

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Administrative Rulemaking Cleanup

February 2001

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 Cleanup*, 30 Cal. L. Revision Comm'n Reports 533 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

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February 1, 2001

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

Chapter 1060 of the Statutes of 2000 implemented two Law Revision Commission recommendations regarding rulemaking procedure under the Administrative Procedure Act. Chapter 1059 of the Statutes of 2000 also made changes to the rulemaking procedure. This recommendation would correct two technical problems resulting from these bills:

- (1) The bills each added a section governing use of electronic communications in the rulemaking process. The requirements of these sections are mostly duplicative, with only a few minor differences. The Commission recommends that the requirements of these sections be harmonized and combined in a single section.
- (2) Chapter 1059 added a definition of “proposed action” that is technically defective. The Commission recommends that the defect be corrected.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner
Chairperson

ADMINISTRATIVE RULEMAKING CLEANUP

Chapter 1060 of the Statutes of 2000¹ implemented two Law Revision Commission recommendations regarding rule-making procedure under the Administrative Procedure Act.² Chapter 1059 of the Statutes of 2000³ also made changes to the rulemaking procedure. This recommendation would correct two technical problems resulting from these bills.

Duplicative Electronic Communication Requirements

Chapters 1059 and 1060 each added a section governing use of electronic communication in the rulemaking process (Government Code Sections 11340.8 and 11340.85, respectively). The requirements of these sections are duplicative, with only a few minor differences. The Commission recommends that the requirements of these sections be harmonized and combined in a single section. Also, surplus language relating to publication of “public notices” should be deleted.

Definition of “Proposed Action”

Chapter 1059 added Government Code Section 11342.595, defining “proposed action” as “the regulatory action submitted to the office for publication in the California Regulatory Notice Register.”

Technically, a regulatory action is not submitted to the Office of Administrative Law for publication. A notice of proposed action is published in the California Regulatory Notice Register, but not the proposed action itself.⁴ The

1. AB 1822 (Wayne).

2. *Administrative Rulemaking*, 29 Cal. L. Revision Comm’n Reports 459 (1999); *Improving Access to Rulemaking Information*, 30 Cal. L. Revision Comm’n Reports 517 (2000).

3. AB 505 (Wright).

4. See Gov’t Code § 11344.1(a) (contents of California Regulatory Notice Register).

Commission recommends that the definition be amended to correct this defect.

PROPOSED LEGISLATION

Gov't Code § 11340.8 (repealed). Electronic communication

SECTION 1. Section 11340.8 of the Government Code is repealed.

~~11340.8. In order to make the regulatory process more user friendly and to improve communication between affected businesses and the regulatory agencies, each state agency that proposes regulations pursuant to this chapter shall do all of the following:~~

~~(a) Accept comments from interested parties by facsimile and electronic mail.~~

~~(b) Post on its Internet website, if the agency has an Internet website, information regarding the proposed regulation or proposed regulatory repeal or amendment that includes, but is not limited to, all of the following:~~

~~(1) Notice of the proposed action.~~

~~(2) Initial statement of reasons for the regulation or proposed repeal or amendment.~~

~~(3) Text of the proposed regulation or proposed amendment to the regulation or instructions on how to obtain the text.~~

~~(4) Final statement of reasons.~~

~~(5) If applicable, a dated notice of the intent of the agency to discontinue the proposed action.~~

~~(6) The office's decisions on the regulation, proposed regulation, or proposed amendment or repeal of a regulation.~~

~~(7) The date the regulation was filed with the Secretary of State.~~

~~(8) The effective date of the regulation.~~

~~(9) A statement to the effect that a business or person submitting a comment to a proposed regulation or proposed amendment or repeal of a regulation has the right to request a copy of the final statement of reasons.~~

~~(c) Publication under subdivision (b) supplements any other required form of publication or distribution. The failure to comply with this section is not grounds for disapproval of a proposed regulation. Subdivision (b) does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written material.~~

Comment. Section 11340.8 is repealed. Those of its provisions that duplicate the requirements of Section 11340.85 are redundant and have not been continued. Those provisions that are not duplicative have been continued as follows: The introductory statement of intent is continued in Section 11340.85(f) without substantive change. The mandatory aspect of subdivision (a), requiring an agency to accept comments submitted by facsimile or email, is continued in Section 11340.85(b)(4). Subdivision (b)(6)-(9) is continued in Section 11340.85(c)(6)-(9) without substantive change.

