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OFFICE OF ADMINISTRATIVE LAW
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**TITLE 1, CALIFORNIA CODE OF REGULATIONS
UNDERGROUND REGULATIONS: AMENDMENT OF SECTIONS 250, 260, 270, AND 280**

FINAL STATEMENT OF REASONS

UPDATES TO THE INITIAL STATEMENT OF REASONS

Section 250, subsection (a)(3). As discussed in the Initial Statement of Reasons, the existing regulation defines interested person as “any person who submits a petition to OAL,” however, a petition may be submitted by a business, industry association, or group of persons or entities who have an interest in the results of the petition. The term was further defined to make clear to the public that petitions are not limited to submission only by an individual. Following the 45-day comment period, OAL determined that the term should be revised from “interested person” to “petitioner” because although the term “interested person” is used in Government Code section 11340.5, it was only used twice in the existing regulations and “petitioner,” which is used throughout the existing regulations, is a more accurate term to describe this party. Upon receipt of a petition from a person, business, industry association, or group of persons or entities who have an interest in the results of the petition pursuant to section 260, OAL then considers that interested party a petitioner.

Section 250, subsection (a)(5). Throughout sections 260, 270, and 280 the phrases “purported underground regulation,” “rule challenged by the petition,” and “challenged rule” were all used interchangeably to describe the regulation or rule alleged by the petitioner to be an underground regulation. For consistency throughout the regulations and to prevent any confusion “challenged rule” was defined and replaced the terms “purported underground regulation” in sections 260(b)(2), 260(b)(3), 260(b)(4), and 280(a)(1); and “rule challenged by the petition” in 270(f)(1) and 270(f)(2).

Section 260, subsection (a). The first sentence of this subsection was revised non-substantively to be more concise.

Section 270, subsection (a). The subsection was revised non-substantively to be more concise.

Section 270, subsection (a)(2)(A). As discussed in the Initial Statement of Reasons, the purpose of the petitioner's confirmation that a copy of the petition

was sent to the challenged agency is for OAL to determine where and to whom the petition was sent once it starts its review of the petition. Often, the petitioner sends the petition to an agency's headquarters or another address that is available on the agency's website. The petition is not always delivered to the best person at the agency to handle the petition. Even if addressed to the correct individual or department, petitions may be routed through mail rooms or several people or departments before reaching the correct person at an agency, if at all. OAL has found that usually an agency's legal department or regulations department is the proper contact for an Underground Regulation Petition, and because of OAL's work with agencies in rulemaking, OAL can often reach the correct contact person before they receive the petition. To ensure that the correct person or department at an agency is aware the petition is under review and is available to discuss it with OAL, section 270(a)(2)(A) was adopted to indicate that upon receipt of a complete petition OAL will inform the challenged agency that the petition is under review and offer to provide a copy by email.

Section 270, subsection(c)(2). This section was amended to replace the phrase "administrative body with jurisdiction" with "other body that can address the petitioner's concerns." OAL does not have enforcement authority over other agencies as it relates to underground regulations and cannot provide for relief or damages, so a petitioner may be better served by a Court or other body providing relief. This provision informs the public that OAL considers all aspects of the challenged rule in a petition and whether the petition rises to the level of considerable public importance so as to support a decision to accept the petition and render an opinion under the totality of the circumstances. Not all petitions benefit from an opinion by OAL, and it is important to weigh the benefit of providing an opinion with other compelling factors such as those articulated in Section 270.

Section 270, subsection (f)(2)(C). In response to a comment this section was amended non-substantively to replace the term "expressly" with "statutorily". Government Code section 11346(a) states, "It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by any statute. *This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.*" Because only an express statutory exemption may supersede the requirements of the APA the sentences have the same meaning but using the word "statutorily" is more readily understood by the general public and will result in less confusion.

Section 270, subsection (f)(4). This section was amended to indicate that OAL will publish the summary disposition or a summary of the summary disposition in the California Regulatory Notice Register. Depending on the length of the summary disposition, OAL may choose to only publish a summary to avoid a lengthy publication in the Notice Register.

Section 270, subsection (g). Existing section 270(g) sets requirements for the public to submit a comment, but there was no existing language that stated whether OAL would consider a comment that did not comply with those requirements. To ensure the public understands that a comment must be compliant to be considered, this section was amended to indicate that OAL will only consider a public comment that complies with the requirements in 270(g)(1)-(2). Additionally, this section was amended to state that a comment can be submitted by a person or an entity. Like an underground regulation petition, a comment from the public may be submitted by a business, industry association, or group of persons or entities who have an interest in the results of the petition.

