

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

**TITLE 1, CALIFORNIA CODE OF REGULATIONS
AMENDING SECS. 84 & 86; ADOPTING SECS. 85, 87, & 88**

FINAL STATEMENT OF REASONS

UPDATE TO THE INITIAL STATEMENT OF REASONS

Following the close of the 45-day comment period and public hearing on January 22, 2025, OAL modified the following proposed regulations, as detailed below, and made them available for public comment from April 25, 2025 to May 16, 2025.

Section 84 - “Incorporation of Prior Files by Reference.”

Existing regulation allows each agency, in re-submitting a previously withdrawn or disapproved action to OAL, to incorporate by reference all or any specified parts of the prior withdrawn or disapproved file by submitting a “transmittal memo identifying the prior rulemaking file by date of submission and specifying that portion of the prior file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

As explained in the Initial Statement of Reasons, this action amends this process by requiring each agency to include its “incorporation by reference” statement within the table of contents of the re-submitted rulemaking record, rather than in a separate “transmittal memo” to OAL.

In response to comments received at the public hearing, OAL modified section 84 to add subsection lettering to better organize the section and allow for improved readability. There were no other changes to the section.

Section 85 - “Notice by Electronic Communication.”

Government Code section 11340.85, subdivision (b)(3), allows an agency to deliver any notice required or authorized under the Administrative Procedure Act (APA) by means of “electronic communication” if the recipient “has expressly indicated a willingness to receive the notice by means of electronic communication.”

This action proposes to adopt section 85 to further specify when a person may be deemed by an agency as “expressly indicat[ing] a willingness to receive [a] notice by means of electronic communication,” as used in Government Code

section 11340.85, subdivision (b)(3), and to establish permissible electronic delivery methods.

In response to public comments, OAL modified section 85, subsection (a)(2), to clarify that an agency may deem a person as consenting to receive its APA notice(s) via electronic communication **if** the person submits a written comment via electronic communication to the agency in connection with *any* rulemaking action undertaken by that agency and has not previously or otherwise requested that the agency deliver its notice(s) by non-electronic means (i.e., by traditional mail).

Otherwise, the originally proposed language, “in connection with a *particular* rulemaking action,” may be misinterpreted as only deeming those who have commented via electronic communication to an agency regarding the specific rulemaking action. If this were the rule, it would require each agency to mail out physical copies of the original NOPAs, unless the agency had actually received from each person an express request to receive rulemaking documents via electronic means, because the agency does not typically receive comments on a specific rulemaking action until *after* the NOPA is published and distributed under Government Code section 11346.4.

For example, if a person emails their written comment to an agency in connection with one of the agency’s rulemaking actions, then the agency may deem that person as consenting to receiving notices electronically for that, and any future, rulemakings undertaken by the agency—as long as that person has not previously or otherwise requested to receive notices from the agency by non-electronic means. If the person *has* previously or otherwise requested that the agency deliver its notice by non-electronic means (e.g., by mailing a physical copy), then the agency must honor that request, even if the person later submits a comment via email to the agency.

Subsections (a)(1) and (2) were also revised to improve grammar.

Section 88 - “Method of Electronic Notice.”

Section 88 prescribes three methods that an agency may use when delivering electronic notice of any APA-related document and clarifies that an agency may only provide notice electronically **if** specified conditions are met.

In response to public comments, OAL modified section 85, subsection (a), to more closely align with the underlying statute, Government Code section 11340.85, as follows:

(a) An agency may provide notice ~~exclusively~~ by means of electronic communication only if:

(1) the person on the agency's ~~entire~~ distribution list ~~has requested to receive notices electronically~~ is deemed to have expressly indicated a willingness to receive notice(s) by means of electronic communication pursuant to section 85, subsection (a); and

(2) the agency complies with the requirements of section 85, subsection (b).

Government Code section 11340.85, subdivision (b)(2), allows an agency to publish or distribute a document by means of electronic communication, but provides that the agency “shall not make that the exclusive means by which the document is published or distributed.” Government Code section 11340.85, subdivision (b)(3), authorizes an agency to deliver its notice “to a person” via electronic communication “if *the person* has expressly indicated a willingness to receive the notice by means of electronic communication.” (Emphasis added.)

As originally proposed, subsection (a) was intended to remind agencies that if they seek to provide notice via electronic communication, the recipients of the electronic notice must have consented to electronic delivery. However, to more closely align with Government Code section 11340.85, OAL modified subsection (a) to remove the term “exclusively” and re-write the section to focus on ensuring that the agency has deemed each person, individually, as willing to accept the notice via electronic communication, as provided in section 85, subsection (a).

Subsection (a)(1) now cross-references the deeming language of proposed section 85, subsection (a), to clarify that the recipient must be deemed as “expressly indicating a willingness to receive the notice” electronically, as specified in subsection (a) of section 85.

