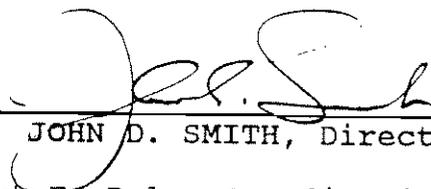


CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

In re:)
Request for Regulatory) 1990 OAL Determination No. 12
Determination filed by)
Michael O. Finch) [Docket No. 89-019]
concerning the Department)
of Finance's "Fiscal)
Impact Statement" (STD) November 2, 1990
399) and its related)
instructions in sections) Determination Pursuant to
6050-6057 of the State) Government Code Section
Administrative Manual) 11347.5; Title 1, California
(SAM)) Code of Regulations,
) Chapter 1, Article 3
)
)
)

Determination by:



JOHN D. SMITH, Director

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether the Department of Finance's "Fiscal Impact Statement" form and its related instructions are "regulations" required to be adopted in compliance with the Administrative Procedure Act. The form requires state agencies to indicate the fiscal effect of proposed regulations on (1) state and local governments and (2) federal funding of state programs. The accompanying instructions indicate what sort of agency rules must be formally adopted as regulations, define budgetary terms, and tell how to complete the form.

The Office of Administrative Law has concluded that the Fiscal Impact Statement and accompanying instructions are "regulations" required to be adopted in compliance with the Administrative Procedure Act, except for certain provisions which simply restate existing law.

THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not the Department of Finance's (sometimes "Department" or "DOF") "Fiscal Impact Statement" ("Standard Form 399," "STD 399," or "Form 399") and its related instructions in sections 6050-6057 of the State Administrative Manual ("SAM") are "regulations" required to be adopted pursuant to the Administrative Procedure Act.⁴

THE DECISION ^{5, 6, 7, 8, 9}

OAL finds that:

- (1) the Department's rules are generally required to be adopted pursuant to the Administrative Procedure Act ("APA");
- (2) the Form 399 and accompanying instructions in SAM are "regulations" as defined in the key provision of Government Code section 11342, subdivision (b), except for certain provisions which simply restate existing law;
- (3) the provisions of the challenged rules found to be "regulations" do not fall within any established exception to the APA; and therefore,
- (4) these regulatory provisions violate Government Code section 11347.5, subdivision (a).

R E A S O N S F O R D E C I S I O N

I. AGENCY; AUTHORITY; BACKGROUND

Agency

The Department of Finance was created by the Legislature in 1927.¹⁰ Since 1945, the Department's enabling act has appeared in Part 3 ("Department of Finance") of Division 3 ("Executive Department") of Title 2 ("Government of the State of California") of the Government Code. Part 3 currently consists of sections 13000--13881.

Government Code section 13070 states that

"The department has general powers of supervision over all matters concerning the financial and business policies of the State and whenever it deems it necessary, or at the instance of the Governor, shall institute or cause the institution of such investigations and proceedings as it deems proper to conserve the rights and interests of the State."
[Emphasis added.]

The Department's best known duty is preparation of the annual Governor's Budget for submission to the Legislature each January.¹¹ Among other statutory duties, the Department is mandated to conduct population research to provide demographics for the adequate distribution of resources and implementation of policy,¹² inspect State funded institutions,¹³ audit nonprofit corporations or foundations which enter into contracts with state educational institutions, and apply for federal loans for public works.¹⁴

In addition to these considerable duties and powers, the Department's statutes contain criminal penalties for anyone who violates its fiscal mandates. Government Code section 13030 states that it is a misdemeanor if one:

- "(a) Fails or neglects to make, verify, and file with the Department of Finance any report required by this part [Part 3, Division 3, Title 2, of the Government Code].
- "(b) Fails or neglects to follow the directions of the Department of Finance in keeping the accounts of his office.
- "(c) Refuses to permit the examination of or access to the records, files, books, accounts, papers,

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documents or cash drawers or cash of his office by a representative of the Department of Finance or in any way interferes with such examination."

One of the Department's duties involves control of costs to state government which are likely to result from the adoption of regulations by state administrative agencies. New regulations may affect direct costs to state agencies, the amounts of funds available from the federal government, and the obligation of the state to reimburse local governments for the cost of compliance with state mandates. The Department assures that cost impacts are estimated prior to the adoption of regulations and that funding is, or will be, available to cover the resulting costs.

Authority¹⁵

Three APA provisions authorize the Department to adopt regulations concerning preparation of fiscal impact statements by rulemaking agencies. These three provisions are Government Codes sections 11346.5, 11346.51, and 11346.52. One of these provisions, Government Code section 11346.51, was dropped from the unofficial annotated codes by the two legal publishers, West's and Deering's, in the early 1980's, under the belief it had been repealed. Even the Agency Response prepared in this proceeding by the Attorney General for the Department of Finance stated that section 11346.51 had been repealed.

Section 11346.51, however, is clearly cited by SAM section 6050 (revised July 1986) as still being in effect. Section 6050's introductory sentence reads:

" The purpose of this and the following sections is to comply with the requirements of Section 11346.51 of the Government Code, as added by Chapter 327, Statutes of 1982 (SB 1326, Alquist) by prescribing procedures to be followed by State agencies in developing estimates of the potential costs and/or savings which any local, State, or Federal agency may incur as the result of regulations which those State agencies propose to issue." (Emphasis added.)

Because of the importance of the fiscal impact review function, OAL decided to conduct a thorough, independent review of the legislative history of section 11346.51. In the process, we learned that DOF staff believed, as reflected in the above quotation from section 6050, that the statute was still in effect. After completing our legislative history review, we concluded, although the matter is not wholly free from doubt, that section 11346.51 is indeed still in effect and should be restored to the annotated codes. We shared our findings with the Office of Legislative Counsel, which after checking the statute

through its computerized indexing system, agreed that it had never been repealed and stated that the publishers would be advised in due course to print it in the annotated codes. (OAL's detailed findings are set out in note 16¹⁶.)¹⁷

The three key statutes provide as follows. Government Code section 11346.5, subdivision (a), paragraph (6) states that any notice of proposed regulatory action adopted in accordance with the APA must contain:

"[a]n estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state." [Emphasis added.]

The second key statute, Government Code section 11346.51, provides:

"The Department of Finance shall adopt and update, as necessary, instructions for inclusion in [SAM] prescribing the methods which agencies subject to the [APA] shall use in making the determination required by paragraph (5) and the estimate required by paragraph (6) of subdivision (a) of Section 11346.5. The instructions shall include, but need not be limited to, the following:

"(a) Guidelines governing the types of data or assumptions or both, which may be used, and the methods which shall be used, to calculate the estimate of the cost or savings to public agencies mandated by the regulation for which the estimate is being prepared.

"(b) The types of direct or indirect costs and savings which should be taken into account in preparing the estimate.

"(c) The criteria which shall be used in determining whether the cost of a regulation must be funded pursuant to Section 2231 of the Revenue and Taxation Code or whether the cost is not reimbursable pursuant to Sections 2205, 2206, 2206.5, or subdivision (b) and (c) of Section 2253.2 of the Revenue and Taxation Code.

"(d) The format the agency preparing the estimate shall follow in summarizing and reporting its estimate of the cost or savings to state and local agencies, school districts, and in federal funding of state programs which will result from the regulation." (Emphasis

added.)

The third key statute is Government Code section 11346.52, which read, when first enacted in 1982:¹⁸

"The Department of Finance may review any estimate prepared pursuant to Section 11346.51 for content including, but not limited to, the data and assumptions used in its preparation." (Emphasis added.)

The three quoted Government Code provisions clearly delegate the power to adopt quasi-legislative "instructions."¹⁹

Background: The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that statute's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]²⁰

In 1982, upon recognizing that state agencies were for various reasons bypassing APA requirements, the Legislature enacted Government Code section 11347.5. Section 11347.5,

in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

Background: This Determination

What is the "State Administrative Manual"? By its own terms, SAM is "a reference source for statewide policies, procedures, regulations, and information developed and issued by The Governor's Office, The Department of Finance, The Department of General Services, and The Department of Personnel Administration."²¹ [Emphasis added.]

SAM also provides:

"[T]he Department of Finance is delegated authority to supervise the fiscal policy of the State and is empowered to regulate specific financial and business policies of the State."²² [Emphasis added.]

On October 11, 1989, Michael O. Finch submitted to OAL a Request for Determination concerning the Department of Finance's Fiscal Impact Statement (Standard [STD.] Form 399) and its related instructions in SAM sections 6050-6057. The form 399 is attached to this determination as Appendix "A."

On March 30, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,²³ along with a notice inviting public comment.

On May 14, 1990, the Department filed a Response to the Request with OAL. The Department argues that the challenged rules (1) are not rules or standards of general application, (2) were not adopted to implement, interpret, or make specific the law enforced by the Department, and (3) in any event are exempt from the APA under both the "internal management" and "forms" exceptions.

II. ISSUES

The three main issues before us are:²⁴

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULES FOUND TO BE "REGULATIONS"

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FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."²⁵ Since the Department is clearly in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.²⁶

DOF's apparent position, by contrast, is that it is not subject to the APA. We note, for instance, that DOF has no regulations in the California Code of Regulations ("CCR"), except for its Conflict of Interest Code, incorporated by reference into section 37000 of Title 2 of the CCR. A further indication of a belief that it is not subject to the APA is found in a decision cited by the Department in its Agency Response: California Association of Nursing Homes, Etc. v. Williams.²⁷ In that case, the California Court of Appeal found that the Department of Health Services' ("DHS") incorporation by reference²⁸ of a Department of Finance document was a violation of the APA. The document, entitled "Schedule of Maximum Allowances," was a rule written by the Department of Finance for use in determining Medi-Cal reimbursements to nursing and convalescent homes. The court found that the Department of Finance had promulgated the rule without APA compliance, and that the Department of Health Services' effort to incorporate the rule into a valid regulation was without evidentiary support. The court stated:

"To put the matter bluntly, Regulation 51511 is the product of the Department of Finance, not of the Medi-Cal Agency [DHS]. The latter's adoption of the former's fiat without independent consideration of the underlying evidence and without public or judicial access to it transgresses fundamental demands for the adoption of administrative regulations."²⁹

Thus, the Court implicitly rejected the proposition that DOF rules need not be adopted pursuant to the APA. Indeed, we are not aware of any specific³⁰ statutory exemption which would permit DOF to issue regulations without complying with the APA.³¹ On the other hand, we are aware of a statute which specifically addresses the question of whether rules interpreting the APA must be adopted as regulations. Government Code section 11342.4 provides that OAL "shall adopt, amend, and repeal regulations for the purpose of carrying out the provisions of this chapter [the rulemaking portion of the APA]." (Emphasis added.) Thus, OAL has no choice but to adopt regulations to interpret, implement, and make specific the rulemaking provisions of the APA.