Section 270, Reference Citations: Government Code section 11346 is added as a reference citation. Section 270(f)(2) lists the circumstances in which facts demonstrate that the challenged rule is not an underground regulation, including instances where the challenged rule is statutorily exempt from the rulemaking provisions of the APA. Pursuant to Government Code section 11346(a) the APA “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.” Section 270(f)(2)(C) interprets Government Code section 11346, and it is necessary to include as a reference citation.

LOCAL MANDATE DETERMINATION

In accordance with Government Code section 11346.9, subdivision (a)(2), OAL determined that the regulations do not impose a mandate upon local agencies or school districts.

ALTERNATIVES DETERMINATION

In accordance with Government Code section 11346.9, subdivision (a)(4), as discussed in the summary and response to comments below, OAL has determined that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, as effective and less burdensome to affected private persons than the proposed action, or more

cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

ALTERNATIVES THAT WOULD LESSEN THE ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS

No alternative that would lessen any adverse economic impact on small businesses was proposed.

SUMMARY AND RESPONSE TO COMMENTS

OAL received written comments from only two commenters during the 45-day comment period. No oral comment was presented at the public hearing.

Rural County Representatives of California (RCRC):

Comment 1: RCRC supports the amendment to Section 250, subsection (a)(3) as written, which conveys greater clarity on who can submit a petition by broadening the definition of “interested person”.

OAL Response 1: OAL appreciates the support for this amendment.

Comment 2: RCRC supports the revision of Section 260, subsection (a) which ultimately benefits the petitioner with greater clarity on how to initiate a challenge to an agency’s rule. We appreciate OAL modernizing this process further by allowing electronic submission of the written petition and resolving the ambiguity of concurrently notifying the challenged agency. We further appreciate the simplification of concurrently notifying the challenging agency through the addition of Section 260, subsection (b)(7)(B), to satisfy the written confirmation requirement.

OAL Response 2: OAL appreciates the support for these amendments.

Comment 3: Section 270. RCRC is concerned with the addition of Section 270, subsection (c)(2), which allows OAL to decline to hear a petition “if the issue raised by the petition is currently being considered by a court or *administrative body with jurisdiction*” [emphasis added]. Unfortunately, as currently written “administrative body with jurisdiction” is too vague and could be construed to apply to a challenged agency’s internal review or public workshop process, ultimately forestalling OAL action. OAL should amend Section 270, subsection (c)(2) to only reflect formal adjudicatory proceedings, which would satisfy the stated objective on page 5 of the Initial Statement of Reasons (ISOR). More specifically, we offer the following suggestions to the proposed text:

(2) Whether the issue raised by the petition is currently being considered by a court or [begin strikeout] ~~administrative body with jurisdiction~~ [end strikeout]
[begin underline] formal adjudicatory proceeding that can award damages or injunctive relief [end underline].

We believe this change would better convey OAL's stated intent as well as preempt potential unintended consequences.

OAL Response 3: Pursuant to 1 CCR 270(c), OAL considers all factors in deciding whether to accept a petition and does not want to limit its consideration to a specific jurisdictional body when another body, even if internal to the agency, is able to resolve or assist in resolving the petitioner's issue. In addition, even if the challenged rule is already under consideration by another body OAL would not be forestalled in taking action if OAL believed it was the best course of action. OAL still retains that discretion. Rather than make the changes requested by the commenter, this section was further amended in a 15-day notice from "administrative body with jurisdiction" to "other body that can address the petitioner's concerns" as specifically enumerated forms of relief may not resolve the petitioner's concerns.

Additionally, we note that Government Code section 11340.5(e) limits the consideration of a determination by a court or administrative agency in an adjudicatory proceeding when the court or administrative agency proceeding involves the party that sought the determination from OAL, the proceeding began prior to the party's request for OAL's determination, and at issue in the proceeding is the question of whether the challenged rule is a regulation as defined in Section 11342.600. Because a court or administrative agency would not be permitted to consider the determination if issued after the court or adjudicatory proceedings have already begun, it would not be a good use of OAL staff time to research and prepare a determination when the court or administrative agency is undertaking the same effort and with greater effect because the court or administrative body can provide a remedy.

Comment 4: As proposed to be amended in Section 270, subsection (g)(2), we appreciate aligning the opportunity to concurrently service public comments to OAL and the challenged agency without additional certification. Reciprocally, we agree with the proposed addition to Section 270, subsection (h)(1) to require the challenged agency to confirm or concurrently serve its responses to the petitioner.

OAL Response 4: OAL appreciates the support for these amendments.