Gov't Code § 11340.85 (amended). Electronic communication

SEC. 2. Section 11340.85 of the Government Code is amended to read:

11340.85. (a) As used in this section, "electronic communication" includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.

(b) Notwithstanding any other provision of this chapter that refers to mailing or to oral or written communication:

(1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.

(2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.

(3) A notice required or authorized by this chapter or by a regulation implementing this chapter may be delivered to a person by means of electronic communication if the person

has expressly indicated a willingness to receive the notice by means of electronic communication.

(4) A comment ~~or petition~~ regarding a regulation may be delivered to an agency by means of electronic communication.

(5) *A petition regarding a regulation may be delivered to an agency by means of electronic communication if the agency has expressly indicated a willingness to receive a ~~comment or~~ petition by means of electronic communication.*

(c) An agency that maintains an Internet website or other similar forum for the electronic publication or distribution of written material shall publish the following materials on that website or other forum:

(1) Any public notice required by this chapter or by a regulation implementing this chapter. ~~For the purposes of this paragraph, “public notice” means a notice that is required to be given by an agency to persons who have requested notice of the agency’s regulatory actions.~~

(2) The initial statement of reasons prepared pursuant to subdivision (b) of Section 11346.2.

(3) The final statement of reasons prepared pursuant to subdivision (a) of Section 11346.9.

(4) Notice of a decision not to proceed prepared pursuant to Section 11347.

(5) The text of a proposed regulation or instructions on how to obtain a copy of the text.

(6) *A statement of any decision made by the office regarding a proposed action.*

(7) *The date a rulemaking action is filed with the Secretary of State.*

(8) *The effective date of a rulemaking action.*

(9) *A statement to the effect that a business or person submitting a comment regarding a proposed action has the right to request a copy of the final statement of reasons.*

(d) Publication under subdivision (c) supplements any other required form of publication or distribution. Failure to comply with ~~subdivision~~—(e) *this section* is not grounds for disapproval of a proposed regulation. Subdivision (c) does not require an agency to establish or maintain a website or other forum for the electronic publication or distribution of written material.

(e) Nothing in this section precludes the office from requiring that the material submitted to the office for publication in the California Code of Regulations or the California Regulatory Notice Register be submitted in electronic form.

(f) This section is intended to make the regulatory process more user-friendly and to improve communication between interested parties and the regulatory agencies.

Comment. Section 11340.85 is amended to harmonize its requirements with those of former Section 11340.8.

Subdivision (b)(4) is amended to provide that agencies are required to accept comments by facsimile or electronic mail. The mandatory aspect of this rule is drawn from former Section 11340.8(a). Subdivision (b)(5) makes clear that an agency is not required to accept rulemaking petitions by facsimile or electronic mail.

Subdivision (c)(1) is amended to delete surplus language. This is a nonsubstantive change.

Subdivision (c)(6)-(9) continues former Section 11340.8(b)(6)-(9) without substantive change.

Subdivision (f) continues the introductory statement of intent in former Section 11340.8 without substantive change.

Gov't Code § 11342.595 (amended). "Proposed action"

SEC. 3. Section 11342.595 of the Government Code is amended to read:

11342.595. "Proposed action" means the regulatory action, *notice of which* is submitted to the office for publication in the California Regulatory Notice Register.

Comment. Section 11342.595 is amended to correct a technical defect. It is the notice of proposed action, not the proposed action itself, that is

published in the California Regulatory Notice Register. See Section 11344.1(a) (contents of California Regulatory Notice Register).
