CALIFORNIA LAW AND THE ADMINISTRATIVE PROCEDURE ACT

Part 1: The Constitution, Statutes, Regulations, and Underground Regulations

1.01. Introduction

California is perceived as having one of the best systems in the world by which state agencies adopt rules. California law has several levels, including constitutional, statutory, and regulatory - all of which are potential sources you may work with in connection to administrative rulemaking. Thus, when conducting or participating in rulemaking in California, it is useful to understand the similarities, differences, and interplay between constitutional provisions, statutes, regulations, and underground regulations.

This section will provide an overview of these types of provisions, including the concepts of force of law and hierarchy of law. Also, with respect to statutes and regulations, we will discuss numbering, publication, and effective dates.

1.02. Overview of California Law

A. California Constitution. The California Constitution is the primary governing law of the state. As we know, the Constitution separates the powers of state government into the legislative, executive, and judicial powers and provides that a person charged with the exercise of one power may not exercise the other except as permitted in the Constitution.

1. **Who can revise the Constitution?** In California, any amendment or revision to the Constitution must be approved by the state's voters. Constitutional amendments may be proposed by either the Legislature or by the state's voters through an initiative petition.

B. California Statutes and Legislation. The process by which bills are considered and laws enacted by the California State Legislature is commonly referred to as the legislative process.

1. **Who can adopt, amend, or repeal a statute?** The Constitution vests lawmaking authority to the State Legislature and reserves to the People the right of initiative and referendum. While the state's voters have the power to enact statutes, it is the Legislature that primarily enacts statutes.

2. **Overview of the Legislative Process.** California's legislative branch consists of a bi-cameral legislature: the Senate and the Assembly. All legislation begins as an idea or concept. Ideas and concepts can come from a variety of sources. The process begins when a Senator or Assembly Member decides to author a bill. A Legislator sends the idea for the bill to the Legislative Counsel where it is drafted into the actual bill. The draft of the bill is returned to the Legislator for introduction. If the author is a Senator, the bill is introduced in the Senate. If the author is an Assembly Member, the bill is introduced in the Assembly.

   A bill is introduced or read the first time when the bill number, the name of the author, and the descriptive title of the bill is read on the floor of the house. The bill is then sent to the Office of State Printing. No bill may be acted upon until 30 days has passed from the date of its introduction. The bill then goes to the Rules Committee of the house of origin where it is assigned to the appropriate policy committee for its first hearing. Bills are assigned to policy committees according to subject area of the bill. For example, a Senate bill dealing with health care facilities would first be assigned to the Senate Health and Human Services Committee for policy review. Bills that require the expenditure of funds must also be heard in the fiscal committees: Senate Appropriations or Assembly Appropriations. Each house has a number of policy committees and a fiscal committee. Each committee is made up of a specified number of Senators or Assembly Members.

   During the committee hearing the author presents the bill to the committee and testimony can be heard in support of or opposition to the bill. The committee then votes by passing the bill, passing the bill as amended, or defeating the bill. Bills can be amended several times. Letters of support or opposition are important and should be mailed to the author and committee members before the bill is scheduled to be heard in committee. It takes a majority vote of the full committee membership for a bill to be passed by the committee.

   Each house maintains a schedule of legislative committee hearings. Prior to a bill's hearing, a bill analysis is prepared that explains current law, what the bill is intended to do, and some background information. Typically, the analysis also lists organizations that support or oppose the bill.

   Bills passed by committees are read a second time on the floor in the house of origin and then assigned to third reading. Bill analyses are also prepared prior to third reading. When a bill is read the third time it is explained by the author, discussed by the Members and voted on by a roll call vote. Bills that require an appropriation or that take effect immediately, generally require 27 votes in the Senate and 54 votes in the Assembly to be passed. Other bills generally require 21 votes in the Senate and 41 votes in the Assembly. If a bill is defeated, the Member may seek reconsideration and another vote. Once the bill has been approved by the house of origin it proceeds to the other house where the procedure is repeated.

If a bill is amended in the second house, it must go back to the house of origin for concurrence, which is agreement on the amendments. If agreement cannot be reached, the bill is referred to a two house conference committee to resolve differences. Three members of the committee are from the Senate and three are from the Assembly. If a compromise is reached, the bill is returned to both houses for a vote.

If both houses approve a bill, it then goes to the Governor. The Governor has three choices. The Governor can sign the bill into law, allow it to become law without his or her signature, or veto it. A governor's veto can be overridden by a two thirds vote in both houses. Most bills go into effect on the first day of January of the next year. Urgency measures take effect immediately after they are signed or allowed to become law without signature.

3. **How are statutes numbered?** Several different numbering systems are used for statutes based on where they are in the process of becoming a law. When a bill is introduced into the Legislature, it is given a bill number based on its house of origin and the sequence of its introduction in that house in the two-year Legislative session. A bill introduced in the Assembly is designated AB (Assembly Bill) and a bill introduced in the Senate is designated SB (Senate Bill). As an example, AB 14 would be the fourteenth bill introduced in the Assembly in a particular two-year session. The bill keeps this number for the entire time it is considered by the Legislature and the Governor.

