

AMENDED IN ASSEMBLY MARCH 29, 2012

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 2090

Introduced by Assembly Member Bill Berryhill

February 23, 2012

An act amend Sections 11342.548, 11346.3, 11346.45, and 11349.1 of, and to add Section 11346.39 to, the Government Code, relating to regulations.

LEGISLATIVE COUNSEL'S DIGEST

AB 2090, as amended, Bill Berryhill. Regulations.

The

(1) *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, prior to submitting a proposal to adopt, amend, or repeal an administrative regulation, to determine the economic impact of the regulation by preparing an economic impact analysis. The act defines a major regulation as a regulation that the agency determines has an expected economic impact on California business enterprises and individuals in an amount exceeding \$50,000,000. Existing law requires an agency proposing to adopt, amend, or repeal a major regulation to also prepare a standardized regulatory impact analysis.*

~~This bill would declare the intent of the Legislature to enact legislation that would provide greater oversight over the regulatory process.~~

This bill would instead define a major regulation as a regulation that the agency determines has an expected economic impact on California

business enterprises and individuals in an amount exceeding \$15,000,000.

This bill would modify the requirements that an adopting agency must meet when preparing the economic impact analysis and the standardized regulatory impact analysis.

(2) The act requires the office to initiate, at the request of a standing, select, or joint committee of the Legislature, a priority review of an existing regulation that uses prescribed procedures to determine whether the regulation continues to satisfy specified standards.

This bill would require an agency proposing to adopt a major regulation to submit a detailed summary of the standardized regulatory impact analysis to specified persons and entities. This bill would require the agency to submit a full copy of that analysis if requested by specified persons and entities. This bill would require the office to initiate, at the request of specified persons and entities, a priority review of a proposed regulation, in accordance with certain procedures, to determine whether the regulation continues to satisfy specified standards. This bill would require the agency, if requested by specified persons or entities, to hold up to 2 additional public hearings or public workshops on the proposed major regulation.

(3) The act requires that state agencies proposing to adopt regulations, prior to publication of the notice of proposed action, involve parties that would be subject to the proposed regulations in public discussions regarding those proposed regulations, when the proposed regulations involve complex proposals or a large number of proposals that cannot easily be reviewed during the comment period. The act also provides that these requirements are not subject to judicial review or a specified review by the office.

This bill would instead make that requirement applicable to all proposed regulations. The bill would repeal the provisions that exempt these requirements from judicial review and review by the office. The bill would require the office to return the regulation to the agency if the agency does not comply with these requirements.

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

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

1 SECTION 1. The Legislature finds and declares all of the
2 following:

1 (a) Robust jobs and economic growth are the key to repairing
2 California's chronic budget problems and generating adequate
3 revenues to fund vital programs like education, infrastructure, and
4 public safety.

5 (b) California's jobs, business, and economic climate have been
6 in dire straits for several years, resulting in higher unemployment,
7 and a reduction in the number of businesses, small businesses in
8 particular, operating in the state and concomitant decline in state
9 revenues.

10 (c) California's regulatory burdens are often cited as one of the
11 main causes of stagnant job and economic growth and why many
12 businesses decide to expand in other states instead of California.
13 In fact, in 2011 CEO magazine ranked California last among states
14 where companies prefer to do business for the seventh straight
15 year.

16 (d) A large part of the problem is that too much authority over
17 the California economy and jobs climate has been ceded to the
18 unelected state bureaucracy. Regulations adopted by state agencies
19 often impose unnecessary burdens on California's economic and
20 jobs climate at a time when California can least afford to
21 discourage economic and job growth.

22 (e) Today, instead of using due diligence in analyzing the
23 economic impacts of proposed regulations, state agencies often
24 merely fill out a four-page economic questionnaire that provides
25 little more than one-word answers and checked-off boxes and is
26 devoid of supporting data. On top of that, this information is not
27 currently required to be made available to the public.

