

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
INITIAL STATEMENT OF REASONS

**INCORPORATION OF PRIOR FILES BY REFERENCE, NOTICE BY ELECTRONIC
COMMUNICATION, STATEMENT OF MAILING NOTICE, NOTICE OF SCHEDULED,
CONTINUED, OR POSTPONED HEARINGS, AND METHODS OF ELECTRONIC NOTICE**

INTRODUCTION

The rulemaking provisions of the California Administrative Procedure Act (APA, Gov. Code, sec. 11340 et seq.) govern state agency rulemaking. Specifically, the APA establishes procedures with which each state agency must comply, unless exempt, to adopt regulations lawfully.

Section 84. Incorporation of Prior Files by Reference.

Government Code section 11347.3 requires each agency to maintain a rulemaking record for its regulatory action and submit the record with the adopted regulation to the Office of Administrative Law (OAL) for review.

Government Code section 11349.3 requires OAL to either approve or disapprove a regulation submitted to it within 30 working days and permits an agency, if it determines on its own initiative, to withdraw its regulation prior to completion of OAL's review. Government Code sections 11349.3 and 11349.4 allow an agency to resubmit a previously withdrawn or disapproved regulation to OAL.

Existing regulation allows each agency, in resubmitting a previously withdrawn or disapproved action to OAL, to "incorporate by reference all or any part of the withdrawn or disapproved file" by submitting a "transmittal memo identifying the prior rulemaking file by date of submission and specifying that portion of the prior file that is incorporated by reference." (Cal. Code Regs, tit. 1, sec. 84)

PROBLEM STATEMENT

Although existing section 84 permits an agency to incorporate items from a prior record into the record for a resubmitted action by including that information in a "transmittal memo," section 84 does not require that the agency include the transmittal memo in the record for the resubmission. Existing section 84 also does not address the requirement that each record's table of contents must

itemize the entire contents of the record, including actual and any incorporated documents within it.

Although a transmittal memo clarifies for OAL which items in the record for the resubmission are to be found in the prior record of a previously withdrawn or disapproved regulatory action, the memo is not required to be part of the record and therefore may not be available to someone reading the record, including during judicial review.

SPECIFIC PURPOSE OF, AND RATIONALE FOR, SECTION 84

The purpose of amending section 84 is to ensure that an agency's record for a resubmitted regulatory action includes information that is sufficient to identify all items within the record, including any items not physically included but incorporated by reference from a prior record of a previously withdrawn or disapproved action. The proposed amendment promotes clarity and certainty as to the contents of the record because it will result in one document contained in the record (the table of contents for the resubmitted action) that informs readers of any incorporated content of the final record for a resubmitted action.

It is necessary to require each agency to include a statement incorporating items from a prior record as part of the resubmitted record's table of contents, rather than in a separate memo not part of the record, to ensure all documents within the final record are itemized, including documents incorporated by reference from a prior record. As mentioned above, although a transmittal memo clarifies for OAL which items in a resubmitted record are to be found in a prior record of a previous related matter, there is no requirement to include the memo in the final record and therefore it may not be available to someone reading the record, including during judicial review. A table of contents, on the other hand, must become part of the final record. Requiring an agency to identify, on the table of contents, the portions of the prior record being incorporated by reference into the resubmitted record ensures that documentation of the incorporation is included in the record and makes it clear to anyone reviewing the record which items of the record are incorporated from, and therefore can be located in, the originally submitted record.

This action also proposes to amend section 84 to update terminology to use terms more commonly used by OAL and other state agencies. It is necessary to revise "file" to "prior rulemaking record" because when an agency incorporates items from a "withdrawn or disapproved file" or "prior file" as part of its resubmission, it is commonly understood as incorporating documents from the prior rulemaking *record* of the withdrawn or disapproved regulatory action. Proposed section 84 also revises the term "file" to the more specific and

commonly understood term, “prior regulatory action,” when the intent is to refer to an agency’s prior regulatory action. OAL’s regulations more commonly refer to an agency’s rulemaking proposal (i.e., the adopted regulation and rulemaking record) as a “regulatory action.” (See, e.g., Cal. Code of Regs., tit. 1, secs. 6 and 6.5.)

This action also proposed to amend section 84 to revise the requirement to identify the prior rulemaking action by date of submission to “previous related OAL action number.” This change is necessary because identifying a prior regulatory action only by the date of submission to OAL may not be specific enough to identify the prior action, especially if OAL receives several rulemaking actions on the same day from the same agency. When OAL receives a regulatory action for review, it is assigned an OAL action number, which is based on the date of submission and the order in which the filing was received by OAL that day. It is necessary to require each agency to identify the prior rulemaking action by its OAL action number because it is more specific to that rulemaking action and better identifies the prior record.