   If a bill is signed by the Governor or allowed to become law without the Governor's signature, the bill must be filed with the Secretary of State. It then gets a new number unrelated to its bill number. The new number, called a chapter number, is comprised of the year in which it is filed and the sequence of its filing in that year. As an example, Statutes 2014, Chapter 6 is the number of the sixth bill filed with the Secretary of State in 2014.

   If you read the AB, SB, or the chaptered version of a bill, you will see that it is divided into sections and that each section usually adds, amends, or repeals numbered sections in a code. The Legislature has divided legislative statutes into various codes on different topics. A section might say, for example: "Amend Government Code Section 11340 to read: . . .."

   Most, but not all, statutory provisions are codified in one of the following codes: Business and Professions Code, Civil Code, Code of Civil Procedure, Commercial Code, Corporations Code, Education Code, Elections Code, Evidence Code, Family Code, Financial Code, Fish and Game Code, Food and Agricultural Code, Government Code, Harbors and Navigation Code, Health and Safety Code, Insurance Code, Labor Code, Military and Veterans Code, Penal Code, Probate Code, Public Contract Code, Public Resources Code, Public Utilities Code, Revenue and Taxation Code, Streets and Highways Code,

Unemployment Insurance Code, Vehicle Code, Water Code, and Welfare and Institutions Code.

Sometimes the Legislature chooses *not* to codify some statutory text in one of these codes. Such statutory text is known as an uncodified statute. All statutory text, whether codified or uncodified, can be found in the chaptered version of a bill. Be aware that uncodified statutory text has the force of law. One example of an uncodified statute is the annual state budget.

4. **Where are statutes published?** The Legislative Counsel publishes codified statutes online, free of charge, at http://leginfo.legislature.ca.gov/.

   The public may obtain chaptered versions of statutes printed by the Office of State Publishing through the Bill Room in the State Capitol. Also, a compilation of all chaptered versions of all statutes (codified and uncodified) for each legislative year may be found in larger libraries in a set of annual publications called "Statutes and Amendments to the Codes." Like statutes, bills are also available online, free of charge, at http://leginfo.legislature.ca.gov/.

   Two private publishers, Thomson Reuters (aka West's) and LexisNexis (aka Deering's) publish the codified statutes online and in hardcopy with unofficial annotations which include the history of each code section as well as section-specific cross-references to related materials and digests of some court cases. These publishers update their books annually with supplements called "pocket parts" which come out near the beginning of each calendar year. The pocket parts include new statutes and amendments adopted during the previous year. The publishers also issue softbound updates, called "advance sheets," during the year to further update the annual pocket parts. **When researching a statute by the books always start with the pocket part or advance sheet**.

5. **What are the effective dates for statutes?** Most statutes become effective on January 1st of the year following the year in which they are adopted. Each year, however, the Legislature also enacts a few "urgency" statutes that require more than a majority vote to pass, which become effective upon enactment and filing with the Secretary of State.

C. **Regulations.** Under the Administrative Procedure Act (APA), a regulation means "every rule, regulation, order, or standard of general application, or the amendment, supplement, revision or any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Government Code section 11342.600.)

1. **Who can adopt, amend, or repeal a regulation?** State agencies in the executive—*not the legislative or judicial*—branch of the California State government may adopt, amend, or repeal regulations. A state agency only has

that rulemaking power that has been delegated to it by the Legislature. It is a quasi-legislative function.

- Defining State Agencies. A "state agency" includes every state office, officer, department, division, bureau, board, and commission. (Government Code section 11000.) Because the Administrative Procedure Act only applies to state agencies, local and regional agencies are not subject to the Administrative Procedure Act. Please note, many agencies that do not have statewide jurisdiction are still state agencies for Administrative Procedure Act purposes. An example is the San Francisco Bay Conservation and Development Commission, which, as the name suggests, does not have statewide jurisdiction. Also, be aware that one cannot rely on the name of an agency to determine if it is a state agency for purposes of the Administrative Procedure Act. For example, the California Regional Water Quality Control Boards are state agencies because their enabling statute so specifies.

2. **Where are regulations published?** The texts of virtually all regulations of California state agencies adopted pursuant to the Administrative Procedure Act are published by the Office of Administrative Law (OAL) in the California Code of Regulations. You will see this abbreviated as CCR. In some cases, a statute will expressly exempt an agency from the requirement to publish its regulations in the California Code of Regulations but will still require the agency to otherwise follow the rulemaking requirements of the Administrative Procedure Act.

   Title 24, the Building Standards Code, is the only title of the California Code of Regulations that is not published by OAL, but published through another agency, the Building Standards Commission. (See, Government Code section 11356.)

   When a regulation is published in the California Code of Regulations, the regulation is accompanied by Authority and Reference citations and the regulatory history of the section. The rulemaking agency prepares the Authority and Reference citations that OAL reviews for accuracy unless it is exempt. The publisher prepares the history note pursuant to direction from OAL.

