

AMENDED IN SENATE AUGUST 18, 2014

AMENDED IN ASSEMBLY MAY 1, 2014

AMENDED IN ASSEMBLY APRIL 9, 2014

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 2723

**Introduced by Assembly Member Medina
(Coauthor: Assembly Member Fox)**

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 amended, 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 institution.

This bill would instead provide that a “small business” does not include a landscape architect, an architect, or a building designer with 50 or more employees or an entity organized as a nonprofit institution with more than 100 employees.

~~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. Existing~~

Existing law requires each state agency proposing to adopt, amend, or repeal a major regulation on or after November 1, 2013, to prepare a standardized regulatory impact analysis in the manner prescribed by the Department of Finance. Existing law requires the standardized regulatory impact analysis to address, among other things, the 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, and would require~~ the analysis to address, the 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:

3 11340. The Legislature finds and declares as follows:

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

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

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

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

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

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

27 (g) The complexity and lack of clarity in many regulations put
28 small businesses, which do not have the resources to hire experts
29 to assist them, at a distinct disadvantage. Given the importance of

1 small businesses within the California economy, it is especially
2 important that regulations that may have significant impacts on
3 the private sectors be evaluated to determine the potential impact
4 on these smaller size businesses.

5 SEC. 2. Section 11342.535 of the Government Code is amended
6 to read:

7 11342.535. "Cost impact" means the amount of reasonable
8 range of direct costs, or a description of the type and extent of
9 direct costs, that a representative private person or sole
10 proprietorship, small business, and business necessarily incurs in
11 reasonable compliance with the proposed action.

12 SEC. 3. Section 11342.610 of the Government Code is amended
13 to read:

14 11342.610. (a) "Small business" means a business activity in
15 agriculture, general construction, special trade construction, retail
16 trade, wholesale trade, services, transportation and warehousing,
17 manufacturing, generation and transmission of electric power, or
18 a health care facility, unless excluded in subdivision (b), that is
19 both of the following:

20 (1) Independently owned and operated.

21 (2) Not dominant in its field of operation.

22 (b) "Small business" does not include the following professional
23 and business activities:

24 (1) A financial institution including a bank, a trust, a savings
25 and loan association, a thrift institution, a consumer finance
26 company, a commercial finance company, an industrial finance
27 company, a credit union, a mortgage and investment banker, a
28 securities broker-dealer, or an investment adviser.

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

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

31 (4) A subdivider or developer.

32 (5) An entity organized as a nonprofit institution with more than
33 100 employees.

34 (6) An entertainment activity or production, including a motion
35 picture, a stage performance, a television or radio station, or a
36 production company.

37 (7) A utility, a water company, or a power transmission company
38 generating and transmitting more than 4.5 million kilowatthours
39 annually.

1 (8) A petroleum producer, a natural gas producer, a refiner, or
2 a pipeline.

3 (9) A manufacturing enterprise exceeding 250 employees.

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

6 (11) A landscape architect, an architect, or a building designer
7 with 50 or more employees.

8 (c) “Small business” does not include the following business
9 activities:

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

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

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

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

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

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

22 (7) Transportation and warehousing, where the annual gross
23 receipts exceed one million five hundred thousand dollars
24 (\$1,500,000).

25 SEC. 4. 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.

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

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

(b) (1) 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, shall prepare an economic impact assessment that assesses whether and to what extent it will affect the following:

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

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

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

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

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

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

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

1 standardized regulatory impact analysis shall address all of the
2 following:

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

4 (B) The creation of new businesses or the elimination of existing
5 businesses within the state, including the impact on sole
6 proprietorships and small businesses, as defined in Section
7 11342.610.

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

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

11 (E) The incentives for innovation in products, materials, or
12 processes.

13 (F) The benefits of the regulations, including, but not limited
14 to, benefits to the health, safety, and welfare of California residents,
15 worker safety, and the state's environment and quality of life,
16 among any other benefits identified by the agency.

17 (2) This subdivision shall not apply to the University of
18 California, the Hastings College of the Law, or the Fair Political
19 Practices Commission.

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

23 (d) Any administrative regulation adopted on or after January
24 1, 1993, that requires a report shall not apply to businesses, unless
25 the state agency adopting the regulation makes a finding that it is
26 necessary for the health, safety, or welfare of the people of the
27 state that the regulation apply to businesses.

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

(f) Each state agency proposing to adopt, amend, or repeal a major regulation on or after November 1, 2013, and that has prepared a standardized regulatory impact analysis pursuant to subdivision (c), shall submit that analysis to the Department of Finance upon completion. The department shall comment, within 30 days of receiving that analysis, on the extent to which the analysis adheres to the regulations adopted pursuant to Section 11346.36. Upon receiving the comments from the department, the agency may update its analysis to reflect any comments received from the department and shall summarize the comments and the response of the agency along with a statement of the results of the updated analysis for the statement required by paragraph (10) of subdivision (a) of Section 11346.5.

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

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

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

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

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

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

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

(C) A policy statement overview explaining the broad objectives of the regulation and the specific benefits anticipated by the proposed adoption, amendment, or repeal of a regulation, including, to the extent applicable, nonmonetary benefits such as the protection of public health and safety, worker safety, or the environment, the prevention of discrimination, the promotion of

1 fairness or social equity, and the increase in openness and
2 transparency in business and government, among other things.

