

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
NOTICE OF PROPOSED RULEMAKING ACTION

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

The Office of Administrative Law (OAL) proposes to adopt the proposed changes to regulations described below after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

OAL will hold a public hearing on January 22, 2025, beginning at 9:30 a.m.

Attendees may participate via Microsoft Teams online meeting platform or telephone conferencing. To participate via Microsoft Teams online meeting platform, contact Nicole Carrillo at Nicole.carrillo@oal.ca.gov or (916) 323-6808 by 4:30 p.m. on January 21, 2025, to request a link to the meeting. A link to the hearing will also be posted under the "Announcements" heading on the homepage of the OAL website at oal.ca.gov, no later than 8:00 a.m. the day of the hearing. To participate by telephone, call 1-916-245-8850 and enter Conference ID: 701 021 252#.

For those who wish to attend the hearing in person, including those who require reasonable accommodations, limited seating will be available in the OAL Training Room, 300 Capitol Mall, Suite 1210, Sacramento, CA 95814. Please contact Nicole Carrillo at nicole.carrillo@oal.ca.gov or (916) 323-6808 by 4:30 p.m. on January 21, 2025 to request to attend the hearing in person or by 4:30 p.m. on January 8, 2025 if reasonable accommodations are necessary.

Participants will be given instructions on how to provide oral comment once they have accessed the hearing. The hearing will proceed on the date noted above until all testimony is submitted or until 12:00 p.m., whichever is later. At the hearing, any person may present oral or written statements or arguments that are relevant to the proposed action. OAL requests, but does not require, that persons who make oral comments at the hearing also submit a written copy of their testimony via email.

WRITTEN COMMENT PERIOD

Any interested person, or their authorized representative, may submit written comments relevant to the proposed regulatory action to:

Office of Administrative Law
Attn: Nicole Carrillo
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Comments may also be submitted by facsimile (FAX) at (916) 323-6826 or by e-mail to OALProposedRulemakings@oal.ca.gov. The written comment period closes on January 18, 2025. To ensure that OAL will consider your comment, it must be received by 11:59 p.m. on January 18, 2025. When commenting, please indicate the proposed rulemaking action to which your comment refers.

AUTHORITY AND REFERENCE

Government Code sections 11342.4 and 11349.1 authorize OAL to adopt the proposed regulations. The proposed regulations further implement, interpret, and make specific Government Code sections 11340.85, 11346.1, 11346.4, 11346.8, 11347.1, 11347.3, 11349.1, and 11349.4.

INFORMATIVE DIGEST

Section 84. Incorporation of Prior Rulemaking Records by Reference.

Summary of Existing Laws & Regulations Related Directly to the Proposed Action

Government Code section 11347.3 requires each agency to maintain a rulemaking record for its regulatory action and submit the record with the proposed regulatory changes to OAL for review.

Government Code section 11349.3, subdivision (a), requires OAL to either approve or disapprove a regulation submitted to it within 30 working days after the regulation has been submitted to OAL for review. If the adopting agency determines, on its own initiative, that a regulation submitted to OAL should be returned to the agency prior to completion of OAL's review, Government Code section 11349.3, subdivision (c), permits the agency to withdraw that regulation from OAL review.

When an agency resubmits a withdrawn or disapproved regulation to OAL, Government Code section 11349.4, subdivision (c), requires that the agency

identify the prior withdrawn or disapproved regulation and “specify the portion of the prior rulemaking record that should be included in the resubmission.”

Existing regulation (Cal. Code Regs, tit. 1, sec. 84) allows each agency, in resubmitting a previously withdrawn or a disapproved action to OAL, to incorporate by reference all or any specified parts of the prior withdrawn or disapproved file by submitting a “transmittal memo” identifying the prior rulemaking file by date of submission and specifying which portions of the prior file are incorporated by reference.

Effect of Proposed Action

This action proposes to amend section 84 to require that each agency include its statement incorporating by reference all or specified parts of its prior rulemaking record within the table of contents of the record for the resubmitted rulemaking action, rather than in a separate transmittal memo, to ensure that this statement becomes part of the final record for the resubmitted rulemaking action.

