

**OFFICE OF ADMINISTRATIVE LAW**

300 Capitol Mall, Suite 1250  
Sacramento, CA 95814  
(916) 323-6225 FAX (916) 323-6826



Date: February 14, 2014

To: Rene Chavez

From: Chapter Two Compliance Unit

Subject: **2014 OAL DETERMINATION NO. 5(S)**  
**(CTU2013-1218-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation California Code of Regulations, title 15, section 3000, concerning constructive possession of objects.

On December 18, 2013, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether California Code of Regulations (CCR), title 15, section 3000, concerning the definition of "possession," constitutes an underground regulation. The challenged rule is contained in the list of definitions contained in section 3000, title 15, of the CCR, and states as follows:

Possession is defined as either actual possession or constructive possession of an object. Actual possession exists when a person has physical custody or control of an object. Constructive Possession exists where a person has knowledge of an object and control of the object or the right to control the object, even if the person has no physical contact with it.

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.

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:

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<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.

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.]

On December 9, 2011, CDCR certified by Operational Necessity under Penal Code section 5058.3 that amendments to section 3000, and others, of title 15 of the CCR be adopted as an emergency. The definition of "possession" was adopted in that rulemaking, which was filed with the Secretary of State on December 9, 2011, and was effective as of that date. The definition was amended to read as it does now pursuant to a Certificate of Compliance submitted to OAL on May 3, 2012, which was approved and filed with the Secretary of State on June 6, 2012, and was effective as of that date.

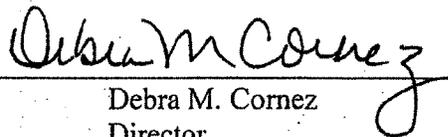
We find that the rule challenged by your petition has been duly adopted as a regulation, and therefore, is not an underground regulation.<sup>2</sup>

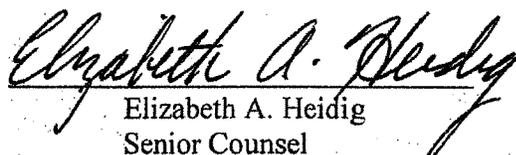
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<sup>2</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) 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 issued 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.
  - (E) An express statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.
- (3) A summary disposition letter shall state the basis for concluding that the challenged rule is not an underground regulation and shall specify that the issuance of the letter does not restrict the petitioner's right to adjudicate the alleged violation of section 11340.5 of the Government Code.
- (4) A summary disposition letter shall be sent to the petitioner not later than 60 days following receipt of the complete petition. [Emphasis added.]

The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

  
Debra M. Cornez  
Director

  
Elizabeth A. Heidig  
Senior Counsel

Copy: Dr. Jeffrey Beard  
Tim Lockwood

**OFFICE OF ADMINISTRATIVE LAW**

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**ENDORSED FILED  
IN THE OFFICE OF****2014 FEB 24 PM 2:16**

Debra M. Cornez, Director

*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

TO: Secretary of State; Rene Chavez  
Cc: Timothy Lockwood, California Department of Corrections and Rehabilitation  
From: Elizabeth Heidig, Senior Counsel, Office of Administrative Law  
Date: February 24, 2014

RE: 2014 OAL Determination No. 5(S)  
(CTU2013-1218-01)

The attached determination was filed with the Secretary of State on February 14, 2014, with an erroneously identified determination number (it should have been 2014 OAL Determination No. 5(S), but instead said 2013 OAL Determination No. 5(S)). Attached is a corrected copy of the determination which reflects the year the determination was actually filed with the Secretary of State. No other changes should be reflected in the document. A copy of the endorsed, originally-filed determination is included with this submission. Please retain a copy of this memorandum and the corrected 2014 OAL Determination No. 5(S) with the original filing for 2014 (indicated as 2013) OAL Determination No. 5(s). Thank you.

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ENDORSED FILED  
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2014 FEB 14 PM 12:21



*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: February 14, 2014

To: Rene Chavez

From: Chapter Two Compliance Unit

Subject: **2013 OAL DETERMINATION NO. 5(S)**  
**(CTU2013-1218-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

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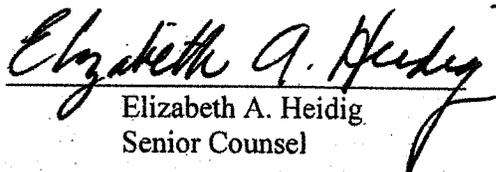
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The issuance of this summary disposition does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.



Debra M. Cornez  
Director



Elizabeth A. Heidig  
Senior Counsel

Copy: Dr. Jeffrey Beard  
Tim Lockwood