation

Plans to acquire a state-of-the-art office automation system are almost complete, with installation anticipated in the summer of 1986.

The system represents an important milestone in OAL's efforts to increase both the amount and quality of public information.



OAL will have the capability to provide up-to-the-minute information on its regulatory activities and those of other state agencies. The data base will also enable us to produce statistical information and analyses more quickly, in greater depth, and with wider application than ever before.

The system will have an integrated, across-the-board application. Management will be able to ensure the most efficient use of resources and reduce the amount of overtime often required to meet the many legal deadlines governing OAL's regulatory reviews and determinations.

At any given time, OAL has more than 100 regulatory and official notice filings under review. The regula-

tory files range from the simple to the complex. A file may be composed of a regulation printed on a single page with a few supporting documents or hundreds of pages of text and several boxes of documents. In any case, OAL has 30 days to complete each review and issue its decision.

The new automation system will enable OAL to predict the number, size, type and complexity of filings and relate this to the number of attorneys available for review work. This will effectively eliminate work compaction that occurs at both the legal and support staff levels.

The system will help reduce the number of unapprovable regulations as problem areas in regulatory filings can be identified more quickly. This will speed the process and provide agencies with a "blueprint" for future guidance. It will give OAL the data and time necessary for detailed analysis of regulatory activities statewide. Automation will greatly facilitate the compilation and publication of informational and legal materials now done manually by OAL staff.



New Quarters

The premises occupied by OAL since soon after it was established in 1980 are no longer adequate, nor is it financially feasible to convert these premises to accommodate the automation system. Therefore, OAL plans to move to new quarters near the Capitol in 1986.

1985 IN STATISTICAL PROFILE

Californians have had unprecedented opportunities to help draft state regulations—and to have something positive come of their comments—since 1980, when OAL was created and regulatory reform instituted. This has made the promulgation of regulations by state agencies and departments a very open-to-the public process.

The legislation that created OAL included provisions requiring state regulatory agencies to review all regulations in place prior to OAL's establishment to ensure that they meet the same critical standards required for subsequent regulations. It is the agencies' responsibility to identify those to be repealed, amended, and retained and to provide for public scrutiny.

To ensure that the general public is aware of all such determinations by participating agencies, the Office of Administrative Law routinely publishes notices of them in the weekly *California Administrative Notice Register*.

By the end of 1985, all but 12 agencies had reviewed their pre-1980 regulations. Of the 31,632 regulatory sections reviewed, 28% or 8,890 were earmarked for repeal, and 37% or 11,637 were earmarked for amendment to bring them into compliance with the APA. Of the 11,105 regulations that the agencies planned to retain, OAL's review identified an addi-

tional 1,486 regulations that should be repealed, and has instructed the agencies to do so.

Statistics on actions completed by the close of 1985 on both pre-1980 and post-1980 regulations reveal that 3,971 were repealed and 7,998 amended in response to public concerns. OAL disapproved 2,411 regulations and agencies withdrew another 6,084 from OAL review.

Between January, 1983, and December 31, 1985, a total of 20,464 regulations were repealed, amended, disapproved or otherwise kept from taking effect.

Statistics are one of the more tangible ways to measure how well regulatory reform is working, but they tell only one side of the story. They reveal only what was done. These statistics do not show how many times an agency decided against initiating a regulation. Experience over the past three years leads OAL to conclude, however, that the process has served to encourage agency administrators to question more closely the need to promulgate regulations.



While OAL's review process guarantees that the public's concerns will be addressed by the promulgating agencies, it is the public who provide the knowledge in their areas of expertise that is the real key to making regulatory reform work. **By working together, the public and state government ensure that regulations in the best interests of all Californians are promulgated.**

ADMINISTRATIVE

OAL is organized into three divisions—Legal, Regulatory Determinations, and Public Programs and Administration. Each is headed by a Deputy Director who reports to the Director.

