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Director

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Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

Date: June 29, 2012

To: Anthony Crawford

From: Chapter Two Compliance Unit

Subject: **2012 OAL DETERMINATION NO. 7(S)**
(CTU2012-0524-01)
(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 3006(a), concerning possession of wireless communication devices in prisons

On May 24, 2012, we received your petition to the Office of Administrative Law (OAL) asking for a determination as to whether California Code of Regulations, title 15, section 3006(a), concerning possession of wireless communication devices in prisons constitutes an underground regulation.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600,¹ which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).² 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,

¹ "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.

² Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (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.

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.

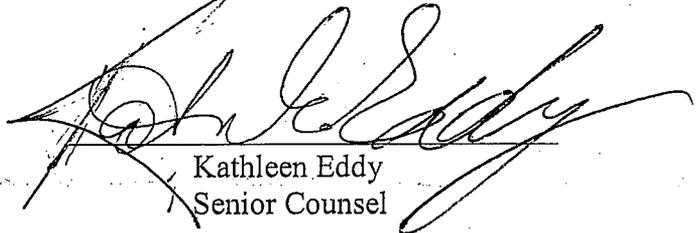
On October 5, 2011, Governor Edmund G. Brown Jr. signed into law urgency legislation (Senate Bill 26) which took effect immediately enacting section 4576 of the Penal Code concerning wireless communication devices in prisons. CDCR has certified as an Operational Necessity under Penal Code section 5058.3 that amendments to section 3000, and others, of title 15 of the California Code of Regulations be adopted as an emergency to implement the changes made by the enactment of section 4576 of the Penal Code. The amendment to section 3000 was filed with the Secretary of State on December 9, 2011, and was effective on that date. CDCR certified completion of the rulemaking process and the final rule was filed with the Secretary of State on June 6, 2012, and was effective on that date.

For the reasons discussed above, we find that the rule challenged by your petition is not an underground regulation.³

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



Kathleen Eddy
Senior Counsel

Copy: Matthew Cate
Timothy Lockwood

³ 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.