

HOW TO PARTICIPATE IN THE RULEMAKING PROCESS

**THE STATUTES, REGULATIONS AND CASE LAW YOU
NEED TO MAKE YOUR VOICE HEARD IN THE
CALIFORNIA RULEMAKING PROCESS**

HOW TO PARTICIPATE IN THE RULEMAKING PROCESS

A CALIFORNIA STATE AGENCY MUST CONSIDER RECOMMENDATIONS AND OBJECTIONS FROM THE PUBLIC BEFORE IT ADOPTS OR CHANGES ANY REGULATION NOT EXPRESSLY EXEMPTED FROM THE CALIFORNIA ADMINISTRATIVE PROCEDURE ACT (APA). 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.

- The procedure for rulemaking 2
- The California Code of Regulations 2
- Pre-notice involvement 2
- Commenting on the initial proposal 2
- Commenting on modifications to the initial proposal..... 2
- Effective comments 3
- Standards for regulations 3
- Emergency regulations 3
- An overview of the rulemaking process 3
- A delegation of rulemaking authority 4
- Preliminary activities 4
- Special considerations 5
- Issuing the notice 5
- Availability of the proposed text and the initial statement of reasons 5
- Rulemaking Graphic 6
- The 45 day comment period 8
- The public hearing 8
- Consideration of public input on the initial proposal 8
- Assessing the nature of modifications to the initial proposal 8
- Making changes available for public comment 8
- Opportunity for public comment based upon new material relied upon 9
- Summary and response to comments 9
- Submission of a rulemaking action to OAL for review 9
- What must be adopted pursuant to the APA? 10
- Express statutory exemptions are found in the APA and in other statutes 14
- OAL review for compliance with the Authority and Reference Standards 16
- Express and implied rulemaking authority 17
- OAL review for Authority 17
- Judicial review of authority to adopt a particular regulation 18
- OAL review for compliance with the Consistency standard 19
- OAL review for compliance with the Clarity standard 19
- OAL review for compliance with the Nonduplication standard 21
- OAL review for compliance with the Necessity standard 22
- Citations 24

THE PROCEDURE FOR RULEMAKING Every department, division, office, officer, bureau, board or commission in the executive branch of California state government must follow the rulemaking procedures in the Administrative Procedure Act (Government Code § 11340 *et seq.*) The Government Code is available at <http://www.leginfo.ca.gov/calaw.htm>. Rulemaking must also comply with regulations adopted by the Office of Administrative Law (OAL) (California Code of Regulations, Title 1, §§ 1-120; <http://ccr.oal.ca.gov/>) unless expressly exempted by statute from some or all of these requirements. OAL's publication, *California Rulemaking Law Under the Administrative Procedure Act*, is an annotated compilation of the California statutes and regulations governing rulemaking and is available from OAL for a nominal fee. The checklists used by OAL in its review of regulation filings are available online at <http://www.oal.ca.gov/rulemaking.htm>.

THE CALIFORNIA CODE OF REGULATIONS Regulations are printed in the California Code of Regulations after they are adopted by the rulemaking agency, approved by OAL and filed with the Secretary of State. You may access regulations in the California Code of Regulations at <http://ccr.oal.ca.gov>.

PRE-NOTICE INVOLVEMENT An agency may involve the public in workshops or other preliminary activities well before the start of the formal rulemaking process. Government Code section 11346.46 requires an agency proposing to adopt complex proposals or a large number of proposals to involve the public. You can contact the agency and request to be added to their regulations mailing list to ensure you are notified of this opportunity. Also, agency websites often provide information on upcoming rulemaking actions. For websites, go to the State Agency Index under "Quick Hits" at: <http://www.ca.gov>.

COMMENTING ON THE INITIAL PROPOSAL A 45 day opportunity to submit written, faxed, or e-mail comments on all or any part of a proposed rulemaking action starts when the notice of proposed rulemaking is published in the California Regulatory Notice Register. The Notice Register may be accessed online at <http://www.oal.ca.gov/notice.htm>. The notice of proposed rulemaking is also mailed to those who have asked to be on the agency's notice mailing list, and is posted on the rulemaking agency's website. The notice tells you how to obtain access to the proposed regulation text and the initial statement of reasons and who to call if you have questions. The notice may also schedule a public hearing at which you may comment on the proposal orally and/or in writing.