The three Government Code sections authorizing the Department of Finance to adopt instructions concerning fiscal impact statements are all contained in the rulemaking part of the APA (the chapter cited in Government Code section 11342.4). Since the fiscal impact instructions were issued for the purpose of carrying out the provisions of the rulemaking part of the APA (chapter 3.5), we conclude that Government Code 11342.4 requires these instructions to be adopted pursuant to the APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

The challenged rules were written by the Department of Finance and are published in SAM. They comprise a series of pronouncements concerning local mandates and estimates of costs resulting from regulatory actions of administrative agencies. In brief overview, by SAM section number, the challenged rules are as follows:

6050 - Overview of state agency mandates upon local agencies through regulatory enactments, and agency's obligation to estimate costs and savings.

6051 - Terms defined.

6052 - Determining mandates on local agencies and estimating costs and savings.

6053 - Estimating fiscal impact upon state government.

6054 - Estimating fiscal impact upon federal funding of state programs.

6055 - Standard Form 399, requirement for completed form in rulemaking files, supporting calculations, retention of record.

6056 - Requirement for approval by the Department of Finance.

6057 - Securing input from other agencies and Finance concurrence.

Having identified the challenged rules, we next discuss whether these rules are "regulations."

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supple-

ment or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

In Grier v. Kizer,³² the California Court of Appeal upheld OAL's two-part inquiry concerning whether or not a challenged agency rule is a "regulation" within the meaning of the key provision of Government Code section 11342, subdivision (b):

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

If an uncodified agency rule fails to satisfy both parts of the above two-part test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the

APA's requirements should be resolved in favor of the APA." [Emphasis added.]³³

STANDARD OF GENERAL APPLICATION

For an agency rule or standard to be of general application within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.³⁴ In its Agency Response, DOF argues that the challenged SAM provisions are not standards of general application. We cannot accept DOF's contention. We must, rather, conclude under the governing law that all the challenged rules are standards of general application. At a minimum, the challenged rules apply to all state agencies engaging in rulemaking under the APA.

Next, we shall quote DOF's arguments and then detail our reasons for disagreeing with them. In short, we must decline to create a de facto APA exemption by very narrowly construing the statutory term "standard of general application."

DOF argues:

". . . those cases which have found the existence of a rule or standard of general application . . . focus on the effect that a standard has on a class of individuals or entities who are outside of state government. For example, Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, found a State Personnel Board policy relating to withdrawals of resignations to be subject to the APA because of its 'import to all state civil service employees.' Similarly, the court in Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 736, found a procedure used to classify prison inmates to be subject to the APA because it represented a 'rule of general application significantly affecting the male prison population.' Finally, in City of San Marcos v. California Highway Com. (1976) 60 Cal.App.3d 383, 405,409, the court found a deadline applicable to local entities' applications for certain highway funds to be a regulation because it affected local entities unconnected with the state.

"This case is strikingly different. There is no application of a standard to individuals or entities that are not a part of state government. Use of STD 399 and the instructions are restricted to agencies of state government who [sic] desire to issue regulations which are subject to the APA. (Section 11347.3 subdivisions (a)(5) and (6).) Thus, the information is part of that which the public has available to it in reviewing and participating in the process by which

state agencies adopt regulations. If there are concerns as to fiscal impact, they can be addressed in the rulemaking forum.

"An important rule of statutory construction is the requirement that every statute be construed with reference to the scheme of which it is a part and in such a manner as to harmonize the varying provisions of each. [citation omitted.] The ability of the affected public to address concerns in a public forum has been described as a major purpose of the APA. (Armistead v. State Personnel Board, supra, 22 Cal.3d at page 104), Grier v. Kizer, supra, 90 D.A.R. at page 3644.) This interest is served when the fiscal impact information becomes a part of the rulemaking record. This goal must also be harmonized with the legislatively declared purposes of minimizing the regulations where possible and making the process and the results less complex. (sections 11340 and 11340.1.) [footnote omitted.] In this case, that harmonization occurs by a determination that STD 399 and its instructions do not constitute a standard of general application and are not, therefore, regulations within the meaning of the APA."

Though superficially plausible, the above argument cannot withstand close scrutiny. We cannot accept it for these reasons:

- (1) it assumes that the challenged SAM provisions are of no interest to and have no effect upon any person or entity other than state agencies;
- (2) it does not take into account the legal definition of "directly affected public";
- (3) even assuming arguendo that the challenged provisions apply to or affect state agencies solely, it ignores the clear statement of legislative policy contained in Government Code section 11347.5;
- (4) it cannot be reconciled with case law interpreting the phrase "general application";
- (5) it reflects an unduly constricted view of the purposes of the APA;
- (6) it does not address either the statutory ban on implied APA exemptions or the judicial presumption in favor of APA applicability.

(1) INTEREST TO AND EFFECT UPON PERSONS OUTSIDE THE STATE AGENCY COMMUNITY

In its Agency Response, DOF concedes that the challenged

provisions are part of a "process by which the promulgating agency informs itself and the public of the fiscal consequences of its actions." (Emphasis added.) On the other hand, later in the Agency Response, DOF contends that there is "no application of a standard to individuals or entities that are not a part of state government."

There is a curious inconsistency here. Do the rules governing disclosure of fiscal impact details affect the public or not? Would, for instance, local governments like to have a say concerning which and how much information concerning local mandates is included in rulemaking notices or rulemaking files?

Numerous APA provisions demonstrate a strong legislative concern (1) for full disclosure of fiscal impact information to the public,³⁵ (2) for careful consideration by the rulemaking agency of possible impact on small business,³⁶ and (3) for disclosure of information concerning impact on housing.³⁷

There are two additional respects in which the challenged Form 399 provisions appear to affect groups other than state agencies. First, if an agency's failure to comply with the requirements contained in the challenged rules results in DOF disapproval of the Form 399, this means that the proposed regulations will not become law.

For example, in Union of American Physicians and Dentists v. Kizer,³⁸ several agency rules were struck down by the California Court of Appeal as "underground" regulations. (An "underground" regulation is a rule that should have been, but was not, adopted pursuant to the APA.) One invalidated rule required physicians treating Medi-Cal patients to document the treatment provided in specified ways. If this rule had been included in a proposed regulation, and if DOF had declined to approve the Form 399 because, for instance, the cabinet-level agency secretary had not signed the form, the physicians would have been affected by this action in that they would not have been legally obligated to follow the documentation requirements.

Second, incorrect statements concerning which of an agency's rule must be adopted pursuant to the APA could have the unintended consequence of encouraging agencies to improperly issue rules without public notice and hearing, thus improperly subjecting the public to regulatory directives. As will be discussed in greater detail below at pp. 348-350, the Form 399 instructions mistakenly state that any agency rules "which can be described as 'forms' or as instructions relating thereto" (emphasis added) are exempt from the APA public notice and comment requirements. This misstates the law. This misstatement makes it sound as though all agency rules contained in forms or in form

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instructions are exempt from the APA. In fact, governing law provides that general rules adopted by agencies to implement, interpret, or make specific laws enforced by the agency must be adopted pursuant to the APA--whether or not such rules are contained in forms.

An agency acting in conformity with the above statement might well place a significant new directive in a form, without first obtaining public input. This DOF statement misinterpreting the APA "forms" exception affects numerous segments of the public. And, it affects not just the quality and quantity of the fiscal impact information available to the public--it could easily mean that the new rules would not go through the APA process at all!

Let us discuss a hypothetical example of the consequences of DOF's interpretation of the APA forms provision. What if the agency licensing automobile drivers is preparing a regulation designed to ensure that citizens applying for driver's licenses are capable of paying accident claims filed against them? Suppose the agency analyst reads SAM section 6050, concludes that forms are never subject to the APA, drops the rulemaking effort, and prepares form instructions requiring applicants for drivers' licenses to attach to their application forms copies of their last five years' federal income tax returns? Such an uncodified rule would clearly have an immediate impact on thousands of members of the regulated public. Also, there would have been no opportunity for public comment or for OAL review, which might have brought out legitimate concerns about the necessity and legality of the tax return disclosure requirement.

We do not dispute the practical value of legally correct fiscal impact rules. If such DOF rules were followed carefully, the general public would be benefited in several ways. Specifically, agencies would not adopt regulations causing them to overspend their budgets; these agencies would not need to seek additional funds from the Legislature. Taxpayers would thus benefit by either (1) not having to pay higher taxes to cover the cost overrun or (2) not having to see one program abolished, in order to offset the unexpected and excessive costs associated with regulations setting up a different program.

Similarly, suppose DOF blocks a proposed regulation after correctly concluding that it would impose a mandate on local governments which would cost the state \$100,000,000 a year in unbudgeted funds. Several effects can be identified: localities will not have to perform the function, localities would not have to fund performance of the function and would not have to file claims with the Commission on State Mandates, and state taxpayers would again not have to face the choice of having to pay higher taxes or reduce programs

which did not go over budget.