This action also proposes to amend section 84 to update terminology to clarify the process and require each agency to identify its incorporated prior rulemaking record by its previous related OAL action number.

Policy Statement Overview & Anticipated Benefits

When resubmitting a previously disapproved or withdrawn action to OAL, if an agency decides to incorporate by reference all or parts of its prior rulemaking record, there is no requirement that the agency’s “transmittal memo,” (which specifically identifies the parts of the prior record incorporated by reference into the record for the resubmittal) be included in the actual record for the resubmitted action. Use of a separate memorandum to identify contents of the rulemaking record can make it difficult to ascertain and locate the contents of an approved rulemaking record, which can impede public or judicial review of the rulemaking action. The proposed amendment promotes clarity and certainty as to the contents of the rulemaking record because it will result in one document contained in the rulemaking record (the table of contents for the resubmitted action) that informs readers of the content of the rulemaking record for resubmitted actions, including which parts of the prior record are incorporated into the resubmitted record by reference. 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.

Summary of Existing Laws & Regulations Related Directly to the Proposed Action

Notwithstanding the provisions of the APA that refer to mailing or sending, Government Code section 11340.85 permits and encourages the use of electronic communication when publishing and transmitting notices and rulemaking documents. Government Code section 11340.85, subdivision (a), defines "electronic communication" to include "electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication."

Government Code section 11340.85, subdivision (b)(3), permits agencies to deliver any notice required or authorized by the APA via electronic communication "if the person has expressly indicated a willingness to receive the notice by means of electronic communication." There are no existing regulations that define what constitutes an "[express] willingness to receive" an APA notice electronically.

Effect of Proposed Action

This action proposes to adopt section 85 to define certain circumstances under which a person is deemed to have "expressly indicated a willingness to receive [a] notice by means of electronic communication," within the meaning of Government Code section 11340.85, subdivision (b)(3), and further specifies permissible electronic delivery methods.

Policy Statement Overview & Anticipated Benefits

One of the primary purposes of the APA is to ensure meaningful public participation in the rulemaking process. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422 at 438; *Tidewater Marine Western, Inc., et al. v. Bradshaw* (1996) 14 Cal.4th 557.) The stated intent of Government Code section 11340.85 is "to make the regulatory process more user-friendly and to improve communication between interested parties and the regulatory agencies." (Gov. Code, sec. 11340.85, subd. (f).) The adoption of section 85 will promote meaningful public participation and improve communication in the APA rulemaking process by providing certainty for agencies regarding when and how their notices may be sent electronically to the regulated public.

Section 86. Statement of Mailing Notice.

Summary of Existing Laws & Regulations Related Directly to the Proposed Action

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, subdivisions (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 (Cal. Code of Regs., tit. 1, sec. 86) 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.]

Effect of Proposed Action

This action proposes to amend section 86 to require each agency to include additional language in its mailing statement confirming compliance with the Internet posting requirement of Government Code section 11346.4, subdivision (a)(6), which was added to the statute after promulgation of the regulation and is not currently addressed in the regulation. In effect, the amendment ensures that each agency properly documents in its rulemaking records that the NOPA was sent and posted online properly and in compliance with the APA.

This action also proposes to add subsection (b) to section 86 to further specify that the term "mailing" includes delivery by means of electronic communication pursuant to Government Code section 11340.85, subdivision (b)(3), and proposed section 85, which, in effect, clarifies the scope of "mailing" under the APA.

Policy Statement Overview & Anticipated Benefits

One purpose of the formal rulemaking procedures of the APA is to give those persons and entities affected by a regulation a voice in its creation, and another purpose is to create an administrative record assuring effective judicial

review. (*POET, LLC v. State Air Resources Bd.* (App. 5 Dist. 2013) 160 Cal.Rptr.3d 69, 217 Cal.App.4th 1214, 218 Cal.App.4th 681.)

Proposed section 86 advances the purposes identified by the court in *POET* by ensuring that mailing statements in the record include enough information to determine whether the agency complied with the notice requirements of the APA, assuring the creation of an adequate record and effective judicial review.

