Guide to

Public Participation in the Regulatory Process

Office of Administrative Law

INTRODUCTION

In California, laws are enacted by the Legislature and are called "statutes". Often times, the Legislature enacts statutes that allow or require a state agency in the Executive Branch to adopt "regulations". A "regulation" is a policy or procedure affecting the public or any segment of the public that implements, interprets, or makes specific a statute the state agency enforces or administers. Unless expressly exempted, state agencies must follow the procedures and requirements set forth in the California Administrative Procedure Act (Government Code § 11340 *et seq.*) (APA) and rules adopted by the Office of Administrative Law (OAL). Once properly adopted, regulations have the force of law and therefore can directly affect the legal rights and duties of members of the public.

The APA is designed to provide the public with a meaningful opportunity to participate in the adoption of regulations by California state agencies and to ensure the creation of an adequate record for OAL and judicial review. Every California state agency must satisfy the basic minimum procedural requirements established by the APA for the adoption, amendment or repeal of an administrative regulation unless the agency is expressly exempted by statute. The following materials are intended to provide guidance on how members of the public can participate in the rulemaking process.[1] This includes a general overview APA and sources of relevant information, a discussion on what must be adopted pursuant to the APA, an overview of the regular rulemaking process and an overview of the emergency rulemaking process.

[1] / This document is for information purposes only. For specific legal requirements and procedures, please review the California Administrative Procedure Act (Government Code § 11340 et seq.) (APA) and rules adopted by the Office of Administrative Law (OAL).

WHAT IS A REGULATION THAT MUST BE ADOPTED PURSUANT TO THE APA?

Not every statute requires the adoption of an implementing regulation. In this regard, it is useful to think about three types of statutory provisions:

1) ***self-executing, 2) wholly-enabling and 3) susceptible to interpretation.***

A self-executing statutory provision is so specific that no implementing or interpreting regulation is necessary to give it effect. An example is a statutory provision that provides: "The annual licensing fee is $500."

In contrast, a wholly-enabling statutory provision is one that has no legal effect without the enactment of a regulation. An example is a statute that provides: "The department may set an annual licensing fee up to $500." This type of statute cannot be legally enforced without a regulation setting the fee.

A statutory provision that is susceptible to interpretation, may be enforced without a regulation, but may need a regulation for its efficient enforcement. An example is a statute that provides: "There shall be adequate space between hospital beds." Conceptually, this statute could be enforced on a case-by-case basis, but such enforcement would probably present significant difficulties. *(It does not violate the APA to enforce or administer a statute on a case-by-case basis so long as no rule or standard of general application is used that should have been adopted pursuant to the APA.)*

Every "regulation" is subject to the rulemaking procedures of the APA unless expressly exempted by statute.

IT'S MANDATORY Compliance with the rulemaking requirements of the Administrative Procedure Act is mandatory. (***Armistead v. State Personnel Board.***) All regulations are subject to the APA, unless expressly exempted by statute. (***Engelmann v. State Board of Education.)*** Any doubt as to the applicability of the APA should be resolved in favor of the APA. (***Grier v. Kizer***.) If a rule looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated by the courts as a regulation whether or not the issuing agency so labeled it. (***SWRCB v. OAL***.)

"Regulation" means <u>every</u> rule, regulation, order, or standard of general application or the amendment, supplement, or revision of <u>any</u> rule, regulation, order or standard adopted by <u>any</u> state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

A GENERAL RULE ***A standard or procedure of general application (general rule) is a standard or procedure that applies to an open class. (***Roth v. Department of Veterans Affairs***.) An open class is one whose membership could change*****. This broad definition includes many classes of rules that are exempt from notice and comment under the federal Administrative Procedure Act.**

THE PROHIBITION The APA specifically prohibits any state agency from making any use of a state agency rule which is a "regulation" as defined in Government Code section 11342.600, that should have, but has not been adopted pursuant to the APA (unless expressly exempted by statute). Such a rule is called an “underground regulation” and its efficacy may be challenged to OAL or to a court.

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a “regulation” under the APA unless it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA. Government Code section 11340.5(a)

Armistead v. State Personnel Board

In 1978, the California Supreme Court made it clear that compliance with the rulemaking requirements of the Administrative Procedure Act is mandatory. (***Armistead v. State Personnel Board.***) In doing so, the court quoted a 1955 legislative report finding that noncompliance with APA rulemaking requirements was common.

> "The committee is compelled to report to the Legislature that it has found many agencies which avoid the mandatory requirements of the Administrative Procedure Act of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the Administrative Code.
>
> "The committee has found that some agencies did not follow the act's requirements because they were not aware of them;

some agencies do not follow the act's requirements because they believe they are exempt; at least one agency did not follow the act because it was too busy; some agencies feel the act's requirements prevent them from administering the laws required to be administered by them; and many agencies . . . believe the function being performed was not in the realm of quasi-legislative powers.

"The manner of avoidance takes many forms, depending on the size of the agency and the type of law being administered, but they can all be briefly described as 'house rules' of the agency.