28 (f) More sunshine and public input is needed in the regulatory
29 rulemaking process. Those subject to regulations are often in the
30 best position to determine the actual costs of regulations, and also
31 to identify equally effective but less burdensome alternatives.

32 (g) Additionally, the connection between those that adopt laws
33 and those that implement them has been eroded. Stronger and more
34 direct oversight of the regulatory rulemaking process by the
35 Legislature, as the body conferring authority to adopt regulations,
36 will improve the regulatory rulemaking process.

37 (h) It is not the intent of this act to unduly impede the regulatory
38 rulemaking process. It is rather to provide greater sunshine and
39 public participation in the fastest-growing area of government and
40 to develop the most thoughtful, economically efficient, and least

1 burdensome regulations on jobs and businesses when carrying out
2 the intent of authorizing statutes.

3 (i) Under this act, if a state agency has sufficiently involved the
4 public in the rulemaking process and conducted a thorough analysis
5 of a regulation’s economic impacts, this act should have no adverse
6 effect on the regulatory rulemaking process.

7 (j) Further, the purpose of this act is not to prevent or postpone
8 the adoption of any particular type of regulation or regulations but
9 simply to ensure that accurate and honest information about a
10 proposed regulation’s true economic impact is prepared and made
11 available to the public and the legislative and executive branches
12 of government.

13 ~~SEC. 2. It is the intent of the Legislature to enact legislation~~
14 ~~that would provide greater oversight over the regulatory process.~~

15 *SEC. 2. Section 11342.548 of the Government Code is amended*
16 *to read:*

17 11342.548. “Major regulation” means any proposed adoption,
18 amendment, or repeal of a regulation subject to review by the
19 Office of Administrative Law pursuant to Article 6 (commencing
20 with Section 11349) that will have an economic impact on
21 California business enterprises and individuals in an amount
22 exceeding ~~forty million dollars (\$40,000,000)~~ *fifteen million dollars*
23 *(\$15,000,000)*, as estimated by the agency *in the economic impact*
24 *analysis prepared pursuant to Section 11346.3.*

25 *SEC. 3. Section 11346.3 of the Government Code is amended*
26 *to read:*

27 11346.3. (a) State agencies proposing to adopt, amend, or
28 repeal any administrative regulation shall assess the potential for
29 adverse economic impact on California business enterprises and
30 individuals, avoiding the imposition of unnecessary or unreasonable
31 regulations or reporting, recordkeeping, or compliance
32 requirements. For purposes of this subdivision, assessing the
33 potential for adverse economic impact shall require agencies, when
34 proposing to adopt, amend, or repeal a regulation, to adhere to the
35 following requirements, to the extent that these requirements do
36 not conflict with other state or federal laws:

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

1 (2) The state agency, prior to submitting a proposal to adopt,
2 amend, or repeal a regulation to the office, shall consider the
3 proposal's impact on business, with consideration of industries
4 affected including the ability of California businesses to compete
5 with businesses in other states. For purposes of evaluating the
6 impact on the ability of California businesses to compete with
7 businesses in other states, an agency shall consider, but not be
8 limited to, information supplied by interested parties.

9 (3) An economic analysis prepared pursuant to this subdivision
10 for a proposed regulation that is not a major regulation or that is
11 a major regulation proposed prior to November 1, 2013, shall be
12 prepared in accordance with subdivision (b). An economic analysis
13 prepared pursuant to this subdivision for a major regulation
14 proposed on or after November 1, 2013, shall be prepared in
15 accordance with subdivision (c), and shall be included in the initial
16 statement of reasons as required by Section 11346.2.

