

ASSEMBLY BILL

No. 2723

Introduced by Assembly Member Medina

February 21, 2014

An act to amend Sections 11340, 11342.535, 11342.610, 11346.3, and 11346.5 of the Government Code, relating to administrative procedure.

LEGISLATIVE COUNSEL'S DIGEST

AB 2723, as introduced, Medina. Administrative procedure: small businesses.

The Administrative Procedure Act governs the procedures for the adoption, amendment, or repeal of regulations by state agencies and for the review of those regulatory actions by the Office of Administrative Law.

Existing law requires the notice of proposed adoption, amendment, or repeal of a regulation to include, among other things, a description of all cost impacts, known to the agency at the time the notice of the proposed action is submitted to the Office of Administrative Law, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Existing law defines “cost impact” as the amount of reasonable range of direct costs, or a description of the type and extent of direct costs, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action.

This bill would define “cost impact” to include those direct costs that a representative private person or sole proprietorship, small business, and business necessarily incurs in reasonable compliance with the proposed action.

Existing law requires every state agency to prepare and submit to the Office of Administrative Law a final statement of reasons with the adopted regulation that includes, among other things, an explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact on small businesses, as defined. Under existing law, a small business does not include, among others, a landscape architect, an architect, or a building designer or an entity organized as a nonprofit.

This bill would delete a landscape architect, an architect, or a building designer from that list and would require that entity organized as a nonprofit to have more than 100 employees in order to not be considered a small business for purposes of the act.

Existing law requires all state agencies proposing to adopt, amend, or repeal a regulation that is not a major regulation or that is a major regulation proposed prior to November 1, 2013, to prepare an economic impact assessment that assesses whether and to what extent the proposal will affect, among other things, creation of new businesses or the elimination of existing businesses within the state.

This bill would require the assessment to assess whether and to what extent the proposal will affect, among other things, creation of new businesses or the elimination of existing businesses within the state, including the impact on sole proprietorships and small businesses, as defined.

If a state agency, in proposing to adopt, amend, or repeal any administrative regulation, makes an initial determination that the action may have a significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states, existing law requires the state agency to include certain information in the notice of the proposed action, including, but not limited to, identification of the types of businesses that would be affected.

This bill would require that information to additionally include the size of businesses that would be affected.

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 11340 of the Government Code is
 2 amended to read:

1 11340. The Legislature finds and declares as follows:

2 (a) There has been an unprecedented growth in the number of
3 administrative regulations in recent years.

4 (b) The language of many regulations is frequently unclear and
5 unnecessarily complex, even when the complicated and technical
6 nature of the subject matter is taken into account. The language is
7 often confusing to the persons who must comply with the
8 regulations.

9 (c) Substantial time and public funds have been spent in adopting
10 regulations, the necessity for which has not been established.

11 (d) The imposition of prescriptive standards upon private persons
12 and entities through regulations where the establishment of
13 performance standards could reasonably be expected to produce
14 the same result has placed an unnecessary burden on California
15 citizens and discouraged innovation, research, and development
16 of improved means of achieving desirable social goals.

17 (e) There exists no central office in state government with the
18 power and duty to review regulations to ensure that they are written
19 in a comprehensible manner, are authorized by statute, and are
20 consistent with other law.

21 (f) Correcting the problems that have been caused by the
22 unprecedented growth of regulations in California requires the
23 direct involvement of the Legislature as well as that of the
24 executive branch of state government.

25 (g) The complexity and lack of clarity in many regulations put
26 small businesses, which do not have the resources to hire experts
27 to assist them, at a distinct disadvantage. *Given the importance of*
28 *small businesses within the California economy, it is especially*
29 *important that regulations that may have significant impacts on*
30 *the private sectors be evaluated to determine the potential impact*
31 *on these smaller size businesses.*

32 SEC. 2. Section 11342.535 of the Government Code is amended
33 to read:

34 11342.535. "Cost impact" means the amount of reasonable
35 range of direct costs, or a description of the type and extent of
36 direct costs, that a representative private person or *sole*
37 *proprietorship, small business, and* business necessarily incurs in
38 reasonable compliance with the proposed action.