Comment 5: RCRC supports Section 280, subsection (a)(1) to require written certification for any challenged agency's suspension of actions, and to provide that written confirmation to the petitioner. Similarly, we appreciate that OAL has retained and enhanced the transparency provided by Section 280, subsection (b). Should an agency suspend action, that decision should be widely circulated, including public notice, with access to the challenged agency's written suspension of actions, in the California Regulatory Notice Register. Further, we appreciate OAL's ability to reconsider a petition that was suspended if the challenged agency continues to act on the challenged rule [Section 280, subsection (c) and (c)(1)].

OAL Response 5: OAL appreciates the support for these amendments.

California Department of Insurance:

[Note: The Department of Insurance submitted comments on May 21, 2021, then on May 25, 2021, submitted a revised version of the comment letter that changed the date and added a new paragraph on page 2. Both comment letters are included in the file, but the summary and response are only included once below.]

Comment 1: Of primary concern is the proposed amendment to Subdivision (f)(2)(E) of Section 270. Clarity: Rather than improving clarity, the amended language in fact creates ambiguity. The phrase "expressly exempt from the rulemaking provisions of the APA," as applied to a challenged agency rule, is readily susceptible to any number of readings, including the following: (1) The rule itself expressly indicates that it is exempt; or, the likeliest interpretation, (2) the statute underlying the rule in question contains an express exemption pertaining specifically to the rule in question. Because the proposed new language can thus "reasonably and logically be interpreted to have more than one meaning," it constitutes a per se violation of the clarity standard of the APA. (Cal. Code Regs., tit. 1, § 16, subd. (a)(1).) OAL apparently believes that the new language proposed for Subdivision (f)(2)(E) of Section 270 admits of a third interpretation ... [c]ircumstances in which the facts indicate a challenged agency rule is not an underground regulation include situations where "an express statutory exemption is applicable to the challenged rule," *without limitation as to where such applicable express statutory exemption may be lodged*. (As pointed out above, though, the proposed new phrase, "the challenged rule is expressly exempt," suggests, on the other hand, that the location of the express exemption in question *does* limit the applicability of Subdivision (f)(2)(E), to situations where the exemption resides either in the particular statute underlying the agency rule or in the text of the regulation itself.)

OAL Response 1: Government Code section 11346(a) states,

(a) It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this chapter are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter repeals or diminishes additional requirements imposed by any statute. **This chapter shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.**

Based on the language of Government Code section 11346(a), the only exemptions to the APA are those expressly adopted in statute, including those found in Government Code section 11340.9. There can be no implied exemptions and an agency could not create their own exemption through a regulation or underground regulation. Further, as noted by the commenter, OAL does not have the authority to adopt a regulation that allows for any of these situations. It would also be inconsistent with Government Code section 11346(a) for OAL to do so. However, this comment did make OAL aware that while the change was stylistic and non-substantive to make the language of the list in 270(f)(2) consistent, this amendment as proposed may cause confusion to individuals who are not aware of the requirement in Government Code 11346(a). In response to this comment, OAL proposed an additional change to this section in the 15-day notice replacing the word “expressly” with “statutorily” to ensure that the public is aware that any exemption to the APA must be contained in statute. As noted in the update to the ISOR above, because only an express statutory exemption may supersede the requirements of the APA, the sentences have the same meaning but using the word “statutorily” is more readily understood by the general public and will result in less confusion.

Comment 2: Consistency: A fundamental concern we have with proposed Subdivision (f)(2)(E) is that the new language indicates that the applicability of an exemption set forth in Government Code section 11340.9 to a challenged agency rule will now be insufficient to serve as the basis for OAL to issue a summary disposition letter. In our view, however, such an agency rule, to which one of these generic exemptions applies, could never, under any but the most strained interpretation of the phrase, be characterized as “expressly exempt” from the rulemaking provisions of the APA solely on the basis that one of the generic exemptions listed in Section 11340.9 is applicable to it. For this reason, the proposed revision to Subdivision (f)(2)(E) of Section 270 fails of the APA’s consistency standard, as well.

OAL Response 2: The commenter wrongly asserts that the exemptions in 11340.9 are not express exemptions from the APA. Courts have held otherwise, see, for example, *Winzler & Kelly v. Department of Industrial Relations* (121 Cal.App.3d. 120). An exemption, whether listed in Government Code section 11340.9 or another agency specific statute such as Education Code section 89030, is an express statutory exemption from the APA. This amendment to the regulation is not inconsistent.

