

ASSEMBLY BILL

No. 2091

Introduced by Assembly Member Bill Berryhill

February 23, 2012

An act to amend Sections 11346.2 and 11349.1 of, and to add Section 11346.10 to, the Government Code, relating to regulations.

LEGISLATIVE COUNSEL'S DIGEST

AB 2091, as introduced, Bill Berryhill. Regulations: new or emerging technology.

The Administrative Procedure Act generally sets forth the requirements for the adoption, publication, review, and implementation of regulations by state agencies, and for review of those regulatory actions by the Office of Administrative Law. The act requires an agency that is proposing an administrative regulation to prepare and submit to the office, and make available to the public upon request, specific information. The act requires the office to return to an agency any proposed regulation that does not meet certain requirements.

This bill would require a state agency proposing an administrative regulation that would require a person or entity to use a new or emerging technology or equipment in order to achieve the identified purpose of the regulation to determine if that technology is available and effective in accordance with certain requirements. The bill would also require the state agency that is proposing the regulation to include certain provisions in the regulation. The bill would require the state agency to submit to the office, and make available to the public upon request, a statement that the agency has complied with the requirements of this act. The bill would require the office to return to the agency the proposed

regulation if the agency has not complied with the prescribed requirements.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11346.2 of the Government Code, as
2 amended by Section 2 of Chapter 496 of the Statutes of 2011, is
3 amended to read:

4 11346.2. Every agency subject to this chapter shall prepare,
5 submit to the office with the notice of the proposed action as
6 described in Section 11346.5, and make available to the public
7 upon request, all of the following:

8 (a) A copy of the express terms of the proposed regulation.

9 (1) The agency shall draft the regulation in plain, straightforward
10 language, avoiding technical terms as much as possible, and using
11 a coherent and easily readable style. The agency shall draft the
12 regulation in plain English.

13 (2) The agency shall include a notation following the express
14 terms of each California Code of Regulations section, listing the
15 specific statutes or other provisions of law authorizing the adoption
16 of the regulation and listing the specific statutes or other provisions
17 of law being implemented, interpreted, or made specific by that
18 section in the California Code of Regulations.

19 (3) The agency shall use underline or italics to indicate additions
20 to, and strikeout to indicate deletions from, the California Code
21 of Regulations.

22 (b) An initial statement of reasons for proposing the adoption,
23 amendment, or repeal of a regulation. This statement of reasons
24 shall include, but not be limited to, all of the following:

25 (1) A statement of the specific purpose of each adoption,
26 amendment, or repeal, the problem the agency intends to address,
27 and the rationale for the determination by the agency that each
28 adoption, amendment, or repeal is reasonably necessary to carry
29 out the purpose and address the problem for which it is proposed.
30 The statement shall enumerate the benefits anticipated from the
31 regulatory action, including the benefits or goals provided in the
32 authorizing statute. The benefits may include, to the extent
33 applicable, nonmonetary benefits such as the protection of public

1 health and safety, worker safety, or the environment, the prevention
2 of discrimination, the promotion of fairness or social equity, and
3 the increase in openness and transparency in business and
4 government, among other things.

5 (2) For a major regulation proposed on or after January 1, 2013,
6 the standardized regulatory impact analysis required by Section
7 11346.3.

8 (3) An identification of each technical, theoretical, and empirical
9 study, report, or similar document, if any, upon which the agency
10 relies in proposing the adoption, amendment, or repeal of a
11 regulation.

12 (4) Where the adoption or amendment of a regulation would
13 mandate the use of specific technologies or equipment, a statement
14 of the reasons why the agency believes these mandates or
15 prescriptive standards are required.

16 (5) (A) A description of reasonable alternatives to the regulation
17 and the agency's reasons for rejecting those alternatives.
18 Reasonable alternatives to be considered include, but are not
19 limited to, alternatives that are proposed as less burdensome and
20 equally effective in achieving the purposes of the regulation in a
21 manner that ensures full compliance with the authorizing statute
22 or other law being implemented or made specific by the proposed
23 regulation. In the case of a regulation that would mandate the use
24 of specific technologies or equipment or prescribe specific actions
25 or procedures, the imposition of performance standards shall be
26 considered as an alternative.

27 (B) A description of reasonable alternatives to the regulation
28 that would lessen any adverse impact on small business and the
29 agency's reasons for rejecting those alternatives.

30 (C) Notwithstanding subparagraph (A) or (B), an agency is not
31 required to artificially construct alternatives or describe
32 unreasonable alternatives.

33 (6) Facts, evidence, documents, testimony, or other evidence
34 on which the agency relies to support an initial determination that
35 the action will not have a significant adverse economic impact on
36 business.