The Legal Division reviews regulatory actions of agencies and departments of state government. This review is limited to the contents of the official rulemaking file as submitted by the promulgating department.

The Regulatory Determinations Division responds to written requests submitted to OAL under section 11347.5 of the APA. It conducts independent investigations to determine if an agency is enforcing as a regulation a requirement that should be, but has not been, adopted in compliance with the APA process.

The Public Programs and Administration Division is responsible for all other activities of OAL. The Public Programs unit prepares and distributes materials for the general public and other governmental agencies.

To better accommodate the increasing number of requests to talk before organizations and legal groups, a speaker's bureau was established. Members of OAL's Public Programs and Legal staffs are available to speak to groups. The bureau adds another dimension to OAL's goals of making the public aware of the regulation-making process and encouraging their involvement.

OVERVIEW

The Public Programs unit also publishes the California Administrative Notice Register, the California Administrative Code, OAL UPDATE, and governmental documents and reports. Special projects, such as the formatting of the CAC and office automation, are undertaken by the Public Programs unit.

Development of OAL's budget, staffing and other business related functions are handled by the Administration unit.



OAL PUBLICATIONS

This is a descriptive list of publications, resource materials and services made available to the public by the Office of Administrative Law:

RULEMAKING PROCESS FLOW CHART

One side of the sheet is a flow chart that depicts the step-by-step process of adopting, amending or repealing regulations in California. The other side summarizes the statutory requirements that pertain to the adoption and approval of regulations.

YOUR WINDOW ON STATE GOVERNMENT

This is a brochure that describes the function of the Office of Administrative Law and explains how the public can get involved in the adoption of regulations.

AND SERVICES

The Directory lists the state agencies that adopt regulations. The director of the agency, a contact person, and the Title in which the regulations are found in the California Administrative Code are named.

DIRECTORY OF STATE REGULATORY AGENCIES

A bi-monthly newsletter, OAL UPDATE deals with matters of interest to those members of the public who wish to participate in the regulatory process and those who have an ongoing interest in the role and functions of OAL. It is mailed free of charge to anyone who has requested a subscription.

OAL UPDATE

OAL MAILING LIST

Anyone who wishes to be informed of changes in the regulatory process may request his or her name be placed on OAL's mailing list.

STATUTE AND REGULATIONS GOVERNING OAL

This booklet contains the Administrative Procedure Act (Government Code Sections 11340-11356), the statute that governs OAL and describes the process agencies must follow in developing and filing regulations. Regulations that govern OAL's review of regulatory actions and regulatory determinations under provisions of Government Code Section 11347.5 are also in the booklet.

The Notice Register is a weekly publication of notices of regulations proposed by state agencies. It also contains a summary of regulations filed with the Secretary of State, and opinion letters that explain OAL disapprovals. The Notice Register is available at a subscription price of \$50 per year. Subscription information for the Notice Register is on the inside cover of the sample copy.

CALIFORNIA ADMINISTRATIVE NOTICE REGISTER

OAL SPEAKERS BUREAU

OAL's Speakers Bureau offers assistance to groups interested in learning about the regulatory process. Call or write OAL for more information.

CODE RESEARCH

Individuals who wish to trace the historic process by which a specific California state regulation has been adopted, and/or amended, but who do not have access to the comprehensive California Administrative Register, may request code research be done for them by the Office of Administrative Law. OAL is one of a few facilities that maintain complete, accurate and historic sets of the California Administrative Register. A fee of \$43.50 per hour is charged for code research.

OAL INFORMATION LINE

Telephone OAL at (916) for information about OAL's role and functions in state government, its publications and services, status of regulations under review and how private individuals can participate in the regulatory process.

HOW TO RECEIVE OAL PUBLICATIONS

Please use the mail-in coupon on the last page of this brochure or telephone OAL at (916) 323-6225, and ask to speak to a public programs coordinator.