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

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

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

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

19 For purposes of this paragraph, “cost or savings” means
20 additional costs or savings, both direct and indirect, that a public
21 agency necessarily incurs in reasonable compliance with
22 regulations.

23 (7) If a state agency, in proposing to adopt, amend, or repeal
24 any administrative regulation, makes an initial determination that
25 the action may have a significant, statewide adverse economic
26 impact directly affecting business, including the ability of
27 California businesses to compete with businesses in other states,
28 it shall include the following information in the notice of proposed
29 action:

30 (A) Identification of the types and size of businesses that would
31 be affected.

32 (B) A description of the projected reporting, recordkeeping, and
33 other compliance requirements that would result from the proposed
34 action.

35 (C) The following statement: “The (name of agency) has made
36 an initial determination that the (adoption/amendment/repeal) of
37 this regulation may have a significant, statewide adverse economic
38 impact directly affecting business, including the ability of
39 California businesses to compete with businesses in other states.
40 The (name of agency) (has/has not) considered proposed

1 alternatives that would lessen any adverse economic impact on
2 business and invites you to submit proposals. Submissions may
3 include the following considerations:

4 (i) The establishment of differing compliance or reporting
5 requirements or timetables that take into account the resources
6 available to differing size of businesses.

7 (ii) Consolidation or simplification of compliance and reporting
8 requirements for differing size of businesses.

9 (iii) The use of performance standards rather than prescriptive
10 standards.

11 (iv) Exemption or partial exemption from the regulatory
12 requirements for differing size of businesses.”

13 (8) If a state agency, in adopting, amending, or repealing any
14 administrative regulation, makes an initial determination that the
15 action will not have a significant, statewide adverse economic
16 impact directly affecting business, including the ability of
17 California businesses to compete with businesses in other states,
18 it shall make a declaration to that effect in the notice of proposed
19 action. In making this declaration, the agency shall provide in the
20 record facts, evidence, documents, testimony, or other evidence
21 upon which the agency relies to support its initial determination.

22 An agency’s initial determination and declaration that a proposed
23 adoption, amendment, or repeal of a regulation may have or will
24 not have a significant, adverse impact on businesses, including the
25 ability of California businesses to compete with businesses in other
26 states, shall not be grounds for the office to refuse to publish the
27 notice of proposed action.

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

32 If no cost impacts are known to the agency, it shall state the
33 following:

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

37 (10) A statement of the results of the economic impact
38 assessment required by subdivision (b) of Section 11346.3 or the
39 standardized regulatory impact analysis if required by subdivision
40 (c) of Section 11346.3, a summary of any comments submitted to

1 the agency pursuant to subdivision (f) of Section 11346.3 and the
2 agency's response to those comments.

3 (11) The finding prescribed by subdivision (d) of Section
4 11346.3, if required.

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

9 (B) The agency officer designated in paragraph (14) shall make
10 available to the public, upon request, the agency's evaluation, if
11 any, of the effect of the proposed regulatory action on housing
12 costs.

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

17 (D) For purposes of model codes adopted pursuant to Section
18 18928 of the Health and Safety Code, the agency shall comply
19 with the requirements of this paragraph only if an interested party
20 has made a request to the agency to examine a specific section for
21 purposes of estimating the costs of compliance and potential
22 benefits for that section, as described in Section 11346.2.

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

37 (14) The name and telephone number of the agency
38 representative and designated backup contact person to whom
39 inquiries concerning the proposed administrative action may be
40 directed.

1 (15) The date by which comments submitted in writing must
2 be received to present statements, arguments, or contentions in
3 writing relating to the proposed action in order for them to be
4 considered by the state agency before it adopts, amends, or repeals
5 a regulation.

6 (16) Reference to the fact that the agency proposing the action
7 has prepared a statement of the reasons for the proposed action,
8 has available all the information upon which its proposal is based,
9 and has available the express terms of the proposed action, pursuant
10 to subdivision (b).

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

15 (18) A statement indicating that the full text of a regulation
16 changed pursuant to Section 11346.8 will be available for at least
17 15 days prior to the date on which the agency adopts, amends, or
18 repeals the resulting regulation.

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

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

26 (21) If the proposed regulation is subject to Section 11346.6, a
27 statement that the agency shall provide, upon request, a description
28 of the proposed changes included in the proposed action, in the
29 manner provided by Section 11346.6, to accommodate a person
30 with a visual or other disability for which effective communication
31 is required under state or federal law and that providing the
32 description of proposed changes may require extending the period
33 of public comment for the proposed action.

34 (b) The agency representative designated in paragraph (14) of
35 subdivision (a) shall make available to the public upon request the
36 express terms of the proposed action. The representative shall also
37 make available to the public upon request the location of public
38 records, including reports, documentation, and other materials,
39 related to the proposed action. If the representative receives an
40 inquiry regarding the proposed action that the representative cannot

1 answer, the representative shall refer the inquiry to another person
2 in the agency for a prompt response.
3 (c) This section shall not be construed in any manner that results
4 in the invalidation of a regulation because of the alleged inadequacy
5 of the notice content or the summary or cost estimates, or the
6 alleged inadequacy or inaccuracy of the housing cost estimates, if
7 there has been substantial compliance with those requirements.

O