(2) "DIRECTLY AFFECTED PERSONS"--CCR DEFINITION

The DOF argument that the challenged provisions are not "of general application" does not take into account a duly adopted OAL regulation, which interprets another key APA provision. In brief, if a group of persons is found to be "directly affected" by a regulatory standard, it would seem logically necessary that the standard also be deemed to be generally applicable to this group of persons.

In 1979, the Legislature found that the language in regulations was "frequently unclear."³⁹ Accordingly, the Legislature directed OAL to review all proposed regulations to ensure that they were "clear." Government Code section 11349, subdivision (c) provides:

"'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." [Emphasis added.]

A regulation interpreting the emphasized phrase was adopted by OAL in 1985. This regulation, Title 1, CCR, subsection 16(b), provides:

"In examining a regulation for compliance with the 'clarity' requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

". . . .

"(b) Persons are presumed to be 'directly affected' [by a proposed regulation] if they:

"(1) are legally required to comply with the regulation; or

"(2) are legally required to enforce the regulation; or

"(3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or

"(4) incur from the enforcement of the regulation a detriment that is not common to the public in general." [Emphasis added.]

Some regulatory standards require state agencies to comply with specific rules. For instance, the Department of Personnel Administration recently adopted regulations

concerning drug testing of state employees in sensitive positions.⁴⁰ Many of the comments on the proposed regulations came from other state agencies. These other agencies were the "persons" who were going to have to "enforce" (or "comply with") the drug testing rules. The other state agencies, thus, were under Title 1, CCR, subsection 16(b), "directly affected" by the proposed regulations.

In the analogous context of determining whether or not rules which purportedly apply "only" to state agencies should be deemed to be rules of "general application," we would suggest that subsection 16(b) supports the conclusion that such rules are rules of general application. Clearly, state rulemaking agencies are expected to "comply with" the Form 399 requirements. Accordingly, these agencies are "directly affected" by the Form 399 rules. If all state agencies are "directly affected" by the Form 399 rules, it seems logically inevitable that these Form 399 rules should also be deemed to generally apply to state agencies.

Also, local governments would be "directly affected" by the local mandate disclosure requirements in the Form 399 rules in that these cities and counties would derive a benefit from the enforcement of that regulatory provision that is not common to the public in general.

(3) EVEN ASSUMING ARGUENDO THAT THE CHALLENGED SAM PROVISIONS APPLY TO OR AFFECT STATE AGENCIES SOLELY, THE DOF ARGUMENT FAILS BECAUSE IT IGNORES THE CLEAR STATEMENT OF LEGISLATIVE POLICY CONTAINED IN GOVERNMENT CODE SECTION 11347.5.

Government Code section 11347.5 was intended to send a strong signal to state agencies that it was unlawful to use underground regulations in performing the agency's duties. Section 11347.5 unequivocally states:

"No state agency shall issue. . . any guideline, . . . manual, . . . or other rule which is a regulation as defined in [the APA], unless the guideline, . . . manual, . . . or other rule has been adopted as a regulation [pursuant to the APA.]" [Emphasis added.]

We note that section 11347.5 applies to all state agencies and that it expressly mentions "manuals." Also, section 11347.5 specifically forbids four distinct agency actions: (1) issuing, (2) utilizing, (3) enforcing, and (4) attempting to enforce underground regulations.

According to Grier, it is not necessary that an agency rule require any sort of affirmative conduct by an affected party before the rule may be deemed to constitute a "regulation."⁴¹ In the matter at hand, we note again the

faulty interpretation of the forms exception that was "issued" by DOF. As is discussed below at pp. 348-350, the interpretation (1) is generally applicable to specified agency actions and (2) clearly constitutes a "regulation." The Agency Response makes no attempt to analyze this or any other specific provision of the Form 399 rules in terms of the statutory definition of "regulation" or in light of the statutory ban on the use of underground regulations. Rather, the Response discusses the Form 399 rules as a unit, and only in the most general terms.

(4) DOF'S ARGUMENT CANNOT BE RECONCILED WITH CASE LAW INTERPRETING THE PHRASE "GENERAL APPLICATION."

In the above quoted argument, DOF cites the case City of San Marcos v. California Highway Com. (1976) in support of the proposition that rules that apply "only" to state agencies should not be deemed to be "of general application." It is true, as DOF points out, that in San Marcos the underground regulation applied solely to local governments. However, San Marcos contains significant language which weighs heavily against DOF's position.

San Marcos refers to an earlier case decided by the California Supreme Court, Faulkner v. California Toll Bridge Authority (1953).⁴² In Faulkner, the plaintiffs sued to block construction of the Richmond-San Rafael Bridge on the grounds the resolution authorizing construction was an underground regulation. San Marcos quoted Faulkner as follows:

"The [Faulkner] court rejected the contention that the resolution affected the public generally, and stated, '. . . inasmuch as the "application" so urged by plaintiffs relates to only one particular bridge, and solely to the specific project described, and as the resolutions (as alleged) do not purport to treat generally with, for instance, all bridges or all toll bridges or any open class under the jurisdiction of the authority, we are satisfied that plaintiff's position in this respect is without merit."⁴³ [Emphasis added.]

The phrase "of general application" has thus been authoritatively interpreted by both the California Supreme Court and the First District Court of Appeal to mean "to apply generally to all members of any open class." (Emphasis added.) Clearly, a rule which applies to all state agencies applies to an "open class." Thus, DOF's argument cannot be reconciled with governing case law.

(5) DOF'S ARGUMENT REFLECTS AN UNDULY CONSTRICTED VIEW OF THE PURPOSES OF THE APA

After reviewing the APA and the cases interpreting it, we have identified six primary APA purposes:

1. Meaningful public participation (upholding democratic values)⁴⁴
2. Complete Administrative Record (Effective Judicial Review)⁴⁵
3. Insuring Clarity, Necessity, and Legality (Independent OAL review)⁴⁶
4. Central, Accessible Publication ("All agency rules in one place")⁴⁷
5. Control of Underground Regulations (Channel agency rules into APA process)⁴⁸
6. Reducing the number of adopted regulations (preventing the issuance of unnecessary regulations)⁴⁹

It is true, as the Agency Response points out, that one declared goal of the APA (see Government Code section 11340.1) is to reduce the number of regulations. However, this declaration must be read in conjunction with other APA provisions. Government Code section 11340, subdivision (c) specifically identifies the legislative concern: "[s]ubstantial time and public funds have been spent in adopting regulations, the necessity for which has not been established." (Emphasis added.) Thus, the Legislature declared in Government Code section 11340.1 that "it is in the public interest to establish an Office of Administrative Law which shall be charged with the orderly review of adopted regulations." (Emphasis added.) OAL was mandated to review all regulations proposed by state agencies, with an eye toward screening out those regulations for which "necessity had not been established."

Clearly, the regulation must be first submitted to OAL before it can be determined whether or not it is necessary.⁵⁰ In 1982, after having observed the 1979 revision of the APA in operation for about two years, the Legislature enacted Government Code section 11347.5. Legislative history documents indicate that the Legislature was concerned that some agencies were avoiding OAL review by simply issuing bulletins, manuals, etc., containing regulatory material.⁵¹ Thus, reading the pertinent APA provisions together, it is clear that agencies have several related responsibilities in exercising quasi-legislative power: (1) they should not issue general rules interpreting statutes or regulations unless these rules are necessary; (2) they must not issue these rules without first going through the APA public notice and comment process; and (3)

these rules must be submitted for OAL review prior to taking legal effect to ensure--in the words of Government Code section 11340, subdivision (e)--"that they are written in a comprehensible manner, are authorized by statute and are consistent with other law."

In upholding these principles, the Grier Court rejected an argument very similar to that contained in the Agency Response:

"The Department [DHS] also urges that by refraining from the adoption of a formal regulation, it advanced the APA's goal of reducing the number of administrative regulations. (section 11340.1.) The argument is unpersuasive. It is for the OAL to determine whether or not a regulation is necessary and nonduplicative; a regulation found to be unnecessary and nonduplicative will be disapproved. (section 11349.1, subds. (a)(1) and (a)(6).)" [Emphasis added.]⁵²

The Union of American Physicians and Dentists Court also rejected a similar argument:

"The Department also urges that compelling the adoption of formal regulations to cover the subject matter of informational bulletins such as these 'would require the felling of a forest to provide the paper for an infinitely expanding regulatory code.' The Department has raised this argument before, unsuccessfully. The mere desire to check the growth of administrative regulations does not excuse an agency from complying with the APA." [Emphasis added.]⁵³

It should also be noted that the fact that an agency rule is absent from the CCR does not mean it is non-existent. Such an agency rule can in practice substantially influence behavior. Indeed, such uncodified rules present several disadvantages from the public point of view: they have generally not been made available for public comment; they may well not be readily accessible to the public; they certainly have not undergone review by OAL.

(6) THE AGENCY RESPONSE ADDRESSES NEITHER THE STATUTORY BAN ON IMPLIED APA EXEMPTIONS NOR THE JUDICIAL PRESUMPTION IN FAVOR OF APA APPLICABILITY

The Agency Response does not address the applicability of Government Code section 11346, the statutory ban on the creation of implied APA exemptions.

Section 11346 provides:

"It is the purpose of this article to establish basic minimum procedural requirements for the adoption,

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amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

Nor does the Agency Response address the judicial presumption (found in Grier v. Kizer)⁵⁴ in favor of APA applicability. Resolution of the APA applicability issue in favor of DOF would indeed appear to have the effect of eliminating the chance for "interested persons," such as cities and counties, to "provide input" on the content of the fiscal impact disclosures.

Moreover, if the Form 399 rules were to be adopted pursuant to the APA, state agencies would have an opportunity to comment on these rules. Agencies may well have concerns, such as that DOF approve or disapprove fiscal impact statements submitted to it within a certain period of time, e.g., 30 days. Since rulemaking agencies must submit regulatory actions to OAL within one year of the date notice is published in the Notice Register, delay in obtaining an approved Form 399 might compel the rulemaking agency to start the entire rulemaking process over again if the one year deadline were missed.