37 (7) A department, board, or commission within the
38 Environmental Protection Agency, the Natural Resources Agency,
39 or the Office of the State Fire Marshal shall describe its efforts, in
40 connection with a proposed rulemaking action, to avoid

1 unnecessary duplication or conflicts with federal regulations
2 contained in the Code of Federal Regulations addressing the same
3 issues. These agencies may adopt regulations different from federal
4 regulations contained in the Code of Federal Regulations
5 addressing the same issues upon a finding of one or more of the
6 following justifications:

7 (A) The differing state regulations are authorized by law.

8 (B) The cost of differing state regulations is justified by the
9 benefit to human health, public safety, public welfare, or the
10 environment.

11 (c) A state agency that adopts or amends a regulation mandated
12 by federal law or regulations, the provisions of which are identical
13 to a previously adopted or amended federal regulation, shall be
14 deemed to have complied with subdivision (b) if a statement to
15 the effect that a federally mandated regulation or amendment to a
16 regulation is being proposed, together with a citation to where an
17 explanation of the provisions of the regulation can be found, is
18 included in the notice of proposed adoption or amendment prepared
19 pursuant to Section 11346.5. However, the agency shall comply
20 fully with this chapter with respect to any provisions in the
21 regulation that the agency proposes to adopt or amend that are
22 different from the corresponding provisions of the federal
23 regulation.

24 *(d) If an agency is proposing to adopt, amend, or repeal a*
25 *regulation that requires a person or entity to use a new or emerging*
26 *technology or equipment in order to achieve the identified purpose*
27 *of the regulation, a statement that the agency has complied with*
28 *the requirements of Section 11346.10.*

29 ~~(d)~~

30 (e) This section shall become operative on January 1, 2012.

31 ~~(e)~~

32 (f) This section shall remain in effect only until January 1, 2014,
33 and as of that date is repealed, unless a later enacted statute, that
34 is enacted before January 1, 2014, deletes or extends that date.

35 SEC. 2. Section 11346.2 of the Government Code, as amended
36 by Section 3 of Chapter 496 of the Statutes of 2011, is amended
37 to read:

38 11346.2. Every agency subject to this chapter shall prepare,
39 submit to the office with the notice of the proposed action as

1 described in Section 11346.5, and make available to the public
2 upon request, all of the following:

3 (a) A copy of the express terms of the proposed regulation.

4 (1) The agency shall draft the regulation in plain, straightforward
5 language, avoiding technical terms as much as possible, and using
6 a coherent and easily readable style. The agency shall draft the
7 regulation in plain English.

8 (2) The agency shall include a notation following the express
9 terms of each California Code of Regulations section, listing the
10 specific statutes or other provisions of law authorizing the adoption
11 of the regulation and listing the specific statutes or other provisions
12 of law being implemented, interpreted, or made specific by that
13 section in the California Code of Regulations.

14 (3) The agency shall use underline or italics to indicate additions
15 to, and ~~strikeout~~ to indicate deletions from, the California Code
16 of Regulations.

17 (b) An initial statement of reasons for proposing the adoption,
18 amendment, or repeal of a regulation. This statement of reasons
19 shall include, but not be limited to, all of the following:

20 (1) A statement of the specific purpose of each adoption,
21 amendment, or repeal, the problem the agency intends to address,
22 and the rationale for the determination by the agency that each
23 adoption, amendment, or repeal is reasonably necessary to carry
24 out the purpose and address the problem for which it is proposed.
25 The statement shall enumerate the benefits anticipated from the
26 regulatory action, including the benefits or goals provided in the
27 authorizing statute. These benefits may include, to the extent
28 applicable, nonmonetary benefits such as the protection of public
29 health and safety, worker safety, or the environment, the prevention
30 of discrimination, the promotion of fairness or social equity, and
31 the increase in openness and transparency in business and
32 government, among other things. Where the adoption or
33 amendment of a regulation would mandate the use of specific
34 technologies or equipment, a statement of the reasons why the
35 agency believes these mandates or prescriptive standards are
36 required.

37 (2) For a major regulation proposed on or after November 1,
38 2013, the standardized regulatory impact analysis required by
39 Section 11346.3.

1 (3) An identification of each technical, theoretical, and empirical
2 study, report, or similar document, if any, upon which the agency
3 relies in proposing the adoption, amendment, or repeal of a
4 regulation.

5 (4) (A) A description of reasonable alternatives to the regulation
6 and the agency’s reasons for rejecting those alternatives.
7 Reasonable alternatives to be considered include, but are not
8 limited to, alternatives that are proposed as less burdensome and
9 equally effective in achieving the purposes of the regulation in a
10 manner that ensures full compliance with the authorizing statute
11 or other law being implemented or made specific by the proposed
12 regulation. In the case of a regulation that would mandate the use
13 of specific technologies or equipment or prescribe specific actions
14 or procedures, the imposition of performance standards shall be
15 considered as an alternative.