"They consist of rules of the agency, denominated variedly as 'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or are directed to the public in the form of circulars or bulletins." [First Report of the Senate Interim Committee on Administrative Regulations (1955) as cited in ***Armistead,*** p. 205.]

HOW TO DETERMINE WHETHER AGENCY'S POLICY OR PROCEDURE SHOULD BE ADOPTED PURSUANT TO THE APA

Preliminarily determine whether the particular policy or procedure is already set out in an applicable statute or duly adopted regulation. (Generally, duly adopted regulations are printed in the California Code of Regulations.) The adoption of a policy or procedure as a "regulation" pursuant to the APA is not required if you find the specific policy or procedure in an applicable statute or duly adopted regulation.

If you determine that the policy or procedure (i.e., rule) is not set out in an applicable statute or duly adopted regulation, use the following three-step analysis to determine whether the policy or procedure must be adopted as a regulation pursuant to the requirements and procedures of the APA:

First, is the policy or procedure either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the policy or procedure been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

Third, has the policy or procedure been expressly exempted by statute from the requirement that it be adopted as a "regulation" pursuant to the APA?

If the policy or procedure satisfies steps one and two, then it is a "regulation" as defined in the APA and must be adopted pursuant to the APA unless it falls within an express statutory exemption from the requirements of the APA. Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Government Code section 11346.) If the policy or procedure does not fall within an express statutory exemption, then it is subject to the rulemaking requirements of the APA.

EXPRESS STATUTORY EXEMPTIONS ARE FOUND IN THE APA AND IN OTHER STATUTES. THE FOLLOWING ARE SOME OF THE EXPRESS EXEMPTIONS SET OUT IN THE APA.

- **INTERNAL MANAGEMENT:** "A regulation that relates only to the internal management of the state agency." (Government Code Section 11340.9(d).)

  The internal management exception to the APA is narrow. A regulation is exempt as internal management if it:

(1) directly affects only the employees of the issuing agency, and

(2) does not address a matter of serious consequence involving an important public interest. (***Armistead, Stoneham, Poschman,*** and ***Grier***.)

- **FORMS:** "A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued." (Government Code Section 11340.9(c).)

  This legislative language creates a limited statutory exemption relating to forms. A regulation is *not* needed if the form's contents consist only of existing, specific legal requirements.

  By contrast, if an agency *adds any language which satisfies the definition of "regulation" to the existing legal requirements*, then, under Government Code section 11340.9(c), a formal regulation is "needed to implement the law under which the form is issued." Section 11340.9(c) cannot be interpreted as permitting state agencies to avoid mandatory APA rulemaking requirements by simply typing regulatory language into a form because this interpretation would allow state agencies to ignore the APA at will.

- **AUDIT GUIDELINES:** "A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial arrangement, or in the defense, prosecution, or settlement of a case, if disclosure of the criteria or guidelines would do any of the following:

  "(1) Enable a law violator to avoid detection.

  "(2) Facilitate disregard of requirements imposed by law.

"(3) Give clearly improper advantage to a person who is in an adverse position to the state." (Government Code Section 11340.9(e).)

- **ONLY LEGALLY TENABLE INTERPRETATION:** "A regulation that embodies the only legally tenable interpretation of a provision of law." (Government Code Section 11340.9(f).)

- **RATE, PRICE, TARIFF:** "A regulation that establishes or fixes rates, prices, or tariffs." (Government Code Section 11340.9(g).)

- **LEGAL RULING OF TAX COUNSEL:** "A legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization." (Government Code Section 11340.9(b).)

- **PRECEDENT DECISION:** A quasi-judicial decision by a state agency that is designated pursuant to Government Code Section 11425.60 as a precedent decision is expressly exempt from being adopted as a "regulation" pursuant to the APA.

THE RULEMAKING PROCESS

- **Delegation of Authority:**

How can a state agency in the executive branch adopt rules and regulations that have the force of law? The California Constitution separates the powers of the state government into the legislative, executive, and judicial branches. Branches charged with the exercise of one power may not exercise either of the others' except as permitted by the Constitution. The Constitution also vests the legislative power of the State in the Legislature, but reserves the powers of initiative and referendum to the people.

California courts have long recognized that under the Constitution, the Legislature may delegate quasi-legislative powers to a state agency in the executive branch by statute. Therefore, if the Legislature has enacted a statute delegating quasi-legislative power to an agency, that agency has authority to adopt regulations within the scope of that delegation.

- **What Prompts a Rulemaking?**

All regulations are prompted by the identification of a "problem" that needs to be addressed by the agency through the adoption, amendment, or repeal of regulations in order to enforce or administer a statute. For example, when the Legislature enacts a new program or amends statutes governing existing programs, the Legislature often leaves it up to the agency administering the program to implement the statutory changes. The agency must then adopt, amend, or repeal regulations to avoid the use of prohibited "underground regulations."

- **Preliminary Activities / Regulation Development & Analysis:**

Once an agency determines that the adoption, amendment or repeal of regulations is necessary, the agency performs legal and factual research needed to develop and support the documents required to conduct a formal APA rulemaking proceeding. While much of this research is done internally by the agency, some agencies involve the public during this stage through workshops or other informal proceedings where the agency may invite interested persons to provide input or information. The APA provides that an agency must engage in pre-notice public discussions regarding complex proposals or large proposals. However, a decision whether to engage in such discussions is not subject to review by OAL or the courts.