Also, it would seem illogical to conclude that state agencies could support or oppose bills before the Legislature, could support or oppose federal agency rulemaking proposals, could support or oppose most California state agency rulemaking proposals, could sue various parties (including other state agencies) in court, but did not have the right to comment on fiscal impact rules which would significantly affect the performance of their statutory missions. It is noteworthy that the Department of Justice (Office of the Attorney General), which drafted the Agency Response in this determination proceeding on behalf of the Department of Finance, filed formal written comments concerning proposed OAL regulations in 1982.⁵⁵ These and other comments persuaded OAL to drop plans to adopt a particular proposed regulation.

And, if the challenged SAM provisions are deemed not to be underground regulations, state agencies will not be the only entities which will be denied notice and hearing under the APA. Members of the public would also be denied an opportunity for input. Local governments have a legitimate interest in commenting on the rules which cover review of

proposed regulations for local mandates. Certain local governments undoubtedly possess considerable experience and expertise in identifying mandates. Certain state agencies also possess expertise in this area, including the Commission on State Mandates and the Office of the Attorney General. Indeed, since the Department of Finance does not at present employ any staff attorneys to perform the "house counsel" function, it might be that comments from the legal perspective would be of assistance in the development of rules concerning fiscal impact review.

In summary, for the six reasons outlined above, we cannot accept the argument that the challenged rules are not standards of general application. Each of the challenged rules applies to all state administrative agencies which adopt regulations pursuant to the APA. The rules oblige all state agencies adopting, amending or repealing regulations to estimate the associated cost impacts and complete a Form 399, which summarizes those impacts. The challenged rules thus have general application to state agencies which engage in rulemaking. Beyond their general application to all state agencies practicing rulemaking, we note that the rules themselves will in some cases have an influence upon members of the public who, for instance, derive benefits from programs governed by administrative regulations.

HAVING CONCLUDED THAT THE CHALLENGED FISCAL IMPACT RULES ARE STANDARDS OF GENERAL APPLICATION, WE NOW PROCEED WITH A RULE BY RULE ANALYSIS OF WHETHER THEY HAVE BEEN ADOPTED TO IMPLEMENT, INTERPRET, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT.

IMPLEMENT, INTERPRET, OR MAKE SPECIFIC

Section 6050 presents a page and a half of material drawn from several sources, some of which are identified in the text of the challenged rule. The paraphrasing of a portion of Government Code section 11346.5 in the rule's second paragraph and the quotation of Government Code section 11342, subdivision (b), are simply restatements or quotations without any interpretation. The descriptions of Government Code sections 11346.1 and 11346.5 in the fourth and last paragraphs of section 6050 are correct, involving no interpretation or further specification of those statutes. As the Agency Response correctly points out, the mere repetition or description of a statute in a manual without alteration or enhancement of its meaning is not considered to be the type of "implementation" which constitutes a regulatory act.

Following the quotation of the definition of the term "regulation," section 6050 provides as follows:

"It should be emphasized that only two types of directives issued by a State agency are excluded from this definition and concomitant requirements: (1) those which relate only to the internal management of the agency; and (2) those which can be described as 'forms' or as instructions relating thereto." [Emphasis added.]

The latter portion (concerning forms) of the description of "two types of directives" which are not "regulations" is not accurate. We doubt that it was the intention of the Department of Finance to alter the existing law when it issued section 6050. However, the misinterpretation may have misled some of the many individuals who consult SAM.

The actual exclusion of "forms" from the definition of the term "regulation" is not nearly as broad as is described in section 6050. Section 11342, subdivision (b) provides, in part, as follows:

"'Regulation' does not mean or include . . . any form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part [Part 3.5, Division 3, Title 2, Government Code] when one is needed to implement the law under which the form is issued." [Emphasis added.]

Under the statutory definition of the term "regulation," the determination of whether written material presented in a form is regulatory hinges upon its content, rather than simply its format. As stated by the Court of Appeal:

"Whether the action of a state agency constitutes a [']regulation['] does not depend on the designation of the action, but rather on its effect and impact on the public. If the action is not only of local concern, but of statewide importance, it qualifies as a [']regulation['] despite the fact that it is called 'resolutions,' 'guidelines,' 'rulings' and the like." [Emphasis added.]⁵⁶

When the effect of material presented in a form is to interpret, implement or make specific the law enforced or administered by the agency which issued the form, the material is a "regulation." Compare SAM section 6050 which states that any directive which "can be described as" (emphasis added) a form or as "instructions relating thereto" is excluded from the definition of "regulation" and is thus exempt from APA rulemaking requirements.

The quoted language from section 6050 does not take into account the express statutory limitation on the forms "exception" and does not reflect the fact that courts have struck down forms and form instructions on the ground that they violated the APA.^{57, 58} Also not reflected in the section 6050 language is the fact that OAL has, in regulatory determinations issued pursuant to Government Code section 11347.5, found material contained in forms to constitute "regulations."⁵⁹

In this instance, we see two problems which have resulted from an attempt to paraphrase statutory law in a manual which is intended to impose requirements upon state agencies. The first is the problem which results when an agency issues statutory interpretations intended for general application without complying with the requirements of the APA. We find that the Department's description of what constitutes a "regulation" in section 6050 is an interpretation of Government Code section 11342, subdivision (b). The second problem is one which results when the interpretation issued by an agency is contrary to existing law, and therefore, invalid. We mention this second problem only because the interpretation in question is one involving a statute administered by OAL.

Section 6051 contains definitions of terms used in the other challenged rules. The definitions of "local agency," and "school district" are identical to the definitions of these terms appearing in both the Government Code and the Revenue and Taxation Code, which are already applicable to the matter of reimbursement of local mandates. Repetition of these definitions involves no further interpretation by the Department. Section 6051 contains ten other definitions of terms for which OAL was unable to locate a directly applicable statutory basis. The Department did not provide in its Response information identifying any legal basis for such definitions. The definitions interpret and make specific the meaning of terms essential to an understanding of the instructions in SAM sections 6050 through 6057, concerning estimates of the costs and savings associated with regulatory actions by state agencies.

Section 6052 concerns state agency estimates of the impact of regulatory enactments upon local agencies and school districts. The challenged rule contains accurate quotations of material from Article XIII B of the California Constitution and Government Code section 17516 and a number of statements which are either accurate descriptions of the existing statutes or the consequences which necessarily follow from such laws. Where the scope and meaning of the statutes is clear, such statements are not interpretations of the law.

Section 6052 also contains numerous provisions which modify

and in other ways go beyond existing statutory and state constitutional law. For example, on the topic of when costs to local governments are "costs mandated by the state," Government Code section 17556 directs the Commission on State Mandates to find no costs mandated by the state when the regulation "imposed duties which were expressly included in a ballot measure approved by the voters in a statewide election." (Emphasis added.) Compare section 6052, which provides "any costs which local entities incur as the result of a regulation which implements a ballot measure approved by the voters . . . would not be reimbursable by the State." (Emphasis added.) Similarly, the exemption of section 6052 from cost estimates for all regulations which implement a "federal directive" is broader than that found in section 17556. Under section 17556, a state regulation implementing a federal law or regulation will result in costs mandated by the state whenever the regulation mandates costs which exceed the mandate in the federal law or regulation. The challenged rule, on the other hand, interprets section 17556 with broader exclusions from the requirement for cost estimates for regulations based on ballot measures and federal law.

Section 6052 also presents instructions for gathering data and making calculations necessary for the estimation of costs. The discourse in section 6052 is presented largely as advice. We note, however, that sections 6055 and 6057 require the preparation of cost estimates, their retention in the rulemaking record, and in certain instances, their review by the Department of Finance. We have no information to indicate whether the Department, as a practical matter, requires compliance with these instructions in those estimates subject to its review, or whether the instructions are simply helpful information.

Some of the language is so indefinite that any directory effect it may have is left to speculation. For example, on the topic of working data, section 6052 provides:

"In addition, it is very useful and, in some instances essential, that a representative sampling of the affected entities be contacted and queried as to the impact of the mandate on them."

We are unable to determine whether the foregoing instruction is a "regulation" or simply a recommendation. Because the language of the instruction does not identify the circumstances in which the polling of affected agencies is essential, its meaning is not clear. If such polling is indeed essential and, by implication, required by the Department, then the instruction is a "regulation" interpreting Government Code section 11346.5, subdivision (a)(6), which requires an estimate prepared in accordance with instructions adopted by the Department.

Section 6053 begins with an accurate paraphrasing of Government Code section 17514.5, a correct statement concerning sections 17620 through 17625, and a logical conclusion drawn from the identified statutes. These provisions involve no new interpretations of the law. On the other hand, we note in section 6053 the following specification of the contents of a cost estimate:

"Although neither the Constitution nor the Government Code specifically require an estimate of any revenue changes at the local level as the result of a state executive regulation, any such impact should be included in the estimate prepared by the issuing agency." [Emphasis added.]

This is clearly a rule which makes Government Code section 11346.5, subdivision (a), paragraph (6) more specific. The fact that the instruction is expressed in the language of a recommendation, rather than in mandatory terms adds a measure of ambiguity, but does not, under the circumstances presented here, mitigate the regulatory effect.

Section 6053 further implements section 11346.5, subdivision (a), paragraph (6), by specifying the methodology for estimating costs to other state agencies. The methodology specified is the same as the one to be used for estimates of costs to local government set forth in SAM section 6052, adapted to suit state agencies. Section 6053 also interprets the requirement of section 11346.5, subdivision (a)(6) for an estimate of savings to state government as follows:

"Although only nondiscretionary savings must, by statute, be reported, discretionary savings should also be identified so that the total potential magnitude of such savings can be known." [Emphasis added.]