CALIFORNIA ADMINISTRATIVE CODE
TITLE 1. GENERAL PROVISIONS
CHAPTER 1. OFFICE OF ADMINISTRATIVE LAW

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- 11 Necessity in the context of mandated regulations
- 12 Nonduplication
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ARTICLE 2. DETERMINATIONS OF WHETHER STATE AGENCY RULES ARE REGULATIONS

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OAL Regulations
CALIFORNIA ADMINISTRATIVE CODE
TITLE 1

Chapter 1. Office of Administrative Law

Article 1. Adoption and Review of Regulations

“Necessity.”

Section 10. (a) In reviewing the rulemaking record for compliance with subsection (b), the Office of Administrative Law shall not dispute the decision of a rulemaking agency to adopt a particular regulatory provision when the information provided for in subsection (b) is also adequate to support one or more alternative conclusions.

(b) In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

(1) a description of the public problem, administrative requirement, or other condition or circumstance which each provision of the regulation is intended to address; and

(2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Sections 11340.1, 11346.7(a), 11349.1(a)(1), and 11349.1(b), Government Code.

“Necessity” in the context of mandated regulations.

Section 11. When an agency adopts a regulation which is identical to another statute, regulation, or standard, the “necessity” standard of Government Code section 11349.1 shall be met if the record demonstrates that the specific provisions adopted in the regulation are mandated by a California statute or other applicable law. However, when an agency adopts a provision of a regulation that is not mandated by the specific enabling statute or law, the record shall include the information required by section 10(b) for each such provision of the regulation.

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Sections 11346.7(d), 11349(a), and 11349.1(a), Government Code.

“Nonduplication.”

Section 12. (a) A regulation shall “serve the same purpose,” as that term is used in Government Code section 11349(f), where it either repeats or rephrases in whole or in part a state or federal statute or regulation.

(b) A regulation which duplicates a state or federal statute or regulation

shall, nonetheless, meet the “nonduplication” standard of Government Code section 11349.1 if any one of the following conditions is met:

(1) The proposed regulation duplicates or overlaps a state or federal statute or regulation which is cited as “authority” or “reference” for the proposed regulation and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code section 11349.1(a)(3). Justification for such duplication shall be provided by inclusion of facts, explanations, expert opinions or other information in the rulemaking record which establish that the overlap or duplication is necessary in order for the regulation to satisfy the requirements of Government Code section 11349.1(a)(3);

or

(2) The agency meets the requirement of Government Code section 11346.7(d) when adopting or amending federally mandated regulations;

or

(3) The duplication is mandated or authorized by a specified statute or other provision of law. The agency shall include a statement in its rulemaking record which (A) identifies the state or federal statute(s) or regulation(s) which the regulation under review overlaps or duplicates, and (B) identifies the provision of law which mandates or permits the overlap or duplication. This statement shall set forth the applicable provision of law in a citation style which clearly identifies the statute or regulation and provides information necessary to locate the full text of the statute or regulation.

NOTE: Authority cited: Section 11349.1(b), Government Code. Reference: Sections 11349(f), 11349.1(a)(6), 11346.7(a) and (b), Government Code.

“Authority” and “Reference.”

Section 14. In reviewing a regulation for compliance with the “authority” and “reference” requirements of Government Code section 11349.1, the Office of Administrative Law shall apply the following standards and presumptions:

Sources of “Authority”

(a) “Authority” shall be presumed to exist only if an agency cites in its “authority” note proposed for printing in the California Administrative Code:

(1) a California constitutional or statutory provision which expressly permits or obligates the agency to adopt, amend, or repeal the regulation; or

(2) a California constitutional or statutory provision that grants a power to the agency which impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted.

Sources of “Reference”

(b) “Reference” shall be presumed to exist if an agency is empowered to implement, interpret or make specific a:

(1) California constitutional provision; or

(2) California statute; or

(3) federal statute or regulation; or

(4) court decision or order,

cited in its “reference” note proposed for printing in the California Administrative Code.

