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How to File a Petition with OAL To Challenge an Alleged Underground Regulation

Overview

With a few exceptions, state agencies are required to adopt regulations to enforce or implement the laws that they administer. These regulations must be adopted through formal procedures established by the Administrative Procedure Act (APA), which begins at section 11340 of the California Government Code. On occasion, an agency may attempt to enforce a rule that is required to be adopted formally pursuant to the APA, but which was not formally adopted. Such a rule is called an "underground regulation." Section 11340.5 of the Government Code prohibits a state agency from using an underground regulation.

Anyone who believes that a state agency is enforcing an underground regulation may submit a petition to the Office of Administrative Law (OAL) asking OAL to determine whether or not the agency is complying with section 11340.5.

Once OAL receives a complete petition, OAL will evaluate it and contact the agency involved. If OAL accepts the petition, a written determination as to whether the rule is or is not an underground regulation will be issued. The matter may also be resolved informally, perhaps by the agency agreeing to change its practices or to adopt the disputed rule through formal rulemaking.

OAL may also decide not to accept a petition. A decision not to accept a petition does not imply that the issues presented by the petition lack merit.

Petition Content Requirements

OAL requires each petition to contain specific information. OAL regulations, found at Title 1, California Code of Regulations section 260, require that the petition contain:

- (1) The petitioner's name and contact information.
- (2) The name of the agency that has allegedly issued, used, enforced, or attempted to enforce the underground regulation.
- (3) A complete description of the particular underground regulation and a **written** copy of the purported underground regulation.
- (4) A description of the actions of the agency showing that it has issued, used, enforced, or attempted to enforce the underground regulation.

(5) The legal basis for concluding that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the APA is applicable.

(6) Information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

(7) Certification by the petitioner that a copy of the petition and all attachments has been submitted to the agency that is alleged to have issued, used, enforced, or attempted to enforce the underground regulation. The certification shall include the name, address, and telephone number of the person to whom the copy was submitted.

Item #4 provides the essential factual basis of the petition. In order for an agency to violate section 11340.5, it must "issue, utilize, enforce, or attempt to enforce" the underground regulation. In item #4, it is necessary to provide specific facts demonstrating that the agency has, in fact, done this.

Item #5 requires a petitioner to provide a basic legal argument as to why the agency's guideline, criterion, bulletin, provision in a manual, instruction, order, standard, or other rule or procedure meets the legal definition of underground regulation and that it is not subject to an exemption from the APA rulemaking requirements. A key element of this is showing that it is a "rule of general application." An agency action in a single case, even if the action is illegal, does not mean that the action is an underground regulation. Agencies routinely make case-by-case applications of the laws they administer, but only if this situation results in a rule of general application could the agency be using an underground regulation.

Item #6 requires that the petition contain the public policy argument in favor of OAL accepting the petition. The importance of different issues may be based upon very different factors. One petition may, for example, deal with a rule affecting a large number of people, another may deal with something imposing a significant cost to the economy, and a third may allege a serious abuse of an agency's authority.

There are no precise form requirements for providing the petition information, but an optional form is available to assist in preparing and submitting a petition.

OAL's Decision to Accept or Decline a Petition or to Issue a Summary Disposition

OAL will review each complete petition that it receives. If OAL receives a petition that is incomplete, a notice will be sent. The petition must be completed within 60 calendar days from the date of the notice. If a complete petition is not received within 60 days from the date of the notice, the petition will be denied.

If the petition is complete, the possible actions OAL may take are:

- (1) To accept the petition and issue a determination, pursuant to Title 1, California Code of Regulations, section 270.
- (2) To issue a summary disposition. Pursuant to Title 1, California Code of Regulations, section 270(f), a summary disposition must be issued within 60 days after receipt of a complete petition. The summary disposition is used

only when the facts presented in the petition or obtained by OAL during its review demonstrate clearly that the rule is not an underground regulation. A summary disposition may not be used to conclude that a challenged rule is an underground regulation.