39 SEC. 3. Section 11342.610 of the Government Code is amended
40 to read:

1 11342.610. (a) "Small business" means a business activity in
2 agriculture, general construction, special trade construction, retail
3 trade, wholesale trade, services, transportation and warehousing,
4 manufacturing, generation and transmission of electric power, or
5 a health care facility, unless excluded in subdivision (b), that is
6 both of the following:

- 7 (1) Independently owned and operated.
- 8 (2) Not dominant in its field of operation.

9 (b) "Small business" does not include the following professional
10 and business activities:

11 (1) A financial institution including a bank, a trust, a savings
12 and loan association, a thrift institution, a consumer finance
13 company, a commercial finance company, an industrial finance
14 company, a credit union, a mortgage and investment banker, a
15 securities broker-dealer, or an investment adviser.

16 (2) An insurance company, either stock or mutual.

17 (3) A mineral, oil, or gas broker.

18 (4) A subdivider or developer.

19 ~~(5) A landscape architect, an architect, or a building designer.~~

20 ~~(6)~~

21 (5) An entity organized as a nonprofit institution *with more than*
22 *100 employees.*

23 ~~(7)~~

24 (6) An entertainment activity or production, including a motion
25 picture, a stage performance, a television or radio station, or a
26 production company.

27 ~~(8)~~

28 (7) A utility, a water company, or a power transmission company
29 generating and transmitting more than 4.5 million kilowatt hours
30 annually.

31 ~~(9)~~

32 (8) A petroleum producer, a natural gas producer, a refiner, or
33 a pipeline.

34 ~~(10)~~

35 (9) A manufacturing enterprise exceeding 250 employees.

36 ~~(11)~~

37 (10) A health care facility exceeding 150 beds or one million
38 five hundred thousand dollars (\$1,500,000) in annual gross receipts.

39 (c) "Small business" does not include the following business
40 activities:

1 (1) Agriculture, where the annual gross receipts exceed one
2 million dollars (\$1,000,000).

3 (2) General construction, where the annual gross receipts exceed
4 nine million five hundred thousand dollars (\$9,500,000).

5 (3) Special trade construction, where the annual gross receipts
6 exceed five million dollars (\$5,000,000).

7 (4) Retail trade, where the annual gross receipts exceed two
8 million dollars (\$2,000,000).

9 (5) Wholesale trade, where the annual gross receipts exceed
10 nine million five hundred thousand dollars (\$9,500,000).

11 (6) Services, where the annual gross receipts exceed two million
12 dollars (\$2,000,000).

13 (7) Transportation and warehousing, where the annual gross
14 receipts exceed one million five hundred thousand dollars
15 (\$1,500,000).

16 SEC. 4. Section 11346.3 of the Government Code is amended
17 to read:

18 11346.3. (a) State agencies proposing to adopt, amend, or
19 repeal any administrative regulation shall assess the potential for
20 adverse economic impact on California business enterprises and
21 individuals, avoiding the imposition of unnecessary or unreasonable
22 regulations or reporting, recordkeeping, or compliance
23 requirements. For purposes of this subdivision, assessing the
24 potential for adverse economic impact shall require agencies, when
25 proposing to adopt, amend, or repeal a regulation, to adhere to the
26 following requirements, to the extent that these requirements do
27 not conflict with other state or federal laws:

28 (1) The proposed adoption, amendment, or repeal of a regulation
29 shall be based on adequate information concerning the need for,
30 and consequences of, proposed governmental action.

31 (2) The state agency, prior to submitting a proposal to adopt,
32 amend, or repeal a regulation to the office, shall consider the
33 proposal's impact on business, with consideration of industries
34 affected including the ability of California businesses to compete
35 with businesses in other states. For purposes of evaluating the
36 impact on the ability of California businesses to compete with
37 businesses in other states, an agency shall consider, but not be
38 limited to, information supplied by interested parties.

39 (3) An economic assessment prepared pursuant to this
40 subdivision for a proposed regulation that is not a major regulation

1 or that is a major regulation proposed prior to November 1, 2013,
2 shall be prepared in accordance with subdivision (b). An economic
3 assessment prepared pursuant to this subdivision for a major
4 regulation proposed on or after November 1, 2013, shall be
5 prepared in accordance with subdivision (c), and shall be included
6 in the initial statement of reasons as required by Section 11346.2.