17 (b) (1) All state agencies proposing to adopt, amend, or repeal
18 a regulation that is not a major regulation or that is a major
19 regulation proposed prior to November 1, 2013, shall prepare an
20 economic impact analysis that ~~assesses whether and to what extent~~
21 ~~it will affect the following~~ *meets all of the following requirements:*

22 ~~(A) The creation or elimination of jobs within the State of~~
23 ~~California.~~

24 ~~(B) The creation of new businesses or the elimination of existing~~
25 ~~businesses within the State of California.~~

26 ~~(C) The expansion of businesses currently doing business within~~
27 ~~the State of California.~~

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

30 *(A) Estimates the total actual costs of compliance for affected*
31 *small businesses, large businesses, and other parties subject to*
32 *the regulation or group of regulations. The economic impact*
33 *analysis shall, at a minimum, estimate the costs of individual*
34 *compliance for a representative small business, large business,*
35 *and other party subject to the regulation as well as the cumulative*
36 *statewide cost of compliance.*

37 *(B) If an agency declares that it is not aware of any cost impact*
38 *that a representative small business, large business, or other party*
39 *subject to the regulation would incur in compliance with the*
40 *regulation, or group of regulations authorized by the same statute,*

1 *the economic impact analysis shall include an express statement*
 2 *to that effect as well as a detailed statement describing how a small*
 3 *business, large business, or other party subject to the regulation*
 4 *could comply with the regulation or group of regulations without*
 5 *incurring cost.*

6 *(C) If an economic impact analysis prepared pursuant to this*
 7 *section finds that the cumulative statewide cost of compliance of*
 8 *any regulation, or group of regulations authorized by the same*
 9 *statute, exceeds fifteen million dollars (\$15,000,000) then the*
 10 *regulation or group of regulations shall be deemed to be a major*
 11 *regulation. If reasonable doubt exists as to whether the cumulative*
 12 *statewide cost of compliance of any regulation or group of*
 13 *regulations authorized by the same statute exceeds fifteen million*
 14 *dollars (\$15,000,000), the doubt shall be resolved in favor of*
 15 *finding that the regulation or group of regulations authorized by*
 16 *the same statute qualifies as a major regulation.*

17 *(D) Each economic impact analysis that an agency prepares*
 18 *shall be maintained in the agency’s records and shall be made*
 19 *available to the office and the parties identified in subdivision (a)*
 20 *of Section 11346.39 upon request.*

21 *(E) An adopting agency shall prepare a standardized regulatory*
 22 *impact analysis for any regulation that the agency determines is*
 23 *a major regulation.*

24 (2) This subdivision ~~does~~ shall not apply to the University of
 25 California, the Hastings College of the Law, or the Fair Political
 26 Practices Commission.

27 (3) Information required from state agencies for the purpose of
 28 completing the assessment may come from existing state
 29 publications.

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

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

37 ~~(B) The creation of new businesses or the elimination of existing~~
 38 ~~businesses within the state.~~

39 ~~(C) The competitive advantages or disadvantages for businesses~~
 40 ~~currently doing business within the state.~~