   OAL makes the California Code of Regulations available online, free of charge, at http://ccr.oal.ca.gov/.

   The loose-leaf, hard copy of the California Code of Regulations is published by the West Publishing Company under a contract with OAL. The full California Code of Regulations is available in many law libraries, including the State Law Library and county law libraries.

3. **How are regulations numbered?** Each regulation proposed for addition to the California Code of Regulations has a title number and a section number. The

California Code of Regulations is divided into 28 titles. Within each title, the regulations are numbered sequentially, beginning with section 1. Usually, a regulation keeps the same title and section number from start to finish in the rulemaking process. That is, the title and section numbers of the regulation as proposed are the title and section numbers of the regulation as printed in the California Code of Regulations. If there is a problem with the section number, you will get a call from OAL. When in doubt when numbering, or when your agency needs to adopt a large group of new regulations, call OAL first.

4. **What are the effective dates for regulations?** Most regulations become effective on the first day of the next calendar quarter following the date they are filed with the Secretary of State, *so long as* there are at least 30 days between the date of filing with the Secretary of State and the first day of the next calendar quarter. Pursuant to Government Code section 11343.4, regulations filed between:

    - September 1 – November 30 take effect January 1
    - December 1 – February 29 take effect April 1
    - March 1 – May 31 take effect July 1
    - June 1 – August 31 take effect October 1

    There are exceptions to the regular effective dates when:

    - A statute provides for a specific effective date.
    - The state agency makes a written request for a later effective date than would otherwise occur under this schedule.
    - The state agency makes a written request demonstrating good cause for an earlier effective date than would otherwise occur under this schedule.
    - The regulation is adopted by the Fish and Game Commission under Fish and Game Code section 250, et seq., or it is adopted by the Fish and Game Commission and a different effective date than would otherwise occur under this schedule is required to conform the regulation to a federal regulation.
    - Emergency regulations pursuant to Government Code section 11346.1(d).

D. Underground Regulations. An underground regulation, which is sometimes called a "house rule," is essentially any policy or procedure that is required to be adopted using the rulemaking procedure mandated by the Administrative Procedure Act but was not.

1. **Who can adopt, amend, or repeal underground regulations?** Only state agencies adopt underground regulations because only state agencies must use the rulemaking procedure mandated by the Administrative Procedure Act. ***Underground Regulations are procedurally defective provisions that may appear to be legally valid, but they are not.*** State agencies are specifically prohibited by statute from issuing, using, or enforcing underground regulations

regardless of whether they are hidden from the public or broadly disseminated (See, Government Code section 11340.5(a).)

1.03. What Material has the Force of Law?

Of course, the California Constitution has the force of law. The California Constitution is the preeminent law for the State of California.

Statutes have the force of law in that the lawmaking power of the state is vested by the Constitution primarily with the Legislature, which adopts most statutes. However, as noted above, some statutes are adopted by the people through the initiative or referendum process.

Does a regulation have the force of law? Yes, a regulation properly adopted by a state agency using delegated quasi-legislative powers has the force of law. A regulation is administratively enforceable and administrative enforcement will be upheld in court so long as the regulation satisfies standards for judicial review. The publication of a regulation in the California Code of Regulations raises a rebuttable presumption of validity. (*Stoneham v. Rushen* (1984) 203 Cal.Rptr. 20, 156 Cal.App.3d 302.)

Does an underground regulation have the force of law? No. An underground regulation has no legal effect. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576, 59 Cal.Rptr.2d 186 citing *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1.) Issuance or use of an underground regulation is prohibited by statute. (Government Code section 11340.5.) Consequently, except in very limited circumstances a court will not enforce an underground regulation. *Tidewater Marine Western, Inc. v. Bradshaw* explains that an underground regulation does not repeal a controlling law. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576-577, 59 Cal.Rptr.2d 186.)

Note: Be aware that an underground regulation found to be a state mandated local program may create a duty for the state to reimburse local government for costs attributable to it.

1.04. What is the Hierarchy of the State Law?

As explained above, the California Constitution, statutes, and regulations have the force of law. But what happens if a regulation conflicts with the Constitution or statute? Or if there is any inconsistency or conflict between constitutional, statutory, or regulatory provisions? If a provision within the California Constitution conflicts with a statute or regulation, then the Constitution takes precedence over both statute and regulation. If a statute conflicts with a regulation, then then the statute takes precedence over the regulation. This is called the hierarchy of the law.

1.05. Federal vs. California Administrative Procedure Act

Federal administrative law has traditionally divided regulations into "quasi-legislative" and "interpretive." Under the federal scheme the distinction is important for purposes of the applicability of the federal Administrative Procedure Act and the federal standard of judicial review. In California, however, this distinction is much less significant because under the California Administrative Procedure Act, both "quasi-legislative" and "interpretive" regulations are subject to Administrative Procedure Act notice and hearing procedures and because virtually all regulations adopted by California state agencies are, to a greater or lesser degree, quasi-legislative. (See *Yamaha Corp. v. State Board of Equalization* (1998) 19 Cal.4th 1, 18-19, 78 Cal.Rptr.2d 1 (Conc. opn. of Mosk, J.).) "A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 574-575, 59 Cal.Rptr.2d 186.)

