

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

## RECOMMENDATIONS

Response to Demand for Production of Documents in Discovery . . . . .	561
Uniform TOD Security Registration Act . . . . .	577
Effect of Dissolution of Marriage on Nonprobate Transfers . . . . .	599
Administrative Rulemaking:	
Consent Regulations and Other Noncontroversial Regulations . . . . .	625
Advisory Interpretations . . . . .	657

September 1998

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

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STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Response to Demand for Production  
of Documents in Discovery

March 1998

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Response to Demand for Production of Documents in Discovery*, 28 Cal. L. Revision Comm'n Reports 561 (1998). This report is part of publication #199 [*1998 Recommendations*].

STATE OF CALIFORNIA

PETE WILSON, Governor

## CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335

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March 19, 1998

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation would extend the time for a response to a demand for production of documents in civil discovery to 30 days from the present 20 days. This will tend to reduce frequent motions or requests for an extension of time, will conform the California time period to that in Rule 34 of the Federal Rules of Civil Procedure, and will make it the same as the 30-day period in California for a response to written interrogatories and requests for admission.

This recommendation is submitted pursuant to Resolution Chapter 102 of the Statutes of 1997.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## RESPONSE TO DEMAND FOR PRODUCTION OF DOCUMENTS IN DISCOVERY

In discovery in a civil case, a party may demand that another party produce and permit inspection and copying of a document.<sup>1</sup> The demand must specify a reasonable time for the inspection that is at least 30 days after service of the demand.<sup>2</sup> Within 20 days after service of the demand, the other party must respond in writing to each item or category of items in the demand by stating either that the party will comply, that the party lacks the ability to comply, or that the party objects to the demand.<sup>3</sup>

These provisions were enacted in 1974<sup>4</sup> to replace the former procedure for obtaining documents by noticed motion and court order with the present extra-judicial method of simply serving a demand.<sup>5</sup> The 1974 legislation brought California substantially into line with the 1970 revision of Rule 34 of the Federal Rules of Civil Procedure.<sup>6</sup> However, in adopt-

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1. Code Civ. Proc. § 2031(a).

2. Code Civ. Proc. § 2031(c).

3. Code Civ. Proc. § 2031(f), (h). Special time periods apply in unlawful detainer cases — five days after the demand for the written response, and a minimum of five days after the demand for inspection. *Id.* § 2031(c), (h). These time periods are extended for service by mail or facsimile transmission. Code Civ. Proc. §§ 2019(e), 1013; R. Weil & I. Brown, *California Practice Guide: Civil Procedure Before Trial* § 8:1450.1, at 8H-8 (Rutter Group, rev. #1, 1997).

4. 1974 Cal. Stat. ch. 592. The 1974 legislation permitted the demand to specify a reasonable time for inspection of the documents, with no minimum time. The minimum 30-day period for inspection was adopted in 1991, but the 20-day period for the written response was not changed. 1991 Cal. Stat. ch. 1090.

5. *Review of Selected 1974 California Legislation*, 6 Pac. L.J. 125, 220 (1975); 2 B. Witkin, *California Evidence Discovery and Production of Evidence* § 1516, at 1479 (3d ed. 1986).

6. Witkin, *supra* note 5.

ing a 20-day period for the written response, California departed from the 30-day period in federal Rule 34.<sup>7</sup>

The Commission is informed that, when faced with a demand for production of documents, parties routinely request an extension of the 20-day period for the written response, often resolving the matter by agreeing with the demanding party that both the response and inspection of the requested documents shall be done on the same day.<sup>8</sup> The result of having two different time periods — 20 days for the response and a minimum of 30 days for the inspection — appears to be that motions for extension are often necessary, even though the purpose of the 1974 legislation was to keep these proceedings out of court whenever possible and to bring the law into line with practice.<sup>9</sup>

The 30-day period for a response to a demand for production of documents under federal Rule 34 appears better designed to reduce unnecessary discovery motions than the California rule. Moreover, adopting a 30-day period in California for a response to a demand for production of documents would make that time period the same as the 30-day

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7. A possible justification for having a shorter time for the response than for inspection is that the party in possession of the document may object to producing it. In such a case, a short time for the response will avoid unnecessary delay in discovery. However, the Commission believes that any possible benefit of a short response time is outweighed by the benefit in most cases of avoiding unnecessary motions for extensions of time. See generally R. Weil & I. Brown, *California Practice Guide: Civil Procedure Before Trial* § 8:1450.1, at 8H-8 (Rutter Group, rev. #1, 1997).

8. Communication from attorney Richard E. Guilford to California Law Revision Commission (October 28, 1996) (attached to Memorandum 97-77, on file with California Law Revision Commission).

9. *Review of Selected 1974 California Legislation*, 6 Pac. L.J. 125, 220 (1975).



period for a response to written interrogatories<sup>10</sup> and requests for admission.<sup>11</sup>

The Commission recommends replacing the present 20-day period for a response to a demand for production of documents with the 30-day period of federal Rule 34.

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10. A response to written interrogatories must be within 30 days after service of the interrogatories unless otherwise provided by the court. Code Civ. Proc. § 2030(h).

11. A response to requests for admission must be within 30 days after service of the request unless otherwise provided by the court. Code Civ. Proc. § 2033(h).

## PROPOSED LEGISLATION

### **Code Civ. Proc. § 2031 (amended). Inspection of documents, things, and places**

SECTION 1. Section 2031 of the Code of Civil Procedure is amended to read:

2031. (a) Any party may obtain discovery within the scope delimited by Section 2017, and subject to the restrictions set forth in Section 2019, by inspecting documents, tangible things, and land or other property that are in the possession, custody, or control of any other party to the action.

(1) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made.

(2) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made.

(3) A party may demand that any other party allow the party making the demand, or someone acting on that party's behalf, to enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, and to inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it.

(b) A defendant may make a demand for inspection without leave of court at any time. A plaintiff may make a demand for inspection without leave of court at any time that is 10 days after the service of the summons on, or in unlawful detainer actions within five days after service of the summons on or appearance by, the party to whom the demand is directed,

whichever occurs first. However, on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to make an inspection demand at an earlier time.

(c) A party demanding an inspection shall number each set of demands consecutively. In the first paragraph immediately below the title of the case, there shall appear the identity of the demanding party, the set number, and the identity of the responding party. Each demand in a set shall be separately set forth, identified by number or letter, and shall do all of the following:

(1) Designate the documents, tangible things, or land or other property to be inspected either by specifically describing each individual item or by reasonably particularizing each category of item.

(2) Specify a reasonable time for the inspection that is at least 30 days after service of the demand, or in unlawful detainer actions at least five days after service of the demand, unless the court for good cause shown has granted leave to specify an earlier date.

(3) Specify a reasonable place for making the inspection, copying, and performing any related activity.

(4) Specify any related activity that is being demanded in addition to an inspection and copying, as well as the manner in which that related activity will be performed, and whether that activity will permanently alter or destroy the item involved.

(d) The party demanding an inspection shall serve a copy of the inspection demand on the party to whom it is directed and on all other parties who have appeared in the action.

(e) When an inspection of documents, tangible things or places has been demanded, the party to whom the demand has been directed, and any other party or affected person or organization, may promptly move for a protective order. This motion shall be accompanied by a declaration stating facts

showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.

The court, for good cause shown, may make any order that justice requires to protect any party or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. This protective order may include, but is not limited to, one or more of the following directions:

(1) That all or some of the items or categories of items in the inspection demand need not be produced or made available at all.

(2) That the time specified in subdivision (h) to respond to the set of inspection demands, or to a particular item or category in the set, be extended.

(3) That the place of production be other than that specified in the inspection demand.

(4) That the inspection be made only on specified terms and conditions.

(5) That a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only to specified persons or only in a specified way.

(6) That the items produced be sealed and thereafter opened only on order of the court.

If the motion for a protective order is denied in whole or in part, the court may order that the party to whom the demand was directed provide or permit the discovery against which protection was sought on terms and conditions that are just.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(f) The party to whom an inspection demand has been directed shall respond separately to each item or category of item by a statement that the party will comply with the particular demand for inspection and any related activities, a representation that the party lacks the ability to comply with the demand for inspection of a particular item or category of item, or an objection to the particular demand.

In the first paragraph of the response immediately below the title of the case, there shall appear the identity of the responding party, the set number, and the identity of the demanding party. Each statement of compliance, each representation, and each objection in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand, but the text of that item or category need not be repeated.

(1) A statement that the party to whom an inspection demand has been directed will comply with the particular demand shall state that the production, inspection, and related activity demanded will be allowed either in whole or in part, and that all documents or things in the demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be included in the production.

Any documents demanded shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand. If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form.

(2) A representation of inability to comply with the particular demand for inspection shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify

whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item.

(3) If only part of an item or category of item in an inspection demand is objectionable, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the remainder of that item or category. If the responding party objects to the demand for inspection of an item or category of item, the response shall (A) identify with particularity any document, tangible thing, or land falling within any category of item in the demand to which an objection is being made, and (B) set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Section 2018, that claim shall be expressly asserted.

(g) The party to whom the demand for inspection is directed shall sign the response under oath unless the response contains only objections. If that party is a public or private corporation or a partnership or association or governmental agency, one of its officers or agents shall sign the response under oath on behalf of that party. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for a party, that party waives any lawyer-client privilege and any protection for work product under Section 2018 during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response. The attorney for the

responding party shall sign any responses that contain an objection.

(h) Within 20 30 days after service of an inspection demand, or in unlawful detainer actions within five days of an inspection demand, the party to whom the demand is directed shall serve the original of the response to it on the party making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the party making the demand the court has shortened the time for response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response. In unlawful detainer actions, the party to whom the demand is directed shall have at least five days from the date of service of the demand to respond unless on motion of the party making the demand the court has shortened the time for the response.

(i) The party demanding an inspection and the responding party may agree to extend the time for service of a response to a set of inspection demands, or to particular items or categories of items in a set, to a date beyond that provided in subdivision (h). This agreement may be informal, but it shall be confirmed in a writing that specifies the extended date for service of a response. Unless this agreement expressly states otherwise, it is effective to preserve to the responding party the right to respond to any item or category of item in the demand to which the agreement applies in any manner specified in subdivision (f).

(j) The inspection demand and the response to it shall not be filed with the court. The party demanding an inspection shall retain both the original of the inspection demand, with the original proof of service affixed to it, and the original of the sworn response until six months after final disposition of the action. At that time, both originals may be destroyed, unless

the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period.

(k) If a party to whom an inspection demand has been directed fails to serve a timely response to it, that party waives any objection to the demand, including one based on privilege or on the protection for work product under Section 2018. However, the court, on motion, may relieve that party from this waiver on its determination that (1) the party has subsequently served a response that is in substantial compliance with subdivision (f), and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

The party making the demand may move for an order compelling response to the inspection demand. The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey the order compelling a response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

(l) If the party demanding an inspection, on receipt of a response to an inspection demand, deems that (1) a statement of compliance with the demand is incomplete, (2) a representation of inability to comply is inadequate, incomplete, or evasive, or (3) an objection in the response is without merit or too general, that party may move for an order compelling further response to the demand. This motion (1) shall set forth specific facts showing good cause justifying the



discovery sought by the inspection demand, and (2) shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by it.

Unless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the demanding party and the responding party have agreed in writing, the demanding party waives any right to compel a further response to the inspection demand.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

If a party fails to obey an order compelling further response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

(m) If a party filing a response to a demand for inspection under subdivision (f) thereafter fails to permit the inspection in accordance with that party's statement of compliance, the party demanding the inspection may move for an order compelling compliance.

The court shall impose a monetary sanction under Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with an inspection demand, unless it finds that the one subject to the sanction acted with substantial justification

or that other circumstances make the imposition of the sanction unjust.

If a party then fails to obey an order compelling inspection, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Section 2023. In lieu of or in addition to that sanction, the court may impose a monetary sanction under Section 2023.

**Comment.** Subdivision (h) of Section 2031 is amended to permit 30 days for a response to a demand for production of documents. This conforms Section 2031 to Rule 34 of the Federal Rules of Civil Procedure, and makes the time period for a response to a demand for production of documents the same as the 30-day period in California for a response to written interrogatories and requests for admission. See Sections 2030(h), 2033(h).

If a party fails to respond to a request for production of documents, the court may prohibit the party from introducing the documents in evidence. Section 2023(a)(4), (b)(3).

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STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

## Uniform TOD Security Registration Act

June 1998

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Uniform TOD Security Registration Act*, 28 Cal. L. Revision Comm'n Reports 577 (1998). This report is part of publication #199 [*1998 Recommendations*].

STATE OF CALIFORNIA

PETE WILSON, Governor

**CALIFORNIA LAW REVISION COMMISSION**

4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335

EDWIN K. MARZEC, Chairperson  
ARTHUR K. MARSHALL, Vice Chairperson  
ROBERT E. COOPER  
BION M. GREGORY  
SENATOR QUENTIN L. KOPP  
SANFORD M. SKAGGS  
ASSEMBLY MEMBER HOWARD WAYNE  
COLIN W. WIED

June 4, 1998

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

This recommendation proposes the enactment of the Uniform TOD Security Registration Act. The uniform act allows the owner of securities to register the title in transfer-on-death form.

This recommendation is submitted pursuant to Resolution Chapter 102 of the Statutes of 1997.

Respectfully submitted,

Edwin K. Marzec  
*Chairperson*



## UNIFORM TOD SECURITY REGISTRATION ACT

The Law Revision Commission recommends that the Uniform TOD Security Registration Act<sup>1</sup> be enacted in California. This uniform act allows an owner of securities to register the title in transfer-on-death (TOD) form and to designate a death beneficiary in the instrument.<sup>2</sup> The uniform act enables an issuer, transfer agent, broker, or other intermediary to transfer securities on the owner's death directly to the designated TOD transferee. The uniform act has been enacted in 39 states.<sup>3</sup>

TOD registration is consistent with existing California law, which authorizes provisions for nonprobate transfer on death in a wide variety of written instruments, including a certificated or uncertificated security.<sup>4</sup> It is also consistent with

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1. The Uniform TOD Security Registration Act was approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in 1989. The act was approved as an addition to the Uniform Probate Code as part of a revised Article VI (nonprobate transfers) and as a separate free-standing act.

2. Mutual fund shares and accounts maintained by brokers and others to reflect a customer's holdings of securities (so-called "street accounts") are also covered by the uniform act.

3. The 39 states that have enacted the Uniform TOD Security Registration Act are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri (substantially similar), Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

4. Prob. Code § 5000; 1 B. Ross & H. Moore, California Practice Guide Probate §§ 2:175-2:178.5, at 2-93 to 2-98 (Rutter Group, rev. 1994); see also Estate of Petersen, 28 Cal. App. 4th 1742, 1751-53, 34 Cal. Rptr. 2d 449, 456-58 (1994) (annuity contracts). Probate Code Section 5000 provides that a "provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust,

long-standing and well-established California policy favoring nonprobate transfers at death for bank deposits,<sup>5</sup> certain state-registered vehicles and vessels,<sup>6</sup> individual retirement accounts, pension plans, and other assets.<sup>7</sup> The uniform act fleshes out the existing California authority for nonprobate transfer of certificated or uncertificated securities by giving specific authority to issuing entities to register securities in TOD form. It is an issuer protection measure that authorizes, but does not require, issuers to offer the TOD title form.<sup>8</sup>

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conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.” Probate Code Section 5003 gives immunity to a holder of property described in Section 5000 who transfers it in compliance with the provision for nonprobate transfer. Sections 5000 and 5003, therefore, may already validate a TOD designation in securities. See Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789, 807-811 (1987). Section 5000 is the same in substance as Section 6-101 of the Uniform Probate Code (1993). The Uniform TOD Security Registration Act extends the nonprobate transfer provision in Uniform Probate Code Section 6-101. *Id.* at 794. Professor Wellman concluded that, for securities, “TOD registration probably will not become a widely used new title form without legislative authorization” such as the Uniform TOD Security Registration Act. *Id.* at 836.