Review of “Notes”

(c) In reviewing “notes”, the Office shall use the same analytical approach employed by the California Supreme Court and the California Court of Appeal, as evidenced in published opinions of those courts.

(1) For purposes of this analysis, an agency’s interpretation of its regulatory power, as indicated by the proposed citations to “authority” or “reference” or any supporting documents contained in the rulemaking record, shall be conclusive unless:

(A) the agency’s interpretation alters, amends or enlarges the scope of the power conferred upon it; or

(B) a public comment challenges the agency’s “authority”; or

(C) a judicial interpretation of a provision of law cited as “authority” or “reference” contradicts the agency’s interpretation.

(2) In the absence of an appellate court decision to the contrary, the Office shall presume the constitutionality of the statutes cited by an agency as “authority” or “reference.”

Citations

(d) Citations of “authority” and “reference” for each regulatory section which has been adopted or amended and submitted to the Office for filing with the Secretary of State shall appear at the end of each section. Court decisions relied upon by agency as support for the citations may also be cited at the end of each relevant section.

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Sections 11343.1(b), 11344(d) and 11349(e); Cal. Const. Art. 3, Section 3.5; *Rivera v. City of Fresno* (1971) 6 Cal. 3d 132, *First Industrial Loan Co. v. Daugherty* (1945), 26 Cal. 2d 545, *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal. 2d 753, *Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal. 2d 287, *Boone v. Kingsbury* (1928) 206 Cal. 148, *Bank of Italy v. Johnson* (1926) 200 Cal. 1, *Hodge v. McCall* (1921) 185 Cal. 330, *Pope v. Bd. of Equalization of State of Cal.* (1983) 146 Cal. App. 3d 1132, *Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal. App. 3d 112.

“Clarity.”

Section 16. In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, the Office of Administrative Law shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:

(1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning and the varying interpretations cannot be harmonized by settled rules of construction; or

(2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or

(3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or

(4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or

(5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or

(6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

(b) Persons shall be presumed to be “directly affected” if they:

(1) are legally required to comply with the regulation; or

(2) are legally required to enforce the regulation; or

(3) incur from the enforcement of the regulation a benefit that is not common to the public in general; or

(4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Section 11349(c), Government Code.

“Incorporation by reference.”

Section 20. (a) “Incorporation by reference” means the method whereby a regulation printed in the California Administrative Code makes provisions of another document part of that regulation by reference to the other document.

(b) Material proposed for “incorporation by reference” shall be reviewed in accordance with procedures and standards for a regulation published in the California Administrative Code. Except as otherwise specified in section 11 of these regulations, the Office of Administrative Law shall not review material proposed for “incorporation by reference” for compliance with the applicable standards of Government Code section 11349.1 when a California statute or other applicable law specifically requires the adoption or enforcement of the incorporated material by the rulemaking agency.

(c) An agency may “incorporate by reference” only if the following conditions are met:

(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Administrative Code.

(2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.

(3) The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.

(4) The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance. Where an authorizing California statute or other applicable law

requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.

(5) The regulation text specifies which portions of the document are being incorporated by reference.

(d) If the document is a formal publication reasonably available from a commonly known or identified source, the agency need not provide six duplicate copies of the document under Government Code section 11343(c).

(e) Where a regulation which incorporates a document by reference is approved by the Office and filed with the Secretary of State, the document so incorporated shall be deemed to be a regulation subject to all provisions of the Administrative Procedure Act, Chapter 3.5, Part 1, Division 3, Title 2 of the Government Code.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Sections 11343(c), 11344(e), 11346.4, 11346.5, 11346.7(d), and 11346.8(c), Government Code.

“Nonsubstantial changes.”

Section 40. Changes to the original text of a regulation shall be deemed to be “nonsubstantial,” as that term is used in Government Code section 11346.8, if they clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text.

