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**SUSAN LAPSLEY**  
Director

ENDORSED FILED  
IN THE OFFICE OF

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*Jenna Brown*  
DEBORAH DENEN  
SECRETARY OF STATE

Date: August 17, 2007

To: David Scott Curtis

From: Chapter Two Compliance Unit

Subject: **2007 OAL DETERMINATION NO. 12(S)**  
**(CTU 2007-0503-01)**

(Issued pursuant to Gov. Code, sec. 11340.5; Cal. Code Regs., tit. 1, sec. 270(f)(2)(C))

Petition challenging as underground regulations California Code of Regulations, title 15, sections 2236 and 2401

On June 22, 2007, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations, title 15, sections 2236 and 2401 are underground regulations.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600<sup>1</sup>, which should have been, but was not, adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250:

The following definitions shall apply to the regulations contained in this chapter:

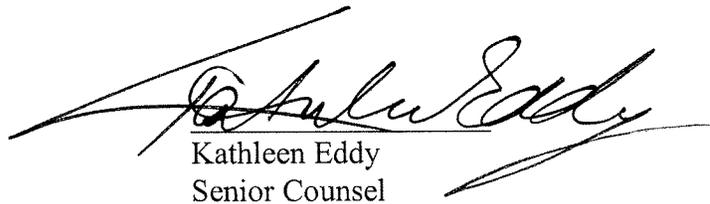
(a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, *but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA* and is not subject to an express statutory exemption from adoption pursuant to the APA. (Emphasis added)

<sup>1</sup> "Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any 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.

Pursuant to Government Code section 11343.6, the filing of a rule with the Secretary of State raises the rebuttable presumption that it was duly adopted and that all the requirements of the APA have been met. You have challenged as underground regulations California Code of Regulations, title 15, sections 2236 and 2401. Section 2236 was filed with the Secretary of State on July 5, 1977, as an emergency regulatory action. The regular rulemaking Certificate of Compliance for section 2236 was filed with the Secretary of State on October 28, 1977. Section 2401 was filed with the Secretary of State on September 8, 1981. Amendments to section 2401 were filed with the Secretary of State on August 12, 1982 and November 13, 1985.

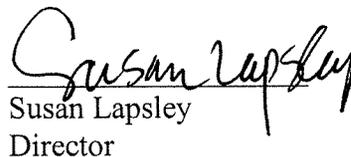
These sections, then, have been adopted as regulations and filed with the Secretary of State pursuant to the APA. There is no evidence in the past twenty years since adoption of the sections to rebut the statutory presumption established pursuant to Government Code section 11343.6. The challenged rules are not underground regulations.<sup>2</sup>

Date: August 17, 2007



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Susan Lapsley  
Director

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<sup>2</sup>A rule which is contained in a properly adopted regulation is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

- (f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion. A summary disposition letter may not be used to conclude that a challenged rule is an underground regulation.
- (2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:
  - (A) The challenged rule has been superseded.
  - (B) The challenged rule is contained in a California statute.
  - (C) *The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.*
  - (D) The challenged rule has expired by its own terms.