5. Prob. Code §§ 5100-5407.

6. Health & Safety Code §§ 18080.2, 18102.2, 18102.3 (manufactured home, mobilehome, commercial coach, truck camper, floating home); Veh. Code §§ 4150.7, 5910.5, 5910.7 (motor vehicle); Veh. Code §§ 9852.7, 9916.5, 9916.7 (undocumented vessel).

7. See also Educ. Code §§ 23300, 23811 (teachers’ death benefits); Gov’t Code §§ 21455-21458 (public employees’ death benefits); 31 C.F.R. § 315.7(b)(3) (U.S. savings bond in beneficiary form).

8. The uniform act is sufficiently protective of issuers to attract their attention. Its primary purpose is “to induce a dominant segment of the world of financial intermediation to lead investors away from the joint and survivor title forms.” Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789, 835, 838 (1987). Implementation of the uniform act is wholly optional with issuers. The drafting committee that prepared the uniform act received advice and assistance from representatives of the mutual fund and stock transfer industries during its three years of preparatory work. Thus the uniform act takes full account of practical requirements for efficient transfer within the securities industry.



TOD registration is designed to give an owner of securities who wants to arrange for a nonprobate transfer at death an alternative to the frequently troublesome joint tenancy form of title. Because joint tenancy registration of securities normally entails a sharing of lifetime entitlement and control, it works satisfactorily only as long as the co-owners cooperate. Difficulties arise when the co-owners fall into disagreement or when a co-owner becomes unable to manage his or her affairs or becomes insolvent. Joint tenancy registration to arrange for a nonprobate transfer at death may also create estate planning problems<sup>9</sup> and may have undesired tax consequences.<sup>10</sup>

Use of the TOD registration form encouraged by the uniform act has no effect on the registered owner's full control of the affected security during his or her lifetime. A TOD designation and any beneficiary interest arising under the designation ends whenever the registered asset is transferred or whenever the owner otherwise complies with issuer's conditions for changing the title form of the investment. The uniform act recognizes that co-owners with a right of survivorship may be registered as owners together with a TOD beneficiary designated to take if the registration remains unchanged until the beneficiary survives the joint owners. In such a case, the survivor of the joint owners has full control of the asset and may change the registration form as the survivor sees fit after the other's death.

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9. If the owner of a security takes title in joint tenancy with a nonowner, there is a present transfer of a share of the owner's interest. This transfer may create problems for the estate planner who is consulted after the security has been registered in joint tenancy. The estate planner has more flexibility if a TOD beneficiary is designated, since the TOD beneficiary designation can easily be changed.

10. The TOD beneficiary may have a more favorable basis for income tax purposes, since there is no transfer to the TOD beneficiary until the death of the owner of the security. In addition, creation of a joint tenancy may create a gift tax liability at the time the interest is created.

The proposed law is subject to other provisions of California law to the same extent as most other forms of nonprobate transfer. It does not limit rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.<sup>11</sup> It does not deprive a married decedent of the right to dispose by will of his or her half interest in a community property security.<sup>12</sup> The proposed law is subject to provisions relating to simultaneous death,<sup>13</sup> effect of homicide,<sup>14</sup> disclaimers,<sup>15</sup> apportionment of estate taxes,<sup>16</sup> and antilapse.<sup>17</sup>

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11. This provision is the same as California Probate Code Section 5000(c) (nonprobate transfer in written instrument) and Section 9(b) of the Uniform TOD Security Registration Act (1989).

12. Prob. Code §§ 5020, 5021.

13. Prob. Code §§ 220-226.

14. Prob. Code §§ 250-258.

15. Prob. Code §§ 260-288.

16. Prob. Code §§ 20100, 20110.

17. Prob. Code § 21110. Applying the antilapse statute is consistent with the intent of Section 7 of the Uniform TOD Security Registration Act (1989). See Comment to Section 7 of that act.

## PROPOSED LEGISLATION

### **Prob. Code §§ 5500-5512 (added). Uniform TOD Security Registration Act**

SEC. \_\_\_\_\_. Part 3 (commencing with Section 5500) is added to Division 5 of the Probate Code, to read:

### PART 3 . UNIFORM TOD SECURITY REGISTRATION ACT

#### **§ 5500. Short title; purposes; construction**

5500. (a) This part may be cited as the Uniform TOD Security Registration Act.

(b) This part shall be liberally construed and applied to promote its underlying purposes and policy (1) to encourage development of a title form for use by individuals that is effective, without probate and estate administration, to transfer property at death in accordance with directions of a deceased owner of a security as included in the title form in which the security is held and (2) to protect issuers offering and implementing the new title form.

(c) Unless displaced by the particular provisions of this part, the principles of law and equity supplement its provisions.

**Comment.** Section 5500 is the same in substance as Section 11 of the Uniform TOD Security Registration Act (1989). As to construing provisions drawn from uniform acts, see Section 2(b). Paragraphs (1) and (2) of subdivision (b) are not in the uniform act, but are included as a useful statement of the underlying purposes and policy of this part. For a severability provision, see Section 11.

#### **§ 5501. Definitions**

5501. In this part:

(a) “Beneficiary form” means a registration of a security which indicates the present owner of the security and the

intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(b) “Register,” including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(c) “Registering entity” means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(d) “Security” means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.

(e) “Security account” means (1) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner’s death, or (2) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner’s death.

**Comment.** Section 5501 is the same as paragraphs (1), (7), (8), (9), and (10) of Section 1 of the Uniform TOD Security Registration Act (1989). Definitions in Section 1 of the Uniform TOD Security Registration Act that are not included here are in other provisions of this code. See Sections 34 (“devisee”), 44 (“heir”), 56 (“person”), 58 (“personal representative”), 62 (“property”), 74 (“state”).

The definition of “security” includes shares of mutual funds and other investment companies. *Cf.* Com. Code § 8102 (definitions). The defined term “security account” is not intended to include securities held in the name of a bank or similar institution as nominee for the benefit of a trust.

“Survive” is not defined. No effort is made in this part to define survival as it is for purposes of intestate succession in Section 6403, which requires survival by an heir of the ancestor for 120 hours. For

purposes of this part, “survive” is used in its common law sense of outliving another for any time interval, no matter how brief. The drafters of the uniform act sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of “survive” in joint tenancy registrations.

**§ 5502. Ownership requirement to obtain registration in beneficiary form**

5502. Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entirety, or as owners of community property held in survivorship form, and not as tenants in common.

**Comment.** Section 5502 is the same as Section 2 of the Uniform TOD Security Registration Act (1989). Section 5502 is designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of *all* co-owners. It coerces co-owning registrants to signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the entirety (T ENT), or as owners of community property. Also, it imposes survivorship on co-owners holding in a beneficiary form that fails to specify a survivorship form of holding. Nothing in Section 5502 authorizes a California married couple to register a security as “tenants by the entirety,” since California does not recognize that form of ownership. See Civ. Code § 682. However, a California corporation may register a security to be held as tenants by the entirety if the shareholders are residents of another state which recognizes that form of ownership. Similarly, California does not permit property to be held as community property with a right of survivorship. However, this title form is recognized in Nevada and Arizona. See Nevada Rev. Stat. Ann. ch. 111.064 (Michie 1993); Ariz. Rev. Stat. Ann. § 33-431 (Supp. 1997).

Tenancy in common and community property otherwise than in a survivorship setting are negated for registration in beneficiary form because persons desiring to signal independent death beneficiaries for each individual’s fractional interest in a co-owned security normally will split their holdings into separate registrations of the number of units

previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary.

The term “individual,” as used in this section, limits those who may register as owner or co-owner of a security in beneficiary form to natural persons. However, the section does not restrict an individual using this ownership form as to the choice of death beneficiary. The definition of “beneficiary form” in Section 5501 indicates that any “person” may be designated beneficiary in a registration in beneficiary form. “Person” is defined in Section 56 so that a church, trust company, family corporation, or other entity, as well as an individual, may be designated as a beneficiary.

### **§ 5503. Law authorizing registration in beneficiary form**

5503. A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity’s principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner’s address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

**Comment.** Section 5503 is the same as Section 3 of the Uniform TOD Security Registration Act (1989). The section encourages registrations in beneficiary form to be made whenever a state with which either of the parties to a registration has contact has enacted this or a similar statute. Thus, a registration in beneficiary form of X Company shares might rely on the enactment of the uniform act in X Company’s state of incorporation, or in the state of incorporation of X Company’s transfer agent. Or, an enactment by the state of the issuer’s principal office, of the transfer agent’s principal office, or of the issuer’s office making the registration also would validate the registration. An enactment of the state of the registered owner’s address at the time of registration also might be used for validation purposes. The last sentence of Section 5503 is designed to establish a statutory presumption that a general principle of law is available to achieve a result like that made possible by this part.

**§ 5504. Origination of registration in beneficiary form**

5504. A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

**Comment.** Section 5504 is the same as Section 4 of the Uniform TOD Security Registration Act (1989). As noted in the Comment to Section 5502, this part places no restriction on who may be designated beneficiary in a registration in beneficiary form. Any legal entity may be designated beneficiary in a registration in beneficiary form.

**§ 5505. Form of registration in beneficiary form**

5505. Registration in beneficiary form may be shown by the words “transfer on death” or the abbreviation “TOD,” or by the words “pay on death” or the abbreviation “POD,” after the name of the registered owner and before the name of a beneficiary.

**Comment.** Section 5505 is the same as Section 5 of the Uniform TOD Security Registration Act (1989). The abbreviation “POD” is included for use without regard to whether the subject is a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to securities evidenced by conventional title documentation. The use of “POD” in a registration in beneficiary form of shares in an investment company should not be taken as a signal that the investment is to be sold or redeemed on the owner’s death so that the sums realized may be “paid” to the death beneficiary. Rather, only a transfer on death, not a liquidation on death, is indicated. The drafters of the uniform act would have used only the abbreviation “TOD” except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation “POD” as signaling a valid nonprobate death benefit or transfer on death.

**§ 5506. Effect of registration in beneficiary form**

5506. The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner’s death. A registration of a security in beneficiary form may be canceled or changed at any time by

the sole owner or all then surviving owners without the consent of the beneficiary.

**Comment.** Section 5506 is the same as Section 6 of the Uniform TOD Security Registration Act (1989). The section simply affirms the right of a sole owner, or the right of all multiple owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity's terms and conditions, if any, may be relevant. See Section 5510. If the terms and conditions have nothing on the point, cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.

### **§ 5507. Ownership on death of owner**

5507. On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

**Comment.** Section 5507 is the same as Section 7 of the Uniform TOD Security Registration Act (1989). Even though multiple owners of a security registered in beneficiary form hold with right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who become entitled to securities by reason of having survived the sole owner or the last to die of multiple owners. Issuers (and registering entities) who decide to accept registrations in beneficiary form involving more than one primary beneficiary should provide by rule whether fractional shares will be registered in the names of surviving beneficiaries where the number of shares held by the deceased owner does not divide without



remnant among the survivors. If fractional shares are not desired, the issuer may wish to provide for sale of odd shares and division of proceeds, for an uneven distribution with the first or last named to receive the odd share, or for other resolution. Section 5508 deals with whether intermediaries have any obligation to offer beneficiary designations of any sort. Section 5510 enables issuers to adopt terms and conditions controlling the details of applications for registrations they decide to accept and procedures for implementing such registrations after an owner's death.

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any antilapse statute that might direct a nonprobate transfer on death to the surviving issue of a beneficiary who failed to survive the owner. See, e.g., Section 21110 (antilapse). Rather, the statement is intended only to indicate that the registering entity involved should transfer or reregister the security as directed by the decedent's personal representative.

See also the Comment to Section 5501 on the meaning of "survive" for purposes of this part.

#### **§ 5508. Protection of registering entity**

5508. (a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this part.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this part.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of the security in accordance with Section 5507 and does so in good faith reliance (1) on the registration, (2) on this part, and (3) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving

beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part do not extend to a reregistration or payment made after a registering entity has received written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this part.

(d) The protection provided by this part to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

**Comment.** Section 5508 is the same as Section 8 of the Uniform TOD Security Registration Act (1989), except for substitution of "part" for "act" and "Section 5507" for "Section 7." A "request" for registration in beneficiary form may be in any form chosen by a registering entity. This part does not prescribe a particular form and does not impose record-keeping requirements. Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.

The written notice referred to in subdivision (c) would qualify as a notice under Section 8403 of the Uniform Commercial Code.

"Good faith" as used in subdivision (c) is intended to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," as specified in Section 2103(1)(b) of the Uniform Commercial Code.

The protections described in this section are designed to meet any questions regarding registering entity protection that may not be foreclosed by issuer protections provided in the Uniform Commercial Code. For a discussion of the relevant Uniform Commercial Code provisions, see Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789, 823 n.90 (1987).

### **§ 5509. Nontestamentary transfer on death; rights of creditors**

5509. (a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this part and is not testamentary, and is

not invalid because the registration does not comply with the requirements for execution of a will, and this code does not invalidate the registration.

(b) This part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.

**Comment.** Section 5509 is the same as Section 9 of the Uniform TOD Security Registration Act (1989), with the addition of the last portion of subdivision (a), drawn from Section 5000.

### **§ 5510. Terms, conditions, and forms for registration**

5510. (a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (1) for registrations in beneficiary form, and (2) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities

regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(2) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

(3) Multiple owners-primary and secondary (substituted) beneficiaries:

John S Brown Mary B Brown JT TEN TOD John S Brown Jr SUB BENE Peter Q Brown *or* John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS.

**Comment.** Section 5510 is the same as Section 10 of the Uniform TOD Security Registration Act (1989). Use of "and" or "or" between the names of persons registered as co-owners is unnecessary under this part and should be discouraged. If used, the two words should have the same meaning insofar as concerns a title form, i.e., that of "and" to indicate that both named persons own the asset.

Descendants of a named beneficiary who take by virtue of an "LDPS" designation appended to a beneficiary's name take as TOD beneficiaries rather than as intestate successors. For distributions to lineal descendants per stirpes, see Section 246. If no descendant of a predeceased primary beneficiary survives the owner, the security passes as part of the owner's estate as provided in Section 5507.

### **§ 5511. Community property rights of nonconsenting spouse**

5511. Nothing in this part alters the community character of community property or community rights in community property. This part is subject to Chapter 2 (commencing with Section 5010) of Part 1.

**Comment.** Section 5511 makes clear that rights granted by this part are subject to Sections 5010-5032 (community property rights of nonconsenting spouse in nonprobate transfers).

Property rights under this part may be subject to other statutory qualifications than those noted in Section 5511. See, e.g., Sections 220-226 (simultaneous death), 250-258 (effect of homicide), 260-288

(disclaimer). Property received under this part may be subject to apportionment of estate taxes. See Sections 20100-20225. If a TOD beneficiary fails to survive the owner, the beneficiary's interest may be subject to the antilapse statute. See Section 21110.

### § 5512. Application of part

5512. This part applies to registrations of securities in beneficiary form made before, on, or after January 1, 2000, by decedents dying on or after January 1, 2000.

**Comment.** Section 5512 is the same as Section 11 of the Uniform TOD Security Registration Act (1989), except that it applies this part to registrations made before, "on," or after the operative date.

## CONFORMING REVISION

### **Com. Code § 8107 (amended). Appropriate person; effectiveness of endorsement, instruction, or entitlement order**

SEC. \_\_\_\_\_. Section 8107 of the Commercial Code is amended to read:

8107. (a) "Appropriate person" means any of the following:

(1) With respect to an endorsement, the person specified by a security certificate or by an effective special endorsement to be entitled to the security.

(2) With respect to an instruction, the registered owner of an uncertificated security.

(3) With respect to an entitlement order, the entitlement holder.