NOTE: Authority cited: Section 11342.4 and 11349.1, Government Code. Reference: Sections 11346.8(c), Government Code.

“Sufficiently related” changes.

Section 42. Changes to the original text of a regulation shall be deemed to be “sufficiently related,” as that term is used in Government Code section 11346.8, if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted.

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Section 11346.8(c), Government Code.

Public availability of changes to regulations

Section 44. At least 15 calendar days prior to the adoption of a change to a regulation required to be made available to the public by Government Code section 11346.8(c), the rulemaking agency shall mail a notice stating the period within which comments will be received together with a copy of the full text of the regulation as originally proposed, with the proposed change clearly indicated, to the following:

- (a) all persons who testified at the public hearing; and
 - (b) all persons who submitted written comments at the public hearing;
- and

(c) all persons whose comments were received by the agency during the public comment period; and

(d) all persons who requested notification from the agency of the availability of such changes.

The rulemaking record shall contain a statement confirming that the agency complied with the requirements of this section and stating the date upon which the notice and text were mailed.

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Section 11346.8(c), Government Code.

15-Day public availability of supporting documents and information.

Section 45. (a) A notice shall be deemed to comply with the requirements in Government Code section 11346.7(b)(1) and 11346.8(d) that certain documents and information be made available for public comment when:

(1) the notice contains a list specifically describing the documents and information, and states where and when they are available for public inspection; and

(2) at least 15 calendar days prior to the adoption or amendment of a resulting regulation, the rulemaking agency mails a copy of the notice to the persons described in section 44.

(b) The documents and information shall be available for public inspection at the location described in the notice for at least 15 calendar days prior to the adoption of the resulting regulation.

(c) Any written comments regarding the documents or information received by the agency during the availability period shall be summarized and responded to in the final statement of reasons as specified in Government Code section 11346.7(b)(3).

(d) The rulemaking record shall contain a statement confirming that the agency complied with the requirements of subsection (a) and stating the date upon which the notice was mailed.

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Sections 11346.7(b)(1), 11346.7(b)(3), Government Code.

Clearly indicated changes.

Section 46. (a) Changes to regulations in accordance with Government Code section 11346.8(c) shall be made using a uniform method and shall illustrate accurately all changes to the original text.

(b) Methods for illustrating such changes may include but are not limited to the following:

(1) annotations which specify the added or deleted language; or

(2) footnotes which specify the added or deleted language; or

(3) double strikeout and double underline; or

(4) for changes to newly proposed text; strikeout and double underline or strikeout and italics.

(c) A written description of the method used shall appear as the first page of the changed text.

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Section 11346.8(c), Government Code.

Emergency regulations adopted after completion of rulemaking procedures.

Section 56. When a regulation adopted as an emergency is submitted to the Office of Administrative Law with the certificate of compliance and the rulemaking file, and the rulemaking file documents that the agency has complied with the Government Code sections 11346.4 through 11346.8, the Office shall:

(a) review the emergency statement within 10 days and not file the regulation if the Office determines that the statement fails to satisfy the requirements of Government Code section 11346.1(b); and

(b) review the emergency regulation and rulemaking file within 30 days and order repeal of the regulation if the Office determines that the regulation fails to meet the standards set forth in section 11349.1 of the Government Code or if the Office determines that the regulation fails to comply with the provisions of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.

NOTE: Authority cited: Sections 11342.4 and 11349.1, Government Code. Reference: Sections 11346.1 and 11349.6, Government Code.

Incorporation of prior files by reference.

Section 84. In re-submitting to the Office of Administrative Law a regulation previously withdrawn or disapproved in accordance with either Government Code section 11349.3 or 11349.4, an agency may incorporate by reference all or any part of the withdrawn or disapproved file. To incorporate such files, the agency shall submit a transmittal memo identifying the prior rulemaking file by date of submission and specifying that portion of the prior file that is incorporated by reference.