Part 2: The Evolution of Regulatory Reform in California

2.01. Introduction.

Immediately after California became a state in 1850, the Legislature began adopting statutes that assigned duties and responsibilities to various officers in the executive branch of state government. Within a few decades, the Legislature was for the first time creating state agencies in the executive branch by statute and empowering them to administer specified statutes. Around that same time, a certain power began to appear in statute: a delegation from the Legislature to a state agency of the power to adopt rules and regulations to implement, interpret, and make specific the various statutes the agency was responsible to administer.

In these early statutes, sometimes a delegation of rulemaking authority was accompanied by procedural requirements the agency had to follow to exercise the power, and sometimes it was not. In the latter case, the state agency was left to its own devices. There were no universally applicable procedural requirements, even for fundamental matters, such as public participation or filing and publication of adopted rules and regulations. It is easy to imagine the difficulty then of trying to participate in rulemaking or trying to find the operative text of a regulation, or in trying to verify whether a regulation even existed.

2.02. The 1940s – Birth of the Administrative Procedure Act.

In 1941, the Legislature and the Governor realized that there needed to be minimum procedural standards for the adoption of state agency rules and that the people should have access to those rules. A new piece of legislation was enacted to let the people who were being regulated weigh in on the proposed rules by which they

would be governed. The California Administrative Procedure Act came into being. The new Administrative Procedure Act would eventually require:

- Public notice and participation;
- Rules be written down and based on substantive standards; and
- That all the rules (regulations) be collected in one central place thereby providing for continuing public access. Originally called the California Administrative Code (CAC), the collection of regulations is now known as the California Code of Regulations (CCR).

The original titles of the California Administrative Code were first published in 1945. The requirement of centralized filing and publication of all regulations, first adopted in 1941, continues to be a vital part of the modern Administrative Procedure Act, providing for continuing public access to all state agency regulations.

In 1947, the Legislature enacted the notice and hearing requirements applicable to every state agency that is not exempt by statute, to provide the opportunity for meaningful public participation in state agency rulemaking.

State agency compliance with regulatory reform has not always been automatic. A legislative committee report issued in 1955, found state agency noncompliance with the mandatory rulemaking requirements of the Administrative Procedure Act to be common. In 1978, the California Supreme Court, quoted this report when noting the problem of noncompliance by state agencies:

> "The committee is compelled to report to the Legislature that it has found many agencies which avoid the mandatory requirements of the Administrative Procedure Act of public notice, opportunity to be heard by the public, filing with the Secretary of State, and publication in the Administrative Code.
>
> The committee has found that some agencies did not follow the act's requirements because they were not aware of them; some agencies do not follow the act's requirements because they believe they are exempt; at least one agency did not follow the act because it was too busy; some agencies feel the act's requirements prevent them from administering the laws required to be administered by them; and many agencies . . . believe the function being performed was not in the realm of quasi-legislative powers.
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> The manner of avoidance takes many forms, depending on the size of the agency and the type of law being administered, but they can all be briefly described as 'house rules' of the agency. They consist of rules of the agency, denominated variedly as 'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like, and are contained in internal organs of the agency such as manuals, memoranda, bulletins, or

are directed to the public in the form of circulars or bulletins." (First Report of the Senate Interim Committee on Administrative Regulations (1955) as cited in, *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 205.)

2.03. The 1980s – Enactment of OAL Oversight

In 1979, the Legislature recognized the need for an independent office in the executive branch to enforce the rulemaking part of the Administrative Procedure Act. This resulted in the statutory establishment of the Office of Administrative Law (OAL). Upon request, OAL must report directly to the Legislature to accomplish regulatory reform in California. The Legislature gave OAL the power and duty to review regulations to ensure that they are easy to understand, have a rational basis, are authorized by statute, and are consistent with other law, including the procedural requirements of the Administrative Procedure Act. Since July 1, 1980, state agencies have been required to submit regulations to OAL for review before the regulations can become effective. Upon approval of OAL, the regulations are filed with the Secretary of State and then become effective on a date specified pursuant to statute.

<u>MAJOR GOALS OF THE ADMINISTRATIVE PROCEDURE ACT:</u>

- Legally valid, clear regulations based in necessity.
- Meaningful public participation in state agency rulemaking.
- Public access to all regulations issued or used by state agencies.
- Complete records of rulemaking proceedings adequate for OAL and judicial review.

The Administrative Procedure Act has been amended many times since 1980. Most of the amendments to the Administrative Procedure Act have addressed changes in the California economy and the impact of regulations on individuals and businesses or have attempted to improve public participation in the rulemaking process.