(4) If the person designated in paragraph (1), (2), or (3) is deceased, the designated person's successor taking under other law or the designated person's personal representative acting for the estate of the decedent.

(5) If the person designated in paragraph (1), (2), or (3) lacks capacity, the designated person's guardian, conservator, or other similar representative who has power under other law to transfer the security or financial asset.

*(6) With respect to an endorsement or an instruction, the beneficiary of a security registered in beneficiary form as defined in subdivision (a) of Section 5501 of the Probate Code, if the beneficiary has survived the death of the registered owner or all registered owners.*

(b) An endorsement, instruction, or entitlement order is effective if it is made by any of the following:

(1) It is made by the appropriate person.

(2) It is made by a person who has power under the law of agency to transfer the security or financial asset on behalf of the appropriate person, including, in the case of an instruction or entitlement order, a person who has control under paragraph (2) of subdivision (c) or paragraph (2) of subdivision (d) of Section 8106.

(3) The appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness.

(c) An endorsement, instruction, or entitlement order made by a representative is effective even if:

(1) The representative has failed to comply with a controlling instrument or with the law of the state having jurisdiction of the representative relationship, including any law requiring the representative to obtain court approval of the transaction.

(2) The representative's action in making the endorsement, instruction, or entitlement order or using the proceeds of the transaction is otherwise a breach of duty.

(d) If a security is registered in the name of or specially endorsed to a person described as a representative, or if a security account is maintained in the name of a person described as a representative, an endorsement, instruction, or entitlement order made by the person is effective even though the person is no longer serving in the described capacity.

(e) Effectiveness of an endorsement, instruction, or entitlement order is determined as of the date the

endorsement, instruction, or entitlement order is made, and an endorsement, instruction, or entitlement order does not become ineffective by reason of any later change of circumstances.

**Comment.** Section 8107 is amended to add paragraph (6) to subdivision (a). This is a technical amendment to make clear that a TOD beneficiary is an “appropriate person” when the beneficiary has survived the registered sole owner or all the registered owners of a security registered in beneficiary form under the Uniform TOD Security Registration Act (1989). See Prob. Code §§ 5500-5512. See also Section 8102 (“entitlement order,” “financial asset,” “endorsement,” “instruction,” “security,” “security certificate,” and “uncertificated security” defined).

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STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

## Effect of Dissolution of Marriage on Nonprobate Transfers

September 1998

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Effect of Dissolution of Marriage on Nonprobate Transfers*, 28 Cal. L. Revision Comm'n Reports 599 (1998). This report is part of publication #199 [*1998 Recommendations*].

STATE OF CALIFORNIA

PETE WILSON, Governor

## CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335

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September 25, 1998

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

A person who creates an instrument making a nonprobate transfer to a spouse probably does not intend that it continue to operate in favor of the spouse after dissolution of their marriage. In many cases the person inadvertently fails to revoke the nonprobate transfer, with the result that on the person's death, the property passes to the person's former spouse, rather than to the person's estate. This result is contrary to the likely intentions of most divorcing parties and is inconsistent with the law governing wills and other inheritance rights. The Commission therefore recommends that dissolution of marriage prevent the operation of a revocable nonprobate transfer on death to a former spouse, unless there is clear and convincing evidence that the transferor intends to preserve the nonprobate transfer in favor of the transferor's former spouse.

This recommendation is submitted pursuant to Resolution Chapter 91 of the Statutes of 1998.

Respectfully submitted,

Arthur K. Marshall  
*Chairperson*



## EFFECT OF DISSOLUTION OF MARRIAGE ON NONPROBATE TRANSFERS

In California, as in most states, the dissolution or annulment of a person's marriage automatically revokes a disposition to a former spouse in that person's will. This policy is based on the assumption that typical divorcing parties will not intend or expect a will provision benefiting a spouse to survive the dissolution of their marriage. Where a person fails to change a will after a divorce, that failure is probably inadvertent.<sup>1</sup>

California law does not extend similar protection to a divorcing person who has chosen to pass property on death by means of an instrument other than a will. For example, the designation of a spouse as beneficiary to a life insurance policy is unaffected by dissolution of marriage. Where a person fails to change such a beneficiary designation after divorce, the policy proceeds will go to that person's former spouse, and not to that person's current spouse or children.

The Law Revision Commission recommends that dissolution of marriage prevent the operation of a revocable nonprobate transfer on death to a former spouse unless there is clear and convincing evidence that the transferor intends to preserve the nonprobate transfer in favor of the transferor's former spouse. This would protect the likely intentions of most divorcing parties and would eliminate the inconsistency that currently exists in the treatment of probate and nonprobate transfers on death after dissolution of a marriage.

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1. See *Tentative Recommendation Relating to Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2325 (1982).

## EXISTING LAW

A broad range of instruments other than wills may be used to transfer property on death.<sup>2</sup> Such instruments include life insurance policies, trusts, retirement death benefits, transfer-on-death financial accounts, and transfer-on-death vehicle registration. Joint tenancy title provides another means of transferring property on death outside of a will.<sup>3</sup> These “nonprobate transfers” form an increasingly important component of many Californians’ estate plans.<sup>4</sup>

Dissolution of marriage does not automatically revoke a disposition to a former spouse in an instrument making a nonprobate transfer.<sup>5</sup> Where a person inadvertently fails to change a provision making a nonprobate transfer after divorce, the property will pass to the former spouse, rather than to the person’s estate.<sup>6</sup> This result is contrary to the

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2. See Prob. Code § 5000.

3. The distinguishing incident of joint tenancy is its survivorship feature. On the death of one joint tenant, that person’s interest in the joint tenancy is terminated. The property is then held in joint tenancy between any surviving joint tenants. If there is only one surviving joint tenant, that person holds an undivided interest in the property. See 4 B. Witkin, *Summary of California Law Real Property* § 257, at 459-60 (9th ed. 1987).

4. As recognized in the Prefatory Note to Article II of the Uniform Probate Code (1993), “will substitutes and other inter-vivos transfers have so proliferated that they now constitute a major, if not the major, form of wealth transmission ....”

5. See, e.g., *Life Ins. Co. of No. America v. Cassidy*, 35 Cal. 3d 599, 606, 676 P.2d 1050, 1053, 200 Cal. Rptr. 28, 31 (1984) (marital property agreement assigning ownership of life insurance policy to one spouse does not automatically revoke status of other spouse as beneficiary); *Estate of Layton*, 44 Cal. App. 4th 1337, 1344, 52 Cal. Rptr. 2d 251, 256 (1996) (status-only dissolution of marriage did not sever marital joint tenancy).

6. Note that the question of the effect of dissolution of marriage on a nonprobate transfer will not often arise in the context of marital joint tenancy. This is because there is a presumption, on dissolution of marriage, that property acquired by spouses in joint form is community property. See Fam. Code § 2581. See also *In re Marriage of Hilke*, 4 Cal. 4th 215, 222, 841 P.2d 891, 896,

probable intentions and expectations of most divorcing parties.<sup>7</sup>

Bifurcated dissolution proceedings can exacerbate this problem. Where one spouse dies after a judgment dissolving marital status but before property division proceedings have begun, a nonprobate transfer may operate to the benefit of the decedent's former spouse before the decedent has had an opportunity to change the instrument making the transfer.<sup>8</sup>

The rule that dissolution of marriage does not affect a nonprobate transfer is inconsistent with other law governing the disposition of property on death. For example, dissolution of marriage automatically revokes a disposition to a spouse in a will,<sup>9</sup> the designation of a spouse as attorney-in-fact,<sup>10</sup> and a

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14 Cal. Rptr. 2d 371, 376 (1992) (community property presumption applies after death of former spouse if court has entered judgment dissolving marriage and reserved jurisdiction over property matters).

7. In discussing the rule that divorce revokes a beneficiary designation under the Public Employees' Retirement System, one court observed:

The statutes anticipate that, upon undergoing a fundamental change in family composition such as marriage, divorce or birth of a child, employees would most likely intend to provide for their new family members, and/or revoke prior provisions made for their ex-spouses. The statutes also anticipate that employees themselves will often fail to so provide and revoke, not out of conscious intent, but simply from a lack of attentiveness. By automatically revoking prior beneficiary-designations upon a change in family composition, and by substituting statutory beneficiaries in their place, [the law is] designed to protect employees from such inattentiveness.

Coughlin v. Board of Admin., 152 Cal. App. 3d 70, 73, 199 Cal. Rptr. 286, 287-88 (1984). See also *In re Marriage of Allen*, 8 Cal. App. 4th 1225, 1231, 10 Cal. Rptr. 2d 916, 919 (1992) (operation of joint tenancy survivorship after divorce not "consistent with what the average decedent and former spouse would have wanted had death been anticipated"); *Estate of Blair*, 199 Cal. App. 3d 161, 169, 244 Cal. Rptr. 627, 632 (1988) (unlikely that divorcing parties wish to preserve joint tenancy after divorce, where an "untimely death results in a windfall to the surviving spouse, a result neither party presumably intends or anticipates").

8. See, e.g., *Layton*, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 2d 251 (1996).

9. See Prob. Code §§ 6122, 6227.

10. See *id.* §§ 3722, 4154, 4727.

death benefit beneficiary designation under the Public Employees' Retirement System.<sup>11</sup> Dissolution of marriage also terminates a person's status as a surviving spouse, and all of the rights that follow from that status.<sup>12</sup>

The inconsistent treatment of probate and nonprobate transfers after dissolution of marriage does not make sense. If the typical divorcing person does not intend to maintain a disposition benefiting a spouse in a will, that person will likewise not wish to preserve a disposition to a spouse in some other instrument. Furthermore, a person who is aware of the laws revoking spousal inheritance rights on dissolution of marriage will probably assume that similar laws apply to nonprobate transfers and to joint tenancy. This increases the probability that a divorcing person will not revoke a nonprobate transfer or sever a joint tenancy after dissolution of marriage, despite an intent to terminate the disposition to the person's former spouse.

## PROPOSED LAW

### General Rule

Subject to the exceptions discussed below, the proposed law would prevent the operation of a nonprobate transfer to a former spouse<sup>13</sup> and would sever a joint tenancy as between

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11. See Gov't Code § 21492.

12. See Prob. Code § 78 ("surviving spouse" defined). The rights contingent on one's status as a decedent's surviving spouse are numerous. See, e.g. Prob. Code §§ 6401 (surviving spouse's share in intestate succession), 6540 (family allowance), 21610 (share of spouse omitted from will).

13. Where a nonprobate transfer fails by operation of the proposed law, the instrument is given effect as if the former spouse had failed to survive the decedent. See proposed Prob. Code § 5600(c). Existing law governing the death of a beneficiary or trustee would then apply. See Prob. Code §§ 15660 (failure of trustee designation), 21111 (failed probate and nonprobate transfers).



the decedent and the decedent's former spouse,<sup>14</sup> if dissolution of marriage has terminated the surviving beneficiary's or joint tenant's status as the decedent's "surviving spouse" under Probate Code Section 78.<sup>15</sup> This rule implements the intentions of the typical divorcing person and eliminates the existing inconsistency between the treatment of probate and nonprobate transfers after dissolution of marriage.<sup>16</sup>

### Exceptions

*Creation after dissolution of marriage.* The proposed law would only affect a provision making a nonprobate transfer or a joint tenancy that was created before or during the former spouses' marriage to each other. This permits a person who wishes to preserve a nonprobate transfer to a former spouse, or a joint tenancy with a former spouse, to do so by recreating the provision or the joint tenancy after dissolution of marriage. For example, if a person adds a former spouse as a beneficiary to a life insurance policy after the dissolution of the person's marriage to the former spouse, the designation of the former spouse as beneficiary of a nonprobate transfer is made after the dissolution of their marriage and is therefore not affected by the proposed law.

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14. Severance of a joint tenancy terminates the right of survivorship, converting the joint tenancy into a tenancy in common between the former joint tenants. See Witkin, *supra* note 3, §§ 276-78, at 475-77.

15. Dissolution of marriage terminates a person's status as a decedent's surviving spouse, unless that person and the decedent are, by virtue of a subsequent marriage, married to each other at the time of the decedent's death. See Prob. Code § 78.

16. The proposed law is similar to Uniform Probate Code Section 2-804, which revokes a broad range of nonprobate transfers on dissolution of marriage. See Unif. Prob. Code § 2-804 (1993). Section 2-804 is based on the same policy assumption as the proposed law, that revocation of spousal dispositions on divorce gives "effect to the average owner's presumed intent ...." McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brook. L. Rev. 1123, 1161-63 (1993).

*Irrevocability.* The proposed law would only affect a nonprobate transfer or joint tenancy that is subject to revocation or severance by the decedent at the time of the decedent's death.<sup>17</sup> A person's intent to revoke a nonprobate transfer or sever a joint tenancy after dissolution of marriage is irrelevant if that person lacks authority to do so.

*Evidence of contrary intent.* The proposed law does not affect a nonprobate transfer or a joint tenancy if there is clear and convincing evidence that the decedent intended to preserve the nonprobate transfer or joint tenancy survivorship.<sup>18</sup> In such a case the policy assumption underlying the general rule, that a typical person does not intend a spousal disposition to survive dissolution of marriage, is inapplicable.

### **Third Party Protections**

The proposed law protects third parties in two contexts:

*Property holders.* Most forms of nonprobate transfer involve an intermediary who holds the property to be transferred and is responsible for its distribution according to the terms of the transferring instrument. The proposed law provides protection from liability for a property holder who transfers property according to the terms of the transferring instrument, unless the property holder has been served with a contrary court order or with notice from a person with an

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17. For example, where a court orders a spousal support obligor to maintain a life insurance policy designating a former spouse as beneficiary, that provision is not subject to revocation by the transferor and thus would not fail by operation of the proposed law.

18. The clear and convincing evidence standard allows consideration of evidence of a contrary intent without opening the door to a flood of litigation. Other Probate Code provisions apply the same standard where considering evidence of an intent contrary to a statutory default rule. See, e.g., Prob. Code §§ 5301 (lifetime ownership of funds in joint account), 5302 (disposition of funds in joint account on death of one account holder).

adverse interest in the property.<sup>19</sup> A person who files a bad faith notice of an adverse interest is liable for costs and damages that result.<sup>20</sup>

*Bona fide purchasers.* The proposed law protects the rights of a good faith purchaser or encumbrancer for value who relies on the apparent failure of a nonprobate transfer or severance of a joint tenancy under the proposed law, or who lacks knowledge of the failure of a nonprobate transfer or the severance of a joint tenancy under the proposed law.<sup>21</sup> The remedy for a person who is injured by a transaction with a purchaser or encumbrancer is against the transacting former spouse and not against the purchaser or encumbrancer.

The proposed law also provides an affidavit procedure that may be used to quickly and easily certify that a person's rights to real property transferred by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship are not affected by the proposed law (either because the person is a surviving spouse or because the transfer falls within one of the proposed law's exceptions).<sup>22</sup> The rights of a good faith purchaser or encumbrancer who relies on such an affidavit are protected.<sup>23</sup>

## SCOPE OF PROPOSED LAW

### Preemption

The Commission recommends that the proposed law apply to the broadest extent consistent with federal law. While the

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19. This protection would be implemented by broadening the application of existing Probate Code Section 5003, which offers similar protection in the context of a failure of spousal consent to a nonprobate transfer of community property.

20. *Id.*

21. See proposed Prob. Code §§ 5600(d), 5601(c).

22. See proposed Prob. Code § 5602.

23. *Id.*

proposed law may be preempted by federal law as applied to many forms of employer-provided benefits,<sup>24</sup> the proposed law does not exempt such benefits from its scope of application.<sup>25</sup> To do so would codify the present extent of federal preemption, precluding broader application of the proposed law if the scope of preemption is later reduced by Congress or construed more narrowly by the courts. It is to be hoped that, as more states adopt provisions similar to the proposed law, Congress will adopt a similar provision or will clear a space for state law to operate in this area.