- 1 ~~(D) The increase or decrease of investment in the state.~~
- 2 ~~(E) The incentives for innovation in products, materials, or~~
- 3 ~~processes.~~
- 4 ~~(F) The benefits of the regulations, including, but not limited~~
- 5 ~~to, benefits to the health, safety, and welfare of California residents,~~
- 6 ~~worker safety, and the state's environment and quality of life,~~
- 7 ~~among any other benefits identified by the agency.~~
- 8 *(A) A detailed estimate, in both the short term and long term,*
- 9 *of the average individual cost of compliance for small businesses,*
- 10 *large businesses, and other parties subject to the major regulation.*
- 11 *(B) A detailed estimate, in both the short term and long term,*
- 12 *of the cumulative statewide cost of compliance with the major*
- 13 *regulation for small businesses, large businesses, and other parties.*
- 14 *(C) A detailed distributional assessment that evaluates, in both*
- 15 *the short term and long term, how certain industries, income*
- 16 *groups, and geographic regions are likely to experience benefits*
- 17 *or costs as a consequence of the major regulation.*
- 18 *(D) A detailed estimate of the short-term and long-term creation*
- 19 *or elimination of jobs in individual sectors as a result of the major*
- 20 *regulation.*
- 21 *(E) A detailed estimate, in both the short term and long term,*
- 22 *of the potential for economic leakage as a result of the major*
- 23 *regulation in which economic activity is relocated from California*
- 24 *to another state or country.*
- 25 *(F) A detailed estimate, in both the short term and long term,*
- 26 *of the impact on the ability of California businesses to compete*
- 27 *with businesses in other states and California's ability to attract*
- 28 *businesses to locate in the state as a result of the major regulation.*
- 29 *(G) A detailed estimate, in both the short term and long term,*
- 30 *of the effects on excise tax, sales and use tax, income tax,*
- 31 *corporation tax, and other tax revenue to the General Fund, and*
- 32 *fee revenues to special funds, as a result of the major regulation*
- 33 *and changes in economic activity as a result of the major*
- 34 *regulation.*
- 35 *(H) A precise statement enumerating the benefits, in both the*
- 36 *short term and long term, anticipated from the major regulation,*
- 37 *including the benefits or goals provided in the authorizing statutes.*
- 38 *Where applicable, the statement shall include the failures in private*
- 39 *markets or public institutions that warrant the proposed major*
- 40 *regulation, in a manner consistent with the guidelines published*

1 *by the federal Office of Management and Budget in OMB Circular*
2 *No. A-94, Revised.*

3 *(I) An identification of each technical, theoretical, and empirical*
4 *study, report, or similar document, if any, upon which the agency*
5 *relies in proposing the major regulation.*

6 *(J) A copy of the economic impact analysis prepared pursuant*
7 *to subdivision (b).*

8 *(K) Any written comments submitted pursuant subdivision (c)*
9 *of Section 11346.39, as well as the agency's written responses to*
10 *those comments.*

11 (2) This subdivision shall not apply to the University of
12 California, the Hastings College of the Law, or the Fair Political
13 Practices Commission.

14 (3) Information required from state agencies for the purpose of
15 completing the assessment may be derived from existing state,
16 federal, or academic publications.

17 (d) Any administrative regulation adopted on or after January
18 1, 1993, that requires a report shall not apply to businesses, unless
19 the state agency adopting the regulation makes a finding that it is
20 necessary for the health, safety, or welfare of the people of the
21 state that the regulation apply to businesses.

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

35 (f) Each state agency proposing to adopt, amend, or repeal a
36 major regulation on or after November 1, 2013, and that has
37 prepared a standardized regulatory impact assessment pursuant to
38 subdivision (c), shall submit that assessment to the Department of
39 Finance upon completion. The department shall comment, within
40 30 days of receiving such assessment, on the extent to which the

1 assessment adheres to the regulations adopted pursuant to Section
2 11346.36. Upon receiving the comments from the department, the
3 agency may update its analysis to reflect any comments received
4 from the department and shall summarize the comments and the
5 response of the agency along with a statement of the results of the
6 updated analysis for the statement required by paragraph (10) of
7 subdivision (a) of Section 11346.5.

8 *SEC. 4. Section 11346.39 is added to the Government Code,*
9 *immediately following 11346.36, to read:*

10 *11346.39. (a) After completing a standardized regulatory*
11 *impact analysis pursuant to Section 11346.3, the adopting agency*
12 *shall submit a detailed summary of that analysis to the Governor's*
13 *Office of Planning and Research, the Director of Finance, the*
14 *Legislative Analyst, the State Auditor, the Controller, the President*
15 *pro Tempore of the Senate, the Minority Floor Leader of the*
16 *Senate, the Speaker of the Assembly, the Minority Floor Leader*
17 *of the Assembly, and the chair and ranking minority party member*
18 *of the appropriate fiscal and policy committees of the Senate and*
19 *the Assembly.*