Comment 3: Authority: By the same token, the proposed amendment to Subdivision (f)(2)(E) of Section 270 must also fail of the authority standard of the APA because, with respect to an agency rule to which one of the generic exemptions listed in Government Code section 11349 is applicable (a “Section 11349–exempt agency rule”), OAL clearly lacks statutory authority to promulgate a regulation that, like the proposed amendment in question, would subject a Section 11349–exempt agency rule to additional OAL review beyond the point at which OAL determines that the rule in question is, in fact, Section 11349–exempt. This is because the rulemaking provisions of the APA, which are cited as authority for the proposed amendment, expressly do not apply to Section 11349–exempt agency rules.

OAL Response 3: First, OAL notes that while the commenter refers to Government Code section 11349 in this portion of the comment, it appears the intent was to refer to Government Code section 11340.9 which lists the exemptions to the APA. OAL agrees with the commenter that if a matter is subject to an express statutory exemption from the APA, OAL does not review the rulemaking for compliance with the APA. That is true whether the exemption is expressed in Government Code section 11340.9 or another statutory provision. This amendment does not change that, as noted in response to comment 2 above.

Comment 4: Necessity: Our final observation with regard to the proposed revision of Subdivision (f)(2)(E) of Section 270 involves the necessity standard of the APA. Because, as pointed out above, it appears that OAL is operating under the mistaken impression that this revision represents a nonsubstantive change, it is unsurprising that no rational basis for making a substantive change to the subdivision appears in the ISOR.

OAL Response 4: Pursuant to 1 CCR 100, non-substantive amendments do not need to articulate “necessity” for the change as no material requirement, right, responsibility, condition, or other regulatory change occurs. The amendment merely changed the syntax of the regulation and not the meaning. The purpose of this proposed amendment was to align the listed categories to be more homogenous as was stated in the Initial Statement of Reasons.

Comment 5: Additionally, we note the proposed revision to Subdivision (a) of Section 260 to specify a physical and an email address for OAL, to which petitions for regulatory determination must be delivered. One of the reasons cited for the change, on page 3 of the ISOR, is that “[p]etitions are sometimes received by unintended recipients at OAL.” The Department of Insurance and, we suspect, other state agencies have experienced the same problem. We believe that proposed amendments to Sections 260(b)(7)(A), 260(b)(7)(B) and 270(g)(2) would actually serve to exacerbate the problem of petitions and associated documents failing to timely reach the intended recipients at agencies other than OAL. Where state agencies other than OAL are concerned, all that appears to be required in order to create a presumption that the agency has been effectively served is a name of an agency employee (*any* employee) and an email address. These proposed amendments also fail of the clarity and necessity standards of the APA.

The proposed amendments violate the clarity standard because the term “email address” admits of multiple interpretations: correct email addresses only; correct and incorrect email addresses; and email addresses that are correct but that are not accepting emails. Even if language were added to eliminate this ambiguity, however, there appears to be no rational basis for OAL’s apparent conclusion that a state agency has been effectively served based merely on the fact that an employee — again, *any* employee — of the agency has been sent the materials in question. Rather, in order to maximize the likelihood that petitions for regulatory determination are correctly resolved, it is imperative that challenged agencies are not kept in the dark, either accidentally or by design, with respect to petitions and associated documents purported to be served on those agencies.

These proposed amendments, ironically, would appear to operate to make it more, not less, likely that the responsible employees at state agencies do not timely receive the documents in question. For this reason, we urge OAL to modify the proposed new language to require proper service on the agency, if not upon the agency’s agent for service of process then at least upon the agency head, that person’s delegee(s) for signing Forms 399 and/or 400, and the agency’s rulemaking coordinator.

OAL Response 5: The Underground Petition process is designed to be accessible to all individuals. It would be unduly burdensome on members of the public to require they research and contact agencies to determine exactly who is required to be served with these documents. Many petitioners are individuals that are incarcerated or hospitalized at state hospitals and do not have access to the internet. Therefore, creating the most user-friendly option for petitioners

while also requiring notification to OAL of where the petition was sent creates the least restrictive process while also permitting OAL to determine whether the petition has been provided to the challenged agency. There is no requirement under the existing or amended regulations that an agency be “served” with a petition for the petition to be valid. In fact, in amending the regulations, OAL makes clear that it does not require the same level of “service” as the Courts do.

The comment does however raise the issue that there should be some mechanism to ensure that the responsible employees at state agencies timely receive the documents in question. In response to this comment, OAL amended section 270, subsection (a)(2)(A) to require OAL to contact the challenged agency and offer to provide a copy of the petition by email once it is received by OAL and under review.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY COMMENT PERIOD

The modified text was made available to the public for comment from February 3, 2022, to February 21, 2022, but no public comments were received during this comment period.