Once again, use of advisory terms ("should also be identified") introduces ambiguity concerning the question of whether a requirement is being stated or whether the provision is merely a recommendation having no binding effect. One might argue at this juncture that the Department is simply offering advice which agencies are free to reject, and that the offering of such advice is not a regulatory act, especially since it is identified as a provision not required by statute. The problem lies in the fact that the challenged rule was written by an agency which has the authority to review and approve these cost estimates. The probable effect of the challenged rule on affected agencies is that they will perform the tasks which "should be done" as certainly as those which "shall be done," although some may wonder if doing so was actually

required.

The effect of the provision above concerning the identification of discretionary savings is to interpret, implement and make specific the requirement of section 11346.5, subdivision (a), paragraph (6) for an estimate of "the cost or savings to any state agency." (Emphasis added.)

Section 6054 presents a brief discussion of the types of circumstances in which increases and decreases in federal funding of state programs are likely to occur. The discussion is factual, and not an interpretation of any other law. The challenged rule also provides, however, an instruction for the preparation of estimates of federal costs and federal savings which is an interpretation of Government Code section 11346.5, subdivision (a), paragraph (6). We note that section 6054 provides in part:

"In this context, it is important to distinguish between regulations which implement Federal mandates and those which are issued under authority granted by the Federal Government."
[Emphasis in original.]

Section 6054 briefly identifies acceptable methods for estimating federal costs and savings. These provisions interpret section 11346.5, subdivision (a), paragraph (6)'s general requirement for such estimates prepared in accordance with instructions adopted by the Department.

Section 6055 repeats without significant change the regulatory language from section 6050 pertaining to the definition of the term "regulation" and the forms and internal management exclusions from that definition. This matter has been thoroughly discussed above, on pages 348-350, where we concluded that the challenged rule is an interpretation of Government Code section 11342, subdivision (b). The primary import of section 6055, however, is stated in advisory language typical of the challenged rules. Having alluded to the statutory requirement for cost estimates, section 6055 provides:

"Fiscal Impact Statement, Std. Form 399, (see 6055 Illustration) has been developed for this purpose, a copy of which should be attached to each Face Sheet for Filing Administrative Regulations, Form OAL 4 [now, STD 400 or Form 400, "Notice Publication/Regulations Submission," Rev. 7/90], with the Office of Administrative Law (OAL)."

(It should be noted here that the Form 400 was adopted pursuant to the APA, effective July 25, 1990.)⁶⁰

The requirement for reporting data on Form 399 implements

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the more general directive of Government Code section 11346.5, subdivision (a), paragraph (6), which requires:

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

"For purposes of this section, 'cost or savings' means additional costs or savings, both direct and indirect, which a public agency necessarily incurs in reasonable compliance with regulations."

The simple fact that use of Form 399 is established as a generally applicable requirement to implement Government Code section 11346.5, subdivision (a), paragraph (6), is sufficient to impart regulatory effect. The form itself contains four additional standards of general application not set forth in existing law.

First, in section (A)(2), the form obliges the agency proposing a regulation to indicate the reason that reimbursement of local government is required. Second, in sections (A)(4) and (A)(5), the form requires agencies to indicate the reason the regulation creates no costs or savings for local government. Third, section (B)(1) asks agencies proposing a regulation to indicate how other state agencies will be able to pay additional costs expected to result from the regulation. Fourth, at the bottom of the Form 399 is a space for "Agency Secretary Approval/Concurrence": the rulemaking agency is required to not only (1) submit the form, (2) with the signature of a rulemaking agency representative, but also (3) obtain the signature of the cabinet-level agency secretary (one of the highest ranking Executive Branch officials, who report directly to the Governor).

Each of these standards applies generally to all state administrative agencies proposing regulations. Each implements section 11346.5, subdivision (a), paragraph (6), by requiring agencies to determine and report the information listed and to make it a part of the rulemaking record. It is noteworthy that section (B)(1) of the Standard Form 399, which was adopted without the input of many of the state agencies affected by its terms, in certain instances requires a rulemaking agency to seek the input of other agencies regarding costs likely to result from regulations.

Section 6056 specifies which estimates of fiscal impact are subject to review by the Department. The challenged rule states that review of estimates is authorized by Government Code section 11346.52. This rule (requiring Department approval of (1) estimates which predict either local or state costs or savings and (2) estimates which indicate that funds will be requested in a subsequent Governor's budget) implements the Department's review authority. The challenged rule also interprets Government Code section 11346.5, subdivision (a), paragraph (6), by setting standards which apply generally to govern the review of estimates of the cost impact of proposed regulations. Section 6056 also implements section 11346.5, subdivision (a), paragraph (6), by specifying generally applicable time limitations for such review.

Section 6057 concerns an agency's obligation to secure the input of other agencies concerning the potential fiscal impact of proposed regulations. The challenged rule, for the most part, mirrors notification procedures which have already been established in the APA. To the extent the Department restates these requirements, no new interpretation of the law is involved. Section 6057 provides:

"Such input should be solicited by the issuing agency by all means practical, including public hearings, OAH 'Notice Supplement,' [sic] and any other appropriate means."⁵¹

In summary, we conclude that some parts of the Form 399 and its instructions are "regulations" within the meaning of the key provision of Government Code section 11342, subdivision (b). The next question is whether these provisions are nonetheless exempt from APA requirements.

THIRD, WE INQUIRE WHETHER THE PROVISIONS FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute from the application of the APA.⁶² Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.⁶³

In addition to arguing that the challenged rules are not "regulations" under the two-part test set out above, the Department contends that the challenged rules fall within two exceptions to the APA--(1) the internal management exception and (2) the exception concerning forms and form instructions. What, precisely, does the APA say about the internal management and forms exceptions?

Internal Management Exception

Government Code section 11342, subdivision (b), provides in part that:

"'Regulation' means every rule . . . or the amendment of any such rule . . . adopted by the state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency." [Emphasis added.]

The cases which have interpreted the "internal management" exception have limited the exception to a very narrow class of rules.⁶⁴ A review of the case law demonstrates that the "internal management" exception applies if the rule under review (1) affects only the employees of the issuing agency^{65, 66} and (2) does not address a matter of serious consequence involving an important public interest.^{67, 68}

SAM section 6050 (one of the challenged rules) accurately paraphrases the above quoted part of section 11342, subdivision (b): agency directives are exempt under the internal management provision if the directives "relate only to the internal management of the agency." (Emphasis added.)

Internal Management Element One: Affects only Employees of the Issuing Agency

In the Agency Response, DOF makes a delicately balanced two-pronged argument:

(1) "STD 399 and instructions relate to the fiscal affairs of the promulgating agency. . . . [E]ach of the factors that are to be addressed on the STD 399 relate directly to the internal budgeting affairs of the promulgating agency. There is no external impact on entities or individuals outside the agency." [Emphasis added.]

(2) "Where fiscal affairs are concerned, and we deal with cost increases, costs [sic] savings, changes in federal funding, and state mandates, with an integrated whole that is the state budget. In the final analysis, no agency exists completely apart from any other in the budget process. Though STD 399 and its instructions may emanate from the Department of Finance and may be directly related to another agency, budgetary matters are inherently interrelated. Thus, this direction should be construed as occurring within the confines of a single entity (the State of California) and in relation to the internal management of that entity.

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(City of San Marcos v. California Highway Com., supra, 60 Cal.App.3d 383, 408.) As such, STD 399 and SAM 6050 through 6057 are exempt under the provisions of Section 11342 subdivision (b)." [Emphasis added.]

There are a number of serious difficulties with DOF's line of reasoning.

First, it tries to demonstrate that the challenged rules relate only to one state rulemaking agency--obviously section 11342, subdivision (b) is addressing the single agency--while simultaneously contending that "the State of California" (presumably, the 100-plus rulemaking agencies in the Executive Branch) is the state agency! While we recognize that the term "state agency" may take on different meanings in different statutory contexts, this "now-you-see-it, now-you-don't" approach is stretching things too far. A rule either relates "only to the internal management of the state agency" (Government Code section 11342, subdivision (b); emphasis added) or it doesn't.

In Armistead v. State Personnel Board, the California Supreme Court discussed the validity of a State Personnel Board ("SPB") rule concerning resignations that applied to all state employees. This SPB resignation rule had been used by the Department of Water Resources ("DWR") against a DWR employee. Before the Armistead Court, SPB defended the challenged rule in terms strikingly similar to the approach taken by DOF in the matter at hand. SPB argued that the resignation rule "'relate[d] only to the internal management of the state agencies'" (emphasis added) and therefore was exempt from the APA.⁶⁹ (We note that the statute refers "the agency" (singular), rather than "the agencies" (plural).) The Armistead Court rejected that argument, pointing out that the challenged rule (1) was designed for use by personnel officers in "agencies" throughout the state, and (2) was not a rule relating only to SPB's "internal affairs."⁷⁰ Clearly, "the" agency for purposes of section 11342, subdivision (b) in Armistead was SPB. DWR was "a" directly affected agency, but not "the" agency that had issued the rule. In order to fall within the internal management exception, the resignation rule would have to "relate only to the internal management of [SPB]." As the Armistead Court suggested, SPB had "confused the internal rules which may govern the department's procedure. . . and the rules necessary to properly consider the interests of all . . . under the statutes." (Emphasis added.)⁷¹

Second, the Agency Response in substance asks OAL to create a new APA exemption. When construing the internal management exception, there is no third alternative--an agency rule either relates solely to the internal management of that agency or it doesn't. Apparently anticipating metaphysical arguments such as that found in the Agency

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Response, the Legislature adopted the following statute (Government Code section 11346) in 1947:

"It is the purpose of this article [Article 5, Chapter 3.5, Part 1, Division 3, Title 2, Government Code] to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1 [emergency regulations], the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly." [Emphasis added.]