COMMENTING ON MODIFICATIONS TO THE INITIAL PROPOSAL You will receive a notice of any 15 day opportunity to comment (1) on proposed modifications or (2) new material relied upon if you commented on the initial proposal or have requested such notice. The rulemaking agency also posts a copy of the notice of opportunity to comment on proposed modifications on its website.

MAKING AN EFFECTIVE 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. The Authority and Reference citations that follow the text of each regulation section identify the statutes on which the section is based. The initial statement of reasons describes the purpose and rationale of each regulation and identifies the factual material upon which the agency relies in proposing it. The response to comments in the final statement of reasons must demonstrate that each relevant, timely comment has been considered.

STANDARDS FOR REGULATIONS A regulation must be easily understandable, have a rationale, and be the least burdensome, effective alternative. A regulation cannot alter, amend, enlarge, or restrict a statute, or be inconsistent or in conflict with a statute.

EMERGENCY REGULATIONS An emergency regulation takes effect immediately, before the regular public opportunity for notice and comment. A state agency may adopt an emergency regulation if it can show that the regulation is necessary for the immediate preservation of public peace, health and safety, or general welfare, or if a statute deems the regulation to be an emergency for purposes of the APA. The public may comment directly to OAL on emergency regulations within 5 days after the regulation is submitted to OAL for review, if OAL has not taken action on the regulations before that time. 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 has up to 10 calendar days to review an emergency regulation. You will find additional information about emergency regulations and how to comment on them at <http://www.oal.ca.gov/emergency.htm>. OAL reviews emergency regulations to determine whether an emergency has been demonstrated, or deemed by statute and whether the regulation satisfies the Authority, Reference, Consistency, Clarity, Nonduplication, and Necessity standards. Once approved, an emergency regulation remains in effect for 120 days, unless the state agency has a special statute allowing more or less time. During the time the emergency is effective, the rulemaking agency must conduct

the regular rulemaking process 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 another 120 days.

AN OVERVIEW OF THE RULEMAKING PROCESS Administrative Procedure Act requirements are 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 the public and 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. (Graphic on pages 6 and 7 illustrates the rulemaking process.)

A DELEGATION OF RULEMAKING 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 legislative, executive, and judicial powers, and provides that persons 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 to the people the powers of initiative and referendum.

California courts have long recognized that under the Constitution the Legislature may by statute delegate quasi-legislative powers to a state agency in the executive branch, so long as adequate standards are provided to guide the agency. The adequacy of such a delegation is virtually never an issue in a rulemaking because all state agencies, including OAL, must presume that any California statute, including one delegating rulemaking authority, is constitutional unless an appellate court has made a determination to the contrary. (California Constitution, Article 3, Section 3.5.) Thus every rulemaking action must be based upon a statutory delegation of rulemaking authority from the Legislature to a state agency.

PRELIMINARY ACTIVITIES What does a state agency do once it decides to conduct a rulemaking action? It makes the decisions and develops the documents required to conduct a formal APA rulemaking proceeding. Some agencies involve the public during this stage. Others do not. The APA in Government Code section 11346.45 provides that an agency must engage in pre-notice public discussions regarding complex proposals or large proposals. A decision to engage or not engage in such discussions, however, is not subject to review by OAL or the

courts. The agency develops four documents during the preliminary activity stage, which are needed to initiate the formal rulemaking process: the express terms of the proposed regulation (the proposed text), the initial statement of reasons, the STD 399 Fiscal Impact Statement, and the notice of proposed rulemaking.