ANTICIPATED BENEFITS

The proposed changes to section 84 will clarify the contents of an agency’s record for a resubmitted action in cases where an agency decides to incorporate by reference items from a prior record. Judicial review of rulemaking actions, as well as government transparency and the public’s access to public records, will be facilitated and enhanced by a single itemization, within the final record, of all materials and their locations.

Section 85. Notice by Electronic Communication.

PROBLEM STATEMENT

Government Code section 11340.85, subdivision (b)(1), permits and encourages agencies to use electronic communication, but prohibits agencies from requiring its use exclusively. Government Code section 11340.85, subdivision (b)(3), permits agencies to deliver electronically any public notice required or authorized under the APA to a person, “if the person has expressly indicated a willingness to receive the notice by means of electronic communication.”

While statute defines “electronic communication,” it does not address other important issues regarding how this process works in practice, such as what constitutes “an express indication of willingness” to receive a notice electronically and permissible methods of electronic delivery. There are no existing APA regulations that further implement, interpret, or make specific how

notices are to be provided electronically under Government Code section 11340.85.

SPECIFIC PURPOSE OF, AND RATIONALE FOR, PROPOSED SECTION 85

The purpose of adopting section 85 is to specify the most common ways in which it is reasonable for an agency to deem a person as having expressly indicated a willingness to receive an APA-related notice(s) electronically and to have indicated a method by which they have consented to do so. Another purpose of section 85 is to provide persons with the ability to specify a method of electronic communication other than the default method a rulemaking agency would otherwise use.

Electronic communication is now the pervasive, ubiquitous, and often preferred means of communication among people and institutions. Government Code section 11340.85, subdivision (b)(3), was enacted in the last century (Stats. 2000, ch. 1060), when email was in its nascency, and it has not been amended since. Although, a generation ago, one could not so readily assume a person's implied willingness to reciprocal electronic communication, it can now be assumed that people and institutions both consent to and expect it.

Proposed subsection (a) is necessary to remove any ambiguity about when an agency can use electronic communication and what methods it can use while, at the same time, preserving the ability of persons to choose whether and how they wish to receive APA notices electronically.

Proposed subsection (a)(1) is necessary to include the most readily apparent way a person can “express a willingness” to receive an APA notice(s) electronically—which is that the person has specifically requested that the agency deliver its notice(s) electronically. Proposed subsection (a)(1) recognizes the primary way a person can express a willingness to receive an APA notice electronically because, in these circumstances, the person is expressly consenting and requesting to receive APA notices electronically.

Proposed subsection (a)(2) allows each state agency to rely on the fact that persons who use electronic communication to submit comments on a rulemaking are also impliedly consenting to receive follow-up notices by electronic communication as is the common understanding today. For example, if a person e-mails a written comment to the agency, it is reasonable to assume that, unless this person specifically requests a different means to receive notice, they have impliedly consented to receiving notice by the same electronic means.

Proposed subsection (a)(3) is similar to proposed subsection (a)(2). It is reasonable for an agency to assume that, absent some specific request for

another means of communication from the agency, people who use electronic communication to request notices are also consenting to receive notices by that same electronic communication.

Proposed subsection (b) is necessary to guard against the misapplication, intentional or otherwise, of the presumptions created by proposed subsections (a)(1)-(3) by state agencies in providing notices to members of the public and ensures that electronic notices are received. Requiring agencies to use the means of electronic communication specified or used by the person commenting or requesting notice, rather than a different, albeit electronic, method, will best ensure the capacity of the person to receive, and ensure the actual receipt of, the required notices.

ANTICIPATED BENEFITS

Proposed section 85 expedites the receipt of notices by clarifying the use of electronic notifications. Section 85 also preserves state resources that would otherwise be expended on paper and postage charges for the mailing of notices and any required accompanying materials. Proposed section 85 best ensures the actual receipt of required notices by limiting the use of electronic communication to the method used by each requestor or commenter in communicating with the agency.

Section 86. Statement of Mailing Notice.

Government Code section 11346.4, subdivision (a), requires that, at least 45 days before the hearing and close of the public comment period on the adoption, amendment, or repeal of a regulation, a notice of the proposed action (NOPA) be:

- mailed by the state agency to the persons described in Government Code section 11346.4(a)(1), (a)(3), and (a)(4);
- mailed or delivered to the director of the department in cases in which the agency is within a department;
- published in the California Regulatory Notice Register; and
- posted on the state agency's website if the agency has a website.

