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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

MARCH FONG EU
SECRETARY OF STATE
OF CALIFORNIA

In re:)	1991 OAL Determination No. 3
Request for Regulatory)	
Determination filed by)	[Docket No. 90-005]
Paul W. Comiskey,)	
Attorney at Law,)	March 28, 1991
concerning an alleged)	
policy of the Board of)	Determination Pursuant to
Prison Terms, which)	Government Code Section
allows the Department of)	11347.5; Title 1, California
Corrections to make)	Code of Regulations,
decisions about changing)	Chapter 1, Article 3
counties of parole)	
)	

Determination by: JOHN D. SMITH, Interim Director

Herbert F. Bolz, Coordinating Attorney
Mathew Chan, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not the alleged Board of Prison Terms' "policy," which permits the Department of Corrections to make decisions about changing the county of parole for prisoners previously sentenced under the Indeterminate Sentencing Law, is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has not made a determination with respect to whether or not the "policy" in fact exists. However, it has been concluded that a "policy," should it exist, which delegates to the Department of Corrections the Board of Prison Terms' authority to determine the appropriate placement of prisoners on parole, is a "regulation."

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THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not the alleged "policy" of the Board of Prison Terms ("Board"), which permits the Department of Corrections ("Department") to make decisions about changing the county of parole for prisoners previously sentenced under the Indeterminate Sentencing Law ("ISL"), is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION ^{4 5 6 7 8}
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OAL finds that:

- (1) the Board's rules are generally required to be adopted pursuant to the APA;
- (2) a "policy" which delegates to the Department the Board's authority to determine the appropriate placement of prisoners on parole is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) there are no exceptions to the APA requirements that apply;
- (4) a "policy" which delegates to the Department the Board's authority to determine the appropriate placement of prisoners on parole violates Government Code section 11347.5, subdivision (a).⁹

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

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act'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.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other 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.

The Rulemaking Agency Named in this Proceeding

The Board of Prison Terms was created in 1980. By the terms of the enacting legislation, the Board succeeded to all powers and duties previously granted to and exercised by the Adult Authority, the California Women's Board of Terms and Paroles and the Community Release Board.¹¹ The Board of Prison Terms meets periodically at each prison to hear parole applications; the Board is authorized to determine parole length and conditions and to determine whether revocation of parole is appropriate.¹²

Authority¹³

Penal Code section 5076.2, subdivision (a), provides in part:

"Any rules and regulations, including any resolutions and policy statements, promulgated by the Board of Prison Terms, shall be promulgated and filed pursuant to [the APA]" [Emphasis added.]

Background

Penal Code section 3003 states in part:

"(a) An inmate who is released on parole shall be returned to the county from which he or she was committed.

For purposes of this subdivision, 'county from which he or she was committed' means the county where the crime for which the inmate was convicted occurred.

(b) Notwithstanding subdivision (a), an inmate may be returned to another county in a case where that would be in the best interests of the public and of the parolee. If the Board of Prison Terms setting the conditions of parole for inmates sentenced pursuant to subdivision (b) of Section 1168 [Indeterminate Sentencing Law] or the Department of Corrections setting the conditions of parole for inmates sentenced pursuant to Section 1170 [Determinate Sentencing Law] decides on a return to

another county, it shall place its reasons in writing in the parolee's permanent record.
. . ." [Emphasis added.]

On February 5, 1990, attorney Paul W. Comiskey ("Requester") submitted to OAL a Request for Determination, alleging that the Board had adopted a "policy" implementing section 3003 in violation of the APA. Mr. Comiskey stated in part:

"Penal Code §3003 requires the Department of Corrections and the Board of Prison Terms to return a parolee back to the county of his commitment unless certain exceptions apply. I recently represented a prisoner who was sentenced under 1168 of the Penal Code and wanted to have his parole changed to another county. I contacted the Board of Prison Terms for their regulations on this subject. One of their legal counsel contacted me after a day or two and told me that they have no regulations whatsoever on this issue and that they have simply allowed the Department of Corrections to make these determinations. It is my opinion that this is a policy which amounts to an invalidly adopted regulation. Accordingly, I would request a determination that the policy of the Board of Prison Terms allowing the Department of Correction to make decisions about changing counties of parole amounts to an invalidly adopted regulation which should properly be adopted in accordance with the Administrative Procedures Act."¹⁴

On August 17, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,¹⁵ along with a notice inviting public comment. No public comments were received. On September 28, 1990, the Board submitted its Response to the Request for Determination ("Response") to OAL. The Board, through declarations from its Chairman, Ron E. Koenig, and its Executive Officer, Robert Patterson, denied that it has a "policy" ("challenged rule") which delegates to the Department of Corrections the Board's statutory duty to determine the appropriate placement of prisoners on parole under Penal Code section 3003.

II. ISSUES

There are three main issues before us:¹⁶

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- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

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

The Board is a "state agency" as that term is defined in Government Code section 11000.¹⁷ Government Code section 11342, subdivision (b), clearly indicates that, for purposes of the APA, the term "state agency" applies to all state agencies, except those "in the judicial or legislative departments."¹⁸ Since the Board is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.¹⁹

In addition, Penal Code section 5076.2, subdivision (a), quoted above, specifies that the Board's rulemaking is subject to the APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

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

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

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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,²⁰ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in 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 rule fails to satisfy either of the above two parts of the 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.]²¹

Before embarking on our two-part analysis, the circumstances of the present determination require that we first address the issue of whether the challenged rule has indeed been adopted by the Board.