7 (b) (1) All state agencies proposing to adopt, amend, or repeal
8 a regulation that is not a major regulation or that is a major
9 regulation proposed prior to November 1, 2013, shall prepare an
10 economic impact assessment that assesses whether and to what
11 extent it will affect the following:

12 (A) The creation or elimination of jobs within the state.

13 (B) The creation of new businesses or the elimination of existing
14 businesses within the state, *including the impact on sole*
15 *proprietorships and small businesses, as defined in Section*
16 *11342.610.*

17 (C) The expansion of businesses currently doing business within
18 the state.

19 (D) The benefits of the regulation to the health and welfare of
20 California residents, worker safety, and the state's environment.

21 (2) This subdivision does not apply to the University of
22 California, the Hastings College of the Law, or the Fair Political
23 Practices Commission.

24 (3) Information required from state agencies for the purpose of
25 completing the assessment may come from existing state
26 publications.

27 (c) (1) Each state agency proposing to adopt, amend, or repeal
28 a major regulation on or after November 1, 2013, shall prepare a
29 standardized regulatory impact analysis in the manner prescribed
30 by the Department of Finance pursuant to Section 11346.36. The
31 standardized regulatory impact analysis shall address all of the
32 following:

33 (A) The creation or elimination of jobs within the state.

34 (B) The creation of new businesses or the elimination of existing
35 businesses within the state.

36 (C) The competitive advantages or disadvantages for businesses
37 currently doing business within the state.

38 (D) The increase or decrease of investment in the state.

39 (E) The incentives for innovation in products, materials, or
40 processes.

1 (F) The benefits of the regulations, including, but not limited
2 to, benefits to the health, safety, and welfare of California residents,
3 worker safety, and the state’s environment and quality of life,
4 among any other benefits identified by the agency.

5 (2) This subdivision shall not apply to the University of
6 California, the Hastings College of the Law, or the Fair Political
7 Practices Commission.

8 (3) Information required from state agencies for the purpose of
9 completing the analysis may be derived from existing state, federal,
10 or academic publications.

11 (d) Any administrative regulation adopted on or after January
12 1, 1993, that requires a report shall not apply to businesses, unless
13 the state agency adopting the regulation makes a finding that it is
14 necessary for the health, safety, or welfare of the people of the
15 state that the regulation apply to businesses.

16 (e) Analyses conducted pursuant to this section are intended to
17 provide agencies and the public with tools to determine whether
18 the regulatory proposal is an efficient and effective means of
19 implementing the policy decisions enacted in statute or by other
20 provisions of law in the least burdensome manner. Regulatory
21 impact analyses shall inform the agencies and the public of the
22 economic consequences of regulatory choices, not reassess
23 statutory policy. The baseline for the regulatory analysis shall be
24 the most cost-effective set of regulatory measures that are equally
25 effective in achieving the purpose of the regulation in a manner
26 that ensures full compliance with the authorizing statute or other
27 law being implemented or made specific by the proposed
28 regulation.

29 (f) Each state agency proposing to adopt, amend, or repeal a
30 major regulation on or after November 1, 2013, and that has
31 prepared a standardized regulatory impact analysis pursuant to
32 subdivision (c), shall submit that analysis to the Department of
33 Finance upon completion. The department shall comment, within
34 30 days of receiving that analysis, on the extent to which the
35 analysis adheres to the regulations adopted pursuant to Section
36 11346.36. Upon receiving the comments from the department, the
37 agency may update its analysis to reflect any comments received
38 from the department and shall summarize the comments and the
39 response of the agency along with a statement of the results of the

1 updated analysis for the statement required by paragraph (10) of
2 subdivision (a) of Section 11346.5.

3 SEC. 5. Section 11346.5 of the Government Code is amended
4 to read:

5 11346.5. (a) The notice of proposed adoption, amendment, or
6 repeal of a regulation shall include the following:

7 (1) A statement of the time, place, and nature of proceedings
8 for adoption, amendment, or repeal of the regulation.

9 (2) Reference to the authority under which the regulation is
10 proposed and a reference to the particular code sections or other
11 provisions of law that are being implemented, interpreted, or made
12 specific.

13 (3) An informative digest drafted in plain English in a format
14 similar to the Legislative Counsel’s digest on legislative bills. The
15 informative digest shall include the following:

16 (A) A concise and clear summary of existing laws and
17 regulations, if any, related directly to the proposed action and of
18 the effect of the proposed action.