Existing regulation requires each agency to include a statement in its rulemaking record confirming that the agency sent its NOPA in compliance with "Government Code Section 11346.4(a)(1) through (4) regarding the mailing of notice of proposed action. . . and stating the date upon which the notice was mailed." [Emphasis added.] (Cal. Code of Regs., tit. 1, sec. 86)

PROBLEM STATEMENT

Existing section 86 has not been substantively amended since its adoption in 1986 and needs to be updated to further implement, interpret, and make specific changes to the underlying statute, Government Code section 11346.4, made by Assembly Bill (AB) 505 (Stats. 2000, ch. 1059). Under the existing regulation, each agency must include a mailing statement in its rulemaking record, "confirming that the agency complied with the public notice provisions of Section 11346.4(a)(1) through (4) regarding mailing of the notice."

However, the existing regulation does not address nor require documentation of compliance with an Internet posting requirement under subdivision (a)(6) of Government Code section 11346.4, which was added to the statute by AB 505 after promulgation of the regulation. As added by AB 505, Government Code section 11346.4(a)(6) states:

At least 45 days prior to the hearing and close of the public comment period on the adoption, amendment, or repeal of a regulation, notice of the proposed action shall be: . . . Posted on the state agency's website if the agency has a website.

The existing regulation must be updated to further implement the Internet posting requirement of Government Code section 11346.4, subdivision (a)(6), and ensure that each adopting agency is documenting compliance with all applicable APA notice requirements under Government Code section 11346.4, including the Internet posting requirement of subdivision (a)(6). Lastly, terminology concerning "mailing" within the existing regulation is outdated and needs to be defined, as explained below.

SPECIFIC PURPOSE OF, AND RATIONALE FOR, PROPOSED SECTION 86

Overall, the purpose of section 86 is to ensure that the rulemaking record contains the information necessary to determine whether the agency complied with all relevant notice provisions of Government Code section 11346.4, subdivision (a), including the Internet publication requirement of section 11346.4, subdivision (a)(6), and specifies the method(s) of delivery and date(s) upon which the notice was mailed and posted on the agency's website, if the agency has a website.

The purpose of proposed subsection (b) is to further specify that, for purposes of the regulation, the term "mailing" includes delivery by means of electronic communication pursuant to Government Code section 11340.85, subdivision (b)(3), to take other permissible methods of notice-delivery under the APA into

account, such as by e-mail or fax, if the recipient has expressly indicated a willingness to receive the notice by means of electronic communication.

Section 86 must be amended to address the problems described above. Existing section 86 requires each rulemaking record to include information confirming that the agency complied with the “provisions of Government Code Section 11346.4(a)(1) through (4) regarding the mailing of the notice” but does not include the Internet posting requirement under subdivision (a)(6) of Section 11346.4, as added by AB 505. Thus, to remedy the issue, proposed section 86 revises the contents of the mailing statements in the record to ensure that the agency confirms that it complied with all relevant APA notice requirements in effect, i.e., Government Code section 11346.4, subdivisions (a)(1) through (4) and (6).

Proposed section 86 does not require an agency to confirm compliance with Government Code section 11346.4, subdivision (a)(5), because an adopting agency must draft and submit its NOPA to OAL for publication in the California Regulatory Notice Register; therefore, it is OAL’s duty under Section 11346.4, subdivision (a)(5), to review and publish notices in the California Regulatory Notice Register.

It is also necessary that an agency specify the method(s) of delivery and date(s) upon which the notice was mailed, because, as currently written, section 86 only serves to certify traditional paper mailings and no other forms of acceptable delivery, such as by e-mail or fax. In practice, several agencies already identify the method of the delivery of the notice, but this is not expressly required by existing section 86. It is also necessary that the method(s) and date(s) of delivery become part of the rulemaking record because judicial review of rulemaking actions is limited to the closed rulemaking record. (Gov. Code, sec. 11350, subd. (d).) Judicial review is hampered if the rulemaking record does not contain accurate and complete information of the rulemaking action.