### **Contracts Clause**

There is some authority suggesting that application of the proposed law to a contract in existence prior to enactment of the proposed law could unconstitutionally impair the obligations of that contract.<sup>26</sup> There is, however, a good argument against this proposition.<sup>27</sup> Considering the uncertainty on this

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24. See, e.g., *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991) (ERISA preempts state law providing that dissolution of marriage revokes designation of former spouse as beneficiary to employer-provided life insurance).

25. The Probate Code's general severability section will preserve application of the proposed law where not preempted. See Prob. Code § 11.

26. See U.S. Const. art. I, § 10, cl. 1; *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991) (Oklahoma statute providing that dissolution of marriage revokes the designation of a spouse as beneficiary to life insurance unconstitutionally impaired obligation of preexisting contract).

27. A cogent summary of the argument is provided by the Joint Editorial Board for the Uniform Probate Code (JEB) in its response to the decision in *Whirlpool Corp. v. Ritter*. See *Joint Editorial Board Statement Regarding the Constitutionality of Changes in Default Rules as Applied to Pre-Existing Documents*, 17 Am. C. Tr. & Est. Couns. Notes 184, 185 (1991). The JEB's argument rests on the following points:

(1) "A life insurance policy is a third-party beneficiary contract. As such it is a mixture of contract and donative transfer.... In *Ritter* and in comparable cases, there is never a suggestion that the insurance company can escape paying the policy proceeds that are due under the contract.... The divorce statute affects only the donative transfer, the component of the

point, and the Commission's recommendation that the law be applied broadly, application of the proposed law is not limited to contracts formed after the law's enactment.<sup>28</sup>

### CONFORMING REVISIONS

The proposed law includes the following minor revisions to existing law:

- Family Code Section 2024, which provides for a printed warning of the automatic revocation of a spousal disposition in a will, is amended to expand the scope of the warning to refer to the effects of the proposed law.
- Probate Code Section 5003, protecting property holders from liability for transferring property according to the terms of an instrument making a nonprobate transfer, is amended to make it applicable to the proposed law.
- Probate Code Section 5302, governing disposition of funds in a multiple party account in a financial institu-

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policy that raises no Contracts Clause issue. The precise question in these cases is which of the decedent's potential donee-transferees should receive the proceeds....

....

.... The JEB believes that there is no justification for extending Contracts Clause concerns to a statute that only [affects] the donative-transfer component of a life insurance policy, since the statute works no interference with the contractual component of the policy, the company's obligation to pay."

(2) "The Contracts Clause protects contractual reliance. Because statutes such as Uniform Probate Code § 2-804 serve to implement rather than to defeat the insured's expectation under the insurance contract, the premise for applying the Contracts Clause is wholly without foundation."

(3) Statutes such as Uniform Probate Code § 2-804 are mere constructional default rules. "The JEB is aware of no authority for the application of the Contracts Clause to state legislation applying altered rules of construction or other default rules to pre-existing documents in any field of law ...."

28. The Probate Code's general severability section will preserve application of the proposed law where not unconstitutional. See Prob. Code § 11.

tion, is amended to make survivorship rights in such accounts subject to the proposed law.

- Probate Code Section 6202, which defines “spouse” for the purposes of California statutory will law, is repealed to eliminate an inconsistency in the treatment of statutory wills, other wills, and nonprobate transfers.<sup>29</sup>
- Probate Code Section 21111, governing the effect of a failed transfer of property on death, is amended to clarify its application to instruments that do not provide for the transfer of a residue.

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29. Under the applicable definition of “spouse,” dissolution of marriage does not revoke a spousal disposition in a California statutory will that is executed before the testator’s marriage to the former spouse. See Prob. Code §§ 6202, 6227. This is inconsistent with the general rule that a disposition to a spouse is revoked on dissolution of marriage, regardless of whether the will was executed before the testator’s marriage to the former spouse. See *Estate of Reeves*, 233 Cal. App. 3d 651, 658, 284 Cal. Rptr. 650, 654 (1991). This is also inconsistent with the proposed law. Repeal of Probate Code Section 6202 eliminates these inconsistencies.

## PROPOSED LEGISLATION

### **Prob. Code §§ 5600-5603 (added). Nonprobate transfer to former spouse**

SEC. \_\_\_\_\_. Part 4 (commencing with Section 5600) is added to Division 5 of the Probate Code, to read:

### PART 4 . NONPROBATE TRANSFER TO FORMER SPOUSE

#### **§ 5600. Failure of nonprobate transfer to former spouse**

5600. (a) Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in either of the following cases:

(1) The nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

(c) Where a nonprobate transfer fails by operation of this section, the instrument making the nonprobate transfer shall be treated as it would if the former spouse failed to survive the transferor.

(d) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section.

(e) As used in this section, "nonprobate transfer" means a provision of either of the following types:

(1) A provision of a type described in Section 5000.

(2) A provision in an instrument that operates on death, other than a will, conferring a power of appointment or naming a trustee.

**Comment.** Subdivision (a) of Section 5600 establishes the general rule that a nonprobate transfer to a former spouse fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse. "Surviving spouse" is defined in Section 78.

Paragraph (1) of subdivision (b) provides that a nonprobate transfer to a former spouse does not fail by operation of subdivision (a) if, at the time of the transferor's death, the nonprobate transfer is not subject to revocation by the transferor. This precludes operation of subdivision (a) where a nonprobate transfer is irrevocable on execution, or later becomes irrevocable by the transferor (for reasons other than the death or incapacity of the transferor). For example, a court may order a spousal support obligor to maintain life insurance on behalf of a former spouse. See Fam. Code § 4360. If a person dies while subject to such an order, subdivision (a) would not affect the rights of the transferor's former spouse under the policy. The irrevocability of a trust can be established by certification of the trust's contents. See Section 18100.5.

Paragraph (2) of subdivision (b) provides that a nonprobate transfer to a former spouse does not fail on the transferor's death if there is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer. For example, if after divorcing, the transferor modified the beneficiary terms of a life insurance policy without changing the designation of the former spouse as primary beneficiary, this might be sufficiently clear and convincing evidence of the transferor's intent to preserve the nonprobate transfer to the former spouse so as to prevent the operation of subdivision (a).

Subdivision (c) governs the effect of failure of a nonprobate transfer under this section. For the effect of a failed nonprobate transfer of property, see Section 21111. For the effect of a failure of a trustee designation, see Section 15660.

Subdivision (d) makes clear that nothing in this section affects the rights of a good faith purchaser or encumbrancer for value who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section. For the purpose of this subdivision, "knowledge" of the failure of a nonprobate transfer includes both actual knowledge and constructive knowledge through recordation of a judgment of dissolution or annulment or other relevant document. See Civ. Code § 1213 (recordation as constructive notice to subsequent purchasers and



mortgagees). The rights of a subsequent purchaser or encumbrancer are also protected if the purchaser or encumbrancer relies on an affidavit or declaration executed under Section 5602. The remedy for a person injured by a transaction with a subsequent purchaser or encumbrancer for value is against the transacting former spouse and not against the purchaser or encumbrancer.

In general, Section 5003 protects a property holder from liability for transferring the property according to the terms of the instrument making the nonprobate transfer, even if the nonprobate transfer has failed by operation of subdivision (a).

This section may be preempted by federal laws regulating employer-provided benefits. See *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991) (ERISA preempts state law providing that dissolution of marriage revokes designation of former spouse as beneficiary to employer-provided life insurance). It is therefore especially important on dissolution or annulment of marriage to review beneficiary designations for employer-provided death benefits.

#### **§ 5601. Severance of joint tenancy between decedent and former spouse**

5601. (a) Except as provided in subdivision (b), a joint tenancy between the decedent and the decedent's former spouse, created before or during the marriage, is severed as to the decedent's interest if, at the time of the decedent's death, the former spouse is not the decedent's surviving spouse.

(b) Subdivision (a) does not sever a joint tenancy in either of the following cases:

(1) The joint tenancy is not subject to severance by the decedent at the time of the decedent's death.

(2) There is clear and convincing evidence that the decedent intended to preserve the joint tenancy in favor of the former spouse.

(c) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on an apparent severance under this section or who lacks knowledge of a severance under this section.

**Comment.** Subdivision (a) of Section 5601 establishes the general rule that a joint tenancy between a decedent and the decedent's former spouse is severed if, at the time of the decedent's death, the former spouse is not

the decedent's surviving spouse. "Surviving spouse" is defined in Section 78. This effectively reverses the common law rule that dissolution or annulment of marriage does not sever a joint tenancy between spouses. See, e.g., *Estate of Layton*, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 2d 251 (1996).

Property acquired during marriage in joint tenancy form is presumed to be community property on dissolution of marriage or legal separation. See Fam. Code § 2581. See also *In re Marriage of Hilke*, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992) (community property presumption applies after death of former spouse if court has entered judgment dissolving marriage and reserved jurisdiction over property matters). This section does not affect the community property presumption and does not affect property characterized as community property under that presumption.

This section applies to both real and personal property joint tenancies, and affects property rights that depend on the law of joint tenancy. See, e.g., Veh. Code §§ 4150.5, 5600.5 (property passes as though in joint tenancy). This section does not affect United States Savings Bonds, which are subject to federal regulation. See *Conrad v. Conrad*, 66 Cal. App. 2d 280, 284-85, 152 P.2d 221, 223 (1944) (federal law controls).

The method provided in this section for severing a joint tenancy is not exclusive. See, e.g., Civ. Code § 683.2.

Where a joint tenancy involves three or more joint tenants, severance by operation of this section converts the decedent's interest into a tenancy in common, but does not sever the joint tenancy as between the other joint tenants. For example, husband, wife, and a third person create a joint tenancy during husband and wife's marriage to each other. On husband's death, wife is not husband's surviving spouse and the joint tenancy is severed by operation of this section. Husband's one third interest becomes a tenancy in common and does not pass by survivorship. The remaining two thirds remain in joint tenancy as between the third person and the former wife.

Paragraph (1) of subdivision (b) provides that a joint tenancy is not severed by operation of subdivision (a) if the joint tenancy is not subject to severance by the decedent (for reasons other than the decedent's death). For example, if the decedent is subject to a court order or binding agreement prohibiting severance of the joint tenancy by the decedent, then the joint tenancy is not severed by operation of subdivision (a).

Subdivision (c) makes clear that nothing in this section affects the rights of a good faith purchaser or encumbrancer who relies on an apparent severance by operation of this section or who lacks knowledge of a severance by operation of this section. For the purpose of this subdivision, "knowledge" of a severance of joint tenancy includes both

actual knowledge and constructive knowledge through recordation of a judgment of dissolution or annulment or other relevant document. See Civ. Code § 1213 (recordation as constructive notice to subsequent purchasers and mortgagees). The rights of a subsequent purchaser or encumbrancer are also protected if the purchaser or encumbrancer relies on an affidavit or declaration executed under Section 5602. The remedy for a person injured by a transaction with a subsequent purchaser or encumbrancer is against the transacting joint tenant and not against the purchaser or encumbrancer.

**§ 5602. Certification of rights under this part**

5602. (a) Nothing in this part affects the rights of a purchaser or encumbrancer of real property for value who in good faith relies on an affidavit or a declaration under penalty of perjury under the laws of this state that states all of the following:

(1) The name of the decedent.

(2) The date and place of the decedent's death.

(3) A description of the real property transferred to the affiant or declarant by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship.

(4) Either of the following, as appropriate:

(A) The affiant or declarant is the surviving spouse of the decedent.

(B) The affiant or declarant is not the surviving spouse of the decedent, but the rights of the affiant or declarant to the described property are not affected by Probate Code Section 5600 or 5601.

(b) A person relying on an affidavit or declaration made pursuant to subdivision (a) has no duty to inquire into the truth of the matters stated in the affidavit or declaration.

(c) An affidavit or declaration made pursuant to subdivision (a) may be recorded.

**Comment.** Section 5602 provides a procedure for certifying that a person's rights to real property transferred on the death of a spouse or former spouse, by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship, are not affected by this part. See

also Code Civ. Proc. § 2015.5 (certification or declaration under penalty of perjury); Prob. Code §§ 210-212 (recording evidence of death affecting title to real property).

**§ 5603. Application of part**

5603. (a) This part is operative on January 1, 2000.

(b) Except as provided in subdivision (c), this part applies to an instrument making a nonprobate transfer or creating a joint tenancy, whether executed before, on, or after the operative date of this part.

(c) Sections 5600 and 5601 do not apply, and the applicable law in effect before the operative date of this part applies, to an instrument making a nonprobate transfer or creating a joint tenancy in either of the following circumstances:

(1) The person making the nonprobate transfer or creating the joint tenancy dies before the operative date of this part.

(2) The dissolution of marriage or other event that terminates the status of the nonprobate transfer beneficiary or joint tenant as a surviving spouse occurs before the operative date of this part.

**Comment.** Section 5603 governs the application of this part.

Under subdivision (c), where a dissolution of marriage, or other event terminating a person's status as a decedent's surviving spouse occurs before January 1, 2000, that person's rights as a nonprobate transfer beneficiary or joint tenant of the decedent are not affected by Section 5600 or 5601. See Section 78 ("surviving spouse" defined).

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## CONFORMING REVISIONS

**Fam. Code § 2024 (amended). Notice concerning effect of judgment on will, insurance, and other matters**

SEC. \_\_\_\_\_. Section 2024 of the Family Code is amended to read:

2024. (a) A petition for dissolution of marriage, nullity of marriage, or legal separation of the parties, or a joint petition for summary dissolution of marriage, shall contain the following notice:

~~“Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change~~  
*“Dissolution or annulment of your marriage may automatically affect the rights of your former spouse regarding such things as your will, life insurance proceeds, trust benefits, retirement death benefits, power of attorney designation, pay on death bank accounts, transfer on death vehicle registration, and joint tenancy survivorship. You should review these matters, as well as any credit cards, other credit accounts, and credit reports to determine whether they should be changed or reaffirmed* in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). ~~Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse.”~~

(b) A judgment for dissolution of marriage, for nullity of marriage, or for legal separation of the parties shall contain the following notice:

~~“Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change “Dissolution or annulment of your marriage may automatically affect the rights of your former spouse regarding such things as your will, life insurance proceeds, trust benefits, retirement death benefits, power of attorney designation, pay on death bank accounts, transfer on death vehicle registration, and joint tenancy survivorship. You should review these matters, as well as any credit cards, other credit accounts, and credit reports to determine whether they should be changed or reaffirmed in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse.”~~

**Comment.** Section 2024 is amended to refer to the effect of dissolution or annulment of marriage on the designation of a former spouse as attorney-in-fact, nonprobate transfers to a former spouse, and joint tenancy survivorship as between former spouses. See Prob. Code §§ 3722, 4154, 4727(e) (power of attorney), 5600 (nonprobate transfer), 5601 (joint tenancy).

**Prob. Code § 5003 (amended). Protection of property holders**

SEC. \_\_\_\_\_. Section 5003 of the Probate Code is amended to read:

5003. (a) A holder of property under an instrument of a type described in Section 5000 may transfer the property in compliance with a provision for a nonprobate transfer on death that satisfies the terms of the instrument, whether or not the transfer is consistent with the beneficial ownership of the property as between the person who executed the provision for transfer of the property and other persons having an

interest in the property or their successors, *and whether or not the transfer is consistent with the rights of the person named as beneficiary.*

(b) Except as provided in this subdivision, no notice or other information shown to have been available to the holder of the property affects the right of the holder to the protection provided by subdivision (a). The protection provided by subdivision (a) does not extend to a transfer made after either of the following events:

(1) The holder of the property has been served with a contrary court order.

(2) The holder of the property has been served with a written notice of a person claiming an adverse interest in the property. However, this paragraph does not apply to a pension plan to the extent the transfer is a periodic payment pursuant to the plan.

(c) The protection provided by this section does not affect the rights of the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property.