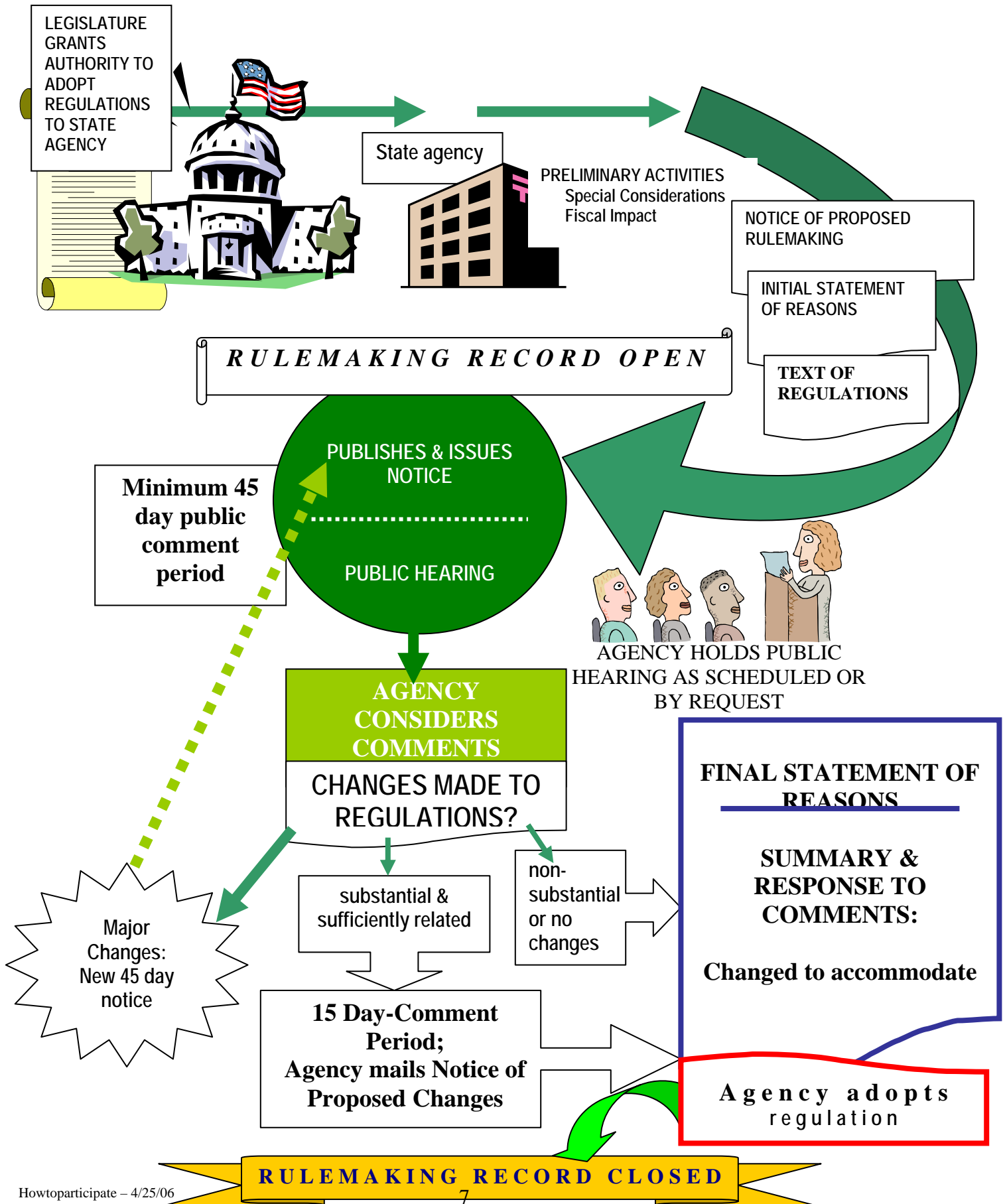
SPECIAL CONSIDERATIONS The APA requires a rulemaking agency to make specified determinations and findings with regard to a proposed action.

- An 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.
- A rulemaking agency must determine whether the regulation “may have,” or “will not have” a significant, statewide adverse impact directly affecting business. The agency must solicit alternatives if it “may have.”
- 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 assess whether and to what extent the regulation will create or eliminate jobs and businesses. A rulemaking agency must find that any business reporting requirement is necessary for the public health, safety, or welfare.
- 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.

ISSUING THE NOTICE To initiate a rulemaking action, an agency issues a notice of a proposed rulemaking by having the notice published in the California Regulatory Notice Register, by mailing the notice to those persons who have filed a request for notice of regulatory actions, and by posting the notice, text, and statement of reasons on its website, if it has one. Once the notice is issued, the APA rulemaking process is officially under way.

AVAILABILITY OF THE PROPOSED TEXT AND THE INITIAL STATEMENT OF REASONS Agencies that have websites must make notice, the proposed text and the initial statement of reasons available there. The proposed text and the initial statement of reasons are also available on request to the agency contact person identified in the notice.