Lastly, it is necessary to further specify that “mailing” includes other permissible forms of electronic delivery, such as e-mail or fax, because, although the notice provisions of Government Code section 11346.4 specifically require that an agency “mail” its NOPA to the entities identified in Section 11346.4, subdivision (a)(1) through (4), the APA also allows an agency to deliver its notice by means of electronic communication, “if the person has expressly indicated a willingness to receive the notice by means of electronic communication.” (Gov. Code, sec. 11340.85, subd. (b)(3).) Government Code section 11340.85 establishes standards that permit and encourage the use of “electronic communication,” and states in relevant part:

- (a) As used in this section, “electronic communication” includes electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication.
- (b) Notwithstanding any other provision of this chapter that refers to mailing or sending, or to oral or written communication:
 - (1) An agency may permit and encourage use of electronic communication, but may not require use of electronic communication.
 - (2) An agency may publish or distribute a document required by this chapter or by a regulation implementing this chapter by means of electronic communication, but shall not make that the exclusive means by which the document is published or distributed.
 - (3) A notice required or authorized by this chapter or by a regulation implementing this chapter may be delivered to a person by means of electronic communication if the person has expressly indicated a willingness to receive the notice by means of electronic communication.

Gov. Code, sec. 11340.85, subds. (a) and (b)(1)–(3).

ANTICIPATED BENEFITS

It is critical that the public be encouraged and enabled to have input into the rulemaking process, and the burden of proof of compliance with APA notice requirements rests with the rulemaking agency. The amendments to section 86 assure that the agency certifies compliance with all the applicable notice provisions of Government Code section 11346.4, subdivision (a), and that the rulemaking record contains evidence of compliance.

Section 87. Notice of Scheduled, Continued, or Postponed Hearings.

The APA does not require that an agency schedule a public hearing at the time of publication of the NOPA, but the agency must hold, and give notice of, a public hearing if the agency receives a timely written request from any interested party to hold a public hearing. (Gov. Code, secs. 11346.4 and 11346.8.)

Government Code section 11346.8, subdivision (a), requires that if an agency receives a timely written request to hold a public hearing, the adopting agency must “to the extent practicable, provide notice of the time, date, and place of

the hearing by mailing the notice to every person who has filed a request for notice thereby with the agency.”

Similarly, Government Code section 11346.8, subdivision (b), provides that if an agency postpones or continues a public hearing, the adopting agency must “provide notice to the public as to when [the continued or postponed hearing] will be resumed or rescheduled.”

PROBLEM STATEMENT

Although statute requires each agency to provide notice of public hearings that have been scheduled pursuant to a timely request, postponed, or continued, neither statute nor regulation provides further clarification or standardized procedures regarding how to provide notice of such hearings or how to document in the record that notice was provided.

SPECIFIC PURPOSE OF, AND RATIONALE FOR, ADOPTING SECTION 87

The purpose of proposed section 87 is to establish standards and procedures for an agency that is required to provide public notice of an APA hearing that is scheduled-by-request, postponed, or continued under Government Code section 11346.8, subdivisions (a) or (b), respectively.

Some agencies have expressed confusion about which members of the public must receive notice of a hearing when one has been scheduled in response to a timely request or when a public hearing has been postponed or continued under Government Code section 11346.8. While many agencies mail their notices of hearing to all interested parties, others may only mail the notice to individuals who have commented. This regulation is needed to eliminate confusion, establish a uniform system of notifying the public of hearings, and ensure that the rulemaking record contains accurate and complete information about how the agency gave notice of its hearing.

Proposed subsection (a) establishes notice requirements and procedures for an agency scheduling a public hearing because it received a timely request under Government Code section 11346.8, subdivision (a), and for an agency providing notice of a postponed public hearing under Government Code section 11346.8, subdivision (b).

Proposed subsection (a)(1) requires that each agency send a notice of its scheduled-by-request or postponed hearing to “all persons who filed a request for notice as specified in Government Code section 11346.4(a)(1).” Many agencies may not understand to whom they must provide notice of these hearings because the underlying statute only generally requires notice “to every

person who has filed a request thereby with the agency." Proposed subsection (a)(1) clarifies for state agencies that "every person who has filed a request thereby with the agency" means "all persons who filed a request for notice" under Government Code section 11346.4, subdivision (a)(1). This is necessary to avoid multiple interpretations of the statute and clarify that each agency must provide notice to all persons who filed a request for notice of regulatory actions under Government Code section 11346.4, subdivision (a)(1), because such persons could reasonably assume, based on their demonstrated interest in the agency's regulations, that if a hearing is later requested and scheduled under Government Code section 11346.8, subdivision (a), they will receive notification of the time, date, and place of the hearing, and therefore, have an opportunity to attend and provide input on the rulemaking action.