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Section 11347.3(b), Government Code.

Statement of mailing notice.

Section 86. The rulemaking record shall contain a statement confirming that the agency complied with the provisions of Government Code section 11346.4(a)(1) through (4) regarding the mailing of notice of proposed action at least 45 days prior to public hearing or close of the public comment period, and stating the date upon which the notice was mailed. This section is not intended to require an agency to provide a copy of its mailing list to support the statement.

NOTE: Authority cited: Sections 11342.4 and 11349.1, Government Code. Reference: Section 11346.4, Government Code.

“Transcript,” “Recording” or “Minutes.”

Section 90. (a) Information submitted in compliance with the requirements of Government Code section 11347.3(a)(8) shall fully and accurately reflect all proceedings applicable to the rulemaking action under review and shall be adequate:

(1) to ensure effective review of the record by the Office of Administrative Law, in light of the provisions of the Administrative Procedure Act providing for meaningful public participation; and

(2) to permit effective judicial review of the record.

(b) Material submitted as a “transcript” or “recording” in fulfillment of this requirement shall consist of a word-by-word, speaker-by-speaker record of all that is said on the record in any and all public hearings or public meetings held as part of the adoption, amendment or repeal of the regulation in question.

(c) “Minutes” submitted in fulfillment of this requirement shall provide a summary of the proceedings, and in all cases shall contain information sufficient to meet the requirement specified in subsection (a).

(d) Where information submitted pursuant to this section also contains material that is unrelated to the subject of the rulemaking action, that information submitted in compliance with subsection (b) or (c) shall be clearly identified as such.

NOTE: Authority cited: Section 11349.1(b), Government Code. Reference: Sections 11347.3(a)(8) and 11350(b), Government Code; *California Optometric Association v. Lackner* (1976) 60 Cal. App. 3d 500, 509, 131 Cal. Rptr. 744, *California Association of Nursing Homes, Sanitariums, Rest Homes and Homes for the Aged, Inc. v. Williams* (1970) 4 Cal. App. 3d 800, 810-812, 84 Cal. Rptr. 590.

Publication of “Changes without regulatory effect.”

Section 100. (a) The Office of Administrative Law shall determine whether changes submitted are “changes without regulatory effect,” as defined in subsection (b), within 30 days of their receipt. The Office shall send written notification of its determination to the agency which submitted the changes.

(b) If the Office determines that the submitted changes are “changes without regulatory effect,” the submitted changes shall be published in the California Administrative Code. Such changes shall include, but not be limited to:

(1) renumbering, reordering, or relocating an existing regulation of the California Administrative Code, provided that the change does not alter the requirements, rights, responsibilities, conditions, or prescriptions contained in the existing regulations; or

(2) removal from the California Administrative Code of any existing sections for which the statutory or constitutional authority has been repealed; or

(3) any change in structure, syntax, reference, grammar, or other change which does not alter the requirements, rights, responsibilities, conditions, or prescriptions contained in the existing regulation; or

(4) changes in the “authority” or “reference” citations for a regulation.

(c) In submitting “changes without regulatory effect” to the Office for review the agency shall:

(1) submit seven copies of the regulations with additions shown in underline or italics and deletions shown in strike-out; and

(2) attach to each copy of the regulations a completed FACE SHEET FOR FILING ADMINISTRATIVE REGULATIONS WITH THE OFFICE OF ADMINISTRATIVE LAW, STATE OF CALIFORNIA STD Form 400 (Rev. 8/85), with at least one face sheet bearing an original signature; and

(3) submit a written statement specifying the reasons why the changes are “changes without regulatory effect.”

NOTE: Authority cited: Sections 11342.4 and 11349.1(b), Government Code. Reference: Sections 11343.8, 11344.6 and 11346, Government Code.

Publication date and submission of notice for approval and publication.