- In 1982, Assembly Bill 3322 added the "non-duplication" standard to the list of substantive standards that regulations must meet. In the same year, Assembly Bill 2820 added an Authority statute for OAL to adopt regulations of its own governing the Administrative Procedure Act and OAL's procedures related to the publication and review of proposed regulations.

- In 1983, Assembly Bill 1718 added a preference for performance standards over prescriptive standards in regulations. In the same year, Assembly Bill 616 added a requirement for an economic impact statement and description of alternatives in the Initial Statement of Reasons.

- In 1986, Assembly Bill 3094 added the requirement that agencies explain why they rejected the alternatives they considered and a requirement that agencies determine that no alternative considered would be as effective and less burdensome to regulated entities.

- In 1987, Assembly Bill 2540 changed the title of the California Administrative Code to the California Code of Regulations and changed the Notice Register to the California Regulatory Notice Register.

- In 1989, Assembly Bill 2061 required agencies to provide additional information in their rulemaking documents whenever they proposed regulations which would have a significant adverse economic impact on small businesses.

- In 1991, Senate Bill 327 exempted the Department of Finance from having to adopt regulations for its instructions in the State Administrative Manual related to preparation or administration of the state budget.

- In 1996, Senate Bill 1910 required OAL to put the California Code of Regulations on its website. In the same year, Senate Bill 1507 added the requirement that state agencies not destroy rulemaking records but preserve them or transfer them to the state archives for preservation.

- In 2000, Assembly Bill 505 added the Small Business Reform Act to the Administrative Procedure Act. It required OAL to put the California Regulatory Notice Register on its website. It also added a requirement for a description of cost impacts on representative private persons and businesses and added a definition of the term "cost impact." It added section 11346.45 to the Administrative Procedure Act to require the involvement of stakeholders in public discussions before an agency published notice of a large or complex regulatory proposal.

- Also, in 2000, Assembly Bill 1822 added what is now section 11340.85 to the Administrative Procedure Act, which requires state agencies to use their websites to post various rulemaking documents. It also changed references in the Administrative Procedure Act from "adoption or amendment" of regulations to "adoption, amendment or repeal" of regulations, thereby requiring agencies to also consider the effects of the repeals of regulations on regulated entities. Assembly Bill 1822 also added the "plain English" writing requirement at several places in the Administrative Procedure Act, such as in the writing of the agency's Informative Digest at section 11346.5(a)(3). It added the option of agencies aggregating repetitive public comments for purposes of summaries and responses in the Final Statement of Reasons. It also added section 11347.1 to the Administrative Procedure Act to require a 15-day period for public comments on any technical or empirical documents added by the agency to the rulemaking file after publication of its notice. Prior to this bill, agencies were only required to make "adequate provision" for public comments in this situation. Assembly Bill 1822 added the requirement that public agencies keep their rulemaking files available for inspection and copying beginning with the publication of their notice and continuing during all subsequent times the file is in the agency's possession. It also amended section 11350 of the Administrative

Procedure Act to specify and limit the evidence which a court may consider in a judicial proceeding challenging the validity of a regulation.

- In 2002, Assembly Bill 1857 added the requirement that in considering alternatives that would lessen the adverse impact on small businesses, agencies must also provide their reasons for rejecting those alternatives.

- In 2006, Assembly Bill 1302 lengthened the initial period of effectiveness of an emergency regulation from 120 to 180 days but capped at two the number of times an agency could readopt an emergency regulation. It also added a five-working-day notice requirement for a proposal to adopt an emergency regulation and a five-calendar-day public comment period on proposed emergency regulations.

- In 2011, Assembly Bill 410 added requirements to the notice to make it more accessible to persons who are visually or otherwise impaired. It also added section 11346.6 to the Administrative Procedure Act to provide special accommodations in the public comment period for regulations adopted by certain state agencies.

- In 2012, Senate Bill 617 further strengthened the Administrative Procedure Act in terms of analysis and disclosure of the economic impact of regulations and the need to consider less burdensome alternatives and to specify the benefits of the regulations in an Economic Impact Assessment document and in the notice. Senate Bill 617 also added a requirement for a more comprehensive Economic Impact Assessment, which the Department of Finance refers to as the Standardized Regulatory Impact Analysis, for regulations projected to have a greater than 50-million-dollar impact over a 12-month period. The Department of Finance has added regulations at California Code of Regulations, title 1, sections 2000 – 2004 to further implement, interpret and make specific Senate Bill 617.

- In 2012, Senate Bill 1099 changed the effective dates for regulations from generally becoming effective 30 days after being filed with the Secretary of State to a quarterly effective date system, if the first day of the next calendar quarter is at least 30 days after the regulation is filed with the Secretary of State. Senate Bill 1099 also required agencies to post on their websites the text of regulations which are pending effectiveness within 15 days of the regulations being filed with the Secretary of State and to send a link to the text of these regulations to OAL, within five days of posting, for OAL to also post on its website.