Proposed subsection (a)(1) also applies to postponed hearings under Government Code section 11346.8, subdivision (b), because, if an agency notices the time, date, and place of the public hearing in its NOPA and later decides to postpone the hearing, it is necessary that the agency send notice of the rescheduled hearing to those same persons who received the NOPA to avoid misleading the public about the time, date, and place of the postponed hearing. This will ensure that those persons who had notice of the originally scheduled hearing are made aware of any changes and minimize any adverse impacts on their ability to attend and participate at the hearing.

Proposed subsection (a)(2) is necessary to require and make clear that an agency must also send a notice stating the time, date, and place of the hearing to "all persons whose comments were received by the agency during the public comment period." For hearings scheduled by request under Government Code section 11346.8, subdivision (a), it is necessary to ensure that persons who have commented during the comment period, and thus have demonstrated an interest in the rulemaking action, receive notice of the public hearing to ensure they have an opportunity to decide on whether to provide additional input on the rulemaking action at the scheduled hearing.

Similarly, for postponed hearings, proposed subsection (a)(2) is necessary to require that each agency send notice to all persons who have commented during the comment period, and thus have a demonstrated interest in the rulemaking action, to avoid misleading this group about the time, date, and place of the rescheduled hearing and ensure they have an opportunity to decide on whether to provide additional input on the rulemaking action at the rescheduled hearing.

Proposed subsection (b) establishes requirements for agencies that continue a public hearing under Government Code section 11346.8, subdivision (b), which is necessary to ensure that each agency includes sufficient information within its

rulemaking record detailing how and when the agency provided notice of a hearing that has commenced but is continued to a subsequent time (i.e., continued hearings).

Proposed subsection (b) states: "If a public hearing commenced and is continued to a subsequent time. . ." This language is intended to clarify the meaning of "continued hearings" because, without context, "continued" could be misinterpreted to mean "postponed." The statutory language of Government Code section 11346.8, subdivision (b), distinguishes "continued hearings" from "postponed hearings," therefore, it is necessary to clarify what is meant by "continued hearings" to avoid any confusion among state agencies.

In addition, instead of specifically requiring that an agency provide notice of a continued hearing to any specific categories of persons, proposed subsection (b) requires that an agency explain in its Final Statement of Reasons how and when it provided notice. Proposed subsection (b) gives the agency discretion on how it will provide notice because the nature of continued hearings makes it difficult to establish specific notice recipients. For example, if an agency commences a public hearing on Monday, then decides that it must continue and resume the hearing on the following day, it would be overly burdensome to require that the agency send notice to its entire 45-day mailing list. In this example, the agency may determine that it is adequate to provide notice by announcing the time, date, and place of the resumed hearing to the persons who attended day one of the hearing and by posting notice of the resumed hearing on the agency's website. Alternatively, if a hearing commences on Monday and is continued to a subsequent hearing two weeks later, the agency may decide that it is appropriate and feasible to notify its entire 45-day mailing list of the continued hearing date. Thus, for these types of hearings, the record only needs to include information explaining how the agency provided notice, which will aid in determining, on a case-by-case basis, whether the agency provided adequate notice of the resumed hearing.

Proposed subsection (c) specifies that each agency's rulemaking record must include any notice of hearing(s) and a statement confirming that the agency complied with the requirements of section 87, subsection (a). This is necessary to ensure that the rulemaking record contains the information necessary to determine whether the agency complied with the notice provisions of Government Code section 11346.8 and proposed section 87(a), thus assuring effective OAL and judicial review.

Proposed subsection (c) is also necessary to ensure that each agency's rulemaking record is complete by including the notice(s) of hearing provided to the public. Although the APA requires each record to include "[a]ny other information, statement, report, or data that the agency is required by law to

consider or prepare in connection with the adoption, amendment, or repeal of a regulation,” the statute does not explicitly require inclusion of any notices of hearing under Government Code section 11346.8. (Gov. Code, sec. 11347.3, subd. (b)(11).) Proposed subsection (c) further interprets Government Code section 11347.3, subdivision (b)(11), to clarify that the record must also include any notice(s) of hearing, which is required by the APA to be prepared and sent out to the public and therefore must be part of the record. Proposed subsection (c) ensures that the record is complete and sufficiently describes how and when the agency provided notice to allow for adequate OAL and judicial review.

ANTICIPATED BENEFITS

Proposed section 87 will benefit both state agencies and the public by clarifying and standardizing requirements and procedures for providing notice of hearings under Government Code section 11346.8. State agencies will have clear standards as to who must receive notice of hearings, while affected members of the public will no longer be surprised to learn, after the close of a rulemaking proceeding, that a public hearing has been held without their knowledge or an opportunity for input.

Section 88. Method of Electronic Notice.

