

AMENDED IN ASSEMBLY APRIL 10, 2012

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 *to* 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.

(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 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)~~

(2) 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: 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. Section 11342.548 of the Government Code is amended
 14 to read:

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

23 SEC. 3. Section 11346.3 of the Government Code is amended
 24 to read:

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

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

38 (2) The state agency, ~~prior to~~ *before* submitting a proposal to
 39 adopt, amend, or repeal a regulation to the office, shall consider
 40 the proposal’s impact on business, with consideration of industries

1 affected including the ability of California businesses to compete
2 with businesses in other states. For purposes of evaluating the
3 impact on the ability of California businesses to compete with
4 businesses in other states, an agency shall consider, but not be
5 limited to, information supplied by interested parties.

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

15 (b) (1) All state agencies proposing to adopt, amend, or repeal
16 a regulation that is not a major regulation or that is a major
17 regulation proposed ~~prior to~~ *before* November 1, 2013, shall
18 prepare an economic impact analysis that meets all of the following
19 requirements:

20 (A) Estimates the total actual costs of compliance for affected
21 small businesses, large businesses, and other parties subject to the
22 regulation or group of regulations. The economic impact analysis
23 shall, at a minimum, estimate the costs of individual compliance
24 for a representative small business, large business, and other party
25 subject to the regulation as well as the cumulative statewide cost
26 of compliance.

27 (B) If an agency declares that it is not aware of any cost impact
28 that a representative small business, large business, or other party
29 subject to the regulation would incur in compliance with the
30 regulation, or group of regulations authorized by the same statute,
31 the economic impact analysis shall include an express statement
32 to that effect as well as a detailed statement describing how a small
33 business, large business, or other party subject to the regulation
34 could comply with the regulation or group of regulations without
35 incurring cost.

36 (C) If an economic impact analysis prepared pursuant to this
37 section finds that the cumulative statewide cost of compliance of
38 any regulation, or group of regulations authorized by the same
39 statute, exceeds fifteen million dollars (\$15,000,000) then the
40 regulation or group of regulations shall be deemed to be a major

1 regulation. If reasonable doubt exists as to whether the cumulative
2 statewide cost of compliance of any regulation or group of
3 regulations authorized by the same statute exceeds fifteen million
4 dollars (\$15,000,000), the doubt shall be resolved in favor of
5 finding that the regulation or group of regulations authorized by
6 the same statute qualifies as a major regulation.

7 (D) Each economic impact analysis that an agency prepares
8 shall be maintained in the agency's records and shall be made
9 available to the office and the ~~parties identified in subdivision (a)~~
10 ~~of Section 11346.39 upon request~~ *Governor's Office of Planning*
11 *and Research, the Director of Finance, the Legislative Analyst,*
12 *the State Auditor, the Controller, the President pro Tempore of*
13 *the Senate, the Minority Floor Leader of the Senate, the Speaker*
14 *of the Assembly, the Minority Floor Leader of the Assembly, and*
15 *the chair and ranking minority party member of the appropriate*
16 *fiscal and policy committees of the Senate and the Assembly, upon*
17 *request.*

18 (E) An adopting agency shall prepare a standardized regulatory
19 impact analysis for any regulation that the agency determines is a
20 major regulation.

21 (F) *Each economic impact analysis shall assess the benefits of*
22 *the regulation to the health and welfare of California residents,*
23 *worker safety, and the state's environment.*

24 (2) This subdivision 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 contain all of the
35 following:

36 (A) A detailed estimate, in both the short term and long term,
37 of the average individual cost of compliance for small businesses,
38 large businesses, and other parties subject to the major regulation.

1 (B) A detailed estimate, in both the short term and long term,
2 of the cumulative statewide cost of compliance with the major
3 regulation for small businesses, large businesses, and other parties.

4 (C) A detailed distributional assessment that evaluates, in both
5 the short term and long term, how certain industries, income
6 groups, and geographic regions are likely to experience benefits
7 or costs as a consequence of the major regulation.

8 (D) A detailed estimate of the short-term and long-term creation
9 or elimination of jobs in individual sectors as a result of the major
10 regulation.

11 (E) A detailed estimate, in both the short term and long term,
12 of the potential for economic leakage as a result of the major
13 regulation in which economic activity is relocated from California
14 to another state or country.

15 (F) A detailed estimate, in both the short term and long term,
16 of the impact on the ability of California businesses to compete
17 with businesses in other states and California's ability to attract
18 businesses to locate in the state as a result of the major regulation.

19 (G) A detailed estimate, in both the short term and long term,
20 of the effects on excise tax, sales and use tax, income tax,
21 corporation tax, and other tax revenue to the General Fund, and
22 fee revenues to special funds, as a result of the major regulation
23 and changes in economic activity as a result of the major regulation.

24 (H) A precise statement enumerating the benefits, in both the
25 short term and long term, anticipated from the major regulation,
26 including the benefits or goals provided in the authorizing statutes.
27 Where applicable, the statement shall include the failures in private
28 markets or public institutions that warrant the proposed major
29 regulation, in a manner consistent with the guidelines published
30 by the federal Office of Management and Budget in OMB Circular
31 No. A-94, Revised.