- In 2013, Assembly Bill 1612 added a requirement, effective January 1, 2014, that if a regulation was a building standard that impacted housing costs, the agency's Initial Statement of Reasons must include an estimated cost of compliance with the regulation and the estimated potential benefits of compliance, and the related assumptions used to determine these estimates.

- In 2013, Assembly Bill 2041 further expanded agencies' responsibilities to make their notices accessible to persons who are visually or otherwise impaired.

Part 3: Identifying What Must be Adopted Pursuant to the Administrative Procedure Act

3.01. Introduction.

OAL has two primary functions besides the publication of the Notice Register and the California Code of Regulations: (1) OAL reviews regulations for compliance with the substantive and procedural requirements of Chapter 3.5 of the Administrative Procedure Act prior to filing the regulations with the Secretary of State; and (2) OAL reviews and makes determinations on petitions challenging state agency action as underground regulations.

The executive branch agencies of the state, which are subject to the Administrative Procedure Act, can exercise quasi-legislative power through the delegation of authority to them by the Legislature. This has been true since California became a state in 1850 and the Legislature started delegating rulemaking power to different people in the executive branch and then started establishing agencies to effectuate specific policy direction.

THE ADMINISTRATIVE PROCEDURE ACT IS MANDATORY

Compliance with the rulemaking requirements of the Administrative Procedure Act is mandatory. (*Armistead v. State Personnel Board*.) All regulations are subject to the Administrative Procedure Act, unless expressly exempted by statute. (*Engelmann v. State Board of Education.)* Any doubt as to the applicability of the Administrative Procedure Act should be resolved in favor of the Administrative Procedure Act. (*Grier v. Kizer*.)

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

If a rule looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated by the courts as a regulation whether the issuing agency so labeled it. (*State Water Resources Control Bd. v. Office of Administrative. Law* (1993) 12 Cal.App.4th 697, 703.)

3.02. Understanding Statutory Language.

The Administrative Procedure Act applies to the exercise "of any quasi-legislative power conferred by any statute heretofore or hereafter enacted." (Government Code section 11346.) This means that it does not matter whether an agency implements newly enacted law or law that has been around for decades - either way, the Administrative Procedure Act applies. But not every statute requires the adoption of an implementing regulation. In this regard, it is useful to think about three types of statutory provisions:

- **Self-Executing**
- **Wholly-Enabling**
- **Susceptible to Interpretation**

A. Self-Executing Statutes. A self-executing statutory provision is so specific that no implementing or interpreting regulation is necessary to give it effect. For example, a statute may provide: "The annual licensing fee is $500." This statutory language is very specific, and it does not give discretion to an agency to decide on the fee amount. Rather, the amount of the fee is set forth by statute; thus, the statute is self-executing, and an agency would not be able to adopt a regulation that said anything else.

B. Wholly-Enabling Statutes. In contrast, a wholly-enabling statutory provision is one that has no legal effect without the enactment of a regulation. An example is a statute that provides: "The department may set an annual licensing fee up to $500." This type of statute cannot legally be enforced without a regulation setting the fee. There has been discretion delegated to the agency to determine (up to a certain limit) what the fee should be.

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

So, self-executing provisions of law are not rules that must be adopted pursuant to the Administrative Procedure Act because they are already enacted law. The agency is not creating a rule (regulation), the Legislature already created a law. Rules interpreting wholly enabling provisions of statutes and those susceptible to interpretation, on the other hand, may need to be adopted pursuant to the Administrative Procedure Act if the rule is a "regulation."

3.03. Identifying Regulations.

As indicated above, the Administrative Procedure Act specifically prohibits any state agency from making any use of a state agency rule that is a "regulation," as defined in Government Code section 11342.600 that should have, but was not, adopted pursuant to the Administrative Procedure Act.

"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 agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. (Government Code section 11342.600.)

How does an agency know if their action is a regulation? Case law clarifies how to determine if agency action is a regulation.

A. ***Armistead v. State Personnel Board***: In the 1978 case *Armistead v. State Personnel Board*, the California Supreme Court made it clear that compliance with the rulemaking requirements of the Administrative Procedure Act is mandatory. The holding of *Armistead* was later codified in Government Code, section 11342.600.

The Armistead case citing to the 1955 Report of the Senate Interim Committee on Administrative Regulations made it clear that it does not matter what the agency called it, if it acts like a regulation, it's a regulation. It also made it clear that **rules that interpret other rules have no legal effect if not properly adopted**.

PTM section 525.11 … does not govern or guide us here because it is an invalid rule. It is invalid because it was not duly promulgated and has not been duly published. … Rules that interpret and implement other rules have no legal effective unless they have been promulgated in substantial compliance with the Administrative Procedure Act.

B. ***Tidewater Marine Western, Inc. v. Bradshaw***: The 1996 *Tidewater* case provided further clarification for agencies on just how to analyze whether agency action is a regulation. The following analysis will help an agency to determine whether a policy or procedure must be adopted as a regulation pursuant to the requirements and procedures of the Administrative Procedure Act:

First, is the policy or procedure a rule or standard of general application (that is not already contained in law), *or* a modification or supplement to such a rule?