It is also required that an agency post the NOPA on its website, and it is likewise important to include a statement in the rulemaking record that confirms the adopting agency complied with the relevant notice requirements of the APA. Because an agency's Internet web site is an accessible, centralized location where the public can review the NOPA, along with the agency's originally proposed regulation with sufficient time to comment, it is essential to update the regulations to reflect that agencies must comply, and confirm compliance in the record, with the Internet posting requirement of Government Code section 11346.4, subdivision (a)(6).

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

Summary of Existing Laws & Regulations Related Directly to the Proposed Action

If an agency does not initially schedule a public hearing in its NOPA, Government Code section 11346.5, subdivision (a)(17), requires that the NOPA include a statement explaining that any interested person may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Government Code section 11346.8.

Government Code section 11346.8, subdivision (a), provides that if a public hearing is timely requested after publication of the NOPA, the "agency shall, *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." [Emphasis added.]

Government Code section 11346.8, subdivision (b), also permits an agency to continue or postpone a public hearing from time to time and at the place it determines. If an agency continues or postpones a hearing, Government Code section 11346.8, subdivision (b), requires "[t]he state agency [to] provide notice to the public as to when [the continued or postponed hearing] will be resumed or rescheduled."

Effect of Proposed Action

This action proposes to adopt section 87 to further implement Government Code section 11346.8 by establishing standardized requirements governing how each agency must provide notice of hearings scheduled, postponed, or continued under Government Code section 11346.8.

If an agency is required to provide notice to the public of a hearing scheduled by request or postponed under Government Code section 11346.8, subdivisions (a) or (b), respectively, the proposed regulation requires that the agency send a notice stating the time, date, and place of the hearing to persons specified in the regulation. Proposed section 87 also requires that the record include the notice of hearing and a mailing statement confirming the agency complied with the requirements of subsection (a) of section 87 and stating the method(s) of delivery and date(s) upon which the notice was sent. Lastly, the regulation specifies that if a public hearing has commenced and is continued to a subsequent date or time, an agency must explain in its Final Statement of Reasons how and when the agency provided notice as to the time, date, and place of the resumed hearing.

Policy Statement Overview & Anticipated Benefits

The adoption of section 87 will provide certainty for agencies regarding notice of hearings requirements, which, in effect, will ensure that agencies provide adequate notice of hearings to the interested parties, as well as include sufficient documentation within the rulemaking record that demonstrates compliance with the notice requirements.

Section 88. Method of Electronic Notice.

Summary of Existing Laws & Regulations Related Directly to the Proposed Action

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.” There are no existing regulations governing or standardizing the methods by which each agency may deliver notices by means of electronic communication.

Effect of Proposed Action

Proposed section 88 prescribes three methods by which an agency may deliver notice of any APA-related document by means of electronic communication. Proposed section 88 also clarifies that an agency may only provide notice exclusively by means of electronic communication if specified conditions are met. Proposed section 88 also cross-references proposed section 85, which deems certain ways in which a person consents to receive electronic notice, to clarify to each agency that its recipient(s) must express a willingness to receive the notice electronically.

Policy Statement Overview & Anticipated Benefits

This promotes meaningful public participation in the APA rulemaking process by ensuring that electronic notices are provided in a manner that allows the recipient to readily access the notice information while also giving the agency flexibility in the method used to provide the notice electronically.

EVALUATION OF INCONSISTENCY/INCOMPATIBILITY OF THE PROPOSED REGULATION WITH EXISTING STATE REGULATIONS

The regulation of the rulemaking process under the APA was delegated to OAL. (Gov. Code, sec. 11342.4.) No other state agency promulgates regulations for this purpose. Nevertheless, OAL has conducted an exhaustive, section-by-section, as well as subdivision-by-subdivision, electronic search of all titles of the California Code of Regulations and has found no section, subdivision, phrase, or clause with which any of the proposed sections conflicts or is incompatible. Therefore, the proposed regulations are neither inconsistent nor incompatible with existing state regulations.

IMPOSITION OF LOCAL MANDATE

The proposed regulations impose no mandate on local agencies or school districts.

FISCAL IMPACT ESTIMATES

Cost to any local agency or school district requiring reimbursement under Gov. Code section 17500 et seq.:

None.