19 (B) If the proposed action differs substantially from an existing
20 comparable federal regulation or statute, a brief description of the
21 significant differences and the full citation of the federal regulations
22 or statutes.

23 (C) A policy statement overview explaining the broad objectives
24 of the regulation and the specific benefits anticipated by the
25 proposed adoption, amendment, or repeal of a regulation, including,
26 to the extent applicable, nonmonetary benefits such as the
27 protection of public health and safety, worker safety, or the
28 environment, the prevention of discrimination, the promotion of
29 fairness or social equity, and the increase in openness and
30 transparency in business and government, among other things.

31 (D) An evaluation of whether the proposed regulation is
32 inconsistent or incompatible with existing state regulations.

33 (4) Any other matters as are prescribed by statute applicable to
34 the specific state agency or to any specific regulation or class of
35 regulations.

36 (5) A determination as to whether the regulation imposes a
37 mandate on local agencies or school districts and, if so, whether
38 the mandate requires state reimbursement pursuant to Part 7
39 (commencing with Section 17500) of Division 4.

1 (6) An estimate, prepared in accordance with instructions
2 adopted by the Department of Finance, of the cost or savings to
3 any state agency, the cost to any local agency or school district
4 that is required to be reimbursed under Part 7 (commencing with
5 Section 17500) of Division 4, other nondiscretionary cost or
6 savings imposed on local agencies, and the cost or savings in
7 federal funding to the state.

8 For purposes of this paragraph, “cost or savings” means
9 additional costs or savings, both direct and indirect, that a public
10 agency necessarily incurs in reasonable compliance with
11 regulations.

12 (7) If a state agency, in proposing to adopt, amend, or repeal
13 any administrative regulation, makes an initial determination that
14 the action may have a significant, statewide adverse economic
15 impact directly affecting business, including the ability of
16 California businesses to compete with businesses in other states,
17 it shall include the following information in the notice of proposed
18 action:

19 (A) Identification of the types *and size* of businesses that would
20 be affected.

21 (B) A description of the projected reporting, recordkeeping, and
22 other compliance requirements that would result from the proposed
23 action.

24 (C) The following statement: “The (name of agency) has made
25 an initial determination that the (adoption/amendment/repeal) of
26 this regulation may have a significant, statewide adverse economic
27 impact directly affecting business, including the ability of
28 California businesses to compete with businesses in other states.
29 The (name of agency) (has/has not) considered proposed
30 alternatives that would lessen any adverse economic impact on
31 business and invites you to submit proposals. Submissions may
32 include the following considerations:

33 (i) The establishment of differing compliance or reporting
34 requirements or timetables that take into account the resources
35 available to *differing size of* businesses.

36 (ii) Consolidation or simplification of compliance and reporting
37 requirements for *differing size of* businesses.

38 (iii) The use of performance standards rather than prescriptive
39 standards.

1 (iv) Exemption or partial exemption from the regulatory
2 requirements for *differing size of businesses*.”

3 (8) If a state agency, in adopting, amending, or repealing any
4 administrative regulation, makes an initial determination that the
5 action will not have a significant, statewide adverse economic
6 impact directly affecting business, including the ability of
7 California businesses to compete with businesses in other states,
8 it shall make a declaration to that effect in the notice of proposed
9 action. In making this declaration, the agency shall provide in the
10 record facts, evidence, documents, testimony, or other evidence
11 upon which the agency relies to support its initial determination.

12 An agency’s initial determination and declaration that a proposed
13 adoption, amendment, or repeal of a regulation may have or will
14 not have a significant, adverse impact on businesses, including the
15 ability of California businesses to compete with businesses in other
16 states, shall not be grounds for the office to refuse to publish the
17 notice of proposed action.

18 (9) A description of all cost impacts, known to the agency at
19 the time the notice of proposed action is submitted to the office,
20 that a representative private person or business would necessarily
21 incur in reasonable compliance with the proposed action.

22 If no cost impacts are known to the agency, it shall state the
23 following:

24 “The agency is not aware of any cost impacts that a
25 representative private person or business would necessarily incur
26 in reasonable compliance with the proposed action.”

27 (10) A statement of the results of the economic impact
28 assessment required by subdivision (b) of Section 11346.3 or the
29 standardized regulatory impact analysis if required by subdivision
30 (c) of Section 11346.3, a summary of any comments submitted to
31 the agency pursuant to subdivision (f) of Section 11346.3 and the
32 agency’s response to those comments.