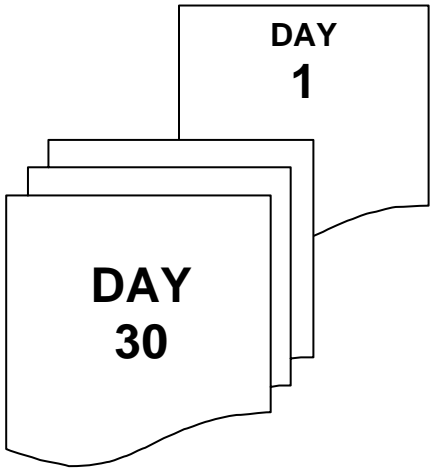
The Rulemaking Process



OAL REVIEW

State agency must submit rulemaking record within 1 year of notice publication

OAL has 30 WORKING days to review a regulation

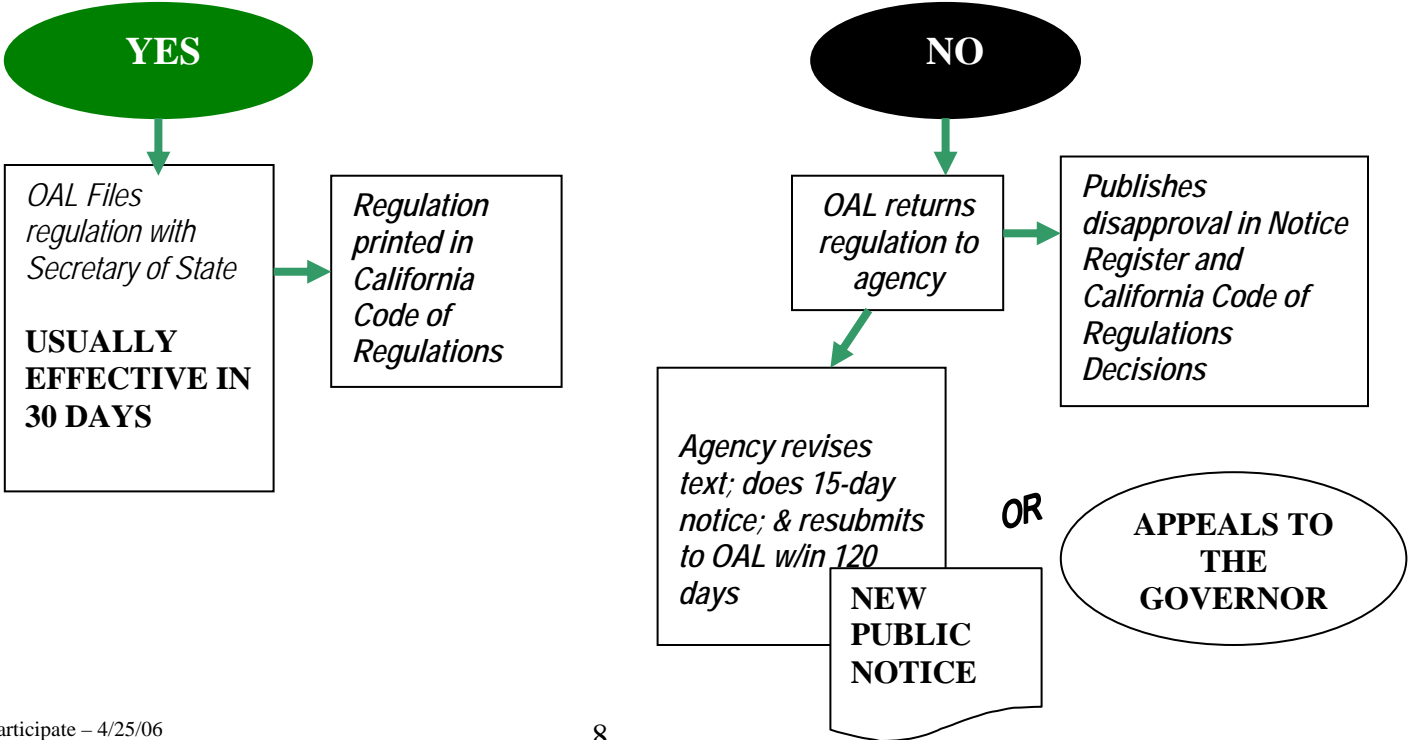


APA STANDARDS:

AUTHORITY
REFERENCE
CONSISTENCY
CLARITY
NON-DUPLICATION
NECESSITY

& PROCEDURAL REQUIREMENTS

DOES THE RULEMAKING SATISFY THE APA?