Second, has the policy or procedure been adopted by the agency to implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure.

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

IS IT A REGULATION?

1. **IS IT A GENERAL RULE?**
   A standard or procedure of general application (general rule) is a standard or procedure that applies to an open class. (*Roth v. Department of Veterans Affairs*.) An open class is one whose membership could change.

2. **DOES IT IMPLEMENT, INTERPRET, OR MAKE SPECIFIC THE LAW?** Implementing, interpreting, or making specific the law enforced by the agency (or governing its procedures). Most action that an agency takes is related to their delegation of quasi-legislative power from the Legislature. If an agency is "clarifying" or "making more specific" how to do something that it is within their statutory authority to do, that action is usually making specific the law being enforced by the agency. When the agency acts to make guidelines for a program or function, it is "making specific" the statutes for that program or function.

If the policy or procedure satisfies steps one and two above, then it is a "regulation" as defined in the Administrative Procedure Act and must be adopted pursuant to the Administrative Procedure Act **unless** it falls within an express statutory exemption from the Administrative Procedure Act.

Regulations come in many forms: policies, procedures, instructions, criteria, guidelines, manuals, and orders, to name just a few. **To be legally enforceable, every regulation must go through the rulemaking procedures of the Administrative Procedure Act unless exempt.** Exemptions are discussed in section 3.04.

If the policy or procedure meets the definition of "regulation," and there is not an express statutory exemption, then courts have found such rules to be **invalid and unenforceable.** These rules that have not gone through the Administrative Procedure Act but should have are often referred to as "**underground regulations**."

3.04. Exemptions to the Rulemaking Requirements of the Administrative Procedure Act

Government Code section 11346(a) states, in part, "This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly."

There are two types of statutory exemptions, those found in the Administrative Procedure Act itself (**general** exemptions), and those found in other provisions of the codes (**special** exemptions). The following are some of the express exemptions set out in the Administrative Procedure Act.

A. General exemptions are found in Government Code section 11340.9:

- **Internal Management:** "A regulation that relates only to the internal management of the state agency." (Government Code section 11340.9(d).) The internal management exception to the Administrative Procedure Act is narrow. A regulation is exempt as internal management if it:

    1. directly affects only the employees of the issuing agency; and
    2. does not address a matter of serious consequence involving an important public interest. (*Armistead, Stoneham, Poschman,* and *Grier.*)

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

  This legislative language creates a limited statutory exemption relating to forms. A regulation is **not** needed if the form's contents consist only of existing, specific legal requirements. By contrast, if an agency **adds any language which satisfies the definition of "regulation" to the existing legal requirements**, then, under Government Code section 11340.9(c), a formal regulation is "needed to implement the law under which the form is issued." Section 11340.9(c) cannot be interpreted as permitting state agencies to avoid mandatory Administrative Procedure Act rulemaking requirements by simply typing regulatory language into a form because this interpretation would allow state agencies to ignore the Administrative Procedure Act at will.

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

  (1) Enable a law violator to avoid detection.
  (2) Facilitate disregard of requirements imposed by law.
  (3) Give clearly improper advantage to a person who is in an adverse position to the state." (Government Code section 11340.9(e).)

- **Only Legally Tenable Interpretation:** "A regulation that embodies the only legally tenable interpretation of a provision of law." (Government Code section 11340.9(f).)

- **Rate, Price, Tariff:** "A regulation that establishes or fixes rates, prices, or tariffs." (Government Code section 11340.9(g).)

- A rate is a "fixed relation of quantity, amount or degree" that a public utility or similar entity may charge.
- A "price" is something which one ordinarily accepts voluntarily in exchange for something else.
- A "tariff" is a public charge and related documents that a common carrier charges and the governing rules relating to those services.

A "**fee**" is a "charge fixed by law for services of public officers or for use of a privilege under control of government." Almost all charges a state agency imposes will fall under the category of a "fee." **Fees are not exempt from the Administrative Procedure Act.**

B. There are additional exemptions in the Administrative Procedure Act that only relate to specific agencies, those are:

- Legal ruling of counsel issued by the Franchise Tax Board or State Board of Equalization. (Government Code Section 11340.9(b).)

- Signs and signals on state highways when used for traffic control. (Government Code Section 11340.9(h).)

C. Other matters to keep in mind.

- **Restatements:** In addition to the express statutory exemptions, remember that a simple restatement of an applicable statute or duly adopted regulation is usually fine. The adoption of a policy or procedure as a "regulation" pursuant to the Administrative Procedure Act is not required if you find the specific policy or procedure set out in an applicable statute or is required for that purpose pursuant to an already duly adopted regulation. But be very sure that the policy or procedure is a restatement and does not further interpret, implement, or make specific a statute or regulation or extend to a different class of persons. If it does, then that further interpretation must be set out in regulation.