In conducting a rulemaking, the APA requires that an agency evaluate, analyze, and consider certain matters in addition to making specified determinations and findings with regard to the rulemaking action. These include, but are not necessarily limited to:

- A rulemaking agency must find that no alternative would be more effective in carrying out the purpose for which a regulation is proposed, or would be as effective as and less burdensome to affected private persons than the adopted regulation, or would be more cost effective and equally effective in effectuating the purpose of the statute.
- A rulemaking agency must determine whether the regulation "may have" or "will not have" a significant, statewide adverse economic impact directly affecting business. The agency must solicit alternatives if it determines that the proposed regulation "may have" a significant adverse economic impact on business.
- A rulemaking agency must describe the potential cost impact of a regulation on a representative private person or business, if known.
- A rulemaking agency must find that any business reporting requirement is necessary for the health, safety, or welfare of the people of California.
- A rulemaking agency must consider the substitution of performance standards for prescriptive standards.
- A rulemaking agency must state whether a regulation affects small business.

- A rulemaking agency must state whether a regulation differs from a federal statute or regulation and avoid unnecessary duplication or conflict.
- If a rulemaking agency makes a determination regarding significant effect on housing costs, it must include the determination in the Notice.
- A rulemaking agency must determine whether a mandate is imposed on a local agency or school district that requires reimbursement pursuant to Government Code, section 17500 et seq.
- A rulemaking agency must determine whether and to what extent the proposed regulations impact: 1) costs to any local agency or school district requiring reimbursement; 2) other non-discretionary cost or savings imposed on local agencies; 3) costs or savings to any state agency; and 4) costs or savings in federal funding to the state.
- A rulemaking agency must evaluate whether the proposed regulation is inconsistent or incompatible with existing state regulations.

- **Economic Analysis – Major Regulations v. Non-Major Regulations:**

In addition to the above determinations and findings, prior to preparation of the Notice of Proposed Action, the agency must determine whether the proposed regulation will be a "major" regulation. A "major regulation" is one in which the estimated costs or benefits exceed $50,000,000. All other regulations are considered "non-major" regulations.

For regulations that are not major regulations, the agency must prepare an Economic Impact Assessment (EIA). The EIA evaluates whether and to what extent the agency's proposed rulemaking will affect the creation or elimination of jobs, creation or elimination of businesses and expansion of existing businesses in California. The EIA also must explain the benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment. This assessment must be included as part of the ISOR.

Major regulations require the agency to perform additional pre-notice analysis, including preparation of a Standardized Regulatory Impact Assessment (SRIA) as prescribed by the Department of Finance (see Gov. Code, Sections 11346.3 and 11346.36; SAM 6600-6616). The SRIA

contains analysis for the EIA plus additional analyses, such as impacts on competitiveness, investment in California and incentives for innovation. Unlike the EIA, the SRIA must be provided to Department of Finance in advance of publication of the Notice of Proposed Action to allow the Department of Finance to provide comments to the agency. The SRIA must also be included as part of the ISOR.

During the preliminary activity stage, the agency will use the above information to develop a minimum of four documents necessary to initiate the formal rulemaking process. These include:

- **Express Terms**: The text of the proposed regulation will clearly identify any changes to the California Code of Regulations. Proposed additions to regulatory text will appear in underline and proposed deletions will be appear in ~~strike-through~~ format. The Authority and Reference citations that follow the text of each regulation section identify the statutes on which the section is based.

- **Notice of Proposed Action (NOPA):** The NOPA contains a variety of information about the nature of the proposed regulatory changes including various findings, determinations, statutory authority and the law(s) being implemented. The NOPA also contains procedural information, such as deadlines for submitting comments, scheduling of hearings (if any), and where copies of the Express Terms, ISOR, and any other supporting information can be obtained (see discussion below). For non-major regulations, the results of the EIA will be included in the NOPA. If the rulemaking is a major regulation, any comments provided by the Department of Finance, along with the agency's responses, will be included in the NOPA.

- **Initial Statement of Reasons (ISOR):** The ISOR is a document that explains the reasons why the agency is making the proposed regulatory changes. This includes an explanation of the problem being addressed, the purpose of and necessity for, and benefits of the proposed changes. The ISOR also identifies the factual material

upon which the agency relied in proposing the regulations. The ISOR also includes a number of the required determinations, findings and analyses discussed above including either the EIA or SRIA.

- **Economic and Fiscal Impact Statement (Form STD. 399):** The Form STD. 399 is a Department of Finance form that an agency is required to complete and have signed by the rulemaking agency's highest ranking official or that official's delegate. The Form STD. 399 includes information on the estimated economic (private) and fiscal (governmental) monetary impacts of the proposed regulation. Rules governing the Form STD. 399 can be found in the State Administrative Manual, sections 6600 through 6615.