16 (B) A description of reasonable alternatives to the regulation
17 that would lessen any adverse impact on small business and the
18 agency’s reasons for rejecting those alternatives.

19 (C) Notwithstanding subparagraph (A) or (B), an agency is not
20 required to artificially construct alternatives or describe
21 unreasonable alternatives.

22 (5) Facts, evidence, documents, testimony, or other evidence
23 on which the agency relies to support an initial determination that
24 the action will not have a significant adverse economic impact on
25 business.

26 (6) A department, board, or commission within the
27 Environmental Protection Agency, the Natural Resources Agency,
28 or the Office of the State Fire Marshal shall describe its efforts, in
29 connection with a proposed rulemaking action, to avoid
30 unnecessary duplication or conflicts with federal regulations
31 contained in the Code of Federal Regulations addressing the same
32 issues. These agencies may adopt regulations different from federal
33 regulations contained in the Code of Federal Regulations
34 addressing the same issues upon a finding of one or more of the
35 following justifications:

- 36 (A) The differing state regulations are authorized by law.
- 37 (B) The cost of differing state regulations is justified by the
38 benefit to human health, public safety, public welfare, or the
39 environment.

1 (c) A state agency that adopts or amends a regulation mandated
2 by federal law or regulations, the provisions of which are identical
3 to a previously adopted or amended federal regulation, shall be
4 deemed to have complied with subdivision (b) if a statement to
5 the effect that a federally mandated regulation or amendment to a
6 regulation is being proposed, together with a citation to where an
7 explanation of the provisions of the regulation can be found, is
8 included in the notice of proposed adoption or amendment prepared
9 pursuant to Section 11346.5. However, the agency shall comply
10 fully with this chapter with respect to any provisions in the
11 regulation that the agency proposes to adopt or amend that are
12 different from the corresponding provisions of the federal
13 regulation.

14 *(d) If an agency is proposing to adopt, amend, or repeal a*
15 *regulation that requires a person or entity to use a new or emerging*
16 *technology or equipment in order to achieve the identified purpose*
17 *of the regulation, a statement that the agency has complied with*
18 *the requirements of Section 11346.10.*

19 ~~(d)~~

20 (e) This section shall be inoperative from January 1, 2012, until
21 January 1, 2014.

22 SEC. 3. Section 11346.10 is added to the Government Code,
23 to read:

24 11346.10. (a) State agencies proposing to adopt, amend, or
25 repeal any administrative regulation that would require a person
26 or entity to use a new or emerging technology or equipment in
27 order to achieve the identified purpose of the regulation shall
28 determine if that technology is available and effective. A
29 technology is available and effective if the agency provides
30 findings and evidence that both of the following conditions are
31 met:

32 (1) (A) The technology is currently commercially available, or
33 will be commercially available by the time that the regulation is
34 effective.

35 (B) For purposes of this section, “commercially available”
36 means that the technology is available on the market from at least
37 two providers or manufacturers.

38 (2) The technology has been available, and has been proven to
39 be effective, for at least two years.

1 (b) Any regulation proposed to be adopted, amended, or
2 repealed, pursuant to this section, shall include the following
3 provisions:

4 (1) If the new technology is not commercially available on the
5 effective date of the regulation, the adopting agency shall not
6 enforce a violation of that regulation with respect to the use of that
7 technology until at least six months after the required technology
8 becomes commercially available, and the agency posts on its
9 Internet Web site, and in the California Regulatory Notice Register,
10 that the required technology has become commercially available.

11 (2) If a person or entity incurs any costs purchasing a new
12 technology required by the regulation, and the agency ultimately
13 determines that the regulatory program is unfeasible because the
14 new technology does not function as intended by the agency, the
15 agency shall reimburse the person or entity for any costs incurred
16 in complying with the regulation.

17 (c) This section shall not apply to a regulation proposed to be
18 adopted, amended, or repealed by a state agency that requires the
19 use of a new or emerging technology or equipment in order to
20 achieve the identified purpose of the regulation if that requirement
21 is only being imposed on the industry that is directly responsible
22 for developing or manufacturing the new or emerging technology
23 as a part of that industry’s core business.

24 (d) Nothing in this section shall be construed to prohibit an
25 agency from adopting new or additional standards for new or
26 emerging technology or other equipment.

27 SEC. 4. Section 11349.1 of the Government Code is amended
28 to read:

29 11349.1. (a) The office shall review all regulations adopted,
30 amended, or repealed pursuant to the procedure specified in Article
31 5 (commencing with Section 11346) and submitted to it for
32 publication in the California Code of Regulations Supplement and
33 for transmittal to the Secretary of State and make determinations
34 using all of the following standards:

- 35 (1) Necessity.
- 36 (2) Authority.
- 37 (3) Clarity.
- 38 (4) Consistency.
- 39 (5) Reference.
- 40 (6) Nonduplication.