(d) The protection provided by this section is not exclusive of any protection provided the holder of the property by any other provision of law.

*(e) A person shall not serve notice under paragraph (2) of subdivision (b) in bad faith. If the court in an action or proceeding relating to the rights of the parties determines that a person has served notice under paragraph (2) of subdivision (b) in bad faith, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the service.*

**Comment.** Subdivision (a) of Section 5003 is amended to make clear that the section applies where a nonprobate transfer has been caused to fail by operation of Section 5600.

Subdivision (e) provides for compensation where a person serves a bad faith notice of a contrary claim to property held for the purpose of a nonprobate transfer. This provision is similar to Section 13541(d) (compensation where notice slanders title to community property after spouse's death).

**Prob. Code § 5302. Sums remaining in account on death of party**

SEC. \_\_\_\_\_. Section 5302 of the Probate Code is amended to read:

*5302. Subject to Section 5600:*

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to their previous ownership interests under Section 5301 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account:

(1) On death of one of two or more parties, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole party or of the survivor of two or more parties, (A) any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the party, (B) if two or more P.O.D. payees survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a Totten trust account:



(1) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole trustee or the survivor of two or more trustees, (A) any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a different intent, (B) if two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, cannot be changed by will.

**Comment.** Section 5302 is amended to make clear that the transfer on death of funds in a multiple party account is subject to Section 5600, which causes a nonprobate transfer to a former spouse to fail if the former spouse is not the transferor's surviving spouse. See Section 5600 (effect of dissolution of marriage on nonprobate transfer).

### **Prob. Code § 6202 (repealed). Spouse defined**

SEC. \_\_\_\_\_. Section 6202 of the Probate Code is repealed.

~~6202. "Spouse" means the testator's husband or wife at the time the testator signs a California statutory will.~~

**Comment.** Section 6202 is repealed to eliminate the inconsistency in the operation of Section 6122 and Section 6227. Section 6122 revokes a

disposition to a former spouse in a will executed before or during the testator's marriage to the former spouse. For the purposes of a statutory will, Section 6202 defines a "spouse" as a person who is married to the testator at the time the testator signs the statutory will. This means that Section 6227 only revokes a disposition to a former spouse in a statutory will that is executed after the testator's marriage to the former spouse. See Estate of Reeves, 233 Cal. App. 3d 651, 284 Cal. Rptr. 650 (1991).

**Prob. Code § 21111 (amended). Failed transfer**

SEC. \_\_\_\_\_. Section 21111 of the Probate Code is amended to read:

21111. Except as provided in Section 21110:

(a) If a transfer, other than a residuary gift or a transfer of a future interest, fails for any reason, ~~the property transferred becomes a part of the residue transferred under the instrument.~~ *the property is transferred as follows:*

*(1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.*

*(2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument.*

*(3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, the property is transferred to the decedent's estate.*

(b) If a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest.

**Comment.** Section 21111 is amended to clarify the treatment of a failed transfer by will, trust, life insurance policy, or other instrument transferring property at death, where the transferring instrument does not provide for the transfer of a residue.

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STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

## Administrative Rulemaking: Consent Regulations and Other Noncontroversial Regulations

September 1998

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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STATE OF CALIFORNIA

PETE WILSON, Governor

## CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335

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September 25, 1998

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

The current rulemaking procedure does not differentiate between a proposed regulatory action that elicits adverse public comments and one that does not. This is inefficient because some procedures that make sense when adopting a controversial regulation make little or no sense when a regulation is noncontroversial. The Commission proposes two reforms that would improve efficiency by simplifying the rulemaking procedures applicable to noncontroversial regulatory actions.

This recommendation is submitted pursuant to Resolution Chapter 91 of the Statutes of 1998.

Respectfully submitted,

Arthur K. Marshall  
*Chairperson*



## CONSENT REGULATIONS AND OTHER NONCONTROVERSIAL REGULATIONS

The current rulemaking procedure does not differentiate between a proposed regulatory action that elicits adverse public comments and one that does not. This is inefficient because some procedures that make sense when adopting a controversial regulation make little or no sense when a regulation is noncontroversial. The Commission proposes two reforms that would improve efficiency:

(1) Exemption from redundant reporting requirements where an agency receives no adverse comments in response to a proposed regulatory action.

(2) The creation of a simplified notice and comment procedure that an agency may use when proposing a regulatory action that it expects will be noncontroversial (“consent regulation procedure”). If any adverse public comment is received in response to a proposed regulatory action, the consent regulation procedure may not be used.

## REDUNDANT REPORTING REQUIREMENTS

The California Administrative Procedure Act (APA) specifies the procedure a state agency must follow in order to take a regulatory action.<sup>1</sup> In greatly simplified form, the procedure is as follows:

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1. See Gov’t Code §§ 11340-11359. Note that certain agencies are partially or entirely exempt from the rulemaking requirements of the APA, either by the terms of the APA or by an exemption in the agency’s authorizing statutes. See, e.g., Gov’t Code §§ 11342(g) (legal rulings of Franchise Tax Board and State Board of Equalization are not regulations subject to APA procedures), 19817.1 (partial exemption of Department of Personnel Administration from APA rulemaking provisions). The proposed law would not affect these exemptions.

The proposed law uses the term “regulatory action” to mean the adoption, amendment, or repeal of a regulation. See proposed Gov’t Code § 11342(g)(2) (“regulatory action” defined).

- (1) Perform various preliminary analyses.
- (2) Distribute public notice.
- (3) Receive written public comments and, in some cases, hold a public hearing.
- (4) Update the preliminary analyses, in light of public input.
- (5) Submit the proposed regulatory action and the record of the rulemaking process to the Office of Administrative Law (OAL) for review and approval.<sup>2</sup>

### **Redundant Requirements**

Of the procedures discussed above, number (4) is unnecessary when there is no adverse comment in response to a proposed regulatory action. Government Code Section 11346.9 requires that an agency update documents prepared before the public comment period, to take public commentary into account. If there is no adverse public comment, then there is no reason to update these preliminary documents. In many cases, the agency will simply take the preliminary document, make minor labeling changes, and resubmit it as the updated document.

### **Exemption**

Under the proposed law, if an agency does not receive any adverse comments in response to a proposed regulatory action and the substance of the proposed regulatory action has not changed since it was circulated for comment, the proposed regulatory action would not be subject to Government Code Section 11346.9.<sup>3</sup> Instead the agency would forward the proposed regulatory action, along with certification that no

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2. See Gov't Code §§ 11346-11347.3 (notice and comment procedure). See also Gov't Code §§ 11349-11349.6 (OAL review procedure).

3. An adverse comment is one that specifically objects to the substance of the proposed regulatory action or identifies a specific defect in the procedures used to adopt the proposed regulatory action. See proposed Gov't Code § 11347(c).



adverse comments were received, to OAL for review and approval.<sup>4</sup> This eliminates the need to issue boilerplate restatements of documents prepared earlier in the process. While the savings to the state from eliminating these unnecessary steps might be minor in any particular rulemaking, the cumulative effect of eliminating them from all noncontroversial rulemaking proceedings should be significant.

### CONSENT REGULATION PROCEDURE

In some cases an agency may be relatively certain, before beginning the rulemaking process, that a proposed regulatory action will be noncontroversial — for example, where a regulatory action has a very minor or generally beneficial effect, or where the agency has obtained consensus among all interested parties before formally proposing a regulatory action. In such cases, a simplified notice and comment procedure will be adequate to provide public notice of the pending rule, confirm the agency's belief that the regulatory action is noncontroversial, and provide other useful feedback to the agency.<sup>5</sup> The proposed law creates such a procedure.<sup>6</sup>

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4. See proposed Gov't Code § 11347.

5. Under existing law regulations that lack substantive effect may be adopted under a streamlined procedure as "regulations without regulatory effect." See 1 Cal. Code Regs. § 100 (Westlaw 1997). However, many noncontroversial regulations have some substantive effect and are therefore not eligible for adoption as a regulation without regulatory effect.

6. The consent regulation procedure is similar to the direct final rulemaking procedure increasingly used in federal administrative rulemaking. See discussion in Levin, *Direct Final Rulemaking*, 64 Geo. Wash. L. Rev. 1 (1995). "The purpose of the direct final rulemaking technique is to streamline the rulemaking process in situations in which a rule is considered so noncontroversial that the most minimal procedures should be adequate." *Id.* at 2. Expanded use of the direct final rulemaking procedure by federal agencies has been recommended by the Administrative Conference of the United States. See ACUS Recommendation 93-4, 59 Fed. Reg. 4670 (1994).

### **Consent Regulation Procedure**

Under the proposed law, an agency may choose to take a regulatory action that it believes will be noncontroversial (a “consent regulation”) by means of a simplified alternative procedure:

- (1) Prepare and distribute public notice of the regulatory action, making clear that it is being taken under the consent regulation procedure.
- (2) Accept written public comment for at least 45 days.
- (3) If no adverse comments are received, submit the text of the regulatory action and certification that no adverse comments were received to OAL for review.

If any adverse comment is received, the regulatory action may not be taken under the consent regulation procedure.<sup>7</sup> If the agency still wishes to take the regulatory action it may do so under the regular rulemaking procedure.<sup>8</sup> In other words, any person can block an agency’s use of the consent regulation procedure by submitting a written comment specifically objecting to the substance of the regulatory action, or identifying a specific defect in the procedures used to propose the regulatory action.<sup>9</sup> This ensures that the consent regulation procedure will only be used to take a regulatory action that is truly noncontroversial. Furthermore, the fact that the resources expended in proposing a consent regulation will be wasted if the consent regulation elicits any adverse comment creates a significant incentive for agencies to restrict their use of the procedure to those cases where the agency is confident that the proposed regulatory action will be noncontroversial.

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7. See proposed Gov’t Code § 11365.030.

8. See Gov’t Code §§ 11346-11347.3.

9. See proposed Gov’t Code § 11365.030(b).

**Review of a Consent Regulation**

A regulatory action taken under the consent regulation procedure is subject to review by OAL and the courts, in the same manner as any other regulatory action.<sup>10</sup>

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10. See Gov't Code §§ 11349-11349.5 (OAL review of proposed regulation), 11350 (declaratory relief regarding validity of regulation), 11350.3 (judicial review of regulation disapproved by OAL).



## Contents

PROPOSED LEGISLATION . . . . . 635

Gov't Code § 11347 (added). Noncontroversial regulatory action . . . . . 635

Gov't Code §§ 11365.010-11365.070 (added). Consent regulation  
 procedure . . . . . 636

§ 11365.010. Purpose and application of article . . . . . 636

§ 11365.020. Consent regulation procedure . . . . . 637

§ 11365.030. Adverse comment . . . . . 638

§ 11365.040. Notice of proposed consent regulation . . . . . 638

§ 11365.050. Limitation on final text . . . . . 640

§ 11365.060. Publication of notice . . . . . 640

§ 11365.070. Rulemaking file . . . . . 640

CONFORMING REVISIONS . . . . . 641

Gov't Code § 11342 (amended). Definitions . . . . . 641

Gov't Code § 11343 (amended). Transmittal and certification . . . . . 643

Gov't Code § 11346.1 (amended). Application of article . . . . . 645

Gov't Code § 11346.9 (amended). Post-comment analysis . . . . . 647

Gov't Code § 11349.1 (amended). Review of regulations . . . . . 649

Gov't Code § 11349.3 (amended). Approval, disapproval, or return  
 of regulation . . . . . 652

Gov't Code § 11349.4 (amended). Returned regulations . . . . . 653

Gov't Code § 11349.5 (amended). Review by Governor of decision  
 by Office of Administrative Law . . . . . 654

Gov't Code § 11356 (amended). Building standards . . . . . 656

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## PROPOSED LEGISLATION

### **Gov't Code § 11347 (added). Noncontroversial regulatory action**

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

11347. (a) If no adverse comment is received in relation to a proposed regulatory action and the final text of the proposed regulatory action is not different in substance from the text that was originally made available to the public for comment pursuant to Section 11346.5, the proposed regulatory action is not subject to Section 11346.9.

(b) The final text of a regulatory action that is not subject to Section 11346.9 pursuant to subdivision (a) shall be submitted to the office for review, along with certification that no adverse comment was received.

(c) For the purposes of this section:

(1) “Adverse comment” means a written comment, received during the public comment period provided under Section 11346.4, that specifically objects to the substance of the proposed regulatory action or identifies a specific defect in the procedures used to adopt the proposed regulatory action.

(2) “Adverse comment” does not include a comment suggesting that a proposed regulatory action be applied to other matters, unless support for the regulatory action is expressly conditioned on its application to other matters.

**Comment.** Section 11347 is similar to Article 11 (commencing with Section 11365.010) in that both govern the procedures applicable where a regulation is noncontroversial. An agency’s assertion that no adverse comment was received is subject to review by the Office of Administrative Law (OAL). See Section 11349.1(a) (OAL reviews proposed regulations for compliance with this chapter).

See also Sections 11342(b) (“office” means Office of Administrative Law), 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

**Gov’t Code §§ 11365.010-11365.070 (added). Consent regulation procedure**

SEC. \_\_\_\_\_. Article 11 (commencing with Section 11365.010) is added to Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

Article 11. Consent Regulation Procedure

**§ 11365.010. Purpose and application of article**

11365.010. (a) The purpose of this article is to provide an efficient procedure an agency may use when taking a regulatory action that the agency believes is noncontroversial.

(b) Nothing in this article requires an agency to proceed under this article when taking a regulatory action.

(c) Except as otherwise provided by statute, any regulatory action that is subject to Article 5 (commencing with Section 11346) may instead be taken pursuant to this article.

**Comment.** Section 11365.010 states the purpose and application of this article. A regulatory action may not be taken under this article if the agency receives an adverse comment in response to the proposed regulatory action. See Section 11365.030 (adverse comment).

A regulatory action affecting a building standard may not be taken under this article. See Section 11356 (building standards).

See also Section 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

#### **§ 11365.020. Consent regulation procedure**

11365.020. To take a regulatory action under this article, an agency shall do all of the following:

(a) Prepare a preliminary text of the proposed regulatory action.

(b) Determine the potential financial impact of the proposed regulatory action on California businesses, individuals, housing costs, state agencies, local agencies, and school districts.

(c) Give public notice of the proposed regulatory action.

(d) Accept written public comments for at least 45 days after giving public notice.

(e) Certify in writing that all written public comments received in the public comment period were read and considered by the agency and that no adverse comments were received.

(f) Prepare the final text of the proposed regulatory action.

(g) Transmit the final text of the proposed regulatory action, the certification required by subdivision (e), and the rulemaking file to the office.

**Comment.** Section 11365.020 provides a procedure an agency may use when proposing a regulatory action that it expects to be

noncontroversial. See Section 11365.010 (purpose and application of article). This procedure may not be used if the agency receives any adverse comment. See Section 11365.030 (adverse comment).

Subdivision (b) requires an agency to determine the potential effects of a proposed regulatory action. A public comment asserting that the agency's determination is incorrect or that the basis for the determination is flawed is an adverse comment as defined in Section 11365.030(b).

See also Sections 11342(b) ("office" means the Office of Administrative Law), 11342(g)(2) ("regulatory action" means adoption, amendment, or repeal of regulation).

### **§ 11365.030. Adverse comment**

11365.030 (a) If an agency receives an adverse comment in response to a proposed regulatory action, the regulatory action may not be taken under this article.

(b) For the purposes of this article:

(1) "Adverse comment" means a written comment, received during the public comment period provided under Section 11365.020, that specifically objects to the substance of the proposed regulatory action or identifies a specific defect in the procedures used to adopt the proposed regulatory action.

(2) "Adverse comment" does not include a comment suggesting that a proposed regulatory action be applied to other matters, unless support for the regulatory action is expressly conditioned on its application to other matters.

**Comment.** Section 11365.030 is similar to Section 11347(c) (noncontroversial regulatory action). See also Section 11342(g)(2) ("regulatory action" means adoption, amendment, or repeal of regulation).

