

**OFFICE OF ADMINISTRATIVE LAW**

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DEBRA M. CORNEZ  
Director

*Debra Bowen*  
DEBRA BOWEN  
SECRETARY OF STATE

Date: March 14, 2014  
To: Bryan Ransom  
From: Chapter Two Compliance Unit  
Subject: **2014 OAL DETERMINATION NO. 6 (S)**  
**(CTU2014-0113-01)**  
(Summary Disposition issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a Pilot Program for Security Threat Group Identification, Prevention, and Management Plan dated October 11, 2012.

On January 13, 2014, the Office of Administrative Law (OAL) received your petition asking for a determination as to whether the Pilot Program for Security Threat Group Identification, Prevention, and Management Plan (STG Pilot Program) issued by the California Department of Corrections and Rehabilitation (CDCR) constitutes an underground regulation. The challenged rule is in a memorandum dated October 11, 2012, and is attached hereto at Exhibit A.

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:

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.

The STG Pilot Program was adopted by CDCR pursuant to Penal Code section 5058.1, which states:

- (a) For the purposes of this section, “pilot program” means a program implemented on a temporary and limited basis in order to test and evaluate the effectiveness of the program, develop new techniques, or gather information.
- (b) *The adoption, amendment, or repeal of a regulation by the director to implement a legislatively mandated or authorized pilot program or a departmentally authorized pilot program, is exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. . . .*
- (c) The adoption, amendment, or repeal of a regulation pursuant to this section becomes effective immediately upon filing with the Secretary of State.
- (d) A regulation adopted pursuant to this section is repealed by operation of law, and the amendment or repeal of a regulation pursuant to this section is reversed by operation of law, two years after the commencement of the pilot program being implemented, unless the adoption, amendment, or repeal of the regulation is promulgated by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. For the purpose of this subdivision, a pilot program commences on the date the first regulatory change implementing the program is filed with the Secretary of State. [Emphasis added.]

CDCR issued the STG Pilot Program on October 11, 2012. It was filed with the Secretary of State and became operative on October 18, 2012, pursuant to Penal Code section 5058.1(c). It was submitted to OAL for filing with the Secretary of State and printing only pursuant to Penal Code section 5058.1(b). The STG Pilot Program is published as section 3999.13 of title 15 of the California Code of Regulations. The STG Pilot Program lapses by operation of law on October 18, 2014, pursuant to Penal Code 5058.1(d), unless formally adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Penal Code section 5058.1(b) provides that a departmentally authorized pilot program is exempt from the rulemaking provisions of the APA while it is in effect.

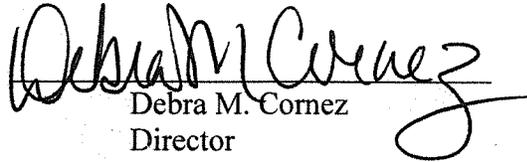
For the reasons discussed above, we find that the rule challenged by your petition is exempt from the rulemaking provisions of the APA, and therefore, is not an underground regulation.<sup>2</sup>

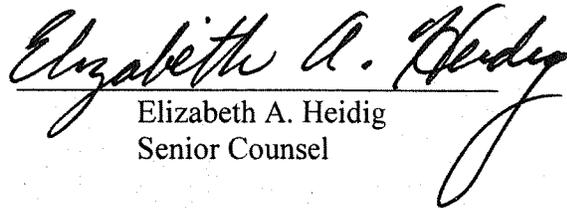
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<sup>2</sup> The rule challenged by your petition is the proper subject of a summary disposition letter pursuant to title 1, section 270 of the California Code of Regulations. Subdivision (f) of section 270 provides:

- (f)(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.* [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

  
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