THE 45 DAY COMMENT PERIOD The APA requires, at minimum, a 45 day opportunity to comment in writing, by fax, or e-mail on the regulation changes as initially proposed by the agency. The notice of proposed rulemaking specifies where the comments must be directed and when this opportunity to comment in writing on the initial proposal closes.

THE PUBLIC HEARING 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.) However, if an agency doesn't schedule a public hearing, and any interested person submits a written request for one within 15 days prior to the close of the written comment period, the agency must give notice of, and hold a public hearing. Because of this requirement, a rulemaking agency usually schedules a public hearing unless it is confident that one will not be requested.

CONSIDERATION OF PUBLIC INPUT ON THE INITIAL PROPOSAL The APA requires a rulemaking agency to consider all relevant matter presented to it during a comment period before adopting, amending, or repealing any regulation.

ASSESSING THE NATURE OF MODIFICATIONS TO THE INITIAL PROPOSAL 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.

MAKING CHANGES AVAILABLE FOR PUBLIC COMMENT The APA provides that a rulemaking agency must make each substantial, sufficiently related change to its initial proposal available for public comment for at least 15 days before adopting such a change. Thus, 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 a notice of proposed modification. The agency must also post the notice on its website. No public hearing is required. The public may comment *on the proposed modifications* in writing. The agency must then consider comments received during the comment period, which are directed at the proposed changes. An agency may conduct more than one 15 day opportunity to comment on a large, complicated, or sensitive rulemaking action before the final version is adopted.

OPPORTUNITY FOR PUBLIC COMMENT BASED UPON NEW MATERIAL RELIED UPON A rulemaking agency must specifically identify in the initial statement of reasons and include in the rulemaking record the material it relies upon in proposing a rulemaking action. If during a rulemaking proceeding an agency decides to rely on material that it did not identify in the initial statement of reasons or otherwise identify or make available for public review prior to the close of the public comment period, the agency must make the document available for comment for 15 days.

SUMMARY AND RESPONSE TO COMMENTS A rulemaking agency must summarize and respond on the record to timely comments that are directed at the rulemaking proposal or at the procedures followed. The summary and response to comment demonstrates that the agency has understood and considered all relevant material presented to it before adopting, amending, or repealing a regulation. An agency may respond to a comment in one of two ways. The agency must either (1) explain how it has amended the proposal to accommodate the comment, or (2) explain the reasons for making no change to the proposal. An agency's summary and response to comments is included as part of the final statement of reasons.

SUBMISSION OF A RULEMAKING ACTION TO OAL FOR REVIEW A rulemaking agency must transmit a rulemaking action to OAL for review within a year from the date that the notice of proposed rulemaking action was published in the California Regulatory Notice Register. OAL then has 30 working days in which to review the rulemaking record to determine whether it demonstrates that the rulemaking agency satisfied the procedural requirements of the APA, and to review regulations for compliance with the six standards: Authority, Reference, Consistency, Clarity, Nonduplication, and Necessity. OAL may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulations.

WHAT 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:

self-executing--wholly-enabling--susceptible to interpretation.

A self-executing 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.

The third type, 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.

Government Code Section 11346

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

Government Code section 11342.600

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.



AUTHORITY-REFERENCE-CONSISTENCY CLARITY-NONDUPLICATION-NECESSITY

OAL REVIEW FOR COMPLIANCE WITH THE 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

**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.
Government Code Section 11342.1.**

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 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."

OAL REVIEW FOR COMPLIANCE WITH 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, Section 11349(d).

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."

OAL REVIEW FOR COMPLIANCE WITH 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 Drafting Legislation and Rules in Plain English, 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.

OAL REVIEW FOR COMPLIANCE WITH THE NONDUPLICATION STANDARD

**Nonduplication means a regulation does not serve the same purpose as a state or federal statute or another regulation.
Government Code Section 11349(f)**

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.

OAL REVIEW FOR COMPLIANCE WITH 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).)

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