- **PUBLICATION OF THE NOTICE OF PROPOSED ACTION (NOPA):**

Publication of the NOPA begins the formal rulemaking process. All NOPAs are published in the California Regulatory Notice Register (Notice Register), which is issued every Friday. Publication of the NOPA serves as a public announcement by the agency that it is proposing to adopt, amend or repeal regulations in the CCR. The rulemaking agency will also post the NOPA, ISOR, Express Terms, and any other rulemaking documents on its website. In addition, no later than the date of publication of the NOPA, an agency is required to send the NOPA to everyone that has requested to be on the agency's mailing list for receipt of notice of any regulatory actions. The NOPA will be sent to recipients by regular mail, or email if the recipient has consented to receive notices by electronic communication. Interested persons who wish to receive NOPAs from an agency should contact the agency and request to be added to the agency's mailing list. OAL also publishes the entire Notice Register on its website each Friday and makes prior Notice Registers available online.

The NOPA contains a wealth of information about the proposed rulemaking, including the subject matter, a summary of existing laws, and how the proposed regulation implements, interprets or makes those laws more specific. The NOPA also contains important information about where and when interested members of the public can submit written comments

regarding the proposed rulemaking as well as the time and date of any public hearing(s) that may be held. Public comments and public hearings are discussed below.

- **SUBMITTING COMMENTS TO AGENCY ON PROPOSED RULEMAKING:**

  - **Submission of Comments:**

During the formal rulemaking process, there are two principal opportunities for interested persons to provide input to the rulemaking agency. The first is the written comment period. The second is the public hearing. This notice and hearing process is for the benefit of the regulated public and this is the time for interested persons to exercise their right to participate in the regulatory process.

  - **Written Comment Period:**

Even if an agency chooses not to engage the public or interested parties in preliminary discussions during the development phase for a rulemaking, the APA requires an agency to provide for a minimum forty-five (45) day written comment period wherein interested persons can submit written comments directly to the agency. This is often referred to as the "forty-five day comment period," although agencies may choose to provide a longer comment period. This forty-five day comment period begins when the NOPA is published in the Notice Register and will end when specified in the NOPA. When submitting comments, interested parties should make sure that the comment is received by the agency by the last day of the notice period. The NOPA will contain the name and address of the person at the agency to whom comments must be addressed to. In order to ensure that a comment is properly directed, the comment should reference the specific rulemaking to which the comment is intended, as some agencies may conduct multiple rulemakings at the same time.

- **Making a Comment**:

Effective comments are based on an understanding of the statutes and factual material the agency relies on in proposing the regulation, on an understanding of what the proposed regulation is intended to do, and on an understanding of the standards the regulation must satisfy. Comments should be directed at the proposed regulation provisions and/or procedures followed by the agency in proposing the regulations. One of the primary purposes of providing the opportunity for public comment is to allow interested persons to present ways of improving the regulations.

- **Public Hearings:**

Under the APA, an agency has an option as to whether it wishes to hold a public hearing on a proposed rulemaking action. (An agency's enabling statutes may eliminate this option by requiring a public hearing.) If a public hearing is scheduled, it must take place no sooner than forty-five (45) days after the date the NOPA is published in the Notice Register. The time, place, date and nature of the hearing will be set forth in the NOPA. However, even if an agency does not schedule a public hearing, any interested person may request a hearing if such request is made in writing within 15 days of the close of the written comment period. If a timely request for hearing is made, the APA requires the agency to conduct a hearing and to provide reasonable notice of the hearing to the public.

If a public hearing is held, the agency must accept both written and oral comments at the hearing. An agency is permitted to place reasonable restrictions on oral comments at hearings, including the length of time allotted to each speaker. Therefore, interested persons who wish to testify may also wish to bring a written testimonial to submit at the hearing. Limitations imposed by the agency will depend on the circumstances of the hearings. Note that the public hearing for a rulemaking is intended to provide the public with an opportunity to voice opinions on the rulemaking. Agencies are not required to, and generally will not, provide a response to comments at the public hearing.

➢ Consideration of Comments:

The APA requires a rulemaking agency to consider all relevant and timely comments presented to it during a comment period before adopting, amending, or repealing any regulation. This includes written comments received during the forty-five day comment period as well as written and oral comments received at the public hearing. An agency is required to respond to comments in a document called a Final Statement of Reasons (FSOR), however, the agency is only required to respond to comments that are directed at the proposed regulations or procedures followed (i.e., relevant) and that are received during the applicable comment period (i.e., timely). Comments not directed at the proposed changes or procedures followed are considered irrelevant and do not need to be responded to by the agency.

An agency must either accept or reject timely and relevant comments. If an agency accepts a comment, the FSOR must include an explanation of how the agency modified the proposed regulations to accommodate the comment. If an agency rejects the comment, the FSOR must include an explanation of the reason for the rejection.

• CHANGES TO PROPOSED TEXT OR RECORD AFTER 45 DAY NOTICE:

➢ Changes to Text:

After the initial public comment period, a rulemaking agency will often decide to change its initial proposal either in response to public comments or on its own. The agency must then decide whether a change is: (1) nonsubstantial, (2) substantial and sufficiently related, or (3) substantial and not sufficiently related.

Nonsubstantial changes are usually technical in nature and do not alter the regulatory effect of the proposed provisions, therefore, no further notice is required.