Due to the modifications in subsections (a) and (a)(1), subsection (a)(2) was added to more specifically cross-reference the method of delivery requirements in section 85, subsection (b). Requiring agencies to use the means of electronic communication specified or used by the person commenting or requesting notice—instead of a different, albeit electronic, method—will best ensure the capacity of the person to receive, and ensure the actual receipt of, the required notices.

LOCAL MANDATE DETERMINATION

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

SUMMARY AND RESPONSE TO WRITTEN COMMENTS RECEIVED DURING 45-DAY COMMENT PERIOD

OAL received the following written comments from two commenters during the 45-day comment period:

Written Comment No. 1.1: Commenter supports updating OAL's regulations to acknowledge that state agencies routinely send notices and other rulemaking documents required by the APA to interested parties via electronic communication, as opposed to the U.S. Mail.

Response: OAL appreciates the support for these amendments. The proposed regulations are intended to modernize OAL's regulations and further implement the provisions of the APA that allow an agency to deliver its APA-notice by means of electronic communication **if** the recipient has expressly indicated a willingness to receive the notice electronically. OAL notes that this rulemaking action does not change the fact that if a person requests an agency to provide its APA notices by means of traditional hardcopy mailing, then the agency must honor that request and continue to mail hardcopy notices to those individuals. (See, Gov. Code, secs. 11340.85 & 11346.4.)

Written Comment No. 1.2: Commenter suggests minor changes to section 85 and states that using the word "particular" adds an element of uncertainty and, as currently cast, the clause can plausibly be read to imply that to be deemed to have consented to receiving notices by means of electronic communication, an interested party must have submitted a written comment by means of electronic communication in connection with the individual rulemaking in question. The commenter recommends replacing the words "a particular" with "any" and inserting the phrase "undertaken by the agency" after "rulemaking action"; the clause would read as follows: "The person has submitted a written comment, via electronic communication, to the agency in connection with *any* rulemaking action *undertaken by the agency* and has not otherwise requested that the agency deliver its notice(s) via non-electronic communication."

Otherwise, the commenter suggests that the existing language could conceivably require agencies to mail out physical copies of their original notices of proposed action, unless the agency had received from each interested party an express request to receive rulemaking documents via electronic means, which requirement would impose a significant fiscal impact.

Response: OAL decided to partially accommodate this comment. OAL modified subsection (a)(2) of section 85 as suggested by the commenter, except that OAL also decided to add the words "previously or" before "otherwise requested" to clarify that if an interested person previously or otherwise requests that the agency provide notice by mail or other non-electronic communication

methods, then the agency must honor that request, even if the commenter follows up with the agency via email or other electronic means.

Written Comment No. 1.3: Commenter suggests section 88(a), as currently drafted, is inconsistent with the “deemer” provisions of section 85(a)(2) and (3). As originally proposed, section 88(a) would require rulemaking agencies to arrange for everyone on the mailing list to “request” that rulemaking documents be received electronically for the agency to distribute rulemaking documents solely by means of electronic communication, which, in effect, nullifies the deemer language in sec. 85(a)(2) and (3). For this reason, the commenter suggests revising the language in sec. 88(a) to require only that (1) everyone on the mailing list be deemed to have requested electronic communication pursuant to section 85(a), and (2) that the agency complies with section 85(b). Such a revision would save the proposed regulations from mistakenly imposing an unnecessary and unduly burdensome prohibition on agencies’ distributing rulemaking documents exclusively by electronic means.

Response: OAL decided to partially accommodate this comment. OAL modified subsection 88, subsection (a), as recommended by the commenter; however, OAL decided to further amend subsection (a) to more closely align with the underlying statute, Government Code section 11340.85, subdivision (b)(3), by removing the term “exclusively” and rephrasing the standard to focus on ensuring that the person, individually, has been deemed as willing to accept an agency’s notice electronically in accordance with section 85, subsection (a), rather than the entire distribution list. Subsections (a)(1) and (2) were added to specify the conditions that an agency must satisfy in order to provide its notice(s) via electronic communication to a *person* on its distribution list.

Written Comment No. 2.1: Commenter supports the proposed regulations and generally appreciates OAL’s efforts to modernize its regulations.

Response: OAL appreciates the support. No action taken.

SUMMARY AND RESPONSE TO WRITTEN COMMENTS RECEIVED AT THE PUBLIC HEARING ON JANUARY 22, 2025:

No oral comments were presented at the public hearing; however, OAL received two additional written comments during the hearing, which were delivered electronically via Microsoft Teams.

Written Comment No. 3.1: Commenter recommends revising the structure of section 84 to add sub-lettering and numbering for easier readability.

Response: OAL decided to accommodate this comment. OAL modified section 84 to add subsection lettering and numbering, as suggested.

Written Comment No. 4.1: Commenter concurs with Written Comment No. 3.1.

Response: See response for Written Comment No. 3.1.

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

The modified text was made available to the public for comment from April 25, 2025 to May 16, 2025. OAL received one written comment by U.S. mail.