### **§ 11365.040. Notice of proposed consent regulation**

11365.040. (a) The agency shall mail notice of a regulatory action proposed under this article to the office and to any person that has requested notice of agency regulatory actions. If the agency is within a state department, the agency shall also mail or deliver notice to the director of the department.



(b) Notice of a proposed regulatory action shall include each of the following:

(1) Instructions on how to obtain a copy of the preliminary text of the proposed regulatory action and how to submit a written comment relating to the proposed regulatory action. The instructions shall specify the deadline for submission of written comment.

(2) The following statement in substance:

“This regulatory action is being taken under the consent regulation procedure. See Government Code Sections 11365.010-11365.070.”

(3) A clear overview explaining the purpose and effect of the proposed regulatory action.

(4) A statement of the agency’s rationale for determining that the proposed regulatory action is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is implemented, interpreted, or made specific by the regulatory action.

(5) Reference to the authority under which the regulatory action is proposed and a reference to the statute, court decision, or other provision of law that is implemented, interpreted, or made specific by the regulatory action.

(6) A determination of the financial impact of the regulatory action on California businesses, individuals, and housing costs, a determination of any costs that the regulatory action will impose on state agencies, or on local agencies or school districts entitled to reimbursement under Part 7 (commencing with Section 17500) of Division 4, and a statement of the basis for these determinations.

**Comment.** Section 11365.040 is similar to Sections 11346.4-11346.5 (notice of regulatory action taken under Article 5 (commencing with Section 11346)). See also Sections 11342(b) (“office” means Office of Administrative Law), 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation), 11365.020(a) (preparation of preliminary text).

**§ 11365.050. Limitation on final text**

11365.050. The final text of a regulatory action taken under this article shall not be changed from the preliminary text, except where the change is solely grammatical in nature or is otherwise nonsubstantial.

**Comment.** Section 11365.050 prevents an agency from making any substantive change to a regulatory action being proposed under this article. See also Section 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

**§ 11365.060. Publication of notice**

11365.060. (a) Except as provided in subdivision (b), on receiving notice of a regulatory action proposed under this article, the office shall publish the contents of the notice in the California Regulatory Notice Register.

(b) The office may refuse to publish a notice of a proposed regulatory action submitted to it pursuant to this article if the agency that submitted the notice has not satisfied the requirements of this article.

**Comment.** Section 11365.060 governs publication of notice of a regulatory action taken under this article. See also Sections 11342(b) (“office” means Office of Administrative Law), 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

**§ 11365.070. Rulemaking file**

11365.070. (a) Except as provided in subdivision (b), an agency taking a regulatory action under this article is subject to Section 11347.3.

(b) The requirements of paragraphs (2), (3), (4), (5), (8), and (9) of subdivision (b) of Section 11347.3 do not apply to a rulemaking file prepared pursuant to this section.

(c) The rulemaking file prepared pursuant to this section shall include the published notice of the proposed regulatory action.

**Comment.** Section 11365.070 incorporates Section 11347.3 (rulemaking file for regulatory action taken under Article 5 (commencing

with Section 11346)), except as specified in subdivision (b). See also Section 11342(g)(2) (“regulatory action” means adoption, amendment, or repeal of regulation).

## CONFORMING REVISIONS

### **Gov’t Code § 11342 (amended). Definitions**

SEC. \_\_\_\_\_. Section 11342 of the Government Code is amended to read:

11342. In this chapter, unless otherwise specifically indicated, the following definitions apply:

(a) “Agency” and “state agency” do not include an agency in the judicial or legislative departments of the state government.

(b) “Office” means the Office of Administrative Law.

(c) “Order of repeal” means any resolution, order or other official act of a state agency that expressly repeals a regulation in whole or in part.

(d) “Performance standard” means a regulation that describes an objective with the criteria stated for achieving the objective.

(e) “Plain English” means language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English.

(f) “Prescriptive standard” means a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means.

(g)(1) “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, except one that relates only to the internal management of the state agency. “Regulation” does not mean or include legal rulings of counsel issued by the

Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

(2) *“Regulatory action” means the adoption, amendment, or repeal of a regulation.*

(h)(1) *“Small business” means a business activity in agriculture, general construction, special trade construction, retail trade, wholesale trade, services, transportation and warehousing, manufacturing, generation and transmission of electric power, or a health care facility, unless excluded in paragraph (2), that is both of the following:*

(A) Independently owned and operated.

(B) Not dominant in its field of operation.

(2) *“Small business” does not include the following professional and business activities:*

(A) A financial institution including a bank, a trust, a savings and loan association, a thrift institution, a consumer finance company, a commercial finance company, an industrial finance company, a credit union, a mortgage and investment banker, a securities broker-dealer, or an investment adviser.

(B) An insurance company, either stock or mutual.

(C) A mineral, oil, or gas broker; a subdivider or developer.

(D) A landscape architect, an architect, or a building designer.

(E) An entity organized as a nonprofit institution.

(F) An entertainment activity or production, including a motion picture, a stage performance, a television or radio station, or a production company.

(G) A utility, a water company, or a power transmission company generating and transmitting more than 4.5 million kilowatt hours annually.

(H) A petroleum producer, a natural gas producer, a refiner, or a pipeline.

(I) A business activity exceeding the following annual gross receipts in the categories of:

(i) Agriculture, one million dollars (\$1,000,000).

(ii) General construction, nine million five hundred thousand dollars (\$9,500,000).

(iii) Special trade construction, five million dollars (\$5,000,000).

(iv) Retail trade, two million dollars (\$2,000,000).

(v) Wholesale trade, nine million five hundred thousand dollars (\$9,500,000).

(vi) Services, two million dollars (\$2,000,000).

(vii) Transportation and warehousing, one million five hundred thousand dollars (\$1,500,000).

(J) A manufacturing enterprise exceeding 250 employees.

(K) A health care facility exceeding 150 beds or one million five hundred thousand dollars (\$1,500,000) in annual gross receipts.

**Comment.** The definition of “regulatory action” is added to Section 11342 for drafting convenience. The term is used extensively in Article 11 (commencing with Section 11365.010) (consent regulation procedure).

**Gov’t Code § 11343 (amended). Transmittal and certification**

SEC. \_\_\_\_\_. Section 11343 of the Government Code is amended to read:

11343. Every state agency shall:

(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it except one which:

(1) Establishes or fixes rates, prices, or tariffs.

(2) Relates to the use of public works, including streets and highways, when the effect of the regulation is indicated to the public by means of signs or signals or when the order determines uniform standards and specifications for official traffic control devices pursuant to Section 21400 of the Vehicle Code.

(3) Is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.

(4) Is a building standard, as defined in Section 18909 of the Health and Safety Code.

(b) Transmit to the office for filing with the Secretary of State a certified copy of every order of repeal of a regulation required to be filed under subdivision (a).

(c) Deliver to the office, at the time of transmittal for filing a regulation or order of repeal six duplicate copies of the regulation or order of repeal, together with a citation of the authority pursuant to which it or any part thereof was adopted.

(d) Deliver to the office a copy of the notice of proposed action required by Section 11346.4 *or* 11365.020.

(e) Transmit to the State Building Standards Commission for approval a certified copy of every regulation, or order of repeal of a regulation, that is a building standard or administrative regulation that applies directly to the implementation or enforcement of building standards, together with a citation of authority pursuant to which it or any part thereof was adopted, a copy of the notice of proposed action required by Section 11346.4, and any other records prescribed by the State Building Standards Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code).

(f) Whenever a certification is required by this section, it shall be made by the head of the state agency or his or her designee which is adopting, amending, or repealing the

regulation and the certification and delegation shall be in writing.

**Comment.** Section 11343 is amended to extend the application of the section to regulations adopted pursuant to Article 11 (consent regulation procedure).

**Gov't Code § 11346.1 (amended). Application of article**

SEC. \_\_\_\_\_. Section 11346.1 of the Government Code is amended to read:

11346.1. (a)(1) This article does not apply to any regulation *that is* not required to be filed with the Secretary of State under this chapter, ~~and only~~ *or to a regulatory action taken under Article 11 (commencing with Section 11365.010).*

(2) *Only* this section and Sections 11343.4 and 11349.6 apply to an emergency regulation adopted pursuant to subdivision (b), or ~~to any~~ *a* regulation adopted under Section 8054 ~~or 3373~~ of the Financial Code.

(b) Except as provided in subdivision (c), if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.

Any finding of an emergency shall include a written statement which contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a description of the specific facts showing the need for immediate action. The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.

The statement and the regulation or order of repeal shall be filed immediately with the office.

(c) Notwithstanding any other provision of law, no emergency regulation that is a building standard, as defined in Section 18909 of the Health and Safety Code, shall be filed,

nor shall the building standard be effective, unless the building standards are submitted to the State Building Standards Commission, and are approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety Code.

(d) The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal.

(e) No regulation, amendment, or order of repeal adopted as an emergency regulatory action shall remain in effect more than 120 days unless the adopting agency has complied with Sections 11346.2 to 11346.9, inclusive, prior to the adoption of the emergency regulatory action, or has, within the 120-day period, completed the regulation adoption process by formally adopting the emergency regulation, amendment, or order of repeal or any amendments thereto, pursuant to this chapter. The adopting agency, prior to the expiration of the 120-day period, shall transmit to the office for filing with the Secretary of State the adopted regulation, amendment, or order of repeal, the rulemaking file, and a certification that either Sections 11346.2 to 11346.9, inclusive, were complied with prior to the emergency regulatory action, or that there was compliance with this section within the 120-day period.

(f) In the event an emergency amendment or order of repeal is filed and the adopting agency fails to comply with subdivision (e), the regulation as it existed prior to the emergency amendment or order of repeal shall thereupon become effective and after notice to the adopting agency by the office shall be reprinted in the California Code of Regulations.

(g) In the event a regulation is originally adopted and filed as an emergency and the adopting agency fails to comply with subdivision (e), this failure shall constitute a repeal thereof



and after notice to the adopting agency by the office, shall be deleted.

(h) A regulation originally adopted as an emergency regulation, or an emergency regulation substantially equivalent thereto that is readopted as an emergency regulation, shall not be filed with the Secretary of State as an emergency regulation except with the express prior approval of the director of the office.

**Comment.** Section 11346.1 is amended to exempt a regulation adopted as a consent regulation from the requirements of this article. See Article 11 (commencing with Section 11365.010) (consent regulation procedure). A former provision stating an exemption to provisions of this chapter for regulations adopted under Financial Code Section 3373 is inaccurate and has not been continued. See Fin. Code § 3373 (regulations adopting changes to Federal Reserve Board regulations).

**Gov't Code §11346.9 (amended). Post-comment analysis**

SEC. \_\_\_\_\_. Section 11346.9 of the Government Code is amended to read:

11346.9. *Every Except as provided in Section 11347, every agency subject to this chapter shall do the following:*

(a) Prepare and submit to the office with the adopted regulation a final statement of reasons that shall include all of the following:

(1) An update of the information contained in the initial statement of reasons. If the update identifies any data or any technical, theoretical or empirical study, report, or similar document on which the agency is relying in proposing the adoption or amendment of a regulation that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period, the agency shall comply with subdivision (d) of Section 11346.8.

(2) A determination as to whether the regulation imposes a mandate on local agencies or school districts. If the determination is that the regulation does contain a local

mandate, the agency shall state whether the mandate is reimbursable pursuant to Part 7 (commencing with Section 17500) of Division 4. If the agency finds that the mandate is not reimbursable, it shall state the reasons for that finding.

(3) A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action.

(4) A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.

(5) An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses.

(b) Prepare and submit to the office with the adopted regulation an updated informative digest containing a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the adopted, amended, or repealed regulation and the effect of the adopted, amended, or repealed regulation. The informative digest shall be drafted in a format similar to the Legislative Counsel's Digest on legislative bills.

(c) A state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with this section if a statement to the effect that a federally mandated

regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found, is included in the notice of proposed adoption or amendment prepared pursuant to Section 11346.5. However, the agency shall comply fully with this chapter with respect to any provisions in the regulation which the agency proposes to adopt or amend that are different from the corresponding provisions of the federal regulation.

**Comment.** Section 11346.9 is amended to make an exception for regulations that do not elicit any adverse comment. See Section 11347 (noncontroversial regulatory action).

**Gov't Code § 11349.1 (amended). Review of regulations**

SEC. \_\_\_\_\_. Section 11349.1 of the Government Code is amended to read:

11349.1. (a) The office shall review all regulations adopted pursuant to the procedure specified in Article 5 (commencing with Section 11346) *or Article 11 (commencing with Section 11365.010)* and submitted to it for publication in the California Regulatory Code Supplement and for transmittal to the Secretary of State and make determinations using all of the following standards:

- (1) Necessity.
- (2) Authority.
- (3) Clarity.
- (4) Consistency.
- (5) Reference.
- (6) Nonduplication.

In reviewing regulations pursuant to this section, the office shall restrict its review to the regulation and the record of the rulemaking proceeding. The office shall approve the regulation or order of repeal if it complies with the standards set forth in this section and with this chapter.

(b) In reviewing proposed regulations for the criteria in subdivision (a), the office may consider the clarity of the proposed regulation in the context of related regulations already in existence.

(c) The office shall adopt regulations governing the procedures it uses in reviewing regulations submitted to it. The regulations shall provide for an orderly review and shall specify the methods, standards, presumptions, and principles the office uses, and the limitations it observes, in reviewing regulations to establish compliance with the standards specified in subdivision (a). The regulations adopted by the office shall ensure that it does not substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations.

(d) The office shall return any regulation ~~subject to this chapter~~ *adopted under Article 5 (commencing with Section 11346)* to the adopting agency if any of the following occur:

(1) The adopting agency has not prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5 and has not included the data used and calculations made and the summary report of the estimate in the file of the rulemaking.

(2) The agency has not complied with Section 11346.3.

(3) The adopting agency has prepared the estimate required by paragraph (6) of subdivision (a) of Section 11346.5, the estimate indicates that the regulation will result in a cost to local agencies or school districts that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, and the adopting agency fails to do any of the following:

(A) Cite an item in the Budget Act for the fiscal year in which the regulation will go into effect as the source from which the Controller may pay the claims of local agencies or school districts.

(B) Cite an accompanying bill appropriating funds as the source from which the Controller may pay the claims of local agencies or school districts.

(C) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has approved a request by the agency that funds be included in the Budget Bill for the next following fiscal year to reimburse local agencies or school districts for the costs mandated by the regulation.

(D) Attach a letter or other documentation from the Department of Finance which states that the Department of Finance has authorized the augmentation of the amount available for expenditure under the agency's appropriation in the Budget Act which is for reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4 to local agencies or school districts from the unencumbered balances of other appropriations in the Budget Act and that this augmentation is sufficient to reimburse local agencies or school districts for their costs mandated by the regulation.

(e) The office shall notify the Department of Finance of all regulations returned pursuant to subdivision (d).

(f) The office shall return a rulemaking file to the submitting agency if the file does not comply with *applicable requirements of* subdivisions (a) and (b) of Section 11347.3 and Section 11365.070. Within three state working days of the receipt of a rulemaking file, the office shall notify the submitting agency of any deficiency identified. If no notice of deficiency is mailed to the adopting agency within that time, a rulemaking file shall be deemed submitted as of the date of its original receipt by the office. A rulemaking file shall not be deemed submitted until each deficiency identified under this subdivision has been corrected.

This subdivision shall not limit the review of regulations under this article, including, but not limited to, the conformity

of rulemaking files to *the applicable requirements of subdivisions (a) and (b) of Section 11347.3 and Section 11365.070.*

**Comment.** Section 11349.1 is amended to provide for administrative review of a proposed consent regulation. See Article 11 (commencing with Section 11365.010) (consent regulation procedure).