- (3) To decline the petition, pursuant to Title 1, California Code of Regulations, section 270 (b) and (c). A decision to decline a petition has no legal significance and does not reflect, in any way, upon the merits of the underlying issues presented by the petition.

The standards OAL will use in deciding whether to accept or decline a petition are defined by regulation. Pursuant to Title 1, California Code of Regulations, section 270(c), OAL will consider, at a minimum, the following factors:

- (1) The degree to which the petition raises an issue of considerable public importance requiring prompt resolution.
- (2) Additional relevant information, if any.
- (3) Availability of OAL personnel to complete the review of the petition pursuant to the time limits established in the regulations.

What Happens If OAL Accepts a Petition?

If OAL accepts a petition, the petition (or a summary of the petition) will be published in the California Regulatory Notice Register (CRNR). The state agency that is the subject of the petition may submit a response to the petition within 45 days after the date of publication, if it chooses to do so. The petitioner will then have 15 days to file a rebuttal to the agency's response. Members of the public may also submit comments to OAL on the issue within 30 days after the date of publication.

OAL will review and consider the material submitted, along with information provided by the agency and the public or other information discovered during the review of the petition. OAL's determination will be made within 120 working days after publication of the petition in the CRNR. Copies of the determination will be sent to the petitioner and the state agency. It will also be published in the CRNR.

Factors to Consider When Submitting a Petition

In deciding whether or not to submit a petition challenging an alleged underground regulation, there are several considerations to keep in mind.

(1) OAL has no power to order an agency to change its practices. An OAL determination is nothing more than OAL's legal judgment regarding whether or not an agency is employing an underground regulation. OAL has no authority under the law to do anything more than express this opinion. OAL cannot force an agency to stop enforcing a rule, only a court can do that. An OAL determination may be persuasive, but it is not directly enforceable.

(2) Filing a petition with OAL may not be the most effective way to approach the problem. Working with the agency in question may be much more effective at resolving the issue than filing a petition with OAL. Most state agencies have some type of dispute resolution procedure. Using these procedures may be more effective and efficient than preparing and filing a petition with OAL.

(3) California law contains some specific exemptions to the general requirement that rules must be adopted as regulations pursuant to the APA. It is possible for an agency to be acting entirely legally even though it employs a rule that is a regulation and that regulation has not been adopted pursuant to APA rulemaking. If the rule is exempt from the APA, it cannot be an underground regulation.

(4) A decision by OAL is not required before challenging the rule in court. Seeking an opinion from OAL is entirely optional. In some situations, going to court requires demonstrating an “exhaustion of administrative remedies” — a legal term meaning all administrative ways to resolve the issue have been tried. An OAL opinion on an alleged underground regulation is not a required administrative remedy. If litigation is inevitable, the time and expense associated with filing a petition with OAL may not be useful.

(5) In certain circumstances, the APA prohibits courts from considering OAL determinations on underground regulations. OAL will contact the agency involved in the petition. If the agency tells OAL that the issue underlying the petition is being litigated and that the petitioner knows this, it could make the petition appear to be directed primarily at obtaining a litigation advantage, thus undercutting the argument that “the petition raises an issue of considerable public importance requiring prompt resolution”.

Submitting a Petition

OAL will only accept petitions and accompanying documentation in hard copy delivered either through the mail, hand delivered in person or by a commercial delivery service (FedEx, UPS, etc), or by fax. Petitions are not accepted via e-mail.

Deliver your petition to:

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
Attention: Chapter 2 Compliance Unit

The fax number is (916) 323-6826.

Additional Information

Additional information, including a copy of the optional petition submission form, may be obtained from the OAL web site at www.oal.ca.gov.

If you have specific questions, please call the OAL Reference Attorney at (916) 323-6815, or send us your question via e-mail to staff@oal.ca.gov.