33 (11) The finding prescribed by subdivision (d) of Section
34 11346.3, if required.

35 (12) (A) A statement that the action would have a significant
36 effect on housing costs, if a state agency, in adopting, amending,
37 or repealing any administrative regulation, makes an initial
38 determination that the action would have that effect.

39 (B) The agency officer designated in paragraph (14) shall make
40 available to the public, upon request, the agency’s evaluation, if

1 any, of the effect of the proposed regulatory action on housing
2 costs.

3 (C) The statement described in subparagraph (A) shall also
4 include the estimated costs of compliance and potential benefits
5 of a building standard, if any, that were included in the initial
6 statement of reasons.

7 (D) For purposes of model codes adopted pursuant to Section
8 18928 of the Health and Safety Code, the agency shall comply
9 with the requirements of this paragraph only if an interested party
10 has made a request to the agency to examine a specific section for
11 purposes of estimating the costs of compliance and potential
12 benefits for that section, as described in Section 11346.2.

13 (13) A statement that the adopting agency must determine that
14 no reasonable alternative considered by the agency or that has
15 otherwise been identified and brought to the attention of the agency
16 would be more effective in carrying out the purpose for which the
17 action is proposed, would be as effective and less burdensome to
18 affected private persons than the proposed action, or would be
19 more cost effective to affected private persons and equally effective
20 in implementing the statutory policy or other provision of law. For
21 a major regulation, as defined by Section 11342.548, proposed on
22 or after November 1, 2013, the statement shall be based, in part,
23 upon the standardized regulatory impact analysis of the proposed
24 regulation, as required by Section 11346.3, as well as upon the
25 benefits of the proposed regulation identified pursuant to
26 subparagraph (C) of paragraph (3).

27 (14) The name and telephone number of the agency
28 representative and designated backup contact person to whom
29 inquiries concerning the proposed administrative action may be
30 directed.

31 (15) The date by which comments submitted in writing must
32 be received to present statements, arguments, or contentions in
33 writing relating to the proposed action in order for them to be
34 considered by the state agency before it adopts, amends, or repeals
35 a regulation.

36 (16) Reference to the fact that the agency proposing the action
37 has prepared a statement of the reasons for the proposed action,
38 has available all the information upon which its proposal is based,
39 and has available the express terms of the proposed action, pursuant
40 to subdivision (b).

1 (17) A statement that if a public hearing is not scheduled, any
2 interested person or his or her duly authorized representative may
3 request, no later than 15 days prior to the close of the written
4 comment period, a public hearing pursuant to Section 11346.8.

5 (18) A statement indicating that the full text of a regulation
6 changed pursuant to Section 11346.8 will be available for at least
7 15 days prior to the date on which the agency adopts, amends, or
8 repeals the resulting regulation.

9 (19) A statement explaining how to obtain a copy of the final
10 statement of reasons once it has been prepared pursuant to
11 subdivision (a) of Section 11346.9.

12 (20) If the agency maintains an Internet Web site or other similar
13 forum for the electronic publication or distribution of written
14 material, a statement explaining how materials published or
15 distributed through that forum can be accessed.

16 (21) If the proposed regulation is subject to Section 11346.6, a
17 statement that the agency shall provide, upon request, a description
18 of the proposed changes included in the proposed action, in the
19 manner provided by Section 11346.6, to accommodate a person
20 with a visual or other disability for which effective communication
21 is required under state or federal law and that providing the
22 description of proposed changes may require extending the period
23 of public comment for the proposed action.

24 (b) The agency representative designated in paragraph (14) of
25 subdivision (a) shall make available to the public upon request the
26 express terms of the proposed action. The representative shall also
27 make available to the public upon request the location of public
28 records, including reports, documentation, and other materials,
29 related to the proposed action. If the representative receives an
30 inquiry regarding the proposed action that the representative cannot
31 answer, the representative shall refer the inquiry to another person
32 in the agency for a prompt response.

33 (c) This section shall not be construed in any manner that results
34 in the invalidation of a regulation because of the alleged inadequacy
35 of the notice content or the summary or cost estimates, or the
36 alleged inadequacy or inaccuracy of the housing cost estimates, if
37 there has been substantial compliance with those requirements.

O