Substantial changes alter the meaning of the regulatory provisions and require further notice to the public. Substantial changes that are sufficiently

related (i.e., reasonably foreseeable based on the NOPA) must be made available for public comment for at least 15 days before adopting such a change. Therefore, before a rulemaking agency adopts such a change, it must mail a notice of opportunity to comment on proposed changes along with a copy of the text of the proposed changes to each person who has submitted written comments on the proposal, testified at the public hearing, or asked to receive any notices of proposed modification. The agency must also post this notice on its website. No public hearing is required. The public may comment on the proposed modifications in writing. The agency must then consider any comments received during the comment period that are directed at the proposed changes. An agency may conduct more than one fifteen-day opportunity to comment before the final version of the text is adopted.

If a change is substantial, but not sufficiently related to the original proposal (i.e. not reasonably foreseeable based on the NOPA), the agency must then publish another forty-five day notice in the Notice Register similar to the original NOPA. These changes are uncommon.

- **Addition of Material to the Rulemaking Record:**

A rulemaking agency must specifically identify any material the agency is relying upon for the proposed rulemaking in the ISOR. If during a rulemaking proceeding an agency decides to rely on material that the agency did not identify in the ISOR, the agency must make the document available for comment for fifteen days. This notice and comment process is similar to a fifteen-day notice for substantial, sufficiently related changes to the regulation text.

- **COMPLETING THE RULEMAKING PROCESS:**

- **Transmission to OAL:**

A rulemaking agency must transmit a rulemaking action to OAL for review within one year from the date that the NOPA was published in the Notice Register. The rulemaking record contains the complete record of an

agency's rulemaking action and is a public record. The rulemaking record documents the agency's compliance with each requirement in the APA.

After an agency submits its rulemaking record to OAL, OAL then has thirty (30) working days to review the rulemaking record to determine whether the record demonstrates that the rulemaking agency satisfied the procedural requirements of the APA, and to review regulations for compliance with the six substantive APA standards: Authority, Reference, Consistency, Clarity, Nonduplication, and Necessity (discussed below). OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulations. If the rulemaking record demonstrates that the agency complied with the APA, OAL will file the final regulation text with the Secretary of State.

- **Retention of Rulemaking Record:**

Once a regulation is approved by OAL and filed with the Secretary of State, the rulemaking record is returned to the rulemaking agency. The rulemaking agency is then required to maintain the rulemaking record indefinitely or transfer the rulemaking record to the State Archives.

- **EFFECTIVE DATES:**

Generally, regulations become effective on one of four quarterly dates based on when the final regulations are filed with the Secretary of State: January 1 if filed between September 1 and November 30; April 1 if filed between December 1 and February 29; July 1 if filed between March 1 and May 31; and October 1 if filed between June 1 and August 31. Effective dates may vary, however, if: a different effective date is provided for in statute or other law; the adopting agency requests a later effective date; or the agency demonstrates good cause for an earlier effective date.

EMERGENCY RULEMAKING ACTIONS

- **EMERGENCY:**

A state agency may adopt emergency regulations in response to a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare, or if a statute deems a situation to be an emergency under the APA. Because emergency regulations are intended to avoid serious harm and require immediate action, the emergency rulemaking process is substantially abbreviated compared to the regular rulemaking process.

- **NOTICE:**

Unless the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest, the agency is required to provide at least five working days advance notice to everyone on its regulatory actions notice list prior to submitting the emergency regulations to OAL. After the minimum five working-day pre-notice, the agency submits the emergency rulemaking record to OAL. The emergency rulemaking record includes, without limitation, the notice of emergency, a finding of emergency describing the specific facts creating the need for immediate action, the proposed emergency text, Form STD. 399 and any supporting information.

- **PUBLIC COMMENT:**

When an emergency action is submitted to OAL, OAL publishes the emergency action on OAL's website that same day. Publication on OAL's website begins a five calendar-day comment period. Unlike a regular rulemaking, for an emergency action, comments are submitted both to the agency and directly to OAL. Comments should be directed at either the proposed regulations or the emergency procedures followed. For an emergency rulemaking, an agency may, but is not required to, summarize and respond to comments received. The state agency may submit a rebuttal to any comments made on an emergency regulation up to eight days after the regulation is submitted to OAL.

- **OAL REVIEW:**

OAL has 10 calendar days to review an emergency rulemaking action. OAL reviews emergency regulations to determine whether an emergency has been demonstrated factually or deemed by statute. OAL also determines whether the agency has complied with the procedural requirements of the APA for the adoption of emergency regulations, and whether the regulation satisfies the Authority, Reference, Consistency, Clarity, Nonduplication, and Necessity standards of the APA.

- **EFFECTIVE DATE:**

Once approved and filed with the Secretary of State, an emergency regulation usually takes effect immediately. An emergency regulation generally remains in effect for 180 days. During the time the emergency is effective, the rulemaking agency must conduct a regular rulemaking called a “Certificate of Compliance” to permanently adopt the regulation. If, however, the agency is unable to complete the rulemaking process within that time, the agency may request permission from OAL to readopt the emergency regulation for an additional ninety (90) days. The agency may be granted not more than two 90-day readoptions. If the agency does not complete the Certificate of Compliance action before the end of the effective period of the emergency, the emergency regulations will expire by operation of law and the CCR will revert to the pre-emergency text.

