



## **How to File a Petition with OAL to Challenge a Rule as an Underground Regulation**

### Overview

State agencies are required to adopt regulations to enforce or implement the laws which they administer. Unless exempt, these regulations must be adopted through procedures established by the Administrative Procedure Act (APA), which begins at section 11340 of the California Government Code. On occasion, an agency may attempt to enforce a rule that is required to be adopted pursuant to the APA, but was not. Such a rule is called an “underground regulation”. Section 11340.5 of the Government Code states that a state agency may not issue, use, enforce, or attempt to enforce an underground regulation.

If you feel that a state agency is using an underground regulation, you may submit a petition to the Office of Administrative Law (OAL) asking for a determination whether the agency is complying with Government Code section 11340.5.

Once OAL receives your petition, the reviewing attorney will evaluate it and contact the agency involved (the “challenged agency”). The reviewing attorney may contact you for additional information, if necessary. Not all petitions are accepted. If your petition is accepted, OAL will issue a written opinion as to whether the rule is, or is not, an underground regulation. If OAL decides not to accept your petition, this has no legal significance. A decision not to accept a petition does not imply that the petition lacks merit. A petition may be declined for any of the reasons listed in title 1, section 270(c) of the California Code of Regulations.

### Petition Content Requirements

OAL requires each petition contain a significant amount of specific information. We have prepared an optional form for you to use when preparing and submitting a petition. You do not need to use the optional form to provide this information, but you should try to be as clear and easily understandable as possible.

Briefly, OAL regulations require that your petition contain:

- 1) Your name and contact information.
- 2) The name of the challenged agency that is allegedly using an underground regulation (the “challenged rule”).
- 3) A complete description of the challenged rule and an original or copy of the challenged rule.

- 4) A description of the actions of the challenged agency showing that it has employed the challenged rule.
- 5) The legal basis for concluding that the challenged rule is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the APA is applicable.
- 6) Information demonstrating that the petition raises an issue of considerable public importance.
- 7) Confirmation that you submitted a copy of the petition and all attachments to the challenged agency, including the name, address, or email address of the person at the challenged agency to whom the copy was submitted.

Items 1, 2, 3, and 7 are procedural elements of the process. They tell OAL the basic components of your petition and show that you have provided a copy to the challenged agency. They also tell OAL who to contact at the challenged agency when considering whether to accept the petition.

Item 4 provides an essential factual element of the petition. For an agency to violate Government Code section 11340.5, it must “issue, utilize, enforce, or attempt to enforce” the underground regulation. In item 4, you must provide facts demonstrating that the challenged agency has, in fact, done this.

For Item 5 you must provide a basic legal argument. This does not need to be exhaustive. A complete legal analysis is OAL's job, not yours, but to the degree that you can, demonstrate that the challenged rule is legally a regulation and that it is not subject to an exemption from the APA rulemaking requirements. A key element of this is showing that it is a “rule of general application”. An agency action in a single case, even if the action is illegal, does not mean that the action is necessarily an underground regulation. Agencies routinely make case-by-case applications of the laws they administer, but only if this situation results in a rule of general application could the agency be using an underground regulation.

Item 6 requires you to explain how the challenged rule has caused harm or affected a particular group or in some other way raises an issue of considerable public importance.

### OAL Acceptance or Denial of a Petition

OAL reviews each complete petition that it receives. Within 60 calendar days of receipt of a complete petition, OAL will decide whether to accept or decline the petition. OAL will notify the challenged agency that the petition is under review and may seek additional information from the challenged agency or you, the petitioner. If the petition is declined, OAL will notify you in writing. A decision to decline a petition has no legal significance and does not reflect, in any way, upon the validity of your claim.

The standards OAL will use in deciding whether to accept or decline a petition are defined by regulation. OAL will consider, at a minimum, the following factors:

- 1) The degree to which the petition raises an issue of considerable public importance.

- 2) Whether the issue raised by the petition was or is currently being considered by a court or other body that can address the petitioner's concerns.
- 3) Whether the challenged rule is superseded.
- 4) Whether the challenged rule expired by its own terms.
- 5) Additional relevant information, if any, that is pertinent to a potential resolution of the issues raised by the petition.
- 6) Availability of OAL personnel to complete the review of the petition pursuant to the time limits established by regulation.

### What Happens If OAL Accepts Your Petition

If OAL accepts your petition we will notify you and the petition, or a summary of the petition, will be published in the California Regulatory Notice Register (CRNR). The challenged agency has 45 calendar days from the date of publication to provide a response, if it chooses to do so. If the challenged agency does provide a response, you will have 15 days to file a rebuttal to the agency's response if you choose. Members of the public also may submit comments to OAL on the issue.

OAL will review and consider the material submitted with your petition, along with information provided by the challenged agency, the public, and any other information discovered during our review of the issue. Our decision will be made within 120 days after publication of the petition in the CRNR. We will send a copy of our decision to you, the challenged agency, and others and we will publish the decision in the CRNR.

### Factors to Consider When Submitting a Petition

When you are deciding whether to submit a petition challenging an alleged underground regulation, there are several considerations you should keep in mind.

- 1) OAL has no power to order an agency to change its practices. An OAL determination is a legal analysis regarding whether an agency is employing an underground regulation. We cannot force an agency to stop using an underground regulation. Only a court can do that. An OAL determination may be persuasive, but it is not directly enforceable.
- 2) Filing a petition with OAL may not be the most effective way to approach your problem. Working within the agency in question may be much more effective at resolving your issue than filing a petition with OAL. Most state agencies have some type of dispute resolution procedure. Using these procedures may be more effective and efficient than preparing and filing a petition with OAL.
- 3) California law contains some specific exemptions to the general requirement that rules must be adopted as regulations. It is possible for an agency to be acting entirely legally even though it employs a rule that is a regulation and has not been adopted pursuant to the APA. If the rule is exempt from the APA, it cannot be an underground regulation.
- 4) A decision by OAL is not required before you may challenge the rule in court. Whether or not you seek an opinion from OAL is entirely optional.
- 5) In certain circumstances, the APA prohibits courts from considering OAL determinations on underground regulations. If you are already involved in ongoing litigation over the subject

of your petition, pursuant to Government Code section 11340.5(e), you may not use a subsequent OAL determination in that lawsuit.

### Delivering Your Petition

Send or bring your petition to:

Attention: CTU  
Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814

OR

[staff@oal.ca.gov](mailto:staff@oal.ca.gov)

### Additional Information

If you have specific questions, please call the OAL Reference Attorney at (916) 323-6815 or send your question via e-mail to [staff@oal.ca.gov](mailto:staff@oal.ca.gov).