20 *(b) Any party identified in subdivision (a) may request the*
21 *adopting agency to provide a complete copy of the standardized*
22 *regulatory impact analysis. The adopting agency shall comply*
23 *with that request within 10 working days of receiving the request.*

24 *(c) Within 60 days of receiving a complete copy of standardized*
25 *regulatory impact analysis pursuant to subdivision (b), any party*
26 *identified in subdivision (a) may submit written comments to the*
27 *adopting agency on that report. The adopting agency shall consider*
28 *any of those written comments submitted to it, and shall respond*
29 *to those comments in writing. Any comments submitted to the*
30 *adopting agency pursuant to this section, and any responses to*
31 *those comments, shall be included in the rulemaking file pursuant*
32 *to Section 11347.3.*

33 *(d) The office, at the request of any of the parties identified in*
34 *subdivision (a), shall initiate a priority review of any regulation,*
35 *group of regulations, or series of regulations that the party believes*
36 *does not meet the requirements of this chapter. For major*
37 *regulations adopted on or after January 1, 2013, a party identified*
38 *in subdivision (a) may also request a priority review to evaluate*
39 *whether the major regulation fails to utilize a less burdensome*
40 *alternative. The office shall conduct a priority review under this*

1 subdivision in accordance with the procedures set out in Section
2 11349.7.

3 (e) An agency proposing to adopt a major regulation, upon the
4 request of a party identified in subdivision (a), shall hold up to
5 two additional public hearings or two additional public workshops
6 on the proposed major regulation.

7 SEC. 5. Section 11346.45 of the Government Code is amended
8 to read:

9 11346.45. (a) In order to increase public participation and
10 improve the quality of regulations, state agencies proposing to
11 adopt regulations shall, prior to publication of the notice required
12 by Section 11346.5, involve parties who would be subject to the
13 proposed regulations in public discussions regarding those
14 proposed regulations, ~~when the proposed regulations involve~~
15 ~~complex proposals or a large number of proposals that cannot~~
16 ~~easily be reviewed during the comment period.~~

17 (b) This section ~~does~~ shall not apply to a state agency in any
18 instance where that state agency is required to implement federal
19 law and regulations for which there is little or no discretion on the
20 part of the state to vary.

21 (c) If the agency does not or cannot comply with the provisions
22 of subdivision (a), it shall state the reasons for noncompliance with
23 reasonable specificity in the rulemaking record.

24 ~~(d) The provisions of this section shall not be subject to judicial~~
25 ~~review or to the provisions of Section 11349.1.~~

26 SEC. 6. Section 11349.1 of the Government Code is amended
27 to read:

28 11349.1. (a) The office shall review all regulations adopted,
29 amended, or repealed pursuant to the procedure specified in Article
30 5 (commencing with Section 11346) and submitted to it for
31 publication in the California Code of Regulations Supplement and
32 for transmittal to the Secretary of State and make determinations
33 using all of the following standards:

- 34 (1) Necessity.
- 35 (2) Authority.
- 36 (3) Clarity.
- 37 (4) Consistency.
- 38 (5) Reference.
- 39 (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) *The adopting agency did not comply with Section 11346.10.*

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

29 (f) The office shall return a rulemaking file to the submitting
30 agency if the file does not comply with subdivisions (a) and (b)
31 of Section 11347.3. Within three state working days of the receipt
32 of a rulemaking file, the office shall notify the submitting agency
33 of any deficiency identified. If no notice of deficiency is mailed
34 to the adopting agency within that time, a rulemaking file shall be
35 deemed submitted as of the date of its original receipt by the office.
36 A rulemaking file shall not be deemed submitted until each
37 deficiency identified under this subdivision has been corrected.

38 (g) Notwithstanding any other law, return of the regulation to
39 the adopting agency by the office pursuant to this section is the
40 exclusive remedy for a failure to comply with subdivision (c) of

- 1 Section 11346.3 or paragraph (10) of subdivision (a) of Section
- 2 11346.5.

O