THE SIX APA STANDARDS

- **Authority and Reference standards**

Each regulation must satisfy the Authority and Reference standards. Complying with the Authority and Reference standards involves a rulemaking agency in two activities: picking appropriate Authority and Reference citations for the note that follows each regulation section to be printed in the California Code of Regulations, and adopting a regulation that is within the scope of the rulemaking power conferred on the agency.

"Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation. Government Code Section 11349(b).

"Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation. Government Code Section 11349(e).

Each regulation section printed in the California Code of Regulations must have a citation to the specific statutory authority under which it was enacted and a citation to the specific statute or other provision of law that the regulation is implementing, interpreting, or making specific. As an example the Authority and Reference Citations for Section 55 of Title 1 of the California Code of Regulations reads as follows: “Authority cited: Sections 11342.4 and 11349.1, Government Code. Reference: Sections 11346.1, 11349.1, 11349.3 and 11349.6, Government Code.”

The statutes and other provisions of law cited in Authority and Reference notes are the agency's interpretation of its power to adopt a particular regulation. A rulemaking agency initially selects Authority and Reference citations when it is drafting the proposed regulation text and may revise and refine the citations during the course of a rulemaking proceeding. The goal is to have accurate, precise, and complete Authority and Reference citations printed in the California Code of Regulations with each regulation.

EXPRESS AND IMPLIED RULEMAKING AUTHORITY A statutory delegation of rulemaking authority may be either express or implied. In an express delegation, the statute expressly states that the state agency may or shall "adopt rules and regulations necessary to carry out this chapter" or some variation on that phrase. Thus, an express delegation *expressly* specifies that regulations shall or may be adopted by the agency.

In contrast, in an implied delegation of rulemaking authority, the applicable statutes do not expressly state that the agency may or shall adopt rules or regulations. Instead, a statute expressly gives a duty or power to a specified state agency, but makes *no* express mention of the authority to adopt rules or regulations. In similar circumstances, courts tell us that agencies which have expressly been given a duty or power by statute have implicitly been delegated the authority to adopt those rules and regulations necessary for the due and efficient exercise of a duty or power expressly granted.

OAL REVIEW FOR AUTHORITY OAL reviews regulations to ensure that they are authorized under controlling statutes. The statutes (and other provisions of law) the agency cites as Authority and Reference identify the sources of the rulemaking power that the agency is drawing on in promulgating a particular regulation. A regulation that is not within the

Each regulation adopted, to be effective, shall be *within the scope of authority conferred* and in accordance with standards prescribed by other provisions of law.

scope of an agency's express or implied rulemaking authority is void and cannot become effective.

In determining whether a rulemaking agency is empowered to adopt a particular regulation, OAL applies the same analytical approach employed by the California Supreme Court and the California Court of Appeal, as evidenced in published opinions of those courts.

JUDICIAL REVIEW OF AUTHORITY TO ADOPT A PARTICULAR REGULATION When reviewing a quasi-legislative regulation, courts consider whether the regulation is within the scope of the authority conferred, essentially a question of the validity of an agency's statutory interpretation. The courts must determine whether the rulemaking agency has exercised its authority within the bounds established by statute.

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute. Government Code Section 11342.2.

The courts apply the following principle to determine whether a rulemaking agency has exercised its authority within the bounds established by statute.

An administrative regulation may not alter or amend a statute or enlarge or impair its scope. Such a regulation is void and must be struck down by a court.

In deciding whether a regulation alters, amends, enlarges, or restricts a statute, or merely implements, interprets, makes specific, or otherwise gives effect to a statute often a court must interpret the meaning of the

statute. In so doing, courts apply principles of statutory interpretation developed primarily in case law. It examines the language of the statute, and may consider appropriate legislative history materials to ascertain the will of the Legislature so as to effectuate the purpose of the statute. In making this determination, a court may consider, but is not bound by the rulemaking agency's interpretation of the statute at issue. As the California Supreme Court explained in *Yamaha v State Board of Equalization*, "Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent-the 'weight' it should be given is ... fundamentally situational." The court identified factors to be considered relating to (1) the possible interpretive advantage of the agency and (2) to the likelihood that the agency is correct and suggested the following. "The deference due an agency interpretation ... 'will depend *upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*'"

- **THE CONSISTENCY STANDARD**

Each regulation must satisfy the Consistency standard. In reviewing for compliance with the Consistency standard, OAL uses the same analytical approach used in judicial review of a regulation. This approach includes the principles discussed above regarding deference to an agency's interpretation of a statute.

"Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law. Government Code,

Commenters on proposed regulations often comment that a proposed regulation is inconsistent with a statute because it requires certain tasks not

specifically set out in statute. This situation does not present a Consistency problem so long as the tasks specified in the regulation are reasonably designed to aid a statutory objective, do not conflict with or contradict (or alter, amend, enlarge or restrict) any statutory provision.

