

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
300 CAPITOL MALL, SUITE 1250
SACRAMENTO, CA 95814**

NOTICE OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 11340.7

The California Gambling Control Commission (CGCC) petitioned the Office of Administrative Law (OAL) to adopt regulations to clarify the process required for a state agency to approve a petition for the adoption, amendment, or repeal of a regulation and schedule the matter for public hearing as provided by Government Code section 11340.7. OAL issues this decision pursuant to Government Code section 11340.7(d).

BACKGROUND

Title 2, Division 3, Part 1, Chapter 3.5 of the Government Code (commencing with section 11340) sets forth the requirements of the Administrative Procedure Act as it relates to agency rulemaking.

Government Code sections 11340.6 and 11340.7 establish a process by which the public may petition an agency to make regulatory changes. Requirements for an interested person to petition a state agency are contained in Government Code section 11340.6:

“Except where the right to petition for adoption of a regulation 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). This petition shall state the following clearly and concisely:

- (a) The substance or nature of the regulation, amendment, or repeal requested.
- (b) The reason for the request.
- (c) Reference to the authority of the state agency to take the action requested.”

Upon receipt of a petition, the petitioned agency must comply with the response requirements in Government Code section 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), 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 in accordance with the 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) 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."

In short, an agency that is petitioned to make regulatory changes pursuant to Government Code section 11340.6 must acknowledge receipt of the petition, then within 30 days issue a written decision denying the petition on the merits or schedule the matter for public hearing in accordance with Article 5 of the Administrative Procedure Act. In addition, Government Code section 11340.7 also permits an agency to "grant any other relief or take any other action as it may determine to be warranted by the petition."

Referenced in Government Code section 11340.7(a) above, Article 5 (commencing with section 11346) of the Administrative Procedure Act establishes the requirements for public participation and procedures for the adoption of regulations by state agencies. To initiate a rulemaking action, an agency issues a Notice of Proposed Action by publishing the notice in the California Regulatory Notice Register, mailing the notice to every person on the agency's mailing list, and posting the Notice of Proposed Action, proposed regulation text, and Initial Statement of Reasons on its website. The agency may include a date for a public hearing in its Notice of Proposed Action, or a public hearing may be requested by the public pursuant to Government Code section 11346.8(a) if the agency did not schedule one.

Pursuant to Government Code section 11342.4, OAL is vested with the authority to "adopt, amend, or repeal regulations for the purpose of carrying out the provisions of" Title 2, Division 3, Part 1, Chapter 3.5 of the Government Code. OAL has not adopted

any regulations implementing, interpreting, or making specific the requirements of Government Code section 11340.7.

DISCUSSION

On November 22, 2022, OAL received a petition from Executive Director Stacey Luna Baxter on behalf of CGCC pursuant to Government Code section 11340.6. The petition requests that OAL “adopt regulations to clarify the meaning of the requirement to ‘...schedule the matter for public hearing in accordance with the notice and hearing requirements of that article,’ as provided in GC section 11340.7, subdivision (a).” Specifically, CGCC recommends that “OAL consider a process that includes a state agency scheduling a public hearing, at a future date of its choosing, and provide notification of such to (1) the petitioner, (2) the list of persons identified in Government Code section 11346.4, subdivision (a)(1), and posted on the state agency’s website. Then, once the state agency submits the [Notice of Proposed Action] to OAL for publishing in the California Regulatory Notice Register, the state agency can include the previously scheduled public hearing date.”

Whether regulatory changes are proposed in response to a petition from a member of the public or the agency proposes changes on its own, in addition to any internal procedures, there are several steps required by the Administrative Procedure Act that must be taken before an agency can publish the Notice of Proposed Action. “[W]hen the proposed regulations involve complex proposals or a large number of proposals that cannot easily be reviewed during the comment period,” the agency shall involve parties who would be subject to the proposed regulations in public discussions pursuant to Government Code section 11346.45. An agency subject to a board or commission needs to obtain any necessary approvals before beginning the rulemaking process. Pursuant to State Administrative Manual section 6615, if there will be a fiscal impact an agency is obligated to send the Form STD. 399 to Department of Finance (Finance) “at least 30 days prior to the date on which the notice of proposed adoption is to be issued.” In the case of changes proposed by a petition, an agency would need to transmit its documents to Finance on the same day the petition is received. For major regulations, there is no ability to comply with the timeline in Government Code section 11340.7. California Code of Regulations, title 1, section 2001(a)(2) requires the agency “submit to [Finance] the information required in subdivision (a)(1) as soon as possible but in no event later than 60 days prior to filing a notice of proposed action with OAL.” In addition, California Code of Regulations, title 1, section 2001(d) requires the agency to “seek public input regarding alternatives from those who would be subject to or affected by the regulations (including other state agencies and local agencies, where appropriate) prior to filing a notice of proposed action with OAL.”

Given the steps that must be taken before an agency can notice its proposed regulatory changes, the timeline required by Government Code section 11340.7 is

nearly impossible to comply with if an agency elects to accept the petition and make regulatory changes. Further, an agency with a board or commission likely cannot even decide whether to deny or accept a petition without first obtaining board or commission approval, which would presumably require compliance with the notice requirements of the Bagley-Keene Act.

While it may be difficult, if not impossible, for agencies to comply with Government Code section 11340.7(a), the statute is clear. An agency that chooses to accept a petition and propose regulatory changes must schedule the matter for public hearing in accordance with Article 5 of the Administrative Procedure Act. Any regulation adopted by OAL that provides for an alternative timeline or defines a different type of public hearing for purposes of accepting a petition would be inconsistent with the statute and violate Government Code section 11342.2.

CGCC's additional suggestion for clarifying regulations to specify who must receive notice are already addressed by the Administrative Procedure Act. Government Code sections 11346.4(a)(1)-(6) require the agency send the notice to the persons, businesses, and groups listed in those subsections (which include those listed by CGCC). Government Code section 11340.85 requires the agency provide notice to the public by posting the Notice of Proposed Action on its website.

It is unclear what CGCC means by a state agency "scheduling a public hearing, at a future date of its choosing" and "once the state agency submits the [Notice of Proposed Action] to OAL for publishing in the California Regulatory Notice Register, the state agency can include the previously scheduled public hearing date". If CGCC means the agency can schedule the hearing for a future date to allow time to obtain proper approvals and develop the required documents and then include that date in the Notice of Proposed Action, as discussed above, OAL cannot adopt a regulation that would be inconsistent with the timing requirements of Government Code section 11340.7 and Article 5 of the Administrative Procedure Act.

DECISION

Based on the above, OAL determined that it must deny the petition and that "other action" is warranted within the meaning of Government Code section 11340.7(b). OAL will schedule a stakeholder meeting to discuss challenges agencies face in responding to petitions pursuant to Government Code section 11340.7 and take necessary and appropriate action.

CONTACT PERSONS

Interested persons have the right to obtain a copy of the petition from OAL and may do so by contacting the OAL Reference Attorney by telephone at (916) 323-6815, by fax at (916)323-6826, by e-mail at staff@oal.ca.gov, or by mail at:

Office of Administrative Law
Attention: Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

Any other questions concerning this matter may be directed to:

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