In short, the Agency Response is urging us to create an implied exemption for rules which purportedly affect only an agency called "the State of California." This we cannot do. Government Code section 11346 creates two criteria for APA exemptions: (1) they must be in statute, and (2) they must be "express." An example of an "express" exemption is Labor Code section 1185, which provides:

"The orders of the [Industrial Welfare Commission] fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the provisions of this chapter, shall be valid and operative and such orders are hereby expressly exempted from the provisions of Article 5 (commencing with section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code." [Emphasis added.]

The "wage order" exemption created by Labor Code section 1185 meets both of the criteria set out in Government Code section 11346; the proposed "State of California" exemption meets neither.

Contrary to DOF's assertions, it is clear that the entire Executive Branch does not constitute an "agency." Review of the APA makes clear that rulemaking is to be performed by each individual state agency.⁷² For instance, Government Code section 11343 makes clear that, with certain exceptions, "every state agency" shall transmit to OAL for filing with the Secretary of State a certified copy of every regulation it adopts. Government Code section 11343, subdivision (f), specifies who must certify the regulation copy on behalf of the rulemaking agency:

"Whenever a certification is required by this section, it shall be made by the head of the state agency or his

or her designee which is adopting, amending, or repealing the regulation and the certification and delegation shall be in writing." [Emphasis added.]

When OAL adopts a regulation, the head of the agency--the Director of OAL (or designee)--signs the certification accompanying the adopted regulation. If the Executive Branch were the "agency," then logically the Governor would sign. The obvious reality is that individual agency heads sign certifications, e.g., the Director of Health Services. If the Agency Response's theory were correct, the Governor would sign every agency certification required by the APA.

In summary, OAL cannot accept the argument that the "State of California" is an "agency" for APA purposes and that the fiscal impact rules at issue here should be deemed to affect only the employees of that agency. We conclude that the challenged fiscal impact rules in fact not only affect the employees of the issuing agency (DOF), but also affect all state rulemaking agencies and, in some respects, members of the regulated public.

Therefore, these rules may not under Armistead and Grier be deemed to fall in the internal management exception. As Grier points out, Armistead drew a distinction between "purely internal rules which merely govern an agency's procedure and rules which have external impact so as to invoke the APA. . . ." [Emphasis added.]⁷³ It is clear that the fiscal impact rules are not "purely internal" DOF rules; they have external impact.

Internal Management Element Two: whether the challenged rules address a matter of serious consequence involving an important public interest

Even assuming for the sake of argument that the fiscal impact rules do affect solely employees of the issuing agency (DOF), they would nonetheless concern a matter of serious consequence involving an important public interest. Two related, important public interests are involved. First, ensuring that state government remains fiscally responsible, that agencies stay within their budgets and do not force the Legislature to choose between cutting programs or raising taxes. Second, the Carmel Valley case teaches us that it is important that state government avoid unwittingly imposing regulatory mandates on local governments that could lead to substantial liabilities in the future.⁷⁴

Thus, we conclude that the fiscal impact rule are not exempt under the internal management exception.

Forms Exception

As discussed above, at pages 348-350, there is a so-called

forms exception to APA requirements. If a form or form instruction contains "regulations" within the meaning of Government Code section 11342, subdivision (b), however, that "regulation" must nonetheless be adopted pursuant to the APA. In other words, if a form contains uniform, substantive rules which were adopted in order to implement a statute, those rules must be promulgated in compliance with the APA.⁷⁵ According to the California Court of Appeal, "the statutory exemption relat[es] to operational forms."⁷⁶ (Emphasis added.) There is, thus, no requirement that an agency adopt a form as a regulation when that form simply provides an operationally convenient place in which applicants for licenses can, for instance, write down information which existing provisions of law already require them to furnish to the licensing agency. By contrast, if an agency form goes beyond existing legal requirements, if that form contains uniform, substantive provisions which in essence make new law, then, under Government Code section 11342, subdivision (b), a formal regulation is "needed to implement the law under which the form is issued."

Thus, we conclude that the fiscal impact rules are not exempt under the forms exception. Nor do any of the other recognized general exceptions (set out in footnote 63) apply to the challenged rules.

Finally, any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.⁷⁷ Like OAL's regulations, the Department's instructions interpret a provision from the APA. Although, as noted by the Department, the instructions do indeed further the purposes of the APA, this fact provides no immunity from APA requirements. Just as the APA was enacted to guarantee the right of members of the regulated public to participate in rulemaking, rules implementing the APA should be adopted with the full benefit of such participation.

If DOF elects to formally adopt the fiscal impact rules as regulations pursuant to the APA, OAL will act promptly to assist, including--if deemed appropriate--cooperating with DOF in jointly adopting desired provisions into Title 1 of the California Code of Regulations. OAL's Form 400, along with other requirements which rulemaking agencies (and in some respects members of the regulated public) are obliged to follow, is found in Title 1.

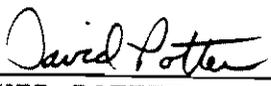
III. CONCLUSION

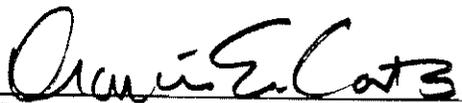
For the reasons set forth above, OAL finds that:

- (1) the Department's regulations are generally required to be adopted pursuant to the APA;
- (2) the Form 399 and instructions are "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) the Form 399 and instructions do not fall within any established exception to the APA; and therefore
- (4) the Form 399 and instructions violate Government Code section 11347.5, subdivision (a), except where they simply restate existing law.

DATE: November 2, 1990


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NOTES

1. This Request for Determination was filed by Michael O. Finch, 6400 66th Avenue, #12, Sacramento, CA 95823. The Department of Finance was represented by Marsha A. Bedwell, Deputy Attorney General, Department of Justice, 1515 K Street, Suite 511, P.O. Box 944255, Sacramento, CA 94244-2550, (916) 327-0352.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "328" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

(1) Los Angeles v. Los Olivas Mobile Home P. (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449, the Second District Court of Appeal--citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved)--refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing.

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as non-mandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

(3) California Coastal Commission v. Office of Administrative Law (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560 (relying on a footnote in a 1980 California Supreme Court opinion, First District Court of Appeal, Division One, set aside 1986 OAL Determination No. 2 (California Coastal Commission, Docket No. 85-003) on grounds that challenged coastal development guidelines fell within scope of express statutory exception to APA requirements); review denied by California Supreme Court on August 31, 1989, two justices dissenting.

(4) Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (giving "due deference" to 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016), the Second District Court of Appeal, Division Three, held that the statistical extrapolation rule used in Medi-Cal provider audits was an invalid and unenforceable underground regulation).

(5) California State Employees' Association v. State of California (1990) 222 Cal.App.3d. 491, 271 Cal.Rptr. 734, petition for review denied and opinion ordered depublished on October 11, 1990 (memorandum issued by the Department of Corrections concerning possible disciplinary action and mandatory counseling for employees charged with "Driving Under the Influence" was an underground regulation).

(6) Union of American Physicians and Dentists v. Kizer (1990) _____ Cal.App.3d _____, 272 Cal.Rptr. 886 (following 1987 OAL Determination No. 10 and Grier v. Kizer, Court held that statistical extrapolation rule and Medi-Cal claims documentation requirements were underground regulations, but held further that extrapolation rule could be used in audits pending when rule was adopted into CCR, since application of this

rule did not change the legal effect of earlier events).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a ['']regulation,[''] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244 (finding that Department of Health Services' audit method was illegal and unenforceable because it was an underground regulation which should have been adopted pursuant to the APA); Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.
- "(c) The office shall do all of the following:
1. File its determination upon issuance with the Secretary of State.
 2. Make its determination known to the agency, the Governor, and the Legislature.
 3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
1. The court or administrative agency proceeding involves the party that sought the determination from the office.
 2. The proceeding began prior to the party's request for the office's determination.
 3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

5. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" 219 Cal.App.3d ___, 268 Cal.Rptr. at 251.

In regard to the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." (Id.; emphasis added.)

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was

"entitled to due deference." (Emphasis added.) 219
Cal.App.3d at _____, 268 Cal.Rptr. at 247.

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

OAL received no public comments on this Request for Determination.

The Department's Response to the Request for Determination was received by OAL on February 13, 1990, and was considered in this Determination.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00.

10. Statutes of 1927, chapter 251, sec. 1, p. 449.
11. Government Code section 13337.
12. Government Code sections 13073 and 13073.5.
13. Government Code section 13076.
14. Government Code section 13079.
15. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

16. Analysis of Government Code sections 11346.51, 11346.52, 11346.55

Both annotated codes omit from the Government Code section 11346.51 which relates to the adoption of criteria by the Department of Finance for the preparation of cost impact estimates. OAL, after research and consultation with the Office of the Legislative Counsel, determined that section 11346.51 as adopted at section 32 of Statutes of 1982, chapter 327, continues in effect. We also noted that the reference to section 11346.55 embedded in section 11346.52 should be changed by legislative action to refer to section 11346.51. The analysis upon which we base these determinations follows.

Statutes of 1979, chapter 567, section 1, adopted section 11346.51 relating to actions with significant effect on housing costs. This section did not become operative because of the provisions of section 4 of chapter 567; and because chapter 940 (Senate Bill 772) of that year was chaptered after chapter 567 (Assembly Bill 1111). Section 4 of chapter 567 provides:

"Section 11346.51 of the Government Code, as added by Section 1 of this act, shall become operative only in the event that both this bill and Senate Bill 772 [Stats. 1979, ch. 940] are chaptered and become effective January 1, 1980, Senate Bill 772 adds section 11424.5 to the Government Code, and this bill is chaptered last." [Stat. 1979, ch. 567, sec. 4.]

Statutes of 1980, chapter 1238, page 4204, at section 1.5, repealed section 11346.51 (housing costs), as adopted in Statutes of 1979, chapter 567, page 1778, section 1 (see above for discussion of Statutes 1979, chapter 567, section 1).

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Statutes of 1980, chapter 1238, page 4204, at section 2, adopted, in the same act as the above repeal, a similar section 11346.51 (housing costs).