PROBLEM STATEMENT

Government Code section 11340.85, subdivision (b)(3), provides that “[a] notice required or authorized by this chapter [Ch. 3.5, Pt. 1, Div. 3 of the Gov. Code] may be delivered to a person by means of electronic communication if the person has expressly indicated a willingness to receive the notice by means of electronic communication.” This provision, however, does not specify the methods by which a state agency is required to send notices by electronic communication.

SPECIFIC PURPOSE OF, AND RATIONALE FOR, ADOPTING SECTION 88

This action proposes to adopt section 88 to specify the way a state agency must provide notice when the agency chooses to send notices via electronic communication.

Generally, this regulation is necessary to create clear standards for sending APA notices via electronic communication. The standards set forth in this regulation are designed to provide flexibility to each state agency while also ensuring that when APA notices are sent via electronic communication, they are sent using a method whereby the recipient can readily access them thereby promoting

government transparency and meaningful public participation in the rulemaking process.

Proposed subsection (a) specifies that an agency may only provide notice exclusively by means of electronic communication **only if** the agency's entire distribution list consents to receiving notices electronically and the agency complies with proposed section 85, which further defines and deems three ways a recipient may "expressly indicate a willingness" to receive notices electronically pursuant to Government Code section 11340.85. Under Government Code section 11340.85, subdivisions (b)(1) and (b)(3), an agency may permit and encourage use of electronic communication but may not require its use, and an agency may deliver its APA notice electronically only "if the person has expressly indicated a willingness to receive the notice by means of electronic communication." Proposed subsection (a) is necessary to make clear to each agency that it may not only provide notice electronically without first confirming that the entire distribution list consents to receiving notice electronically or has been otherwise deemed to have expressed a willingness to receive notices electronically, as specified in proposed section 85.

Proposed subsection (b) establishes three acceptable methods by which an agency must deliver its notice electronically. Proposed subsection (b)(1) requires, as the first allowable method, that each state agency must "transmit the complete content of the actual documents in the body of the electronic communication" itself. By requiring each agency to include the content of the documents in the body of the electronic communication, there is little risk that the recipient will not be able to view the notice information because all the person needs to do is open the communication and read the content. This method may be preferable to some agencies and recipients where limitations on the size of data files that can be transferred may be an issue. Proposed subsection (b)(1) also specifies that each agency must transmit the "complete content of the actual document in the body of the electronic communication," which is necessary to ensure that each agency provides the full content of the actual notice to the recipient, and not an abbreviated or otherwise different notice than what would have been mailed to the public or posted on the agency's website.

Proposed subsection (b)(2) prescribes the second acceptable method to provide notice electronically and requires each agency to "[i]nclude the actual documents as electronic files attached to the electronic communication." Proposed subsection (b)(2) is necessary to allow a state agency to include the documents as electronic files attached to the electronic communication. By attaching the documents as files, all the recipient needs to do to view the documents is open the file on their computer or other device. While this

regulation does not require any specific file format, most state agencies send the notice documents as “PDF” files, which can be viewed using software that is made available online at no charge. This method is frequently used by state agencies and has proven to be an effective way of providing documents to the public.

Proposed subsection (b)(3) prescribes the third and final allowable method and, if chosen, requires that each agency:

- (3) Provide a hyperlink or URL in the body of the electronic communication that redirects the person:
 - (A) directly to the document(s); or
 - (B) to an internet web page containing clearly identified hyperlinks that redirect the person directly to the actual document(s) for that rulemaking action.

Proposed subsection (b)(3) allows a state agency to provide notices electronically by including a web link to the actual documents in the electronic communication as opposed to an attached file. Accessing rulemaking documents through a web link is similar in function to having the files attached to the communication, except that the amount of data included in the electronic communication is much smaller if the files are not attached. This can help reduce the possibility that the transmission is rejected due to restrictions on the amount of data that can be transmitted via electronic communication. For example, some email servers limit the size of files that can be received or sent, and, if a notice document exceeded this limitation, the intended recipient may never receive the email.

The requirement that the hyperlink or URL provided by the state agency redirect the person to an internet page where the actual notice documents can be viewed or to a web page containing clearly identified hyperlinks to the notice documents is necessary to ensure that the recipient receives adequate notice and access to the documents. While allowing the use of hyperlinks may alleviate potential transmission issues as discussed above, it can create confusion if the notice documents are not clearly identifiable on the page the user is taken to. For example, if an agency only provides a link to its homepage, the recipient needs to track down the actual notice, if not specifically identified on the homepage. When notices are sent via electronic communication, the user should not be required to undertake additional steps to determine what the applicable notice documents are or where they are located because it can hinder or discourage meaningful public participation in the rulemaking process.