**Gov't Code § 11349.3 (amended). Approval, disapproval, or return of regulation**

SEC. \_\_\_\_\_. Section 11349.3 of the Government Code is amended to read:

(a) The office shall either approve a regulation submitted to it for review and transmit it to the Secretary of State for filing or disapprove it within 30 working days after the regulation has been submitted to the office for review. If the office fails to act within 30 days, the regulation shall be deemed to have been approved and the office shall transmit it to the Secretary of State for filing.

(b) If the office disapproves a regulation, it shall return it to the adopting agency within the 30-day period specified in subdivision (a) accompanied by a notice specifying the reasons for disapproval. Within seven calendar days of the issuance of the notice, the office shall provide the adopting agency with a written decision detailing the reasons for disapproval. No regulation shall be disapproved except for failure to comply with the standards set forth in Section 11349.1 or for failure to comply with this chapter.

(c) If an agency determines, on its own initiative, that a regulation submitted pursuant to subdivision (a) should be returned by the office prior to completion of the office's review, it may request the return of the regulation. All requests for the return of a regulation shall be memorialized in writing by the submitting agency no later than one week following the request. Any regulation returned pursuant to this subdivision shall be resubmitted to the office for review

~~within the one-year period specified in subdivision (b) of Section 11346.4 one year of distribution of a notice pursuant to Section 11346.4 or Section 11365.040 or shall comply with Article 5 (commencing with Section 11346) or Article 11 (commencing with Section 11365.010) prior to resubmission.~~

(d) The office shall not initiate the return of a regulation pursuant to subdivision (c) as an alternative to disapproval pursuant to subdivision (b).

**Comment.** Section 11349.3 is amended to provide for administrative review of a proposed consent regulation. See Article 11 (commencing with Section 11365.010) (consent regulation procedure).

**Gov't Code § 11349.4 (amended). Returned regulations**

SEC. \_\_\_\_\_. Section 11349.4 of the Government Code is amended to read:

(a) A regulation returned to an agency because of failure to meet the standards of Section 11349.1; *or* because of an agency's failure to comply with this chapter may be rewritten and resubmitted within 120 days of the agency's receipt of the written opinion required by subdivision (b) of Section 11349.3 without complying with the notice and public hearing requirements of Sections 11346.4, 11346.5, and 11346.8, 11365.020, and 11365.040, unless the substantive provisions of the regulation have been significantly changed. If the regulation has been significantly changed or was not submitted within 120 days of receipt of the written opinion, the agency shall comply with Article 5 (commencing with Section 11346) *or* Article 11 (commencing with Section 11365.010) and readopt the regulation. The director of the office may, upon a showing of good cause, grant an extension to the 120-day time period specified in this subdivision.

(b) Upon resubmission of a disapproved regulation to the office pursuant to subdivision (a), the office shall only review the resubmitted regulation for those reasons expressly identified in the written opinion required by subdivision (b) of

Section 11349.3, or for those issues arising as a result of a substantial change to a provision of the resubmitted regulation or as a result of intervening statutory changes or intervening court orders or decisions.

(c) When an agency resubmits a withdrawn or disapproved regulation to the office it shall identify the prior withdrawn or disapproved regulation by date of submission to the office, shall specify the portion of the prior rulemaking record that should be included in the resubmission, and shall submit to the office a copy of the prior rulemaking record if that record has been returned to the agency by the office.

(d) The office shall expedite the review of a regulation submitted without significant substantive change.

**Comment.** Section 11349.4 is amended to provide for administrative review of a proposed consent regulation. See Article 11 (commencing with Section 11365.010) (consent regulation procedure).

**Gov't Code § 11349.5 (amended). Review by Governor of decision by Office of Administrative Law**

SEC. \_\_\_\_\_. Section 11349.5 of the Government Code is amended to read:

(a) To initiate a review of a decision by the office, the agency shall file a written Request for Review with the Governor's Legal Affairs Secretary within 10 days of receipt of the written opinion provided by the office pursuant to subdivision (b) of Section 11349.3. The Request for Review shall include a complete statement as to why the agency believes the decision is incorrect and should be overruled. Along with the Request for Review, the agency shall submit all of the following:

(1) The office's written decision detailing the reasons for disapproval required by subdivision (b) of Section 11349.3.

(2) Copies of all regulations, notices, statements, and other documents which were submitted to the office.



(b) A copy of the agency's Request for Review shall be delivered to the office on the same day it is delivered to the Governor's office. The office shall file its written response to the agency's request with the Governor's Legal Affairs Secretary within 10 days and deliver a copy of its response to the agency on the same day it is delivered to the Governor's office.

(c) The Governor's office shall provide the requesting agency and the office with a written decision within 15 days of receipt of the response by the office to the agency's Request for Review. Upon receipt of the decision, the office shall publish in the California Regulatory Notice Register the agency's Request for Review, the office's response thereto, and the decision of the Governor's office.

(d) The time requirements set by subdivisions (a) and (b) may be shortened by the Governor's office for good cause.

(e) The Governor may overrule the decision of the office disapproving a proposed regulation, an order repealing an emergency regulation adopted pursuant to subdivision (b) of Section 11346.1, or a decision refusing to allow the readoption of an emergency regulation pursuant to Section 11346.1. In that event, the office shall immediately transmit the regulation to the Secretary of State for filing.

(f) Upon overruling the decision of the office, the Governor shall immediately transmit to the Committees on Rules of both houses of the Legislature a statement of his or her reasons for overruling the decision of the office, along with copies of the adopting agency's initial statement of reasons issued pursuant to Section 11346.2 *or copies of the notice issued pursuant to Section 11365.040*, and the office's statement regarding the disapproval of a regulation issued pursuant to subdivision (b) of Section 11349.3. The Governor's action and the reasons therefor shall be published in the California Regulatory Notice Register.

**Comment.** Section 11349.5 is amended to provide for administrative review of a proposed consent regulation. See Article 11 (commencing with Section 11365.010) (consent regulation procedure).

**Gov't Code § 11356 (amended). Building standards**

SEC. \_\_\_\_\_. Section 11356 of the Government Code is amended to read:

11356. (a) Article 6 (commencing with Section 11349) is not applicable to any building standards or administrative regulations that apply directly to the implementation or enforcement of a building standard, subject to the approval of the State Building Standards Commission.

(b) Article 5 (commencing with Section 11346) is applicable to those building standards, except that the office shall not disapprove those building standards nor refuse to publish any notice of proposed building standards if either has been approved by, and submitted to, the office by the State Building Standards Commission pursuant to Section 18935 of the Health and Safety Code.

*(c) Article 11 (commencing with Section 11365.010) is not applicable to any regulatory action that affects a building standard or applies directly to the implementation or enforcement of a building standard.*

**Comment.** Section 11356 is amended to preclude taking a regulatory action involving a building standard under Article 11 (commencing with Section 11365.010) (consent regulation procedure).

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STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

## Administrative Rulemaking: Advisory Interpretations

September 1998

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

#### NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Administrative Rulemaking: Advisory Interpretations*, 28 Cal. L. Revision Comm'n Reports 657 (1998). This report is part of publication #199 [*1998 Recommendations*].

STATE OF CALIFORNIA

PETE WILSON, Governor

## CALIFORNIA LAW REVISION COMMISSION

4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
650-494-1335

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September 25, 1998

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

In general, a state agency must adopt a regulation in order to provide the public with generally applicable written advice as to the agency's interpretation of a law that it enforces or administers. This procedural requirement can impede useful communication between state agencies and the public. The Commission recommends a streamlined procedure that a state agency may use to communicate generally applicable, nonbinding, interpretive advice. This procedure could not be used to adopt binding regulations.

This recommendation is submitted pursuant to Resolution Chapter 91 of the Statutes of 1998.

Respectfully submitted,

Arthur K. Marshall  
*Chairperson*



## ADVISORY INTERPRETATIONS

### INTRODUCTION

The California Administrative Procedure Act (APA) specifies the procedures a state agency must follow in order to adopt a regulation.<sup>1</sup> These procedures are beneficial in that they provide for public participation in agency rulemaking, but they are also time-consuming and costly to the rulemaking agency.<sup>2</sup>

The delay and cost associated with rulemaking procedures can be a problem where it impedes an agency's ability to convey useful information to the public in a timely fashion. For example, an agency must adopt a regulation in order to provide generally applicable advice to the public regarding the agency's opinion as to the meaning of a provision of law.<sup>3</sup> Where the agency lacks the time or resources to adopt a regulation, it must then choose between two undesirable alternatives — remain silent despite the public's need for the

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1. Gov't Code §§ 11340-11359. Note that certain agencies are partially or entirely exempt from these requirements, either by the terms of the APA or by an exemption in the agency's authorizing statutes. See, e.g., Gov't Code §§ 11342(g) (legal rulings of Franchise Tax Board and State Board of Equalization are not regulations subject to APA procedures), 19817.1 (partial exemption of Department of Personnel Administration from APA rulemaking provisions). The proposed law would not affect these exemptions.

2. See Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43, 56-58 (Winter 1992) (discussing the cost and delay associated with rulemaking procedures).

3. The APA's definition of "regulation" is quite broad, and includes a generally applicable statement of an agency's interpretation of a law that it enforces or administers, or that governs the agency's procedures. See Gov't Code § 11342(g).

advice,<sup>4</sup> or provide the advice in violation of the rulemaking statute.<sup>5</sup>

Furthermore, the benefits of the APA's rulemaking procedures, which are clear when an agency is adopting a binding regulation, are less clear when an agency is offering nonbinding advice to the public. Rulemaking procedures are intended, in part, to lighten the regulatory burden on business by reducing the number and complexity of binding regulations.<sup>6</sup> However, nonbinding interpretive advice does not increase the regulatory burden — it lightens the burden, by reducing ambiguity in the law and minimizing its inconsistent application.<sup>7</sup>

The Law Revision Commission recommends the creation of a simplified notice and comment procedure an agency may use to issue generally applicable, nonbinding, interpretive advice (hereinafter an “advisory interpretation”). This will expedite beneficial communication between agencies and the public while preserving the benefits of public participation in agency deliberations. Adoption of an advisory interpretation

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4. In which case the first indication of an agency's interpretation of law may be its application in an enforcement action.

5. There are other ways for an agency to communicate its interpretations of law, such as in an advice letter or individual enforcement action, but these methods are reactive, limited to specific fact situations, and do not provide for public participation in formulating the agency's interpretation. See Gov't Code §§ 11343(a)(3), 11346.1(a). Presently, the only effective way for an agency to express a generally applicable interpretation, in advance of the public's need for information, is to adopt a regulation.

6. Gov't Code § 11340.1.

7. “Though too many regulations may lead to confusing, conflicting, or unduly burdensome regulatory mandates that stifle individual initiative, this effect is less pronounced in the case of interpretive regulations. The public generally benefits if agencies can easily adopt interpretive regulations because interpretive regulations clarify ambiguities in the law and ensure agency-wide uniformity.” *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 576, 927 P.2d 296, 59 Cal. Rptr. 2d 186 (1996).



is optional and does not preclude expression of an agency's interpretive opinion by other lawful means.<sup>8</sup>

## PROPOSED LAW

The proposed law has four principal elements: (1) limitations on the substance and form of an advisory interpretation, (2) limitations on the legal effect of an advisory interpretation, (3) streamlined notice and comment procedures for the adoption of an advisory interpretation, and (4) procedures to review whether a particular advisory interpretation is valid. In combination, these elements ensure that the special procedures for adoption of an advisory interpretation are properly targeted and limited in their effect.

### **Limited Substance and Form**

In order to avoid possible agency misuse of the advisory interpretation procedure and to provide certainty to the regulated public, an advisory interpretation must satisfy both of the following requirements:

*Interpretive content.* An advisory interpretation expresses an agency's opinion as to the meaning of a statute, regulation, agency order, court decision, or other provision of law that the agency enforces or administers, or that governs the agency's procedures. An agency statement that goes beyond offering such advice and purports to bind or compel is not an advisory interpretation.<sup>9</sup>

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8. For example, an agency may express its interpretation of law in a declaratory decision or other adjudication. See Gov't Code §§ 11465.10-11465.70 (declaratory decision). Note that an agency's interpretation expressed in an adjudication may not be expressly relied on as a precedent unless it has been designated a precedent decision by the agency. See Section 11425.60 (use of precedent decisions).

9. See proposed Gov't Code § 11360.020 ("advisory interpretation" defined).

*Clear labeling.* An advisory interpretation must be clearly labeled as an advisory interpretation. This avoids the need to consider agency intention in determining whether a particular agency statement is an advisory interpretation.<sup>10</sup>

### **Limited Effect**

*Legal effect.* The legal effect of an advisory interpretation is limited in two ways. First, an advisory interpretation may not include a statement that purports to bind or compel. Such a statement is not an advisory interpretation and is subject to review and disapproval by the Office of Administrative Law (OAL) and the courts.<sup>11</sup> Second, the proposed law expressly prohibits an advisory interpretation being given any judicial deference or binding effect.<sup>12</sup>

*Practical effect.* An advisory interpretation will have some practical effect, as members of the regulated public may voluntarily conform their behavior to the agency's view of the law in order to avoid a dispute with the agency. The proposed law accounts for this in two ways. First, it requires public participation when adopting an advisory interpretation. This allows those who may be affected by an advisory interpretation to have a say in its formulation and provides a notice period during which members of the public may conform their conduct to the pending advisory interpretation. Second, the proposed law provides a "safe harbor" for those who do

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10. The labeling requirement is drawn from a Washington statute, exempting "interpretive statements" from rulemaking procedures. See Wash. Rev. Code § 34.05.010(8) (Westlaw 1996). This avoids the uncertainty that has occurred under the Federal APA's interpretive statement exception. See 5 U.S.C.A. § 553(b)(A) (Westlaw 1998); see also Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 389-90 (discussing problems that arise under federal law when agencies do not clearly label interpretive statements).

11. See proposed Gov't Code §§ 11360.090-11360.100.

12. Note, however, that an advisory interpretation may be binding on the adopting agency in an enforcement action or adjudication. See proposed Gov't Code § 11360.030(b).

conform their conduct to an interpretation expressed in an advisory interpretation. Under this provision, an agency must abide by its own advisory interpretation in applying the interpreted law.<sup>13</sup> However, the safe harbor provision does not apply to an advisory interpretation that is inconsistent with an interpretation in a published opinion of the California Supreme Court or a California court of appeal.<sup>14</sup>

### **Public Participation**

Because advisory interpretations will have some practical effect on the regulated public, the proposed law requires public input in their formulation. Public input is provided through a simplified notice and comment procedure that achieves the benefits of public participation<sup>15</sup> with less cost and delay than under existing rulemaking procedures. These savings are achieved by limiting the analyses and determinations an agency must conduct and limiting public input to written comments that the agency must read and consider.

### **Review Procedures**

As a check on agency error and misuse of the special procedure, the proposed law includes two methods for review of a problematic advisory interpretation:

*Review by Office of Administrative Law (OAL).* Any interested person may request that OAL review an existing advi-

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13. *Id.*

14. See proposed Gov't Code § 11360.030(c).

15. Public participation serves many purposes. It provides the regulated public with a say in the formulation and interpretation of rules that affect them, and provides a notice period during which affected parties may conform their affairs to the new interpretation. It also benefits the agency by providing useful information and perspectives that might not otherwise have been considered. Furthermore, agency openness enhances the perceived legitimacy of the agency's action, increasing the likelihood of voluntary compliance by the public. See discussion, *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 568-69, 927 P.2d 296, 59 Cal. Rptr. 2d 186 (1996); *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 470-71 (D.C. Cir. 1980).

sory interpretation to determine whether it satisfies the requirements of the law and is consistent with the law it interprets. If OAL disapproves an advisory interpretation as not satisfying the requirements of the law or as being inconsistent with the law it interprets, then the advisory interpretation is invalid.<sup>16</sup>

*Judicial review.* After OAL has had an opportunity to review an advisory interpretation, an interested person may request a declaratory judgment as to the validity or invalidity of the advisory interpretation by bringing an action in the superior court.<sup>17</sup>

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16. See proposed Gov't Code § 11360.090.