- **Precedent Decisions:** A quasi-judicial decision designated pursuant to Government Code Section 11425.60 as a precedent decision is expressly exempt from being adopted as a "regulation" pursuant to the Administrative Procedure Act. There are specific requirements set forth in the Government Code for how to properly adopt a precedent decision.

3.05. What Happens When Agency Action is Challenged as an Underground Regulation?

Any person may challenge the action of a state agency by submitting a petition to OAL seeking a determination as to whether the action is an underground regulation.

OAL has broad discretion. OAL will do preliminary research, perhaps talk with the agency and/or petitioner, and decide whether to accept the petition. OAL has sixty days to review the petition and decide whether to accept or decline it.

- **Decline.** OAL has broad discretion to decline to consider a petition. It does not constitute a judgment or opinion on any issue raised in the petition. Nothing in the decision to decline restricts the petitioner's right or ability to pursue this matter directly with the challenged agency or in court.

- **Incomplete.** If a petition is incomplete, a notice is sent to the petitioner informing them of the deficiency in the petition. If the petitioner does not cure the defect, the petition will be declined.

- **Summary Disposition**. OAL may decide to issue a Summary Disposition (SD). A Summary Disposition may only be issued when there is not an underground regulation. OAL cannot issue a Summary Disposition saying that the agency does have an underground regulation.

- **Determination**. If OAL accepts the petition for consideration, it will publish the petition or a summary in the Notice Register. The public has thirty days to comment, any response from the agency is due within 45 days of publication of the acceptance, and the petitioner has 15 days from receipt of the agency's response to rebut. OAL will issue a Determination within 120 days of the publishing of the acceptance in the Notice Register. The Determination will also be filed with the Secretary of State and published in the Notice Register.

- **280 Certification.** Any action of OAL in connection with a petition pursuant California Code of Regulations, title 1, division 1, chapter 2 shall be suspended if, prior to filing its determination with the Secretary of State, OAL receives a written certification from the challenged agency that it will not issue, use, enforce, or attempt to enforce the challenged rule. OAL may reconsider a petition that has been suspended pursuant to section 280(a) if evidence is brought to OAL's attention indicating that the challenged agency continues to issue, use, enforce, or attempt to enforce the challenged rule.

See, Government Code section 11340.5 and California Code of Regulations, title 1, sections 250, 260, 270, and 280.

Important Administrative Procedure Act Related Cases

Following is a list of cases that are important in the deciding what needs to be adopted as a regulation:

- *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1. "Personnel Transactions Manual" rule governing withdrawal of state employees'

resignations not within "internal management" exemption; rules that interpret and implement other rules have no legal effect unless they have been adopted pursuant to the Administrative Procedure Act.

- *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 3 Cal.Rptr.2d 264. Agencies need not adopt as regulations those rules contained in a statutory scheme which the Legislature has already established; but to the extent that any of the agency rules depart from, or embellish upon, express statutory authorization and language, the agency will need to promulgate regulations.

- *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317. Standard of general application applies to all members of any open class.

- *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Statistical extrapolation rule used by Department of Health Services in Medi-Cal provider audits was subject to the Administrative Procedure Act and, therefore, invalid.

- *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 42 Cal.Rptr.3d 47. The Administrative Procedure Act does apply to the enforcement of a statute when the enforcement involves a generally applicable interpretation of the statute. The exception for the lone "legally tenable" reading of the law applies only in situations where the law "can reasonably be read only one way", such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language. An interpretation that is exempt as the "only legally tenable interpretation" must follow directly and inescapably from the pertinent provisions of law. It must be plainly ineluctable.

- *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596. Rule governing tenure is a matter of serious consequence involving an important public interest, and therefore, does not fall within the Administrative Procedure Act's internal management exemption.

- *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. Noncontractual rule requiring Cal-Vet borrowers to pay late charges was subject to Administrative Procedure Act because it was a standard of general application, i.e., applied to all members of a class, kind, or order.

- *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 702. If an agency rule looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated by the courts as a regulation whether or not the issuing agency so labeled it.

- *Stoneham v. Rushen* (*Stoneham I*) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130. Rules governing state prison inmate classification do not fall within "internal

management" exemption of Administrative Procedure Act because the rules were of general application significantly affecting the male prison population.

- *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 59 Cal.Rptr.2d 186. Division of Labor Standards Enforcement's interpretation of Industrial Welfare Commission's wage order as applying to maritime employees operating off coast was a "regulation," and therefore, void for failure to comply with Administrative Procedure Act. Same interpretation, however, made by the court.

- *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 272 Cal.Rptr. 886. Agency rules properly promulgated as regulations, i.e., California Code of Regulations provisions, cannot legally be embellished upon in administrative bulletins.

- *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 74 Cal.Rptr.2d 407. "When the Legislature has intended to exempt regulations from the Administrative Procedure Act, it has done so by clear, unequivocal language."

- *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 174, Cal.Rptr. 744. Unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of the Administrative Procedure Act when engaged in quasi-legislative activities.