Statutes of 1981, chapter 865, page 3316, section 29.4, proposed a repeal of section 11346.51 (housing costs) which did not become operative under the terms of section 40 of chapter 865.

Statutes of 1981, chapter 983, page 3813, section 2, proposed the addition of another section 11346.51, relating to the inclusion in the informative digest a comparison of the proposed regulations with federal law, which did not become operative under the terms of section 7 of chapter 983.

Statutes of 1982, chapter 327, section 31, amended and renumbered the section 11346.51 (comparison with federal law) to section 11346.52. This is described in the statute as an "amendment," so it is read as an amendment and adoption of the inoperative section 11346.51 (comparison with federal law) of chapter 983 of the previous year; not as a repeal and replacement of the section 11346.51 (housing costs) of chapter 1238, Statutes of 1980.

Section 32 of the same chapter (Statutes of 1982, chapter 327) added a section 11346.51 relating to Department of Finance regulations on criteria for local mandate impact estimates.

Section 33 of the same chapter (Statutes of 1982, chapter 327) added section 11346.52 (a second 11346.52 in the same act) relating to Department of Finance review of local mandate impact estimates. This section contained an embedded reference to the section 11346.51 (criteria for impact estimates) adopted in section 32 of the same chapter.

Therefore, upon the adoption of chapter 327, Statutes of 1982, there were two operative sections numbered 11346.51 and two operative sections numbered 11346.52.

Statutes of 1983, chapter 797, section 16, renumbered and amended section 11346.51 (housing costs) to section 11346.55 relating to housing costs. The publishers of both annotated codes assumed that this repealed section 11346.51 (criteria for impact estimates) of Statutes of 1982, chapter 327, section 32. The term "amendment" indicates that this action did not repeal the "criteria for impact estimates" section and replace it with a "housing costs" section. Instead, the term "amendment" indicates that the Legislature was modifying a housing impact section. Therefore, this action did not affect section 11346.51 (criteria for impact estimates) of Statutes of 1982, chapter 327, section 32, but instead amended and renumbered 11346.51 of Statutes of 1980,

chapter 1238, section 2 relating to actions with significant effect on housing costs.

Section 17 of the same chapter (Statutes of 1983, chapter 797) repealed section 11346.52 (comparison with federal law). As noted above, there were two separate sections numbered 11346.52, both adopted in chapter 327 of Statutes of 1982: one relating to comparison of proposed regulations to federal law; and, the other relating to Department of Finance review of impact statements. The annotated codes assumed it was the "comparison with federal law" that was repealed (because this language also appeared in section 11346.5(a)(3), and left the "review of cost impact estimates" language intact.

Statutes of 1986, chapter 248, section 59, amended section 11346.52 relating to review of impact estimates by Department of Finance by changing embedded reference from 11346.51 to 11346.55. This amendment confirms the interpretation of Statutes of 1983, chapter 797, section 17 as repealing the "comparison with federal law" section 11346.52, and not the "review of cost impact estimates" section 11346.52. The particular change to the embedded reference was done on the assumption that the prior reference to 11346.51 was to the housing cost section, whereas the reference as originally written in chapter 327 of Statutes of 1982 was to the "criteria for cost impact estimates" section 11346.51. That is, the current reference to "section 11346.55" embedded in section 11346.52 ought to be changed by legislative action to refer to "section 11346.51" relating to the preparation of cost estimates.

Based on the above analysis, the Office of Administrative Law has determined that Government Code section 11346.51 as adopted in Statutes of 1982, chapter 327, section 32 continues in effect; and that the change in the embedded reference in section 11346.52 from "11346.51" to "11346.55" was made in error. Legislation re-adopting section 11346.51 and reverting the embedded reference in section 11346.52 would clear any remaining uncertainty.

17. OAL Staff Counsel Frank Coats contributed substantially to this determination by conducting the legislative history review and preparing the OAL findings.
18. As noted in an earlier note, a subsequent drafting error replaced the reference to section 11346.51 with a reference to section 11346.55.

19. Another Government Code section (not part of the APA) confers a limited power to review regulations upon the Department. Government Code section 13075 provides:
- "(a) When authorized or required by the Legislature in the Budget Act, the Department of Finance may exercise control over the adoption of regulations as provided in this section. The Legislature shall not authorize or require the Department of Finance in the Budget Act to review and approve regulations adopted by state agencies except:
- "(1) Regulations adopted by the Department of Social Services which add to the cost of any public assistance programs as these are defined in Section 10061 of the Welfare and Institutions Code.
- "(2) Regulations adopted by a state agency which would have the effect of increasing expenditures from the Health Care Deposit Fund under the Medical Assistance Program.
- "The Department of Finance shall limit its review of a regulation under this section to making a determination as to whether sufficient funds are available to fund the added program expenditures which would be incurred if the regulation were adopted. . . .
- "(b) The Department of Finance shall issue written instructions to the state agencies which adopt regulations subject to the provisions of this section. . . ." [Emphasis added.]
20. Grier v. Kizer, (1990) 219 Cal.App.3d 422, ___, 268 Cal.Rptr. 244, 249.
21. SAM, page 0001.
22. Id.
23. Register 90, No. 13-Z, March 30, 1990, p. 504.
24. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this

earlier Determination may be found in note 2 to today's Determination.

25. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
26. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
27. (1970) 4 Cal.App.3d 800, 84 Cal.Rptr. 590.
28. DHS incorporated by reference the Department of Finance's "Schedule of Maximum Allowances" in section 51511 of Title 22 of the California Administrative Code (now entitled the California Code of Regulations).
29. California Association of Nursing Homes, Etc. v. Williams (1970) 4 Cal.App.3d 814, 813-814, 84 Cal.Rptr. 590, 599.
30. By "specific," we mean an exemption which pertains solely to one specific program or to one specific agency, such as the statute stating that the rule setting the California minimum wage is exempt from APA requirements (Labor Code section 1185). A specific exemption contrasts with a "general" exemption or exception, which applies across-the-board to all agency enactments of a certain type, such as those listed in note 63.
31. As noted above in note 16, we concluded that Government Code section 11346.51 is still in effect. The argument thus could be made that section 11346.51 exempts the fiscal impact rules from the APA in that the statute states that DOF shall "adopt and update, as necessary, instructions for inclusion in [SAM] prescribing the methods which agencies

subject to the [APA] shall use in making the determination required by paragraph (5) and the estimate required by paragraph (6) of subdivision (a) of Section 11346.5." (Emphasis added.) The argument would be that since DOF was instructed to include the rules in SAM, that the Legislature intended that the rules not be adopted pursuant to the APA (and thus not printed in the CCR).

We cannot accept this argument. Other APA provisions require "all agencies" to adopt regulations pursuant to the APA. Section 11346.51 should be read in conjunction with these other provisions to give full effect to both. Harmonizing these various APA provisions, it is clear that DOF is obliged by the APA to (1) adopt the fiscal impact rules pursuant to the APA and also (2) to then print the rules in SAM. The SAM printing requirement is clearly an "additional" requirement within the meaning of Government Code section 11346.

Government Code section 11346 makes clear that (1) all quasi-legislative rules must be adopted pursuant to the APA, (2) nothing in the APA repeals or diminishes "additional requirements" imposed by statute, and (3) the APA provisions shall not be superseded or modified by subsequent legislation except insofar as that legislation does so expressly. Clearly, section 11346.51 has not "expressly" superseded the earlier-adopted APA public notice and comment requirements. Also, there is no inconsistency between the SAM publication requirement and APA rulemaking requirements. DOF can readily comply with both.

True, the SAM publication requirement serves a very useful purpose: insuring that state agency fiscal personnel will have ready access to the fiscal impact rules. All state agencies have copies of SAM. Few state agencies have complete copies of the CCR. However, members of the various publics regulated by state agencies also need to be able to locate the fiscal impact rules. Members of the regulated public will be able to use the compilation in which all "regulations" adopted by state agencies are required to be codified--the California Code of Regulations, which is available in California in all county law libraries and law school libraries, and is now becoming available nationwide on databases accessible over phone lines by personal computers equipped with modems.

32. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

33. Id., 219 Cal.App.3d at ____, 268 Cal.Rptr. at 253.

34. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552; 34. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-24 (standard of general application applies to all members of any open class).
35. Government Code section 11346.7, subdivision (b)(2), section 11346.5, subdivisions (a)(5) and (a)(6), and section 11349.1, subdivision (d).
36. Government Code sections 11346.4, subdivision (a)(3), 11346.53, and 11346.7, subdivision (a)(4).
37. Government Code section 11346.55.
38. (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.
39. Government Code section 11340, subdivision (b).
40. Title 2, CCR, sections 599.960 - 599.966. (OAL file number 88-0805-01, filed with the Secretary of State on September 7, 1988.)
41. (1990) 219 Cal.App.3d 422, ___, 268 Cal.Rptr. 244, 253.
42. 40 Cal.2d 317.
43. 60 Cal.App.3d 383, 407, 131 Cal.Rptr. 804, 819.
44. Government Code sections 11346.8 and 11346.4; California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 131 Cal.Rptr. 744.
45. Government Code section 11347.3; California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 131 Cal.Rptr. 744. See also Government Code section 11350.
46. Government Code sections 11349 and 11349.1.
47. Government Code sections 11344 and 11343.