Written Comment No. 5.1: Commenter stated that, as a patient at the Department of State Hospitals (DSH)-Coalinga, they do not have access to the Internet, fax, or e-mail. Instead, they rely on landline phones and must obtain all State agency notices via conventional U.S. mail, which can take on average 6-8 days to reach a patient at DSH-Coalinga. The commenter says that it is critical that patients receive APA notices via conventional mail in a timely manner.

Response: No action taken. The suggestions are not directly related to the 15-day changes or the procedures followed by OAL in proposing this action. Although not directly related, OAL appreciates the commenter's concerns. The proposed regulations are intended to modernize OAL's regulations and further implement the provisions of the APA that allow an agency to deliver its APA-notice by means of electronic communication **if** the recipient has expressly indicated a willingness to receive the notice electronically. OAL notes that this rulemaking action does not change an agency's obligation under the APA to provide notice by means of traditional hardcopy mailing upon request or to post certain rulemaking documents on its website.

Government Code section 11346.4 requires each agency to mail its notice of proposed action to every person who filed a request for notice of regulatory actions at least 45 days prior to the hearing and close of the public comment period for the regulatory action. An agency may only deliver its notice by means of electronic communication *if* the recipient "has expressly indicated a willingness to receive the notice by means of electronic communication." (Gov. Code, sec. 11340.85.) And while an agency may permit and encourage the use of electronic communication, the APA provides that the agency "may not require use of electronic communication" and "shall not make that the exclusive means by which the document is published or distributed." (Gov. Code, sec. 11340.85, subd. (b).) Therefore, if an interested person does not request electronic notice and is not otherwise deemed as consenting to receive

the notice electronically, then the agency must continue mailing its notice(s) to the recipient.

Written Comment No. 5.2: Commenter stated that another concern with non-electronic communications (or delayed notification) is that it leaves patients with little time to conduct adequate research. The commenter stated more time is needed for patients to obtain non-electronic notices via mail to meet narrow time constraints.

Response: No action taken. OAL acknowledges the commenter's concerns; however, the suggestions are not directly related to the 15-day changes or the procedures followed by OAL in proposing this action. The timeframes for APA comment periods are statutory *minimums*. Agencies can, and should, consider the circumstances of their stakeholders when providing for notice periods.

Written Comment No. 5.3: Commenter stated that mailing of state agency notices has been a critical issue for years and petitions OAL and DSH to “act to remedy mailing procedures that have hindered mental health patients without access to Internet/Fax/Email.”

Response: No action taken. OAL acknowledges the commenter's concerns; however, the suggestions are not directly related to the 15-day changes or the procedures followed by OAL in proposing this action. The timeframes for APA comment periods are statutory minimums. Agencies can, and should, consider the circumstances of their stakeholders when providing for notice periods.

ALTERNATIVES DETERMINATION

In accordance with Government Code section 11346.9, subdivision (a)(4), OAL determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law. The only alternatives that were brought to our attention during this rulemaking process are discussed above in the summary and response to comments, and OAL has not identified any others.

NONSUBSTANTIVE REVISIONS TO THE FINAL REGULATION TEXT

Section 84, subsection (b)(1), includes minor revisions to correct grammar and capitalize the phrase “OAL Regulatory Action Number” for internal consistency with OAL's existing regulations. These changes do not materially alter any

requirement, right, responsibility, condition, prescription, or other regulatory element of any CCR provision.

REQUEST FOR EARLIER EFFECTIVE DATE

Pursuant to Government Code section 11343.4, subdivision (b)(3), OAL requests an earlier effective date of January 1, 2026.

OAL proposes adopting sections 85 and 88 to further specify how an agency may provide APA-notice electronically. State agencies have expressed support in modernizing OAL's regulations to address providing notices electronically. Allowing these sections to take effect a few months early would benefit state agencies by providing clarification on how to provide APA-notice electronically and any directly affected members of the public receiving electronic notices to ensure the recipient is able to receive/access the electronic notice, thereby promoting meaningful public participation.

An earlier effective date for the minor amendments to sections 84 and 86 would also benefit agencies by ensuring their respective rulemaking records are more complete, and thus, adequate for OAL and judicial review. Existing section 84 requires agencies seeking to incorporate by reference prior rulemaking documents into their resubmitted records to submit a statement to that effect *with* the resubmitted rulemaking action. As proposed, the agency must now include this statement within the TOC of the resubmitted record, rather than as a separate memo. Requiring the IBR statement to be part of the actual resubmitted record benefits state agencies by ensuring a more complete record sufficient for OAL and judicial review and is not overly burdensome as it merely changes the location of where to include this statement.

Similarly, existing section 86 requires each agency to include a mailing statement in its record to confirm compliance with the statutory requirements of GC 11346.4. With recent amendments to GC 11346.4, agencies are now required to post the NOPA on their website. As proposed, section 86 requires agencies to additionally confirm compliance with this internet posting requirement. Early implementation benefits agencies in the midst of rulemaking by ensuring a more complete record sufficient for OAL and judicial review and is not overly burdensome because agencies need only add a few words to their mailing statements to comply. Requiring agencies to confirm compliance in the record also benefits the public 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.