1 In reviewing regulations pursuant to this section, the office shall
2 restrict its review to the regulation and the record of the rulemaking
3 proceeding. The office shall approve the regulation or order of
4 repeal if it complies with the standards set forth in this section and
5 with this chapter.

6 (b) In reviewing proposed regulations for the criteria in
7 subdivision (a), the office may consider the clarity of the proposed
8 regulation in the context of related regulations already in existence.

9 (c) The office shall adopt regulations governing the procedures
10 it uses in reviewing regulations submitted to it. The regulations
11 shall provide for an orderly review and shall specify the methods,
12 standards, presumptions, and principles the office uses, and the
13 limitations it observes, in reviewing regulations to establish
14 compliance with the standards specified in subdivision (a). The
15 regulations adopted by the office shall ensure that it does not
16 substitute its judgment for that of the rulemaking agency as
17 expressed in the substantive content of adopted regulations.

18 (d) The office shall return any regulation subject to this chapter
19 to the adopting agency if any of the following occur:

20 (1) The adopting agency has not prepared the estimate required
21 by paragraph (6) of subdivision (a) of Section 11346.5 and has not
22 included the data used and calculations made and the summary
23 report of the estimate in the file of the rulemaking.

24 (2) The *adopting* agency has not complied with Section 11346.3.
25 “Noncompliance” means that the agency failed to complete the
26 economic impact assessment or standardized regulatory impact
27 analysis required by Section 11346.3 or failed to include the
28 assessment or analysis in the file of the rulemaking proceeding as
29 required by Section 11347.3.

30 (3) The adopting agency has prepared the estimate required by
31 paragraph (6) of subdivision (a) of Section 11346.5, the estimate
32 indicates that the regulation will result in a cost to local agencies
33 or school districts that is required to be reimbursed under Part 7
34 (commencing with Section 17500) of Division 4, and the adopting
35 agency fails to do any of the following:

36 (A) Cite an item in the Budget Act for the fiscal year in which
37 the regulation will go into effect as the source from which the
38 Controller may pay the claims of local agencies or school districts.

1 (B) Cite an accompanying bill appropriating funds as the source
2 from which the Controller may pay the claims of local agencies
3 or school districts.

4 (C) Attach a letter or other documentation from the Department
5 of Finance which states that the Department of Finance has
6 approved a request by the agency that funds be included in the
7 Budget Bill for the next following fiscal year to reimburse local
8 agencies or school districts for the costs mandated by the
9 regulation.

10 (D) Attach a letter or other documentation from the Department
11 of Finance which states that the Department of Finance has
12 authorized the augmentation of the amount available for
13 expenditure under the agency's appropriation in the Budget Act
14 which is for reimbursement pursuant to Part 7 (commencing with
15 Section 17500) of Division 4 to local agencies or school districts
16 from the unencumbered balances of other appropriations in the
17 Budget Act and that this augmentation is sufficient to reimburse
18 local agencies or school districts for their costs mandated by the
19 regulation.

20 (4) The proposed regulation conflicts with an existing state
21 regulation and the agency has not identified the manner in which
22 the conflict may be resolved.

23 (5) The *adopting* agency did not make the alternatives
24 determination as required by paragraph (4) of subdivision (a) of
25 Section 11346.9.

26 (6) *If an agency is proposing to adopt, amend, or repeal a*
27 *regulation that requires a person or entity to use a new or emerging*
28 *technology or equipment in order to achieve the identified purpose*
29 *of the regulation, the adopting agency has not complied with the*
30 *requirements of Section 11346.10.*

31 (e) The office shall notify the Department of Finance of all
32 regulations returned pursuant to subdivision (d).

33 (f) The office shall return a rulemaking file to the submitting
34 agency if the file does not comply with subdivisions (a) and (b)
35 of Section 11347.3. Within three state working days of the receipt
36 of a rulemaking file, the office shall notify the submitting agency
37 of any deficiency identified. If no notice of deficiency is mailed
38 to the adopting agency within that time, a rulemaking file shall be
39 deemed submitted as of the date of its original receipt by the office.

1 A rulemaking file shall not be deemed submitted until each
2 deficiency identified under this subdivision has been corrected.
3 (g) Notwithstanding any other law, return of the regulation to
4 the adopting agency by the office pursuant to this section is the
5 exclusive remedy for a failure to comply with subdivision (c) of
6 Section 11346.3 or paragraph (10) of subdivision (a) of Section
7 11346.5.

O