In other words, no conflict is presented if the statute says “Thou shall do A” and the regulation says “Thou shall do B,” if one can do both A and B, and B is reasonably necessary to effectuate the purpose of A, and does not alter, amend, enlarge, or restrict A. In contrast, a conflict is presented if the statute says “Thou shall do A” and the regulation says “Thou shall not do A.”

- **THE CLARITY STANDARD**

Each regulation must satisfy the Clarity standard. Regulations are frequently unclear and unnecessarily complex, even when the technical nature of the subject matter is taken into account. They are often confusing to persons who must comply with them. The performance goal for drafting a regulation is the following. A rulemaking agency must draft regulation text in plain, straightforward language avoiding technical terms as much as possible using coherent and easily readable language. The measure of compliance with the performance goal is the Clarity standard. OAL has a duty to ensure that each regulation can be easily understood.

Clarity means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them. Government Code Sec. 11349(c).

Persons presumed to be "directly affected" by a regulation are those who: (a) must comply with the regulation; or (b) must enforce the regulation; or (c) derive a benefit from the enforcement of the regulation that is not common to the public in general; or (d) incur from the enforcement of the regulation a detriment that is not common to the public in general. California Code of Regulations, Title 1, Sec. 16(b).

Situations in which OAL may presume a regulation is unclear.

1. The regulation has more than one meaning.

2. The language of the regulation conflicts with the description of its effect.

3. The regulation uses an undefined term which does not have a meaning generally familiar to those who are "directly affected."

4. The regulation uses language incorrectly, including incorrect spelling, grammar, or punctuation.

5. The regulation presents information in a format not readily understandable.

6. The regulation does not use citations which clearly identify published material cited in the regulation.

The following regulation drafting tips are drawn from <u>Drafting Legislation and Rules in Plain English</u>, by Robert J. Martineau, (West, 1991) pp 65-105.

1. Use only necessary words.

2. Use common words.

3. Avoid “lawyerisms.”

4. Be consistent.

5. Use short sentences.

6. Arrange words properly.

7. Tabulate to simplify.

9. Look for omissions and ambiguities.

10. Think through common application situations.

- **THE NONDUPLICATION STANDARD**

Nonduplication means a regulation does not serve the same purpose as a state or federal statute or another regulation.

Each regulation must satisfy the Nonduplication standard. A regulation that repeats or rephrases a statute or regulation "serves the same purpose" as that statute or regulation. Any overlapped or duplicated statute or regulation must be identified and the overlap or duplication must be justified. Citing the overlapped or duplicated statute or regulation in the authority or reference note satisfies the identification requirement. Overlap or duplication is justified if information in the rulemaking record establishes that the overlap or duplication is necessary to satisfy the Clarity standard.

- **THE NECESSITY STANDARD**

An agency conducting a rulemaking action under the APA must compile a complete record of a rulemaking proceeding including all of the evidence and other material upon which a regulation is based.

In the record of the rulemaking proceeding (record), the agency must state the specific purpose of each regulatory provision and explain why the provision is reasonably necessary to accomplish that purpose. It must also identify and include in the record any materials relied upon in proposing the provision and any other information, statement, report, or data the agency is required by law to consider or prepare in connection with the rulemaking action. The agency does this first in the initial statement of reasons. During the rulemaking proceeding, the agency may add new material on which it relies by notifying the public and providing a 15 day opportunity to comment on the proposal in light of the new material relied upon. The agency then states in the final statement of reasons what material has been added during the proceeding.

In addition, during the rulemaking, the public may submit recommendations or objections to the proposed regulation and submit material, including studies, reports, data, etc. for consideration by the agency and inclusion in the record. In the final statement of reasons, the agency must respond to all relevant input and explain a reason for rejecting each recommendation or objection directed at the proposed action, or explain how the proposal has been amended to accommodate the input. All of these materials constitute the record.

At the end of a rulemaking proceeding, the rulemaking agency must certify under penalty of perjury that the rulemaking record is complete and closed. The rulemaking agency then submits the complete record to OAL for review. In reviewing for compliance with the Necessity standard, OAL is limited to applicable provisions of law and the record of the rulemaking proceeding. Once OAL review is complete and the record is returned to the rulemaking agency, the file is the agency's permanent record of the rulemaking proceeding. No item in the file may be removed, altered or destroyed. Any judicial review of the regulation is based only on the evidence included in the rulemaking record.

What must be addressed in the record? Each regulation must satisfy the Necessity standard. OAL reviews the rulemaking record to ensure that each provision of regulation text that is adopted, amended, or repealed satisfies the Necessity standard.

> **"Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to facts, studies, and expert opinion. Government Code Section 11349(a).**

What is "substantial evidence"? The "substantial evidence" standard used by OAL is the same as the "substantial evidence" standard used in judicial review of regulations. The following is a definition of "substantial evidence" drawn from the legislative history of the Necessity standard.

> **Such evidence as a reasonable person reasoning from the evidence would accept as adequate to support a conclusion**.