48. Government Code section 11347.5.
49. Government Code sections 11340 and 11340.1.
50. Also, some regulations are specifically mandated in legislation; clearly, the Legislature did not contemplate that agencies would act to reduce the number of regulations by neglecting to adopt these mandated regulations. Newland v. Kizer (1989) 209 Cal.App.3d 647, 257 Cal.Rptr. 450 (mandate is proper remedy to require the Department of Health Services to adopt statutorily mandated regulations concerning temporary operation of long-term health care facilities); California Association of Health Facilities v. Kizer (1986) 178 Cal.App.3d 1109, 224 Cal.Rptr. 247 (court ordered DHS to comply with statute directing the establishment of subacute care program in health facilities and the adoption of regulations to implement the program).
51. Senate Committee on Governmental Organization, Staff Analysis of AB 1013 (undated).
52. 219 Cal.App.3d 422, ___, 268 Cal.Rptr 244, 254.
53. ___ Cal.App.3d ___, 272 Cal.Rptr. 892-93.
54. 219 Cal.App.3d 422, ___, 268 Cal.Rptr. 244, 254.
55. Memorandum dated July 26, 1982, from Willard A. Shank, Chief Assistant Attorney General.
56. Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 127, 174 Cal.Rptr. 744, 747.
57. City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 60 Cal.App.3d 572, 142 Cal.Rptr. 356 (requirement in form authorized by regulation specifying that appeals by filed in San Francisco); Stoneham v. Rushen ("Stoneham I") 1982 137 Cal.App.3d 729, 188 Cal.Rptr. 130 (16 page inmate classification form, with 16 pages of instructions).
58. A thorough examination of the issue of the use of forms in state government (and the APA "forms exception") can be found in 1987 OAL Determination No. 16 (Board of Behavioral

Science Examiners, December 4, 1987, Docket No. 87-006), California Regulatory Notice Register 88, No. 1-Z, January 1, 1988, note 20; typewritten version, note 20 (beginning on p. 21).

59. 1987 OAL Determination No. 8 (Department of Food and Agriculture, June 18, 1987, Docket No. 86-014), California Administrative Notice Register 87, No. 27-Z, July 3, 1987, p. B-27, pp. B-34--B-35.
- 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 445, 452-453.
- 1987 OAL Determination No. 16 (Board of Behavioral Science examiners, December 4, 1987, Docket No. 87-005), California Regulatory Notice Register 88, No. 1-Z, January 1, 1988, pp. 53, 73-79, n. 20.
- 1987 OAL Determination No. 17 (Department of Motor Vehicles, December 18, 1987, Docket No. 87-006), California Regulatory Notice Register 88, No. 1-Z, January 1, 1988, pp. 88, 113-114, n. 34.
- 1990 OAL Determination No. 6 (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, pp. 496, 500-501.
60. Title 1, CCR, sections 1(a)(3), 5, and 6.
61. The reference to the "OAH "Notice Supplement" was, no doubt, intended to denote OAL's "California Administrative Notice Register," which was renamed the "California Regulatory Notice Register," effective January 1, 1988. OAL took over publication of the Notice Register from OAH (Office of Administrative Hearings) in 1980.
62. Government Code section 11346.
63. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- d. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- e. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied

enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test. If an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the basic definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, the Court followed the above two-phase analysis.

The above listing is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

64. See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 206-207, 149 Cal.Rptr. 1; Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1983) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596;

- Grier v. Kizer (1990) 219 Cal.App.3d 422, 436, 440, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002), California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 452-453, typewritten version, pp. 7-9.
65. Id., Armistead, Stoneham I, Poschman, and Grier.
66. 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13, typewritten version, p. 6.
67. See Poschman v. Dumke (1983) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603; and Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203-204, 149 Cal.Rptr. 1, 3-4.
68. 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009), California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864, typewritten version, p. 10.
69. Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 203, 149 Cal.Rptr. 1, 3.
70. Id.
71. Id., 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3.
72. Fundamental to the organization of California state government is the concept of the "agency." Agencies are entities created by statute to carry out duties specified by the Legislature. For instance, in order to create OAL in 1979, the Legislature enacted a statute. This statute, Government Code section 11340.2, subdivision (a), Statutes of 1979, chapter 567, section 1, states in part: "The Office of Administrative Law is hereby established in state government."

EXPRESS RULEMAKING AUTHORITY: MANDATORY OR DISCRETIONARY

Typically, agencies are "expressly" granted rulemaking authority. Express grants of rulemaking authority are either mandatory or discretionary. That is, some express

grants of authority direct or "mandate" the agency to adopt regulations. One example of a mandatory statute is Government Code section 11342.4, which provides that OAL "shall adopt, amend, and repeal regulations for the purpose of carrying out the provisions of this chapter [the rulemaking portion of the APA]." (Emphasis added.) Thus, OAL has no choice but to adopt regulations to interpret, implement, and make specific the rulemaking provisions of the APA. One example of a regulation adopted by OAL to implement the APA is Title 1, CCR, subsection 6(a), which requires all agencies to submit a particular form to OAL when filing regulatory actions. Pursuant to Title 1, CCR, subsection 1(a)(3), this form is referred to in the OAL regulations as the "Form 400." The full designation of the form is "Notice Publication/Regulations Submission STD. 400 (rev. 7/90)." Like the Department of Finance's Form 399, the Form 400 has been approved for use by the Forms Management and Design Unit of the Office of Records Management of the Department of General Services. If OAL's experience working with the Forms Management Unit in developing the Form 400 is typical, state agencies can count on knowledgeable assistance in developing forms.

The abbreviation "STD." in front of the form number stands for "standard." According to SAM section 1623, a "standard state form" is a "form developed for use by all agencies and usually used to carry out administrative functions."

The second type of expressly granted rulemaking authority is discretionary; that is, the agency may adopt regulations on a given subject, but is not required by that particular statute to do so. (Under Government Code section 11347.5 and case law interpreting the APA, all Executive Branch agencies are required to adopt regulations if the agency has developed a general rule which interprets, implements, or makes specific a law administered by the agency.)

An example of a discretionary statute is Food and Agricultural Code section 407, which provides:

"The director may adopt such regulations as are reasonably necessary to carry out the provisions of this code which he [sic] is directed or authorized to administer or enforce." [Emphasis added.]

IMPLIED RULEMAKING AUTHORITY

An agency may also be impliedly granted rulemaking authority. (Gov. Code sec. 11342.2.) As stated in Title 1, CCR, subsection 14(a), OAL presumes that an agency has authority to adopt regulations if the agency can cite:

"a California constitutional or statutory provision that grants a power to the agency which impliedly

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permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted." [Emphasis added.]

The challenged rules issued by the Department are used to control the rulemaking activities of more than 100 state administrative agencies. Neither the Department nor these agencies adopted the challenged rules for their own management. Rather, without prior notice or the opportunity to comment, the rules were imposed by the Department as a requirement for agencies adopting regulations pursuant to the APA. Directly affected agencies may well have an interest in influencing the content of these rules, with which they must comply in performing their responsibilities. Rulemaking agencies have demonstrated a strong interest in the regulations proposed by OAL to implement, interpret, and make specific the provisions of the APA. (Regulations which were formally adopted by OAL may be found in the California Code of Regulations, Title 1, sections 1 through 190.)

RULES INTERPRETING APA ADOPTED PURSUANT TO APA; COMMENTS RECEIVED

Government Code section 11342.4 directs OAL to adopt regulations for the purposes of carrying out the provisions of the APA. Lacking an express exemption from APA procedures, it is clear that the Legislature intended that OAL follow APA procedures in promulgating such regulations. In large measure, the directly affected public includes the same state administrative agencies which are subject to the challenged rules.

In proposing its regulations pursuant to APA procedures, OAL received many suggestions and other comments from interested agencies which sought to influence the resulting regulations. These agencies are divided into two categories: "control" and "line." A "control agency" is one which oversees particular aspects of other agencies' operations, e.g., the Department of General Services oversees contracts, the Department of Personnel Administration and the State Personnel Board oversee personnel matters, and OAL oversees administrative regulations. A "line agency" is one which by statute is charged with administering a particular program, e.g., the Department of Health Services administers the Medi-Cal program, while the Board of Registered Nursing administers the registered nurse licensing program.

The following agencies have submitted formal written comments on proposed OAL regulations:

Control Agencies

Department of Personnel Administration

State Personnel Board

Line Agencies

Department of Health Services
Department of Water Resources
San Francisco Bay Conservation and Development
Commission
Occupational Safety and Health Standards Board
Emergency Medical Services Authority
Department of Education
Department of Developmental Services
Board of Registered Nursing
Department of Real Estate
Contractors State License Board
Department of Conservation
Department of Conservation--Div. of Recycling
California State University Trustees
State Council on Developmental Disabilities
California Waste Management Board
Department of Social Services
Fair Political Practices Commission
Office of Statewide Health Planning and
Development
Department of Corporations
State Water Resources Control Board
Department of Consumer Affairs
State Banking Department
Department of Housing and Community Development
Department of Forestry
California Community Colleges
Department of Industrial Relations
Air Resources Board
Energy Commission
State Controller
Department of Food and Agriculture
Board of Equalization
Department of Motor Vehicles
Department of Justice
California Coastal Commission
California Health Facilities Commission
California Highway Patrol
The Resources Agency

Comments concerning proposed OAL regulations have also been received from the Lieutenant Governor of California; the Chair, Assembly Governmental Efficiency and Cost Control Committee; and the Senate Select Committee on Government Regulation.

Private sector organization and individuals have also demonstrated a lively interest in how the APA is interpreted by OAL. The following have submitted formal written comments in OAL rulemakings.

Private Sector Commenters

Chevron Corporation
Western Oil and Gas Association
California Teachers Association
California Medical Association
California Newspaper Service Bureau, Inc.
Pennzoil Company
Center for Public Interest Law
California Nurses Association
Associated General Contractors of California
Prison Law Office
California Council, The American Institute of
Architects

73. Grier v. Kizer (1990) 219 Cal.App.3d 422, ___, 268 Cal.Rptr. 244, 253.
74. Carmel Valley Fire Protection District v. California (1987) 190 Cal.App.3d 521, 234 Cal.Rptr. 795 (1987).
75. Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 737-38, 188 Cal.Rptr. 130, 135-36.
76. Id.
77. Grier v. Kizer (1990) 219 Cal.App.3d 422, ___, 268 Cal.Rptr. 244, 253.
78. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.