17. See proposed Gov't Code § 11360.100. Declaratory relief under this section is not the exclusive means by which a court may review an advisory interpretation. For example, where the validity of an advisory interpretation arises in an agency adjudication, the advisory interpretation may be subject to review by administrative mandamus. See Code Civ. Proc. § 1094.5.

## PROPOSED LEGISLATION

### **Gov't Code §§ 11360.010-11360.100 (added). Advisory interpretations**

SEC. \_\_\_\_\_. Article 10 (commencing with Section 11360.010) is added to Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code, to read:

#### Article 10. Advisory Interpretations

##### **§ 11360.010. Purpose and application**

11360.010. (a) The purpose of this article is to provide an efficient procedure by which a state agency may communicate, in a nonbinding, advisory form, the agency's interpretation of a statute, regulation, agency order, court decision, or other provision of law that the agency enforces or administers, or that governs the agency's procedures. This procedure is intended as an alternative to the adoption of a regulation.

(b) Except as expressly provided in this chapter, an advisory interpretation adopted pursuant to this article is not subject to the requirements of the other provisions of this chapter.

(c) This article does not provide an alternative means of adopting binding regulations.

(d) This article may not be used to adopt or amend California Environmental Quality Act guidelines as required under Sections 21083 and 21087 of the Public Resources Code.

(e) Nothing in this article requires an agency to adopt an advisory interpretation. An advisory interpretation is not the exclusive means by which an agency may express the agency's interpretation of a statute, regulation, agency order, court decision, or other provision of law that the agency

enforces or administers, or that governs the agency's procedures.

**Comment.** Section 11360.010 states the purpose of this article and governs its application. Subdivision (a) provides that this article is intended as an optional procedure by which an agency can offer generally applicable interpretive advice, without adopting a regulation under Article 5 (commencing with Section 11346). For example, an agency may wish to adopt an advisory interpretation to clarify the meaning of an ambiguous law or to provide examples illustrating the operation of a highly technical law.

Although subdivision (b) generally provides that an advisory interpretation adopted under this article is not subject to other provisions of this chapter, there may be express exceptions. See, e.g., Sections 11340.6-11340.7 (governing petition for adoption, amendment, or repeal of regulation or advisory interpretation).

Subdivision (e) provides that adoption of an advisory interpretation is optional and does not preclude an agency from expressing interpretive advice by some other lawful means. Note that an agency's interpretation expressed in an adjudication may not be expressly relied on as a precedent unless it has been designated a precedent decision by the agency. See Section 11425.60 (use of precedent decisions). Nothing in subdivision (e) affects the prohibition against the issuance or use of regulations that have not been properly adopted. See Section 11340.5 (prohibiting use of "underground regulations").

### **§ 11360.020. Definition of "advisory interpretation"**

11360.020. As used in this article, "advisory interpretation" means a written agency statement, adopted pursuant to this article, that expresses the agency's opinion as to the meaning of a statute, regulation, agency order, court decision, or other provision of law that the agency enforces or administers, or that governs the agency's procedures.

**Comment.** Section 11360.020 defines "advisory interpretation." An advisory interpretation is a statement of an agency's opinion, and does not include a statement that purports to bind or compel. For example, the State Department of Education could adopt an advisory interpretation expressing its opinion that the term "education activities," as used in Education Code Section 46300(a), does not include time spent watching television commercials. However a statement prohibiting the watching of television commercials in school would not be an advisory interpretation.

A binding rule of this type could only be adopted as a regulation under Article 5 (commencing with Section 11346).

**§ 11360.030. Effect of advisory interpretation**

11360.030. (a) Except as provided in subdivision (b), an advisory interpretation has no legal effect and is entitled to no judicial deference. An advisory interpretation cannot prescribe a penalty or course of conduct, confer a right, privilege, authority, exemption, or immunity, impose an obligation, or in any way bind or compel.

(b) In an enforcement action or adjudicatory proceeding, an agency may not assert or rely on an interpretation of law contradicting an advisory interpretation adopted by the agency, where events material to the enforcement action or adjudicatory proceeding occurred while the advisory interpretation was in effect.

(c) Subdivision (b) does not apply where the interpretation of a provision of law expressed in the advisory interpretation is inconsistent with an interpretation of the same provision of law in a published opinion of the California Supreme Court or a California court of appeal.

**Comment.** Section 11360.030 provides that an advisory interpretation has no legal effect other than to bind the adopting agency in an enforcement action or other adjudication.

While an advisory interpretation should not be accorded any deference by a court in interpreting a provision of law that is the subject of the advisory interpretation, this does not preclude a court from independently reaching the same interpretive conclusion. Nor is the adopting agency precluded from advancing the same interpretation on its own merits.

Subdivision (c) provides that the adopting agency is not bound, under subdivision (b), by an advisory interpretation that is inconsistent with an interpretation in a published opinion of the California Supreme Court or a California court of appeal. This does not affect any other possible limits on an agency's ability to contradict an advisory interpretation (e.g., in some circumstances, an agency might be equitably estopped from contradicting an advisory interpretation). Subdivision (c) only affects the safe harbor provision provided under subdivision (b) and is not intended

to raise any implication regarding the proper interpretation of the provision of law that is the subject of the advisory interpretation.

**§ 11360.040. Effective dates of advisory interpretation**

11360.040. (a) The adoption, amendment, or repeal of an advisory interpretation is effective on publication of a notice of completed adoption, amendment, or repeal in the California Regulatory Notice Register.

(b) An advisory interpretation remains in effect until one of the following occurs:

(1) The advisory interpretation is repealed.

(2) The advisory interpretation is disapproved or superseded by a statute or regulation or is contradicted by a published opinion of the California Supreme Court or a California court of appeal.

(3) The advisory interpretation is disapproved by the office and notice of the disapproval is published in the California Regulatory Notice Register.

(c) An advisory interpretation that has been rendered ineffective pursuant to paragraph (2) or (3) of subdivision (b) shall be promptly repealed by the agency that adopted the advisory interpretation.

**Comment.** Section 11360.040 governs the effective period of an advisory interpretation. An advisory interpretation may bind the adopting agency in an enforcement action or adjudicatory proceeding where events material to the enforcement action or adjudicatory proceeding occur while the advisory interpretation is in effect. See Section 11360.030. See also Sections 11342(b) (“office” means Office of Administrative Law), 11360.080(b)(2) (publication of notice of completed adoption, amendment, or repeal), 11360.090(c) (publication of notice of disapproval by Office of Administrative Law).

**§ 11360.050. Adoption, amendment, or repeal of advisory interpretation**

11360.050. An agency may adopt, amend, or repeal an advisory interpretation, by completing all of the following procedures:



(a) Prepare a preliminary text of the proposed action. The preliminary text shall clearly identify the provision of law that the advisory interpretation interprets and shall include the following notice, prominently displayed on its first page:

“This is an advisory interpretation adopted pursuant to Government Code Sections 11360.010-11360.100. It has no legal effect, other than to bind the adopting agency in an enforcement action or adjudicatory proceeding. However, an advisory interpretation that is inconsistent with an interpretation in a published opinion of the California Supreme Court or a California court of appeal does not bind the adopting agency. See Government Code Section 11360.030(c). Review of this advisory interpretation by the Office of Administrative Law is available on request under Government Code Section 11360.090.”

(b) Provide public notice of the proposed action, as provided in Section 11360.060.

(c) Accept written public comment for at least 45 calendar days after providing the notice required in subdivision (b).

(d) Certify in writing to the office that all written public comments received in the period provided in subdivision (c) were read and considered by the agency.

(e) Prepare the final text of the proposed action, subject to the limitations of Section 11360.070. The final text shall clearly identify the provision of law that the advisory interpretation interprets and shall include the following notice, prominently displayed on its first page:

“This is an advisory interpretation adopted pursuant to Government Code Sections 11360.010-11360.100. It has no legal effect, other than to bind the adopting agency in an enforcement action or adjudicatory proceeding. However, an advisory interpretation that is inconsistent with an interpretation in a published opinion of the California Supreme Court or a California court of appeal does not bind

the adopting agency. See Government Code Section 11360.030(c). Review of this advisory interpretation by the Office of Administrative Law is available on request under Government Code Section 11360.090.”

(f) Submit the final text of the proposed action and the certification required by subdivision (d) to the office.

**Comment.** Section 11360.050 specifies the procedures that must be followed in adopting, amending, or repealing an advisory interpretation. See also Section 11342(b) (“office” means Office of Administrative Law).

#### **§ 11360.060. Notice**

11360.060. (a) The agency shall mail notice of the proposed action to the office and to any person who has requested notice of agency regulatory actions. If the agency is within a state department, the agency shall also mail or deliver notice to the director of the department.

(b) Notice of the proposed action shall include both of the following:

(1) A clear overview explaining the purpose of the proposed action.

(2) Instructions on how to obtain a copy of the preliminary text of the proposed action and how to submit a written comment relating to the proposed action. The instructions shall specify the deadline for submission of written comment.

**Comment.** Section 11360.060 specifies the content and delivery requirements of the notice required under Section 11360.050(b). See also Section 11342(b) (“office” means Office of Administrative Law).

#### **§ 11360.070. Limitation on final text of proposed action**

11360.070. An agency may not adopt the final text of a proposed action unless the final text is sufficiently related to the preliminary text provided to the public pursuant to subdivision (a) of Section 11360.050 that the public could reasonably have anticipated adoption of the final text.

**Comment.** Section 11360.070 is drawn from Section 11346.8(c) (relating to the adoption, amendment, or repeal of a regulation). Nothing in this section prevents an agency from reinitiating the procedures in this article, with a former final text as a preliminary text.

**§ 11360.080. Publication and filing**

11360.080. (a) On receiving a notice pursuant to Section 11360.060, the office shall publish the contents of the notice in the California Regulatory Notice Register.

(b) On receiving the final text of a proposed action and certification that all timely public comment was read and considered, pursuant to subdivision (f) of Section 11360.050, the office shall do all of the following:

(1) File the final text of the proposed action with the Secretary of State.

(2) Publish a notice of the completed action in the California Regulatory Notice Register.

(3) Publish the final text of the completed action in the California Code of Regulations.

**Comment.** Section 11360.080 specifies the publication and filing responsibilities of the Office of Administrative Law when an agency adopts, amends, or repeals an advisory interpretation. See also Section 11342(b) (“office” means Office of Administrative Law).

**§ 11360.090. Review by Office of Administrative Law**

11360.090. (a) Any interested person may request in writing that the office review an advisory interpretation.

(b) Within 15 days of receipt of a written request pursuant to subdivision (a), the office shall either deny the request, approve the advisory interpretation, or disapprove the advisory interpretation.

(c) On reaching a decision pursuant to subdivision (b), the office shall do all of the following:

(1) Mail notice explaining its decision to the person who made the request and to the agency that adopted the advisory interpretation.

(2) If the office approves or disapproves the advisory interpretation, it shall publish a notice explaining its decision in the California Regulatory Notice Register.

(3) If the office disapproves an advisory interpretation, the office shall file its decision with the Secretary of State and remove the disapproved advisory interpretation from the California Code of Regulations.

(d) In reviewing an advisory interpretation, the office shall approve the advisory interpretation if it satisfies the requirements of this article and is consistent with the provision of law it interprets. The office shall disapprove an advisory interpretation if it does not satisfy the requirements of this article or is inconsistent with the provision of law it interprets.

(e) For the purposes of this section, an advisory interpretation is consistent with the provision of law it interprets if it is any one of several reasonable interpretations of the provision of law.

(f) An advisory interpretation that has been approved or disapproved by the office under this section is not subject to further review by the office.

**Comment.** Section 11360.090 provides for post-adoption review of an advisory interpretation by the Office of Administrative Law (OAL). Disapproval of an advisory interpretation is effective on publication of the notice of disapproval in the California Regulatory Notice Register. See Section 11360.040(b)(3).

Disapproval of an advisory interpretation does not preclude expression of the agency's interpretation by other lawful means. Note, however, that an agency's interpretation expressed in an adjudication may not be expressly relied on as a precedent unless it has been designated a precedent decision by the agency. See Section 11425.60 (designation of precedent decisions).

A decision under this section is subject to judicial review. See Section 11360.100 & Comment. See also Section 11342(b) ("office" means Office of Administrative Law).

**§ 11360.100. Judicial review**

11360.100. (a) Any interested person may obtain a judicial declaration as to the validity or invalidity of an advisory interpretation that the office has reviewed or declined to review under Section 11360.090, by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure.

(b) An advisory interpretation may be declared invalid for failure to satisfy the requirements of this article or for inconsistency with the provision of law it interprets.

**Comment.** Section 11360.100 is drawn from Section 11350.3 (declaratory review of a regulation disapproved by the Office of Administrative Law). Review under this section is not the exclusive means by which a court may review an advisory interpretation. For example, where the validity of an advisory interpretation arises in an agency adjudication, the advisory interpretation may be subject to review by administrative mandamus. See Code Civ. Proc. § 1094.5. See also Section 11342(b) (“office” means Office of Administrative Law).

## CONFORMING REVISIONS

**Gov’t Code § 11340.6 (amended). Petition for adoption, amendment, or repeal**

SEC. \_\_\_\_\_. Section 11340.6 of the Government Code is amended to read:

11340.6. Except where the right to petition for adoption of a regulation *or advisory interpretation* is restricted by statute to a designated group or where the form of procedure for such a petition is otherwise prescribed by statute, any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation as provided in Article 5 (commencing with Section 11346) *or of an advisory interpretation as provided in Article 10 (commencing with Section 11360.010)*. This petition shall state the following clearly and concisely:

(a) The substance or nature of the regulation, *advisory interpretation*, amendment, or repeal requested.

(b) The reason for the request.

(c) Reference to the authority of the state agency to take the action requested.

**Comment.** Section 11340.6 is amended to permit a petition to an agency to adopt, amend, or repeal an advisory interpretation. See Article 10 (commencing with Section 11360.010).

**Gov't Code § 11340.7 (amended). Agency response to petition for adoption, amendment, or repeal**

SEC. \_\_\_\_\_. Section 11340.7 of the Government Code is amended to read:

11340.7. (a) Upon receipt of a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346) *or of an advisory interpretation pursuant to Article 10 (commencing with Section 11360.010)*, a state agency shall notify the petitioner in writing of the receipt and shall within 30 days deny the petition indicating why the agency has reached its decision on the merits of the petition in writing or schedule the matter for public hearing *comment* in accordance with ~~the~~ *applicable* notice and hearing requirements ~~of that article~~.

(b) A state agency may grant or deny the petition in part, and may grant any other relief or take any other action as it may determine to be warranted by the petition and shall notify the petitioner in writing of this action.

(c) Any interested person may request a reconsideration of any part or all of a decision of any agency on any petition submitted. The request shall be submitted in accordance with Section 11340.6 and include the reason or reasons why an agency should reconsider its previous decision no later than 60 days after the date of the decision involved. The agency's reconsideration of any matter relating to a petition shall be subject to subdivision (a).

(d) Any decision of a state agency denying in whole or in part or granting in whole or in part a petition requesting the adoption, amendment, or repeal of a regulation pursuant to Article 5 (commencing with Section 11346), *or of an advisory interpretation pursuant to Article 10 (commencing with Section 11360.010)*, shall be in writing and shall be transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register at the earliest practicable date. The decision shall identify the agency, the party submitting the petition, the provisions of the California Code of Regulations requested to be affected, reference to authority to take the action requested, the reasons supporting the agency determination, an agency contact person, and the right of interested persons to obtain a copy of the petition from the agency.

**Comment.** Section 11340.7 is amended to permit a petition to an agency to adopt, amend, or repeal an advisory interpretation. See Article 10 (commencing with Section 11360.010).

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