A number of principles and limitations are involved in the application of this standard. Clearly, "substantial evidence" is more than "any evidence," but is nowhere near "proof beyond a reasonable doubt." A key characteristic of the standard is its deferential nature. The "substantial evidence" test was added to the Necessity standard by Chapter 1573, Statutes of 1982 (AB 2820). The following letter from Assemblyman Leo McCarthy to Speaker Willie Brown summarized the "substantial evidence" test as used in the Necessity standard:

"The principal addition AB 2820 makes to what we approved in AB 1111 in 1979 is a specific level of evidence that an agency must meet to demonstrate the need for a particular regulation. The standard is substantial evidence taking the record as a whole into account.

"That standard is a familiar one in the law and has been given a definite interpretation by the courts in the past. Our intent is that an agency must include in the record facts, studies or testimony that are specific, relevant, reasonable, credible and of solid value, that together with those inferences that can rationally be drawn from such facts, studies or testimony, would lead a reasonable mind to accept as sufficient support for the conclusion that the particular regulation is necessary. Suspicion, surmises, speculation, feelings, or incredible evidence is not substantial.

"Such a standard permits necessity to be demonstrated even if another decision could also be reached. This standard does not mean that the particular regulation necessarily be 'right' or the best decision given the evidence in the record, but that it be a reasonable and rational choice. It does not mean that the only decision permitted is one that OAL or a court would make if they were making the initial decision. It does not negate the function of an agency to choose between two conflicting, supportable views.

"The proposed standard requires the assessment to determine necessity to be made taking into account the totality of the record. That means the standard is not satisfied simply by isolating those facts that support the conclusion of the agency. Whatever in the record that refutes the supporting evidence or that fairly detracts from the agency's conclusion must also be taken into account. In other words, the supporting evidence must still be substantial when viewed in light of the entire record." (California, Assembly Daily Journal, 208th Sess. 13, 663-34 (1982).)

- **FREQUENTLY ASKED QUESTIONS**

QUESTION:	***ANSWER:***
What are "regulatory agencies?"	*All state government entities authorized to adopt regulations, including agencies constitutional offices, departments, boards, commissions and bureaus are regulatory agencies.*
How can I find out about regulatory changes that state agencies are planning to undertake?	*The Rulemaking Calendar published by OAL annually, usually in March, provides a listing of rulemaking actions that agencies intend to undertake during the year. However, agencies are not precluded from undertaking rulemakings not included in the Rulemaking Calendar, therefore if a particular agency is of interest, interested persons should request to be added to that agency's regulatory mailing list.*
Is a state agency required to notify the public of regulations the agency plans to adopt?	*Yes. Each state agency must maintain a mailing list of all persons who want to be notified of proposed rulemaking actions. The agency is then obligated to send persons on the mailing list with the NOPA no later than the date the NOPA is published in the Notice Register.*
How can I determine if a regulatory action may affect me?	*The Informative Digest portion of the NOPA contains information about the rulemaking, including the subject matter and statutes being implemented.*
How can I find out why an agency is adopting regulations?	*The ISOR includes an explanation of necessity for why the agency is proposing to adopt the noticed regulations. This is available either on*

	the agency's website or from the contact person identified in the NOPA.
How can I review all of the information and documents an agency is relying on when it proposes a regulatory change?	*All information and documents relied upon by the agency for a rulemaking must be made available to the public during a public comment period. The NOPA will include instruction on where this information is available.*
How can I tell what regulatory actions have been submitted to OAL for final review and filing with the Secretary of State?	*OAL posts a listing of all rulemaking actions submitted for approval and filing with the Secretary of State on its website at www.oal.ca.gov.*
How can I tell whether a proposed regulation has been approved by OAL and its effective date?	*The Notice Register published every Friday contains a summary of recent regulatory actions approved by OAL and filed with the Secretary of State, including the date filed and the effective date of the regulations. OAL also posts a listing of all approved, disapproved or withdrawn actions each day on its website at www.oal.ca.gov.*
Where do I submit comments relating to a rulemaking?	*For a regular rulemaking, comments should be submitted to the rulemaking agency's contact person identified in the NOPA for that rulemaking.* *For emergency rulemakings only, comments should be submitted to both the rulemaking agency contact listed in the Notice of Emergency and to OAL.*
Where can I find the laws that describe how regulations must be adopted by agencies?	*The Administrative Procedure Act (APA) contained in Chapter 3.5 of the California Government Code,*

	commencing with section 11340, contains the statutes governing rulemaking. Regulations governing rulemaking are found in title 1, chapters 1 and 2, in the California Code of Regulations.
Where can I find existing state regulations?	*Regulations are printed in the California Code of Regulations (CCR). Hardcopy versions of the CCR available at several state and other libraries. The CCR is also available online through a link on OAL's website at www.oal.ca.gov.*

CITATIONS

Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr.1

Engelmann v. State Bd. of Education (1991) 2 Cal.APP.4th 47, 3 Cal.Rptr.2d 264

Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244

Poshman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596

Roth v. Dept. of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552

State Water Resources Control Board v. OAL (1993) 12 Cal.App.4th 697, 16 Cal.Rptr.2d 25

Stoneham v. Rushen (*Stoneham I*) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130

Yamaha v. State Board of Equalization (1998) 19 Cal.4th 1, 78 Cal.Rptr.2d