ANTICIPATED BENEFITS

This regulation will benefit both state agencies and the public by encouraging more efficient methods of providing notice while ensuring the promotion of meaningful public participation. This regulation may also have environmental benefits in that state agencies engaged in APA rulemaking may choose to provide notices via electronic communication, such as email, instead of sending out paper notices now that there is a rule clarifying the methods by which agencies can send notices via electronic communication. This could reduce the amount of paper notices being sent thereby resulting in less paper waste and mailing costs.

ECONOMIC IMPACT ASSESSMENT

Effect of the regulation on the creation or elimination of jobs.

The proposed sections are not anticipated to have any impact on the creation or elimination of jobs based on the following:

Section 84 will not have any impact on the creation or elimination of jobs. Tables of contents which itemize all contents of a final rulemaking record are already required by Government Code section 11347.3, subdivision (b)(12). The replacement of a statement regarding the incorporation of materials from a prior rulemaking action on a transmittal memo with the same statement on the table of contents for the resubmitted action (which must be created for every resubmitted action in any event) will have no impact on any state agency budget or state employees responsible for this task and may indirectly impact private sector jobs. While it is possible that some state agencies may decrease purchases of paper and printing supplies from private businesses, OAL estimates that any such reduction would be insufficient to impact the creation or elimination of private sector jobs. Eliminating an unnecessary document in the submission of rulemaking actions to OAL for review will only streamline the process and enhance government efficiency.

Section 85 is not expected to have any impact on the creation or elimination of jobs. The regulation clarifies what is meant in Government Code section 11340.85, subdivision (b)(3), by the phrase "expressly indicated a willingness" and by the term "electronic communication" for purposes of sending notices to persons by electronic means rather than through regular postal delivery. The same state agency staff who would otherwise have sent notices through the U.S. mail or by U.S. mail and electronically (because they could not be sure electronic means were authorized), will now have clear standards to use in the sending of notices electronically. No new state positions will be required, and no existing positions will be eliminated as a result of any greater use of electronic communication by state agencies. Cost savings to state agencies in ink, paper,

and postal charges are unlikely to result in sufficient additional resources in any one state agency for the creation of any new state positions. The regulation does not directly affect private sector employers or employees. While it is possible that some state agencies may decrease purchases of paper and printing supplies from private businesses, OAL estimates that any such reduction would be minimal and insufficient to create any private sector jobs.

Section 86 is not expected to have any impact on the creation or elimination of jobs. The regulation requires a state agency to include additional language in its mailing statement in the record. The same state agency staff who draft these mailing statements are capable, without any additional training or fiscal appropriation, of complying with this requirement. While this is a new requirement, the additional time that will be required by agency staff to add compliance language into these documents is expected to be de minimis. No new positions are required, and no positions will be eliminated as a result of compliance. The cost to agencies in ink and paper of these additional words is without any measurable significance and would require no agency layoffs or cause any budgetary pressure on any agency. The regulation does not directly affect private sector employers or employees. While it is possible that some state agencies may decrease purchases of paper and printing supplies from private businesses, OAL estimates that any such reduction would be minimal and insufficient to create any private sector jobs.

Section 87 is not expected to have any impact on the creation or elimination of jobs. The regulation is consistent with state statute, which already requires that state agencies provide notice of hearings to the public. The regulation requires a state agency to include an additional mailing statement in the record. The same state agency staff who prepare documents for the rulemaking record are capable, without any additional training or fiscal appropriation, of complying with these requirements. While these are new requirements, any additional time that will be required by agency staff to comply with them will be de minimis. No new positions are required, and no positions will be eliminated as a result of compliance. The cost to agencies in ink and paper of an additional document is without any measurable significance and would require no agency layoffs or cause any budgetary pressure on any agency. The regulation does not directly affect private sector employers or employees. While it is possible that some state agencies may decrease purchases of paper and printing supplies from private businesses, OAL estimates that any such reduction would be minimal and insufficient to create any private sector jobs.

Section 88 is not expected to have any impact on the creation or elimination of jobs in California. This regulation addresses the methods that state agencies may use to send notices required or permitted under the APA to interested persons via electronic communication. It does not impose any rights or obligations on

private sector businesses and therefore is not expected to have any economic impact on them. The only private persons who may be impacted by the regulation are those persons who receive notices from agencies; however, at most, this regulation will impact the manner in which these notices are received. The regulation is intended to ensure that when notice documents required under the APA are sent electronically, they are sent in a manner whereby the documents and information are easily and readily accessible by the recipient.