Section 120. (a) Each Friday is designated as the publication date of the California Administrative Notice Register.

(b) At least 10 calendar days before the desired publication date, an agency shall submit to the Office its notice of proposed regulatory action accompanied by a copy of the express terms of the proposed action and the initial statement of reasons.

(c) If a notice fails to comply with the requirements of the Government Code, the Office shall contact the agency within three business days to correct any deficiencies. If these deficiencies cannot be corrected by agreement between OAL and the agency within the three-day period, OAL shall promptly return the notice to the agency with a letter explaining its reasons for disapproval.

NOTE: Authority cited: Section 11344.6, Government Code. Reference: Sections 11344.5, 11346.4, 11346.51, 11346.53 and 11346.7, Government Code.

Article 2.

Determinations of Whether State Agency Rules are Regulations

Definitions.

Section 121. The following definitions shall apply to the regulations contained in Article 2 of this chapter:

(a) “Determination” means a finding by the office as to whether a state agency rule is a regulation, as defined in Government Code section 11342(b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the Administrative Procedure Act or unless it has been exempted by statute from the requirements of the Act.

(b) “Request for determination” means a request made by any person to the Office of Administrative Law, in accordance with the procedures specified in this chapter, to issue a determination as provided by Government Code section 11347.5, as to whether a state agency rule is a regulation as defined in Government Code section 11342(b).

(c) “State agency rule” means any state agency guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule which has not been adopted as a regulation and filed with the Secretary

of State pursuant to the Administrative Procedure Act, Chapter 3.5 of Title 2, Division 3, Part 1 of the Government Code.

(d) "Transmit" means to physically deliver a letter, document or other written instrument to the addressee or to deposit the written instrument into the United States mail or other mail delivery service.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Section 11347.5, Government Code, *Armistead v. State Personnel Board*, (1978) 22 Cal. 3rd 198.

Contents of Requests for Determination.

Section 122. (a) All requests for determination shall be in writing, and shall contain at a minimum:

(1) The name and address of the person making the request;

(2) The name of state agency which has issued, or is utilizing, enforcing, or attempting to enforce the rule;

(3) A copy of the state agency rule which is the subject of the request or a factual description of the rule and its application to the person making the request or other affected persons;

(4) If a copy of the state agency rule is not available, a description of the state agency's method of issuance, utilization, enforcement, or attempt to enforce the rule.

(b) The request and all written information or evidence submitted with the request shall be accompanied by a dated and signed written statement saying that the person submitting the request declares under penalty of perjury that he or she believes that the information contained in the request and any other written information or evidence submitted with the request is true and correct.

(c) Any person who submits to the Office a request for determination, shall first transmit a copy of the request for determination and any written information or evidence contained in or submitted with the request to the head of the state agency whose rule is the subject of the request. A copy of a signed and dated statement under penalty of perjury telling how and when the person making the request transmitted the documents to the head of the state agency shall accompany the request for determination.

(d) If the request is submitted by a state agency, the request shall be signed and certified by the head of the state agency or his or her authorized representative in accordance with Code of Civil Procedure section 2015.5. The request shall contain the legal analysis and conclusions of the agency's legal counsel in addition to the other information required by this section.

(e) The Office shall return the request if it does not comply with the requirements of this section. The Office shall specify in writing the requirement or requirements which must be complied with before the request can be considered.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Section 11347.5, Government Code.

Commencement of active consideration of a request for determination.

Section 123. Within five working days after the date of receipt by the

Office of a request for determination, the Office shall transmit a written notification of its receipt to the person who submitted the request. All requests for determination which meet the requirements of Section 122 of these regulations shall be considered by the Office in the order in which they are received. The Office shall commence active consideration of each request as soon as possible after its receipt within available program resources. When the Office commences active consideration of the request, the Office shall transmit written notification to the person who submitted the request and the state agency whose rule is the subject of the request.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Section 11347.5, Government Code.