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

35 (J) A copy of the economic impact analysis prepared pursuant
36 to subdivision (b).

37 ~~(K) Any written comments submitted pursuant subdivision (c)~~
38 ~~of Section 11346.39, as well as the agency's written responses to~~
39 ~~those comments.~~

1 (K) A description of the benefits of the regulation, including,
2 but not limited to, benefits to the health, safety, and welfare of
3 California residents, worker safety, and the state's environment
4 and quality of life, among any other benefits identified by the
5 agency.

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

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

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

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

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

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

3 ~~SEC. 4. Section 11346.39 is added to the Government Code,~~
4 ~~immediately following 11346.36, to read:~~

5 ~~11346.39. (a) After completing a standardized regulatory~~
6 ~~impact analysis pursuant to Section 11346.3, the adopting agency~~
7 ~~shall submit a detailed summary of that analysis to the Governor's~~
8 ~~Office of Planning and Research, the Director of Finance, the~~
9 ~~Legislative Analyst, the State Auditor, the Controller, the President~~
10 ~~pro Tempore of the Senate, the Minority Floor Leader of the~~
11 ~~Senate, the Speaker of the Assembly, the Minority Floor Leader~~
12 ~~of the Assembly, and the chair and ranking minority party member~~
13 ~~of the appropriate fiscal and policy committees of the Senate and~~
14 ~~the Assembly.~~

15 ~~(b) Any party identified in subdivision (a) may request the~~
16 ~~adopting agency to provide a complete copy of the standardized~~
17 ~~regulatory impact analysis. The adopting agency shall comply with~~
18 ~~that request within 10 working days of receiving the request.~~

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

28 ~~(d) The office, at the request of any of the parties identified in~~
29 ~~subdivision (a), shall initiate a priority review of any regulation,~~
30 ~~group of regulations, or series of regulations that the party believes~~
31 ~~does not meet the requirements of this chapter. For major~~
32 ~~regulations adopted on or after January 1, 2013, a party identified~~
33 ~~in subdivision (a) may also request a priority review to evaluate~~
34 ~~whether the major regulation fails to utilize a less burdensome~~
35 ~~alternative. The office shall conduct a priority review under this~~
36 ~~subdivision in accordance with the procedures set out in Section~~
37 ~~11349.7.~~

38 ~~(e) An agency proposing to adopt a major regulation, upon the~~
39 ~~request of a party identified in subdivision (a), shall hold up to two~~

1 additional public hearings or two additional public workshops on
2 the proposed major regulation.

3 ~~SEC. 5.~~

4 *SEC. 4.* Section 11346.45 of the Government Code is amended
5 to read:

6 11346.45. (a) In order to increase public participation and
7 improve the quality of regulations, state agencies proposing to
8 adopt regulations shall, ~~prior to~~ *before* publication of the notice
9 required by Section 11346.5, involve parties who would be subject
10 to the proposed regulations in public discussions regarding those
11 proposed regulations.

12 (b) This section shall not apply to a state agency in any instance
13 where that state agency is required to implement federal law and
14 regulations for which there is little or no discretion on the part of
15 the state to vary.

16 (c) If the agency does not or cannot comply with the subdivision
17 (a), it shall state the reasons for noncompliance with reasonable
18 specificity in the rulemaking record.

19 ~~SEC. 6.~~

20 *SEC. 5.* Section 11349.1 of the Government Code is amended
21 to read:

22 11349.1. (a) The office shall review all regulations adopted,
23 amended, or repealed pursuant to the procedure specified in Article
24 5 (commencing with Section 11346) and submitted to it for
25 publication in the California Code of Regulations Supplement and
26 for transmittal to the Secretary of State and make determinations
27 using all of the following standards:

- 28 (1) Necessity.
- 29 (2) Authority.
- 30 (3) Clarity.
- 31 (4) Consistency.
- 32 (5) Reference.
- 33 (6) Nonduplication.

34 In reviewing regulations pursuant to this section, the office shall
35 restrict its review to the regulation and the record of the rulemaking
36 proceeding. The office shall approve the regulation or order of
37 repeal if it complies with the standards set forth in this section and
38 with this chapter.

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

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

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

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

19 (2) The adopting agency has not complied with Section 11346.3.
20 “Noncompliance” means that the agency failed to complete the
21 economic impact assessment or standardized regulatory impact
22 analysis required by Section 11346.3 or failed to include the
23 assessment or analysis in the file of the rulemaking proceeding as
24 required by Section 11347.3.

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

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

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

37 (C) Attach a letter or other documentation from the Department
38 of Finance which states that the Department of Finance has
39 approved a request by the agency that funds be included in the
40 Budget Bill for the next following fiscal year to reimburse local

1 agencies or school districts for the costs mandated by the
2 regulation.

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

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

16 (5) The adopting agency did not make the alternatives
17 determination as required by paragraph (4) of subdivision (a) of
18 Section 11346.9.

19 (6) The adopting agency did not comply with Section 11346.10.

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

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

31 (g) Notwithstanding any other law, return of the regulation to
32 the adopting agency by the office pursuant to this section is the
33 exclusive remedy for a failure to comply with subdivision (c) of
34 Section 11346.3 or paragraph (10) of subdivision (a) of Section
35 11346.5.

O