Effect of the regulation on the creation or elimination of businesses and on the expansion of existing California businesses.

The requirements of the proposed action apply exclusively to state government agencies, and no private sector business are required to comply with them. The only private persons who may be impacted by the regulation are those persons who receive notices from agencies or otherwise wish to participate in the rulemaking process; however, at most, these regulations will clarify expectations on such private persons as to when and how participation and notice may/will occur. While it is possible that some state agencies may decrease purchases of paper and printing supplies from private businesses, OAL estimates that any such reduction would be insufficient to impact the creation or elimination of businesses or impact the expansion of existing businesses in California.

Benefits of the regulation to the health and welfare or worker safety of California residents and to the state's environment.

Section 84 will benefit the welfare of California residents by better ensuring clear listings of the contents of resubmitted rulemaking records which facilitates government transparency and the accessibility of public records.

Section 85 may benefit the state's environment and, therefore, the health and welfare of California residents, to the extent that electronic communication supplants some amount of paper consumption and energy expenditure in the delivery of materials to individual addresses throughout the state. Section 85 may benefit worker safety to the extent less printing, copying, sealing, mailing, transporting, and delivering of materials results from increased use of electronic communication.

Sections 86 and 87 will benefit public participation in rulemaking actions that touch on these issues by ensuring that agencies provide notice of hearings, and people are able to attend and inform rulemaking agencies on the issues, which may result in more effective health and welfare, worker safety, and environmental regulations.

The benefits of section 88 include increasing the opportunity for public participation in the rulemaking process by ensuring that notices sent by

electronic communication are sent to interested persons in a manner whereby the documents and information are easily and readily accessible by the recipient, thus enabling them to participate in the rulemaking process if desired. This regulation may also benefit state agencies, because, with a clear rule about when agencies may send notices via electronic communication, agencies may be more likely to send notices electronically, which would save paper, copying time, and mailing expenses.

Alternatives which would lessen any adverse impact on small business.

The proposed regulatory requirements help update the APA rulemaking process and requirements to reflect changes in modern technology that are widely available and in use by state agencies. While it is possible that some state agencies may decrease purchases of paper and printing supplies from private businesses, some of which may be small businesses, OAL estimates that any such reduction would be insignificant. OAL has not identified any alternatives would accomplish the underlying goal of updating APA procedures that would lessen this potential impact. The proposed changes may improve public participation of small businesses in the rulemaking process which could ultimately prove a benefit for them.

Facts, evidence, documents, testimony, or other evidence relied upon by OAL to support its initial determination that the proposed action will have no significant adverse impact on business.

The regulatory requirements proposed by this action will have no adverse impact, significant or otherwise, on businesses. The proposed regulations relate directly to the APA rulemaking process and are intended to improve public participation and availability of information regarding agency rulemaking actions. The primary potential direct impact on members of the public, including regulated businesses, is potentially when an agency will be required to provide notices to certain persons and the way an agency may provide those notices in connection with a rulemaking. While it is possible that some state agencies may decrease purchases of paper and printing supplies from private businesses, OAL estimates that any such reduction would be insignificant as many agencies are already employing similar practices. OAL is unaware of any cost impacts that these regulations are likely to have on any business.

Reasonable alternatives considered by OAL and the reasons for rejection.

Section 85: OAL considered not adopting section 85. However, without section 85, state agencies would not have guidance on what constitutes an express willingness to receive electronic notices.

Section 86: OAL considered no alternatives to the amendments proposed to section 86, because the amendments are consistent with and necessary to

implement statutory provisions that were added in 2000 to Government Code section 11346.4 after promulgation of section 86 in 1986.

Section 87: OAL considered not adopting section 87. However, not adopting section 87 would have left un-standardized the process agencies must use to provide notice of a scheduled-by-request, postponed, or continued hearing, as required by Government Code section 11346.8, and allowed for continued confusion among rulemaking agencies as to how, when, and to whom they must provide notice. In addition, there's currently no uniform procedure for how agencies are to document compliance in the rulemaking record with the notice requirements of Government Code section 11346.8. Without section 87, agencies may not adequately document the circumstances by which the agency provided notice, which is essential to ensure that the record is complete and sufficiently describes how the agency provided notice to allow for adequate OAL and judicial review.

Section 88: OAL considered not adopting section 88. However, without section 88, state agencies would not have guidance or standardized procedures specifying how to provide notice to the public electronically.