Submittal of written information or evidence by interested persons.

Section 124. (a) When the Office commences active consideration of the request for determination, the Office shall publish the request for determination, or a summary or description of the request for determination, in the California Administrative Notice Register. The Office shall at the same time publish a notice which shall specify that any interested person may submit written information or evidence which complies with the requirements of this section concerning the state agency rule to the Office within 30 days after the date of publication of this notice. The notice shall also specify that such written information or evidence received by the Office within the 30 day period shall be considered in making a determination.

(b) All written information or evidence submitted to the Office by any interested person pursuant to this section shall be accompanied by a dated and signed written statement saying that the person submitting the information or evidence declares under penalty of perjury that he or she believes that the information or evidence is true and correct.

(c) Any person who submits written information or evidence to the Office pursuant to this section shall first transmit a copy of the written information or evidence to the head of the state agency whose rule is the subject of the request for determination. A copy of a signed and dated statement under penalty of perjury telling how and when the person transmitted a copy of the written information or evidence to the head of the state agency shall be submitted to the Office with the written information or evidence.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Sections 11347.5 and 11344.1(a)(8), Government Code.

Consideration of written information or evidence.

Section 125. (a) In making its determination, the Office shall consider all written information or evidence which is received by the Office and which

fully complies with the provisions of sections 122 and 124 of these regulations.

(b) In making its determination, the Office shall also consider the following written information or evidence received by the Office from the state agency prior to or within 45 days after the publication of the request for determination if it complies with the requirements of this section:

(1) the agency's responses, if any, to any written information or evidence submitted to the Office in accordance with the provisions of sections 122 and 124 of these regulations;

(2) any other written information or evidence which the agency submits regarding whether the rule under consideration is a regulation.

(c) Any response, written information or evidence submitted to the Office by the state agency pursuant to this section shall be signed and verified in accordance with Code of Civil Procedure section 2015.5 by the head of the state agency or by his or her authorized representative.

(d) Any response, written information or evidence submitted to the Office by the state agency, shall at the same time be transmitted by the state agency to the person who submitted the request. A copy of a statement proving the transmittal, dated and signed under penalty of perjury, shall be submitted to the Office.

(e) Nothing in this section shall preclude the state agency which issued the rule for which the determination was requested from providing the Office with written information or evidence regarding the rule prior to the Office's commencement of active consideration of the request for determination, so long as the agency complies fully with the requirements of this section.

(f) In making its determination, the Office shall not consider any response, written information, or evidence submitted by any person or by the state agency which does not comply with the requirements of this section, section 122 or section 124 of these regulations.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Section 11347.5, Government Code.

Time period within which the Office shall issue a determination.

Section 126. Within 75 days of the date of publication of the notice regarding the commencement of active consideration of the request for determination, commencement the Office shall issue a written determination as to whether the state agency rule is a regulation, along with the reasons supporting the determination.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Section 11347.5, Government Code.

Notification of the issuance of a determination.

Section 127. The Office's determination and supporting reasons shall be filed upon issuance with the Secretary of State and shall become final on the 30th day after filing. The Office's determination and supporting reasons shall be published in the California Administrative Notice Register. A copy of the Office's determination and supporting reasons shall be transmitted to

the person who submitted the request for determination, to the agency, to the Governor and to both Houses of the Legislature.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Sections 11347.5 and 11344.1(a)(8), Government Code.

Issuance of a determination by the Office on its own motion.

Section 128. The provisions of this chapter shall be applicable when the Office undertakes to issue a determination on its own motion. In such cases, the notice that the Office intends to issue a determination, and the Office's written determination shall specify that the Office intends to issue, or has issued, such a determination on its own motion. The notice and the Office's written determination shall include a description of the state agency rule regarding which the Office intends to issue, or has issued, such a determination.

NOTE: Authority cited: Section 11342.4, Government Code. Reference: Section 11347.5, Government Code.

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