Evidence of the existence of the challenged rule before us was provided in the Request for Determination, submitted under penalty of perjury. According to the Request, the Requester's knowledge of the "policy" came from a conversation with an unidentified member of the Board's legal staff. The Requester did not provide any documentation from the Board which reflects the adoption or implementation of the challenged rule. While such documentation is not necessary to effect a

Request for Determination, the fact that the Board's sole defense to the Request was a denial of the existence of the challenged rule prohibits us from concluding that the alleged "policy" exists.

The Response is composed of declarations under penalty of perjury by the Chairman and the Executive Officer of the Board, stating that the Board has no "policy" which permits the Department to make decisions regarding the placement of paroled life prisoners. In addition, the declarations show the Board's understanding of the statutory mandate of Penal Code section 3003, which specifically directs the Board, not the Department, to make parole placement decisions for prisoners sentenced under Penal Code section 1168. Thus, the declarations indicate the Board's awareness that a rule which attempts to delegate the Board's mandated duty under section 3003 would likely be found to conflict with the clear language of that section. Finally, the declarations also set forth the Board's view that section 3003 is sufficiently clear and complete so that no regulation is necessary to interpret or implement that section.

The declarations reflect that the Board equates inmates sentenced under Penal Code section 1168, subdivision (b), with inmates serving life terms. It is not entirely clear, however, that the category of inmates sentenced under section 1168, subdivision (b), includes only life prisoners. Penal Code section 1168 states:

"(a) Every person who commits a public offense, for which any specification of three time periods of imprisonment in any state prison is now prescribed by law or for which only a single term of imprisonment in state prison is specified shall . . . be sentenced pursuant to [the Determinate Sentencing Law]
. . . .

(b) For any person not sentenced under such provision, but who is sentenced to be imprisoned in the state prison, including imprisonment not exceeding one year and one day,²² the court imposing the sentence shall not fix the term or duration of the period of imprisonment." [Emphasis added.]

Assuming that the category of inmates serving sentences pursuant to section 1168, subdivision (b), includes inmates other than those serving life sentences, the Board's stated denial of the alleged "policy," is incomplete; the Board's denial encompasses only the placement of paroled life prisoners.

In any event, for purposes of review, any doubt as to the existence of the challenged rule must be resolved in favor of the Requester. We thus proceed with our analysis.

A. Part One - Does the Challenged Rule Establish Rules or Standards of General Application or Modify or Supplement Such a Rule?

The answer to the first part of the inquiry is "yes."

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.²³ If the challenged rule exists, it undoubtedly would be applied to all parolees previously sentenced under Penal Code section 1168.

B. Part Two - Does the Challenged Rule Establish Rules Which Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Which Govern the Agency's Procedure?

The answer to this question is also "yes." The challenged rule, if it exists, clearly interprets and implements Penal Code section 3003 (quoted above).

Such a rule is a "regulation" within the meaning of the key provision of Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTIONS TO THE APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.²⁴ Rules concerning certain activities of state agencies -- e.g., "internal management" -- are not subject to the procedural requirements of the APA.²⁵

The issue of the applicability of exceptions to the APA requirements were not raised by either the Requester or the Board. Our independent review discloses no applicable exceptions.

Having found the challenged rule to be a "regulation" and not exempt from the requirements of the APA, we conclude that such a rule, if it exists, violates Government Code section 11347.5, subdivision (a).

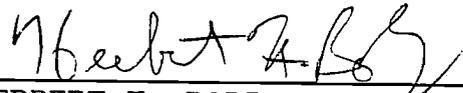
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III. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) the Board's rules are generally required to be adopted pursuant to the APA;
- (2) a "policy" which delegates to the Department of Corrections the Board's authority to determine the placement of prisoners on parole is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) there are no exceptions to the APA requirements that apply;
- (4) a "policy" which delegates to the Department the Board's authority to determine the appropriate placement of prisoners on parole violates Government Code section 11347.5, subdivision (a).

DATE: March 28, 1991


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1. This Request for Determination was filed by Paul W. Comiskey, Attorney at Law, 1909 Sixth Street, Sacramento, CA 95814, (916) 325-2701. The Board of Prison Terms was represented by its Chairman, Ron E. Koenig, and its Executive Officer, Robert Patterson, 545 Downtown Plaza, Suite 200, Sacramento, CA 95814, (916) 322-6366, (916) 445-9975.

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 "55" 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. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

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.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No. 46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

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"), subsection 121(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(b), which is invalid and unenforceable unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) 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, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and 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. 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. 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 at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning 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.]

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.

5. 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.

6. 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.)
7. 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.
8. 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 (\$4.65 if mailed).

9. 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.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.
11. Stats. 1979, ch. 255, sec. 53 p. 568.
12. Penal Code sections 5076.1 and 5077.
13. 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.)

14. Although not well stated in the Request for Determination, it appears that Mr. Comiskey is asking for a review of a "policy" which delegates the Board's role of determining the placement of prisoners sentenced under Penal Code section 1168.
15. California Regulatory Notice Register 90, No. 33-Z, August 17, 1990, p. 1254.
16. 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.
17. Government Code section 11000 states in part:

"As used in this title [Title 2. Government of the State of California] 'state agency' includes every state office, officer, department, division, bureau, board, and commission."

Section 11000 is contained in Title 2, Division 3 (Executive Department), Part 1 (State Department and Agencies), Chapter 1 (State Agencies) of the Government Code.
18. Government Code section 11342, subdivision (a).
19. 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.
20. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
21. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
22. Penal Code section 18 states:

"Except in cases where a different punishment is prescribed by any law of this state, every offense . . . punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, two or three years"

While we are unaware of any offenses which prescribe a maximum state prison sentence of "one year and one

day," we cannot be certain that such prison terms have not been prescribed under Penal Code section 1168.

23. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
24. Government Code section 11346.
25. 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. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. 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).)
 - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
 - 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 require-

ments); 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 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, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above 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.)

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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 \$162.

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.

26. 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.