Cost or savings to any state agency:

Section 84 is not estimated to result in additional costs or savings to any state agency as it will only change where an agency includes its statement regarding incorporation by reference of a prior rulemaking action from a separate transmittal memo to the table of contents of the record for the resubmitted action. The replacement of a statement in a transmittal memo to the same statement in 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.

Section 85 is not estimated to result in additional costs or savings to any state agency. The regulation further specifies circumstances under which a person is deemed to have “expressly indicated a willingness” to receive APA notices electronically and specifies permissible electronic delivery methods. While this is a new regulation, it is consistent with the APA, which permits each state agency to deliver notices electronically, and may aid agencies by clarifying ways in which a person is deemed to have consented to receive APA notices electronically. Any additional time that may be required by agency staff to comply with this regulation is minimal. No new positions are required, and no positions will be eliminated as a result of compliance.

Section 86 is not estimated to have additional costs or savings to any state agency. The regulation requires each state agency to include additional language in its mailing statement in the record. The same 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 state 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.

Section 87 is not estimated to result in additional costs or savings to any state agency. The regulation is consistent with the APA, which already requires each agency to provide notice of hearings to the public. The regulation requires that an agency 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 this requirement. While these are new requirements, any additional time that will be required by agency staff to comply 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.

Section 88 is not estimated to result in increased costs to any state agency because it is not requiring agencies to do anything new or different. Section 88 may, however, result in savings for state agencies because it provides agencies with a clear rule about how notices may be sent via electronic communication. The options provided in section 88 may allow agencies to send electronic notices when, due to the file size or other limitations, sending notices with notice documents attached as files prohibited agencies from using this option. Agencies that now are able to send notices electronically may see a reduction in mailing and copying costs, the amounts of which would depend on the size and number of rulemakings and the number of persons who have expressed a willingness to receive notices by way of electronic communication.

Other non-discretionary cost or savings imposed upon local agencies:

None.

Cost or savings in federal funding to the state:

None.

SIGNIFICANT ADVERSE ECONOMIC IMPACT ON BUSINESS

This proposal will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. This rulemaking makes small changes to the rulemaking process conducted by state agencies.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

Creation of Jobs in California:

None.

Elimination of Jobs in California:

None.

Creation of New Businesses in California:

None.

Elimination of Existing Businesses in California:

None.

Expansion of Businesses Currently Doing Business within California:

None.

Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:

The proposed regulations benefit the general welfare of California residents and businesses by promoting informed public participation in the APA rulemaking process. The regulations may also benefit the state's environment by reducing the need for paper products.

EFFECT ON REPRESENTATIVE PRIVATE PERSONS

OAL is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

BUSINESS REPORT

The proposed regulations do not require a report to be made by business.

HOUSING

There will be no effect on housing costs.

DETERMINATION OF EFFECT ON SMALL BUSINESS

The proposed regulations may potentially affect small businesses that sell paper and printing products to state agencies.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), OAL must determine 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 would be more cost effective to affected private persons and equally as effective in implementing the statutory policy or other provision of law.

CONTACT PERSON

Inquiries concerning this proposed rulemaking action may be directed to:

Nicole Carrillo
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6808
Nicole.carrillo@oal.ca.gov

The backup contact person for these inquiries is:

Kevin Hull
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-8916
Kevin.hull@oal.ca.gov

AVAILABILITY OF STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, AND RULEMAKING RECORD

OAL will make the entire rulemaking record available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking record consists of the Notice of Proposed Action, the proposed text of the regulations, the Initial Statement of Reasons, and the STD. 399. Please direct requests to inspect or copy the rulemaking record to the contact person(s) listed above.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After considering all timely and relevant comments received, OAL may adopt the proposed regulations substantially as described in this notice. If OAL makes modifications that are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before adopting the regulations as revised. Please direct requests for copies of any modified regulations to the contact person(s) listed above. If substantive modifications are made, OAL will accept written comments on the modified regulations for at least 15 days after the date on which they are made available.

AVAILABILITY OF FINAL STATEMENT OF REASONS

Upon its completion, OAL will make copies of the Final Statement of Reasons available. Please direct a request for copies to the contact person(s) listed above.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, the proposed text of the regulations in underline/strikeout format, as well as other rulemaking documents as they are completed, may be accessed via OAL's website at www.oal.ca.gov.